IN THE SUPREME COURT
STATE OF FLORIDA

SUPREME COURT CASE NO.: 93, 534
11TH CIR. CASE NO.: 97-2428
DC NO: 96-00865-CIV-ORL-19

ROSARIO DONATO,

Plaintiff/Appellant,

vs.

AMERICAN TELEPHONE AND
TELEGRAPH COMPANY,

Defendant/Appellee.
_____/

APPELLANT'S INITIAL BRIEF

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA,
ORLANDO DIVISION,
QUESTION CERTIFIED BY THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

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STATEMENT OF THE ISSUE PRESENTED

As Framed By Appellant:

Whether the Florida Civil Rights Act's prohibition against marital status discrimination encompasses discrimination against an employee because of marriage to a particular spouse, absent a legitimate business reason or an anti-nepotism policy.

As Certified By The Eleventh Circuit:

Can an individual proceed under the Florida Civil Rights Act by alleging that he was discharged, in violation of the prohibition on marital status discrimination, because he is married to an individual who filed suit against his employer?

STATEMENT OF THE CASE

This is an appeal from a final Order dismissing with prejudice Plaintiff/Appellant ROSARIO DONATO's [hereinafter "DONATO"] Complaint of marital status discrimination brought pursuant to the Florida Civil Rights Act of 1992 (Chapter 760, Fla. Stats.). The issue on appeal was certified to this Court by the United States Eleventh Circuit Court of Appeals.

DONATO filed his Complaint in Orange County Circuit Court at Orlando, Florida on July 3, 1996. (R 3; RE 1).[1] The matter was removed to the United States District Court, Middle District of Florida, Orlando Division by Defendant/Appellee AMERICAN TELEPHONE AND TELEGRAPH COMPANY [hereinafter "AT&T"][2], which filed a Notice of Removal incorporating the State Court record on August 9, 1996. (R 1-1).

AT&T did not file a responsive pleading. Instead, it filed a Motion to Dismiss the Complaint With Prejudice For Failure to State a Claim Upon Which Relief May

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[1] References are: to the Record on Appeal to the Eleventh Circuit "R.", followed by document number and page number; to the Record Excerpts "RE" followed by document number and page number; and to the Order appealed from "Order" followed by page number.

[2] The corporation is now known as "AT&T Corp."; and the division within which DONATO was employed is now known as Lucent Technologies, Inc. For ease of reference, it is referred to as "AT&T."

be Granted, With Incorporated Memorandum, on August 21, 1996. (R 8; RE 3). DONATO filed a Memorandum in Opposition to the Motion on September 20, 1996 (R 11).

Honorable Patricia C. Fawsett entered an Order on February 21, 1997 granting the Motion to Dismiss but providing DONATO with leave to amend (R 14; RE 4) and a final endorsed Order on March 11, 1997 dismissing the case with prejudice since DONATO had failed to file an amended complaint. (R 14-1; RE 5).

DONATO filed a timely Notice of Appeal to the Eleventh Circuit Court of Appeals on April 8, 1997. (R 15). By Order entered July 23, 1998, the Eleventh Circuit certified the question presented to this Court pursuant to Article V Section 3(b)(6) of the Florida Constitution.

STATEMENT OF THE FACTS[3]

DONATO, a 30-year employee of AT&T, was involuntarily terminated from his employment as a Systems Analyst on November 15, 1994. (R 3 ¶ 6; RE 1 ¶ 6). During his employment, DONATO had never received disciplinary action and his performance was rated as "exceeds objectives." (R 3 ¶ 10; RE 1 ¶ 10).

Although two months prior to his termination DONATO had received a pay increase, a promotion, and an "exceeds objectives" rating (R 3 ¶ 18; RE 1 ¶ 18), on November 15, 1994 DONATO was informed by his supervisor that he was being designated "at risk" (of employment loss) based on alleged poor performance. (R 3 ¶ 15; RE 1 ¶ 15).

DONATO protested that he had just received a promotion, a pay raise and an "exceeds objectives" rating just two months earlier. He was then told that his position was being eliminated. (R 3 ¶¶ 16, 18; RE 1 ¶¶ 16, 18). DONATO alleges that his job was not truly eliminated since another individual was later assigned to perform its functions. (R 3 ¶ 18; RE 1 ¶ 18).

DONATO's wife, Lynda, had also been employed within another division of AT&T. (R 3 ¶ 11; RE 1 ¶ 11). In 1992 Lynda Donato filed Charges of sex

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3 This statement is in addition to the factual statements recited within the Eleventh Circuit's opinion certifying the question.

discrimination and retaliation through the Florida Commission on Human Relations ("FCHR"), which ultimately found cause to support her contentions. (R 3 ¶ 11; RE 1 ¶ 11). Lynda Donato's position was placed "at risk"in June, 1993; and she was laid off in February, 1994.

Lynda Donato filed suit against AT&T in August, 1994. (R 3 ¶ 13; RE 1 ¶ 13). She thereafter attempted to obtain a temporary clerical position within the same business unit as her husband. While initially receiving favorable consideration for the position, Lynda Donato was abruptly informed in October, 1994 that she was "over qualified", after she had informed Al Facini, the Manager who offered the position, of her recently filed suit. (R 3 ¶ 14; RE 1 ¶ 14). The next month, ROSARIO DONATO was terminated.

DONATO's Complaint alleged, in substance, that he was terminated in retaliation for his wife's lawsuit against AT&T (R 3 ¶ 20; RE 1 ¶ 20); and that this retaliation constituted "marital status discrimination" in violation of the Florida Civil Rights Act, §760.10(1)(a), Fla. Stats. AT&T moved to dismiss, arguing that discrimination based on marriage to a particular spouse was not discrimination based on "marital status" within the meaning of the Act since individual spousal discrimination was not discrimination based on DONATO's status as a married

person without regard to the identity of his spouse. Judge Fawsett agreed, and dismissed the Complaint.

In this appeal DONATO contends that "marital status" discrimination prohibited by the Florida Civil Rights Act, properly construed, is broad enough to include discrimination based upon marriage to a particular person where no anti-nepotism policy of the employer exists, and where the employer cannot demonstrate any legitimate business reason for terminating an employee merely because he is married to a particular spouse who is not an employee of the company.

SUMMARY OF THE ARGUMENT

The Florida Civil Rights Act includes discrimination against an employee based on marriage to a particular individual as well as discrimination based on the state of marriage or non-marriage in general. The Trial Court erred in ascribing a narrow construction to the Statute contrary to the express requirement of a liberal construction.

A. The term "marital status" is ambiguous and requires interpretation. It includes discrimination based on the state of marriage or non-marriage as well as discrimination based on the state of marriage or non-marriage to a particular individual. The anti-nepotism exception to the Statute, which addresses the relationship of employees to their particular spouses, would otherwise be unnecessary.

B. Ordinary principles of statutory construction and the Statute itself require a broad interpretation. The use by the legislature of a comprehensive term ordinarily indicates an intent to include everything embraced within the term. The broad remedial purpose of the Civil Rights Act and an express requirement that it be liberally construed requires a broad interpretation rather than the narrow interpretation applied by the Trial Court. Because the Statute itself contains two exceptions, it should be presumed that no others were intended; and the anti-nepotism

amendment, imposed in reaction to the broad construction adopted by the Florida Commission on Human Relations, excepted individual spousal discrimination from the Statute only in the context of anti-nepotism policies.

C. The broad interpretation by the Florida Commission on Human Relations, the agency charged with administering the Statute, is entitled to deference. The broad interpretation is not inconsistent with the Act, its broad purpose, or its mandate of liberal construction.

D. When it passed the anti-nepotism amendment exception to marital status discrimination in 1992, the legislature was aware of the Commission's broad interpretation. The legislature nonetheless chose to outlaw only that form of individual spousal discrimination which was the subject of anti-nepotism policies. It did not define "marital status" as the general state of marriage or non-marriage; and it should be presumed to have intended to remove only anti-nepotism policies from the individual spousal discrimination prohibited by the Statute as interpreted by the Commission.

E. The only reported Appellate Court decision construing "marital status" is neither dispositive nor on point. *National Industries, Inc. v. Commission on Human Relations*, 527 So.2d 894 (5th DCA Fla. 1988). The Court disagreed only with the Commission's ruling that evidence of a legitimate business reason was a

mere affirmative defense to admitted discrimination rather than integral to establishment of discriminatory intent in the first instance. The Court did not adopt a *per se* rule that marital status discrimination did not include individual spousal discrimination even though it was aware of the Commission's broad interpretation. Instead, it merely distinguished the facts before it from an anti-nepotism policy. Even should *National Industries* be expansively construed as adopting a *per se* rule against individual spousal discrimination, it should be rejected because the Court did not engage in an appropriate statutory analysis contrary to the standards for addressing administrative agency decisions. The circumstances of DONATO's claim are distinguishable from any other reported decision DONATO can find, and implicates the public policy considerations embodied within the Statement of Purpose and Intent of the Act, an inquiry which *National Industries* did not make.

F. The broad remedial purpose and liberal construction required by the Act under DONATO's circumstances (DONATO was fired because his wife, a former employee, had filed a lawsuit against AT&T claiming unlawful discrimination) requires reversal as a matter of public policy. Any other result would frustrate enforcement of the Act by permitting an employer to terminate a spouse merely because of the happenstance of marriage to a person who had filed suit to vindicate her rights under the same Act.

DONATO requests that the question certified to this Court by the Eleventh Circuit Court of Appeals be answered in the affirmative.

ARGUMENT

In this appeal DONATO contends that the provisions of the Florida Civil Rights Act of 1992 (Chapter 760, Florida Statutes, hereinafter "the Act") which prohibit discrimination based on marital status encompass discrimination based upon marriage to a particular individual, under circumstances where there is no anti-nepotism policy and where there is no legitimate business reason for the employer to terminate an employee based upon his marriage to a particular spouse who is not an employee. DONATO further contends that AT&T's argument that the term "marital status" should be narrowly construed and therefore encompasses only the state of marriage or non-marriage, should be rejected.

A. The Term "Marital Status" Is Ambiguous And Requires Interpretation.

Section 760.10(1)(a), Fla. Stats., provides:

> "(1) It is an unlawful employment practice for an employer:
>
> (a) to discharge or fail to refuse to hire any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's

> race, color, religion, sex, national origin, age, handicap, or marital status."

There is no statutory definition of the term "marital status," nor any legislative history addressing it.

There are two statutorily enumerated exceptions to the circumstances which constitute marital status discrimination. The first is if the employer can demonstrate a Bona Fide Occupational Qualification [BFOQ]; the second is where marital status is prohibited under an employer's anti-nepotism policy:

> "Notwithstanding any other provision of this Section, it is not an unlawful employment practice under SS. 760.01-760.10 for an employer, employment agency, labor organization, or joint labor-management committee to:
>
> "(a) take or fail to take any action on the basis of religion, sex, national origin, age, handicap, or marital status in those certain instances in which religion, sex, national origin, age, absence of a particular handicap, or marital status is a Bona Fide Occupational Qualification reasonably necessary for the performance of the particular employment to which such action or inaction is related.

* * *

(d) take or fail to take any action on the basis of marital status if that status is prohibited under its anti-nepotism policy." §760.10(8)(a) and (d), Fla. Stats.

On its face, the term "marital status" is broad enough to include the status of marriage or non-marriage in general, and the status of marriage or non-marriage to a particular individual. This is clearly seen by scrutiny of the anti-nepotism Section of the Statute: by definition, an anti-nepotism policy addresses the marital relationship of two co-employees to each other, as opposed to whether or not the employees are married or non-married in general. A specific anti-nepotism policy exclusion would be unnecessary if the term "marital status" were not broad enough to encompass the relationship of an employee to his spouse in the first instance. DONATO contends that a proper construction of this ambiguity mandates reversal for the reasons which follow.

B. Ordinary Principles Of Statutory Construction And The Act Itself Require A Broad Interpretation.

1. The use by the legislature of a comprehensive term ordinarily indicates an intent to include everything embraced within the term. Thus, in *Florida State Racing Commission v. McLaughlin*, 102 So.2d 574 (Fla. 1958), the Florida

Supreme Court held that since the term "racing plant" included a running horse racing plant, a harness horse racing plant, and a dog racing plant, the phrase standing alone should be construed as though each of these types of plants had been specifically enumerated. Similarly, the term "marital status" is broad enough to include the state of marriage in general and the state of marriage to a particular individual.

2. In interpreting an ambiguous statute, the courts may take into consideration the general policy of the law, insofar as it may shed light on the legislative intent. Hence, any ambiguity or uncertainty should receive the interpretation which best accords with the public benefit. *In re Ruff's Estate*, 32 So.2d 840 (Fla. 1947). Moreover, where there is any doubt as to the meaning of a statute, the purpose for which it was enacted is of primary importance in its interpretation. (*Id*.) *See also Florida Industrial Commission v. Manpower, Inc. of Miami*, 91 So.2d 197 (Fla. 1956).

The Florida legislature declared a broad, anti-discriminatory purpose in enacting the Civil Rights Act of 1992 in Section 760.01, Fla. Stats. Significantly, that Section expressly requires a liberal, as opposed to restrictive, construction of the Act:

"760.01 purposes; constructions; title

* * *

> (2) the general purposes of the Florida Civil Rights Act of 1992 are to secure for all individuals within the State freedom from discrimination because of race, color, religion, sex, national origin, age, handicap, or marital status and thereby to protect their interest and personal dignity, to make available to the State their full productive capacities, to secure the State against domestic strife and unrest, to preserve the public safety, health, and general welfare and to promote the interest, rights, and privileges of the individuals within the State.
>
> (3) The Florida Civil Rights Act of 1992 shall be construed according to the fair import of its terms and shall be liberally construed to further the general purposes stated in this Section and the special purposes of the particular provision involved."

The Lower Court admittedly adopted a narrow, restrictive interpretation of the Statute and rejected a liberal construction, contrary to the legislative intent and the plain requirement of the Act.

3. Exceptions which are expressly set forth in a statute strengthen application of the statute to those cases which are not excepted. Thus, express

exceptions made in a statute ordinarily give rise to a strong inference that no other exceptions were intended; and where a statute sets forth exceptions, no others may be implied. *Williams v. American Surety Co.*, 99 S.2d 877 (2d DCA Fla. 1958); *Biddle v. State Beverage Department*, 187 S.2d 65 (4th DCA Fla. 1966), cert. dismissed, 194 S.2d 623 (Fla. 1967).

The Act specifically sets forth only two exceptions to marital status discrimination: where marriage or non-marriage is a Bona Fide Occupational Qualification, and where the employer has adopted an anti-nepotism policy precluding employment of two employees married to each other.

That no other exceptions were intended by the legislature will be made abundantly clear in Section D. *infra*, which traces the origin of the anti-nepotism Section to a legislative reaction to an Appellate Court affirmance of a decision by the Florida Commission on Human Relations, which had adopted a broad construction of "marital status" to include the relationship of one spouse to another, thereby concluding that an anti-nepotism policy was unlawful. As will be seen, in reaction the legislature did not restrict application of "marital status" discrimination in all cases involving discrimination based on marriage to a particular spouse, which it easily could have done.

Accordingly, basic principles of statutory construction mandate an interpretation which includes DONATO's Complaint.

C. <u>The Broad Interpretation By The Florida Commission On Human Relations Is Entitled To Deference</u>.

The Florida legislature established the Florida Commission on Human Relations to investigate and to apply the Florida Civil Rights Act, just as Congress established the Equal Employment Opportunities Commission to investigate and to apply the provisions of Title VII of the Civil Rights Act of 1964. See generally §§760.03-.06, Fla. Stats. A construction placed on a statute by the State's administrative body charged with responsibility for its enforcement is persuasive. Indeed, a reviewing Court must defer to an administrative interpretation of an operable statute where that interpretation is consistent with legislative intent and is supported by substantial competent evidence in the administrative record. *Public Employees Relations Commission v. Dade County Police Benevolent Association*, 467 S.2d 987 (Fla. 1985). Although DONATO's Charge of Discrimination did not reach a determination by the Commission[4], nevertheless the Commission has historically

[4] DONATO chose to file suit after 180 days had passed subsequent to filing his Charge and the Commission had failed to resolve it, Section 760.11(4) and (8), Fla. Stats.

interpreted the term "marital status" broadly to include the relationship of an employee to his spouse.

The five pertinent Commission decisions construing the term "marital status" are attached to AT&T's Memorandum In Support Of Its Motion To Dismiss (R 11) as Exhibits "A", "B", "D", "E" and "F". Each of the decisions is reproduced from the Florida Administrative Law Reporter [FALR]. For ease of reference, DONATO will refer to the Exhibit.

The first case, *Selvaggio v. Knight-Ridder Publishing Co.*, et al., 3 FALR 2379-A (10/23/81) (Exhibit "A") was an order of the Commission adopting the findings of fact and conclusions of law of a hearing officer holding that "marital status" did not include the relationship of an employee to a particular spouse but was confined to the status of marriage or non-marriage in general. No legal authority was cited by the hearing officer in support of her conclusion. 3 FALR at 2385-A, ¶ 4. In adopting that conclusion the Commission engaged in no specific reasoning or analytical process.

In *Owens v. Upper Pinellas Association For Retarded Citizens*, 8 FALR 438 (9/4/85) (Exhibit "B") the Commission engaged in an extensive legal analysis of a claim that an employer's anti-nepotism policy constituted discrimination based on "marital status":

> "The first issue before the panel is whether the ban on discrimination due to marital status includes the identity of one's spouse; that is, whether the discharge of an employee due to his being married to a co-worker is discrimination on the basis of marital status.
>
> We interpret the term "marital status" broadly to include one's relationship to one's spouse, rather than narrowly to include only the fact that one is married, single, divorced or widowed. Absent legislative intent to the contrary, such interpretation is consistent with the general purposes of the Act and the legislative mandate for liberal construction." 8 FALR at 440.

In so holding, the Commission declined to follow *Selvaggio*, *supra* (8 FALR at 442); and it proceeded, based on its broad interpretation, to find unlawful an employer's anti-nepotism policy where the employer had failed to demonstrate a legitimate business reason for the policy.

Owens was appealed to the Second District Court of Appeals which issued a *per curiam* affirmance without opinion. 495 So.2d 754 (2d DCA Fla. 1986).[5]

In each of its subsequent reported decisions, the Commission has continued to adhere to its position that the term "marital status" includes the relationship of an employee to his spouse. *Brown v. Viking Fire Protection, Inc.*, 15 FALR 1625, 1627 (5/20/92) (Exhibit "D"); *Smith v. Food Lion, Inc.*, 17 FALR 3040, 3042, 3047 ¶ 24 (3/22/94) (Exhibit "F"); *Potasek v. The Florida State University*, 18 FALR 1952, 1953 (4/17/95) (Exhibit "E").

Moreover, by rule, the Commission has adopted a definition of marital status as including

> "The identity of the spouse and the relationship to the aggrieved person, not merely the fact that the aggrieved person is married, single, divorced, separated, widowed, etc." Rule 60Y-3.001(17), FAC

and the Commission has continued to issue determinations of "cause" or "no cause" in response to charges of discrimination based upon its liberal interpretation, as

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[5] In 1992 the legislature amended the Act to exclude anti-nepotism policies from the definition of "marital status" discrimination in reaction to *Owens* (Section D *infra*).

embodied within the Rule. *See*, for example, *Nocera v. dme Corporation*, FCHR No. 95-J872 (10/14/97).

The Commission's interpretation is not inconsistent with the Statute, its broad purpose, or its mandate of liberal construction. It is accordingly entitled to deference.

D. In Amending The Statute In Reaction To *Owens*, The Legislature Failed To Overrule The Commission's Broad Interpretation Except As Applied To Anti-Nepotism Policies.

The original prohibition against marital status discrimination was contained in the Florida Human Rights Act which became effective in 1977. In 1992 the legislature amended the Act to provide for additional remedies (including jury trials and damages), renaming it the Florida Civil Rights Act of 1992. The Senate Staff Analysis and Economic Impact Statement with regard to the 1992 changes is attached to AT&T's Memorandum as Exhibit "C". The Staff's comments make it clear that the legislature was aware of the Commission's broad interpretation of the Statute in *Owens*. The comments also make clear that the amendment now found at §760.10(8)(d) overruled only that portion of the Commission's broad interpretation which outlawed anti-nepotism policies.

DONATO contends that the legislature would have, if it so intended, adopted an amendment which exempted from the operation of the Statute all discrimination

based on the relationship of an employee to a particular person, rather than only that set of circumstances where individual spousal relationships are prohibited by anti-nepotism policies, or would have created a definition of "marital status" as the general state of marriage or non-marriage. The failure of the legislature to do so demonstrates that the legislature acknowledged and approved the Statute's ban on other forms of individual spousal discrimination, pursuant to the Commission's broad interpretation.

When construing exceptions to a statute, ordinarily a narrow construction is applied. Accordingly, in the resolution of ambiguities, courts favor a general provision over an exception. 73 Am Jur 2d, Statutes §313. These rules are particularly applicable where the law is entitled to a liberal construction. (*Id.*) Accordingly, in creating an exception by overruling the application of *Owens* only in the context of anti-nepotism policies, the legislature should be presumed to have intended not to overrule the Commission's broad construction of the Statute in other areas.

E. <u>The Only Reported Appellate Court Decision Construing "Marital Status" Is Neither Dispositive Nor On Point</u>:

The only Florida appellate decision which construes the scope of marital status discrimination is *National Industries, Inc. v. Commission on Human Relations*, 527 So.2d 894 (5th DCA Fla. 1988). DONATO contends that that decision does not reject the Commission's broad construction of marital status discrimination as applied to individual spousal relationships in all circumstances (Order, p. 2; R 14 p. 2; RE 4 p. 2). DONATO further contends that even if *National Industries* be so expansively construed, the decision is incorrect because it fails to employ the appropriate statutory analysis.

1. In *National Industries*, the employer had terminated Sharon Morand, the wife of former employee Robert Morand, to eliminate the likelihood that Robert, who had left employment under a cloud of allegations of sexual harassment, rudeness, obscene language, threats, and potential violence, would return to the premises. 527 So.2d at 895, findings 6 and 14. In concluding that this did not constitute marital status discrimination, the hearing officer stated:

> "Whether she was married or not played no part in the [employer's] decisions to hire and then terminate [the wife]. The bulk of the credible evidence established that

National terminated Petitioner because it believed [her husband] would continue coming to the plant to see Petitioner. *National* had a legitimate interest in protecting company property and employees from Robert Morand. While this action would seem unfair to Sharon Morand, even unfair action is not an automatic violation of Section 760.10(1)(a), Florida Statutes. The Petitioner did not establish that her marital status was the motivating factor in the Respondent's action. *National* had a legitimate business concern which it resolved in what appeared to it to be the most effective and efficient manner. That such efficiency proved to be the fairly drastic measure of terminating Petitioner does not, absent more, constitute a violation of Chapter 760.

* * *

In the case at issue *National* would have terminated the Petitioner had she not been married to Robert Morand. It was not the Petitioner's status as married or unmarried that motivated her termination. *National* believed that the

> presence of Sharon Morand, married or unmarried, increased the likelihood of the presence of Robert Morand. Consequently, under the most liberal interpretation of "marital status" Petitioner failed to establish a prima facie case of discrimination... ." 527 So.2d at 895-96.

In reversing the hearing officer's recommended order, the Commission held that the employer's legitimate business reason for terminating the wife [preventing the husband from coming on the property] constituted a mere affirmative defense to a conceded violation of the law, as opposed to evidence probative of whether discriminatory intent was present in the first instance. 527 So.2d at 896.

In reversing the Commission, the Court concluded that the Commission had disregarded the hearing officer's finding of fact. The Court acknowledged that the Commission based its interpretation of the term "marital status" upon its prior opinion in *Owens*, *supra*; but it did not disagree with nor refuse to adopt that decision. Instead, the Court distinguished individual spousal discrimination in the anti-nepotism context from the facts before it, as found by the hearing officer and concluded that even a broad interpretation of "marital status" did not encompass the instant case. 527 So.2d at 897, note 1. The Court then held:

> "Discharge based on an anti-nepotism policy is clearly distinguishable from what occurred in the instant case. Here, Sharon Morand's termination did not occur because of her marital status; it occurred because of *National's* desire to keep Robert Morand off the premises. The Commission's interpretation of the Statute is erroneous and, thus, must be reversed." 527 So.2d 897.

Properly construed, *National Industries* did not hold that termination of an employee based on marriage to a particular individual did not, *per se*, constitute martial status discrimination. Rather, we contend that *National Industries* stands for the narrow proposition that a legitimate business purpose must be taken into account in order to determine whether a discriminatory motive exists in the first instance, and that the Commission's failure to do so constituted the erroneous interpretation. In his Complaint, DONATO has alleged that no legitimate reason existed under AT&T's policies, past practices, procedures and/or supervisory instructions to justify DONATO's termination. (R 3 ¶ 24; RE 1 ¶ 24). Accordingly, *National Industries* is no support for dismissal of DONATO's Complaint.

2. Even should *National Industries* be expansively construed as *per se* rejecting individual spousal discrimination as a violation of the Statute, it should be

rejected as authority because the Court did not engage in an appropriate statutory analysis in overruling the Commission's interpretation. Indeed, other than concluding that a legitimate business reason negates discriminatory intent, the Court engaged in *no* analysis of the Statute whatsoever. That is contrary to the rule that contemporaneous administrative construction of a statute will not be overturned except for the most cogent reasons, and unless clearly erroneous, unreasonable, or in conflict with some provision of the State Constitution or the plain intent of the Statute. *United States Gypsum Co. v. Green*, 110 So.2d 409 (Fla. 1959); *State ex rel. Franklin County v. Lee*, 188 So. 775 (1939); *McKinney v. State*, 83 So.2d 875 (Fla. 1955).

3. DONATO's Complaint is based on the premise that AT&T terminated him because his wife, Lynda Donato, who was no longer an employee of the company, had filed a lawsuit seeking redress of unlawful sex discrimination against her by AT&T. Neither *National Industries*, nor any other reported decision DONATO can locate, has construed a claim of marital status discrimination under those facts. Not only does this allegation itself negate any legitimate business reason for AT&T's termination of DONATO; it requires a public policy analysis of the Statute, in light of its Statement of Legislative Intent, in which the *National Industries* Court did not engage. (Section F.).

F. Public Policy Requires Reversal.

The general purposes of the Act include securing "for all individuals within the State freedom from discrimination because of... marital status and thereby to protect their interest and personal dignity, to make available to the State their full productive capacities... and to promote the interest, rights, and privileges of individuals within the State." Section 760.01(2), Fla. Stats. The liberal construction required by subsection (3) requires that the Act be construed so as to suppress the evil and advance the remedy intended, and to prevent its use as an instrument of fraud. *Becker v. Amos*, 141 So. 136, 80 A.L.R. 1480 (Fla. 1932); *Jones v. Carpenter*, 106 So. 127, 43 A.L.R. 1409 (Fla. 1925).

Among the practices prohibited by the Act is retaliation against an employee for protesting against unlawful discrimination forbidden by the Act. Section 760.10(7), Fla. Stats. In this case, the protesting employee (Lynda Donato) was no longer employed by AT&T, and not available for retaliation. Instead, AT&T discriminated against DONATO because of his wife's opposition to an unlawful employment practice under the Act.

The policy of the Act to prohibit unlawful retaliation and the requirement of liberal construction require reversal. Any other result would enable AT&T to evade by circumvention the stated policies of the Act to prohibit unlawful retaliation and to

protect individuals from discrimination, based upon the mere happenstance that DONATO was joined by marriage with a person who had taken advantage of the Statute by seeking redress of unlawful discrimination. Under such circumstances, the Act's protections would be hollow, at best.

CONCLUSION

For the reasons expressed, DONATO respectfully contends that this Court should exercise its discretion and accept the certified question; that the question certified to this Court should be answered in the affirmative; and that this Court should conclude that the Florida Civil Rights Act's prohibition against marital status discrimination encompasses discrimination against an employee because of marriage to a particular spouse (or, in the words of FAC Rule 60Y-3.001(17), "the identity of the spouse and the relationship to the aggrieved person"), absent a legitimate business reason or an anti-nepotism policy.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was mailed to Sylvia H. Walbolt, Esq., CARLTON, FIELDS, WARD, EMMANUEL, SMITH & CUTLER, P.A., Barnett Tower, Suite 2300, One Progress Plaza, 200 Central Avenue, P.O. Box 2861, St. Petersburg, FL 33731, this 26th day of August, 1998.

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