

Updates . . .

- By now you are probably familiar with the recent decisions in Faragher v. City of Boca Raton (118 S. Ct. 2275 [1998]) and Burlington Industries, Inc. v. Ellerth (118 S. Ct. 2257 [1998]). Based on the outcome of these cases, and from some of the lawsuits we are seeing, we would like to stress the importance of not only having a “sexual harassment” written policy, but also providing training for employees and obtaining a signed acknowledgement of attendance at the training and reading and/or receiving a copy of the written policy. This can have a definite beneficial impact on the defense of a sexual harassment case.
- It should be stressed to employees that when making travel plans, auto rental should be obtained if possible from the state contract vendor, AVIS. Among the important reasons for doing so is in the event an employee is at fault in an accident while in the course and scope of employment, Avis has agreed to handle the adjusting and payment of claims of physical damage to the vehicle, and liability for negligent operation. Otherwise, the liability portion of a claim would be handled by Risk Management, and be included in the appropriate agency’s loss experience for premium calculation purposes.

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When Should a Claim or Lawsuit Be Reported to Risk Management?

Chapter 284, Part II, Florida Statutes, established the Florida Casualty Risk Management Trust Fund. It covers negligence or “tort” liability, federal civil rights violation and employment discrimination claims and lawsuits filed against state agencies and their employees, agents, or volunteers. Our first notice of a claim frequently comes from a citizen and/or the citizen’s attorney. The question often arises as to when and what should be reported to Risk Management by agencies. An incident that may result in claims against the state should be reported promptly in the following situations:

1. incidents in which injury or property damage have occurred on state property;
2. incidents in which it appears liability for the damage may be incurred by the agency;
3. any “notice” received from a party making a claim of negligence, violation of civil rights or employment discrimination against the agency;
4. any summons and complaint served on the agency or an individual employee involving the type of claims covered by the fund.

The following are examples of claims that should not be reported:

1. auto accidents in which the state driver was not at fault;
2. one car (state) collision or

- comprehensive damage claim (we have no authority to pay these types of claims; these are paid by the agency owning or operating the vehicle);
3. incident reports in which no significant injury or damages were incurred and there is no likelihood of a subsequent claim;
4. employment claims being filed with PERC, Human Relations Commission, or EEOC. (We only have authority to handle civil actions, not administrative employment actions. Consequently, we can handle a civil suit arising from these administrative actions.)

When claim notices are received from an agency, a claim file may or may not be established. If a notice has been received by our office from the claimant, in addition to the agency notice, a file and claim reserves will be established. If a notice has not been received from the claimant, the agency notice may be suspended until the statutory requirements for the establishment of a claim have been met (the receipt of claimant’s notice). However, if an immediate investigation is warranted a file can be established without a claim notice from the claimant.

If in doubt, please call a member of our staff and we can discuss whether a claim report should be filed with Risk Management. ▼

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U.S. Supreme Court Delivers Significant Decisions

This past spring the U.S. Supreme Court issued several opinions which would appear to have a significant impact on the liability of the state in several areas. The following is a brief summary of each of these cases:

State Sovereign Immunity from Suit in Federal Courts

• College Savings Bank v. Florida Prepaid (Case No. 98-149) and companion case Florida Prepaid v. College Savings Bank (Case No. 98-531).

These cases, handled by Risk Management, involved a lawsuit filed in federal court by College Savings Bank against the Florida Prepaid College program. College Savings Bank alleged, under the Patent Remedy Act, that Florida Prepaid had infringed on the Bank's patent for a method used to calculate amounts needed for funding college tuition. Arguing that the decision in Seminole Tribe of Florida v. Florida, et al. (Case No. 94-12) had determined Congress lacked the power to abrogate the state's Eleventh Amendment immunity from suit in federal court under any of the powers granted to it in Article I of the Constitution, Florida Prepaid moved to dismiss the suit, asserting the state's Eleventh Amendment immunity. The district court denied the motion, and the Federal Circuit Court of Appeals affirmed. The U.S. Supreme Court reversed the lower court's ruling and granted the motion by Florida Prepaid to be dismissed on grounds of immunity.

• Alden et al. v. Maine (Case No. 98-436; 715 A. 2nd 172)

At the same time the United States

Supreme Court issued its opinion in the College Savings Bank case, a ruling was also issued on Alden et al. v. Maine. This case was brought under the Fair Labor Standards Act of 1938 and filed against the employer, the State of Maine. The Supreme Court affirmed the lower court's ruling that dismissed the suit on the grounds of state sovereign immunity.



Although Risk Management does not handle salary disputes or

similar issues brought under the Fair Labor Standards Act, this ruling could benefit your agency if you are currently involved in this area of litigation.

ADA Decisions – Correctibility or Mitigation of Impairment to be Considered in the Determination of Disability

• Sutton v. United Airlines (Case No. 97-1943)

This case involved twin sisters with myopia. However, their vision with the use of corrective lenses was 20/20. They were denied employment as pilots with United Airlines because they failed to meet vision requirements. They filed suit under the Americans with Disabilities Act (ADA) and claimed discrimination because of their disability or because United regarded them as having a disability. The district court dismissed the complaint, and the Tenth Circuit affirmed, for failure to state a claim for which relief can be granted under the Act. The issue before the Supreme Court was "... whether

petitioners were protected under the ADA and specifically whether such a determination should consider the correctability of an impairment." The U.S. Supreme Court held that the "... determination of whether an individual is disabled under the ADA should be made with reference to measures that mitigate the individual's impairment. Petitioners were not disabled under the Act and failed to show that United 'regarded' them as having a disability within the meaning of the ADA."

• Murphey v. United Parcel Services, Inc. (Case No. 97-1992)

This case follows the findings in Sutton. Murphy was a commercial driver for UPS who had high blood pressure and took medication to keep it in a reasonable range. UPS terminated his employment when they discovered that his blood pressure was too high for the DOT (federal) requirements. Murphy filed suit under the ADA. The district court (Kansas) found that Murphy was not disabled or regarded as such. The Tenth Circuit Court of Appeals affirmed. Citing the Sutton case, the U.S. Supreme Court held that a party asserting an ADA claim must be assessed with reference to the corrective/mitigating factors he/she employs. Murphy argued that his high blood pressure substantially limited one or more major life activities because he was limited from working. However, the Court discerned that he was not actually limited from doing a broad range of jobs, just this specific job because he could not meet the health requirements of DOT. Therefore, the U.S. Supreme Court held that he was not disabled under ADA. ▼

Reducing Employer Liability for Negligent Hiring

In May, 1999, Governor Bush signed into law the Tort Reform Act (House Bill 775). One of the significant sections, § 768.096, Florida Statutes, "Employer Presumption Against Negligent Hiring," is noteworthy as it relates to substantially reducing an employer's liability for injury/damage caused by an employee's intentional acts.

Of course, an employee guilty of an intentional tort would not be provided a legal defense, nor an entitlement to payment of damages awarded to a third party for his/her conduct from the Risk Management Trust Fund. However, an employer could be sued for and have damages awarded against it for "negligent hiring" and "negligent retention," of an employee guilty of an intentional tort. Hopefully, this new statute can limit this type of liability for employers.

The new law applies to a civil action for damages due to death, injury or property damage to a third party, caused by an intentional tort of an employee. The employer is presumed not to have been guilty of negligent hiring if the employer performed a background investigation of the prospective employee which did not reveal anything that would make the employee an unacceptable choice for a position. The law goes on to define what a background investigation must include:

- a. Obtaining a criminal background investigation on the prospective employee (requesting and obtaining from the Department of Law



Enforcement a check of the information received from the Florida Crime Information Center);

- b. Making a reasonable effort to contact references and former employers of the prospective employee concerning the suitability of the prospective employee for employment;
- c. Requiring the prospective employee to complete a job application form that includes questions concerning whether he or she has ever been convicted of a crime, including details concerning the type of crime, the date of conviction and the penalty imposed, and whether the prospective employee has ever been a defendant in a civil action for intentional tort, including the nature of the intentional tort and the disposition of the action;

- d. Obtaining, with written authorization from the prospective employee, a check of the driver's license record of the prospective employee if such

a check is relevant to the work the employee will be performing and if the record can reasonably be obtained; or

- e. Interviewing the prospective employee.

The law also states, that if an employer chooses not to conduct an investigation, it does not raise the presumption that the employer "... failed to use reasonable care in hiring an employee ..." ▼

Comments, Questions...

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