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David P. Phippen
Regine N. Zuber

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Labor Law

by David P. Phippen*  
and  
Regine N. Zuber**

I. INTRODUCTION

This Article examines significant decisions issued during 1991 by the United States Court of Appeals for the Eleventh Circuit in the areas of traditional labor law and employee benefits.¹ More specifically, the cases addressed include noteworthy decisions under the National Labor Relations Act ("NLRA"),² the Labor-Management Relations Act ("LMRA"),³ the Labor-Management Reporting and Disclosure Act of 1959 ("LMRDA"),⁴ the Fair Labor Standards Act of 1938 ("FLSA"),⁵ and the Employee Retirement Income Security Act of 1974 ("ERISA").⁶


² Associate in the firm of Kilpatrick & Cody, Atlanta, Georgia. Duke University (A.B., cum laude, 1988); University of Pennsylvania (J.D., 1991). Member, State Bar of Georgia.

1. This Article focuses on cases that are significant to the developing law of labor relations and employee benefits in the Eleventh Circuit. Not every labor or employee benefits case decided by the Eleventh Circuit is discussed, nor does this Article attempt to address every issue in the cases that are discussed. Decisions addressing employment discrimination issues are discussed in another survey article.


II. THE NATIONAL LABOR RELATIONS ACT (NLRA) (AS AMENDED) AND THE LABOR-MANAGEMENT RELATIONS ACT (AS AMENDED)

A. NLRA: Deference to National Labor Relations Board, Withdrawal of Recognition, Sufficiency of Unfair Labor Practice Charge Allegations, and Reinstatement of Striking Workers

In *U.S. Mosaic Tile Co. v. N.L.R.B.*, the Eleventh Circuit considered a petition for review of a National Labor Relations Board ("NLRB" or "Board") Decision and Order finding that two construction industry employers violated sections 8(a)(1) and (5) of the NLRA by withdrawing recognition from a union and unilaterally changing employees' terms and conditions of employment following expiration of a collective bargaining agreement, and violated sections 8(a)(1) and (3) of the NLRA by failing to reinstate strikers who offered to return to work. Several aspects of the Eleventh Circuit's decision in the case are noteworthy.

The employers and union were parties to a collective bargaining agreement that was effective from October 1983 through September 1985 and covered employees in tile construction work. The parties began negotiating a new agreement shortly before the 1983-1985 contract's expiration. Before an agreement on a successor contract was reached, however, the prior agreement expired.10

Approximately a month after the contract expired, the employers presented a final offer. The union rejected the offer and commenced an economic strike.11 The employers then apparently implemented the final offer and terminated contributions to fringe benefit funds that had been required under the expired contract. The employers had not proposed termination of the contributions during the previous negotiations.12

Eventually, many striking employees returned to work. The union thereafter communicated to the employers an acceptance of the employers' final offer and offered to return to work on behalf of all striking employees, but noted that the employees had to ratify the final agreement. After consultations among the employers' representatives, the employers informed the union that they doubted whether the union had a majority of the employees under its control.13 This doubt was allegedly based on the fact that some employees had signed decertification petitions, some employees had made verbal statements expressing dissatisfaction with

10. 935 F.2d at 1251.
11. Id.
12. Id.
13. Id.
the union, and some employees had returned to work shortly after the strike commenced.14

Eventually, the union informed the employers that the final agreement had been ratified.15 The employers then rehired several of the striking employees, but hired other employees in lieu of reinstating twelve of the strikers who had offered to return.16

Within six months after the final offer, the union filed an unfair labor practice charge alleging that the employers' withdrawal of recognition constituted a refusal to bargain in good faith in violation of sections 8(a)(1) and (5) of the NLRA. Within six months of the strikers' offer to return to work, the union filed a second unfair labor practice charge alleging that the employers violated sections 8(a)(1) and (3) of the NLRA by refusing to reinstate certain strikers and delaying the rehiring of others. The union subsequently filed a third charge alleging that the employers' unilateral termination of fringe benefit fund contributions violated sections 8(a)(1) and (5) of the NLRA. The third charge was filed more than six months after the termination of contributions. The union later withdrew the third charge and amended the earlier charges to include the unilateral elimination of contributions.17 The Board issued a complaint including all allegations, and after a hearing before an administrative law judge ("ALJ"), the Board adopted the ALJ's Recommended Decision and Findings of violations of sections 8(a)(1), (3), and (5) of the NLRA.18

The employers promptly filed a motion for reconsideration, arguing that the NLRB's recent decision in John Deklewa & Sons19 affected the case. The employers correctly argued that the Board in Deklewa decided a pre-hire agreement in the construction industry under section 8(f) of the NLRA is valid only for the term of the agreement and a union would not receive the presumption of majority status and retain the right to exclusive bargaining upon expiration of the agreement.20

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14. Id. at 1251, 1258.
15. Id. at 1251.
16. Id. at 1251-52.
17. Id. at 1252.
18. Id.
20. Section 8(f) of the NLRA provides an exception to other bargaining provisions of the NLRA for the construction industry. Generally, a union outside the construction industry must be designated as bargaining representative by a majority of the employees in a collective bargaining unit or be selected by a majority of unit employees voting in a Board-supervised election. After receiving the status of bargaining representative for a unit of employees, a presumption of majority status exists for a reasonable time, including the period immediately after the expiration of a collective bargaining agreement when the parties are bargaining a new contract. The employer must have a reasonable, good faith belief that the
contended that the union in this case was not entitled to a presumption of majority status after expiration of the 1983-1985 collective bargaining agreement, a section 8(f) pre-hire agreement, and that their duty to bargain with the union terminated upon expiration of the agreement.\footnote{935 F.2d at 1252 n.2. See also NLRB v. Curtin Matheson Scientific, Inc., 494 U.S. 775 (1990).}

The Board denied the motion, asserting that the employers were presenting an untimely affirmative defense based on section 8(f) of the NLRA. The Board held that the employers should have presented the defense before issuance of the final order because Deklewa had been decided before that time.\footnote{Id.}

On review, the Eleventh Circuit upheld the Board's decision to deny the employer's motion for reconsideration, commenting that "the Board's decisions on whether to grant motions for reconsideration are, like other procedural determinations, within its discretion."\footnote{Id. at 1254.} In determining that the Board had reasonably characterized the proposed grounds for reconsideration as an affirmative defense, the court relied on the principles of statutory construction and deference to agency interpretations established by the Supreme Court in *Chevron, U.S.A. v. Natural Resources Defense Council.*\footnote{467 U.S. 837 (1984).}

The Eleventh Circuit noted that under *Chevron,* it was bound to defer to the agency's interpretation of the NLRA if the agency's interpretation was reasonable, unless Congress had addressed the issue.\footnote{935 F.2d at 1254.} Applying this principle, the Eleventh Circuit deferred to the Board's conclusion that the section 8(f) argument raised by the employers in the motion for reconsideration was an affirmative defense and held that the Board's refusal to consider the affirmative defense raised for the first time on a motion for reconsideration was not an abuse of discretion.\footnote{Id. at 1254-57.}

After upholding the Board's denial of the employer's motion for reconsideration, the Eleventh Circuit considered the Board's findings of violations of sections 8(a)(1), (3), and (5) of the NLRA.\footnote{Id. at 1257-58.} The Eleventh Circuit first reviewed the Board's finding that the employers violated sections 8(a)(1) and (5) of the NLRA by withdrawing recognition.\footnote{Id. at 1258.} The employers contended that their withdrawal of recognition was lawful because of a good faith doubt about the union's majority status based on objective
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considerations. The employers argued that the Board erroneously ignored the totality of the evidence supporting their good faith belief that the union had lost majority status.29

In enforcing the Board's order, the Eleventh Circuit noted its previous holding that "an employee's returning to work during a strike does not itself reflect a rejection of the union . . . . Strikers returning to work can only support a good faith belief of lost majority when combined with other evidence."30 Turning to the other bases for the employers' assertion, the Eleventh Circuit found that substantial evidence supported the Board's conclusion that decertification petitions signed by only a minority of a bargaining unit's employees and anecdotal evidence of discontent were insufficient to establish a good faith doubt as to the union's majority status.31

The Eleventh Circuit then reviewed the Board's finding that the employers' unilateral termination of contributions to the employees' fringe benefit fund violated sections 8(a)(1) and (5) of the NLRA.32 The court rejected the employers' contention that the violation was time-barred because no charge alleging that the unilateral termination of benefits violated the NLRA was filed within the six month limitations period of section 10(b) of the NLRA.33 According to the court, the allegations were within the scope of the first unfair labor practice charge because the catch-all "other acts" language preprinted on the NLRB's unfair labor practice charge form was sufficient to include the fringe benefit fund allegations.34

The court noted that "[u]nfair labor practice charges are not construed as strictly as pleadings, and language such as that employed in the [original] charge has been found sufficient to include related acts."35 The court also found that the Board had correctly permitted amendment of the two unfair labor practice charges filed within the six month period of section 10(b) to include the allegation that the unilateral termination of benefits violated the NLRA.36

Finally, the Eleventh Circuit reviewed the Board's determination that the employers violated sections 8(a)(1) and (3) of the NLRA by failing to rehire and delaying the rehiring of certain strikers who had offered to

29. Id.
30. Id. (citations omitted).
31. Id.
32. Id. at 1259.
33. Id.
34. Id.
35. Id. (citations omitted).
36. Id.
return to work. The court found that substantial evidence supported the Board's conclusion that the union's statement that the contract would have to be ratified was merely a statement of fact, not a condition on the offer to return to work. The court agreed that because the striking workers had made an "unconditional" offer to return to work, they were entitled to preferential reinstatement before other employees were hired. The court upheld the Board's rejection of the employers' argument that the employers' obligation to rehire the strikers was excused because they had hired permanent replacements. The court found that substantial evidence supported the Board's conclusion that the alleged replacement workers were not permanent because the employers did not consider the replacements to be permanent and the replacement workers were hired only in order to complete projects then underway.

The Eleventh Circuit's decision in U.S. Mosaic Tile illustrates the deference the court will give to the Board's interpretations of the NLRA and to the Board's determinations involving procedural issues, including the timeliness of arguments that the Board deems to be affirmative defenses. The decision also illustrates the heavy burden that must be satisfied to overturn factual determinations of the Board. Finally, the decision illustrates that the Eleventh Circuit will liberally construe unfair labor practice charges to include not only acts expressly alleged therein, but also "other acts" not mentioned in a charge, so long as the acts are "closely related" to the acts expressly alleged.

B. LMRA: Statute of Limitations in Actions to Compel Arbitration

In United Paperworkers International Union, Local No. 395 v. ITT Rayonier, Inc., the Eleventh Circuit considered whether a state limitations period or a federal limitations period should apply to a union's action under section 301 of the LMRA to compel arbitration under a col-

37. Id.
38. Id.
39. Id.
40. Id.
41. Id.
42. Where the "other acts" are not sufficiently related to the acts expressly alleged, the catch-all "other acts" language preprinted on the Board's unfair labor practice charge forms provides an insufficient basis, on its own, to support a complaint with respect to those acts. See Nippondenso Mfg. Co., 299 N.L.R.B. No. 83 (1990). Under the test set forth by the Board in Nickles Bakery of Indiana, Inc., 298 N.L.R.B. No. 118 (1989), a complaint is properly issued only where its allegations are "closely related" to those expressed in an underlying unfair labor practice charge.
43. 931 F.2d 832 (11th Cir. 1991).
collective bargaining agreement. In *ITT Rayonier*, a union filed an action under section 301 of the LMRA in federal district court in Florida to compel an employer to arbitrate a dispute raised in a grievance filed approximately eleven months earlier under a collective bargaining agreement. No federal statute expressly provides a limitations period for actions under section 301 of the LMRA.

The employer contended that the six month statute of limitations found in section 10(b) of the NLRA barred the action, and it moved for summary judgment on that issue. The union argued that Florida's one year statute of limitations for bringing an action for specific performance of a contract applied. The district court held that Florida's one year statute of limitations was applicable, and it denied the employer's motion for summary judgment. The employer appealed.

Affirming the district court, the Eleventh Circuit followed the general rule that if Congress "fails to supply a statute of limitations when it creates a federal cause of action . . . '[the] courts [are to] apply the most closely analogous statute of limitations under state law.'" The court acknowledged the existence of the narrow exception to this general rule created by the Supreme Court in *DelCostello v. International Brotherhood of Teamsters*. Under that exception, a federal court may borrow from federal law instead of state law when a federal law rule "clearly provides a closer analogy than available state statutes, and . . . the federal policies . . . and the practicalities of litigation make that [federal] rule a significantly more appropriate vehicle for interstitial law making."

In determining whether *ITT Rayonier* satisfied the first prong of the *DelCostello* exception, the Eleventh Circuit considered whether the cause of action to compel arbitration was more analogous to a suit for specific performance of a contract or to an action for an unfair labor practice. The court held that the action for specific performance provided the closer analogy and that the union's claim, therefore, failed to satisfy the first prong of the *DelCostello* exception.

In determining whether the second prong of the *DelCostello* exception was satisfied, the court first considered the practicalities of litigation. The court focused on the relative lengths of the limitations periods in

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45. 931 F.2d at 833.
46. Id.
48. 931 F.2d at 833.
49. Id. at 834 (citations omitted).
51. Id. at 172.
52. 931 F.2d at 835.
53. Id. (citing Textile Workers Union v. Lincoln Mills, 353 U.S. 448 (1957)).
54. Id. at 836-37.
question and the nature of the claim being made. The court emphasized the differences between the facts in *DelCostello* and those in the case before it.\(^5\) The court noted that in *DelCostello*, the state limitations periods ranged from ten to ninety days, periods much shorter than the six month federal limitations period.\(^5\)

In addition, the Eleventh Circuit noted that the case before it involved a straightforward section 301 claim to compel arbitration, not a hybrid claim such as that in *DelCostello*.\(^6\) The court determined that this was an important distinction, commenting that

> [a] hybrid section 301/fair representation action yokes together interdependent claims that could only very impractically be treated as governed by different statutes of limitations. Departure from the normal practice of borrowing state statutes of limitation is more likely to be necessary where distinct actions are combined, making the possibility of finding a single analogous state statute more remote.\(^6\)

The court thus concluded that, in contrast to the *DelCostello* situation, "no practical considerations [made] the federal rule more appropriate" than Florida's one year limitations period.\(^6\)

The Eleventh Circuit then considered the federal policy interests at stake.\(^6\) Although agreeing with the employer that "the need for uniformity in federal labor law and the policy of rapidly resolving labor disputes"\(^6\) were two important federal interests, the Eleventh Circuit rejected them as bases for applying the federal six month limitations period instead of Florida's one-year limitations period.\(^6\) The court held "that the need for uniformity is not of itself enough to override the general rule that we should borrow state statutes of limitations."\(^6\) The court determined that "a statute of limitations that [was] only six months longer could [not] frustrate or significantly interfere with the federal interest in resolving labor disputes quickly."\(^6\)

The court rejected the employer's contention that other Eleventh Circuit decisions established that the six month federal limitations period

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55. *Id.* at 836. In emphasizing the differences between the two cases, the Eleventh Circuit relied heavily on the Supreme Court's holding in Reed v. United Transp. Union, 488 U.S. 319 (1989).
56. 931 F.2d at 837.
57. *Id.*
58. *Id.* (citations omitted).
59. *Id.*
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.*
64. *Id.*
should be applied to actions to compel arbitration, noting that three of the cases were easily distinguishable because they, like *DelCostello*, involved “hybrid suits.” The court also distinguished two earlier Eleventh Circuit decisions that involved straightforward section 301 claims in which the court applied the federal six month statute of limitations. In each of the decisions, the choice was between the federal six month limitations period and a *six year* state limitations period.

The court commented that the Eleventh Circuit applied the federal six month limitations period in those cases, rather than the much longer state limitations period, because of the federal interest in the speedy resolution of labor disputes. The court emphasized that those decisions did not establish a rule requiring that the shorter limitations period always be chosen, however, and noted that the Supreme Court had adopted the longer limitations period in *DelCostello*.

The decision in *ITT Rayonier* illustrates that parties evaluating statute of limitations issues in a section 301 action to compel arbitration should consider the relative lengths of the state and federal limitations periods that might be applicable. The Eleventh Circuit will not apply a fixed rule in such cases, but will instead apply a case-by-case analysis consistent with *DelCostello*.

C. LMRA: Obligation to Arbitrate Grievances Arising After an Employer's Implementation of a Final Offer

In *United Paperworkers International Union v. International Paper Co.*, unions sought to compel arbitration of grievances over severance pay that arose following expiration of a collective bargaining agreement and the employer's implementation of a final offer after impasse in bargaining for a new three year agreement. The employer contended that the grievances were not arbitrable due to expiration of the collective bargaining agreement that contained the arbitration clause. The district court found that the final offer implemented by the employer was accepted by the unions and constituted an interim contract that included an obliga-

65. Id. at 837-38 (distinguishing *Hill v. Georgia Power Co.*, 786 F.2d 1071 (11th Cir. 1986); *Simon v. Kroger Co.*, 743 F.2d 1544 (11th Cir. 1984), cert. denied, 471 U.S. 1075 (1985); *Howard v. Lockheed-Georgia Co.*, 742 F.2d 612 (11th Cir. 1984)).
66. *Id.* (distinguishing *International Ass'n of Machinist & Aerospace Workers, Local 1688 v. Allied Prods. Corp.*, 786 F.2d 1561 (11th Cir. 1986) and *Samples v. Ryder Truck Lines, Inc.*, 755 F.2d 881 (11th Cir. 1985)).
67. Id. at 838.
68. *Id*.
69. 920 F.2d 852 (11th Cir. 1991).
70. *Id.* at 853-55.
tion to arbitrate. The court ordered arbitration of the grievances, and the employer appealed. 71

On review, the Eleventh Circuit affirmed the lower court's decision. 72 The court held that the employer's implementation of a final offer that was not identical in all respects to the employer's offer for a three year contract constituted an offer for an interim contract. 73 The Eleventh Circuit agreed with the district court that the unions, by not instituting a strike, had accepted the employer's offer for an interim agreement, thus creating a binding interim contract that included an obligation to arbitrate. 74

According to the Eleventh Circuit, the employer could have excluded arbitration from the implemented final offer that the unions had accepted, but instead the employer had expressly included in its implemented proposal all aspects of its final offer for a three year contract except for a wage increase and a ratification bonus. 75 Because the employer made no effort to exclude the obligation to arbitrate from its implemented final offer, the Eleventh Circuit concluded that the employer could not complain that the final offer, and consequently the interim agreement, included that obligation. 76

III. LABOR-MANAGEMENT REPORTING AND DISCLOSURE ACT (LMRDA)

A. Union Elections: Eligibility to Vote, Nominate, and Run for Office

In Department of Labor v. Aluminum, Brick & Glassworkers International Union, Local 200, 77 the Eleventh Circuit considered whether the LMRDA prevented a union from requiring payment of strike assessments as a qualification for voting, nominating candidates, and running for office in union elections. 78 The Secretary of Labor commenced an action under the LMRDA alleging that a union had wrongfully denied some of its members the right to participate in an election of union officers by enforcing provisions of its constitution that established eligibility for voting in union elections and nominations for union office.

Under the union's constitution, only members in good standing were allowed to vote. The union constitution provided that a member in good standing had to pay "[a]ll dues . . . fines, reinstatement fees, and assess-
ments . . . in full not later than the adjournment of the nomination meeting." One-third of the union's members who had not paid strike assessments were ineligible to vote in the election as a result of this rule. The union's constitution also provided that members nominating candidates had to be in "good standing" for six months prior to the nomination, and that nominated members must have been in continuous good standing and must have paid all assessments during the thirty-six months prior to their nomination. Four nominations were void because of these rules.

Based on the union's enforcement of the foregoing rules, the Secretary of Labor alleged that the union violated two sections of the LMRDA. The Secretary alleged that union members who had not paid the strike assessments were entitled to fully participate in the election under 29 U.S.C. § 481(e). The Secretary also alleged that by denying those members full participation in the election, the union subjected them to improper disciplinary action and denied them due process as required under 29 U.S.C. § 411(a)(5). The Secretary sought a new election under the supervision of the Department of Labor pursuant to 29 U.S.C. § 492.

The district court granted summary judgment to the union on the grounds that the relief requested by the Secretary was not available under either 29 U.S.C. § 481(e) or 29 U.S.C. § 411(a)(5). The court based its decision on the fact that those provisions protected only union members in "good standing," and that the union had determined that "good standing" depended on payment of the strike assessments. On appeal, the Eleventh Circuit considered whether the union's definition of

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79. Id. (citations omitted).
80. Id. at 1175.
81. Id.
82. 29 U.S.C. § 481(e) provides:
   In any election required by this section . . . every member in good standing shall be eligible to be a candidate and to hold office (subject to section 504 of this title and to reasonable qualifications uniformly imposed) and shall have the right to vote for or otherwise support the candidate or candidates of his choice, without being subject to penalty, discipline, or improper interference or reprisal of any kind by such organization or any member thereof.
83. 29 U.S.C. § 411(a)(5) provides:
   No member of any labor organization may be fined, suspended, expelled, or otherwise disciplined except for nonpayment of dues by such organization or by any officer thereof unless such member has been (A) served with written specific charges; (B) given a reasonable time to prepare his defense; (C) afforded a full and fair hearing.
85. 941 F.2d at 1175.
“member” or "member in good standing" should govern for purposes of
evoting eligibility and nominations of candidates.\textsuperscript{66}

In affirming the district court, the Eleventh Circuit first noted that 29
U.S.C. § 481(e) expressly permits a union to subject a candidate for union
office to "reasonable qualifications, uniformly imposed."\textsuperscript{67} The court next
noted that 29 U.S.C. § 411(a)(1) expressly provides that "the right of
union members to vote in union elections is 'subject to reasonable rules
and regulations in such organization's constitution and bylaws.'"\textsuperscript{68} Based
on the foregoing statutory provisions, the court concluded that both the
right to vote and the right to run for and hold union office may be subject
to reasonable conditions.\textsuperscript{69}

The Eleventh Circuit then considered whether the union constitution's
requirements of payment of strike assessments were reasonable.\textsuperscript{70} The
court determined that the requirements were reasonable, noting that the
minimal impact of the qualification on voting eligibility was an important
factor.\textsuperscript{71}

Finally, the court considered whether forfeiting voting or nomination
rights based on a "good standing" rule imposed by the union constituted
discipline within the scope of 29 U.S.C. § 411(a)(5).\textsuperscript{72} The court deter-
mined that the disqualification of union members from participation in
the union election was not "discipline" within the meaning of 29 U.S.C.
§ 411(a)(5) because (1) there was no evidence that the union leadership
manipulated the good standing requirements, (2) the rules barring partic-
ipation based on the failure to pay the strike assessment were applied
automatically, and (3) the implementation of the rules was not a retaliation.

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\textsuperscript{66. Id. at 1177.}
\textsuperscript{67. Id.}
\textsuperscript{68. Id. at 1178 (citations omitted).}
\textsuperscript{69. Id. at 1178-79.}
\textsuperscript{70. The union's national committee assessed each union member working at one com-
pany twenty-five dollars to aid striking workers at another company. Id. at 1174, 1179.}
\textsuperscript{71. The court relied upon the Supreme Court's standard for determining the reasonableness
of qualifications for candidates that was announced in Local 3489, United Steelworkers
of America v. Usery, 429 U.S. 305 (1977). In Usery, the Supreme Court stated that the
reasonableness of the qualifications imposed “should be gauged 'in light of all the circum-
stances of the particular case,' including the ease of meeting the qualification and the num-ner of members excluded by the operation of the rule in question,” 941 F.2d at 1178 (cita-
tions omitted) and held that a qualification rule that disqualified 96.5% of the membership
from holding office was not reasonable because of its anti-democratic effect of limiting sub-
stantially the pool of opposition candidates. Id. at 1177. The Eleventh Circuit determined
that the Supreme Court’s standard should apply not only for determining the reasonableness
of qualifications for candidacy, but also should apply for determining the reasonableness
of a union’s rules and regulations for voting eligibility. Id. at 1178.}
\textsuperscript{72. 941 F.2d at 1180-81.}
tory action against a member or members for particular acts. Thus, the court concluded that the union’s actions in excluding certain members from full participation in the election did not contravene either 29 U.S.C. § 481(e) or 29 U.S.C. § 411(a)(5).

B. ERISA Does Not Preempt LMRDA

In Hester v. International Union of Operating Engineers, the Eleventh Circuit addressed whether ERISA preempted claims under the LMRDA for damages resulting from a loss of benefits under an ERISA-covered employee benefit plan. In Hester, a former employee of the Tennessee Valley Authority ("TVA") commenced an action claiming that a union wrongfully disciplined him for his failure to pay a union fine and that the discipline led TVA to terminate his employment. The employee claimed that the discipline violated 29 U.S.C. § 411(a)(5) of the LMRDA and a collective bargaining agreement between the union and the TVA. For the alleged LMRDA violation, the employee sought to recover damages for loss of medical insurance benefits under an ERISA-covered employee health benefit plan that he would have had if TVA had not terminated him.

The union moved for summary judgment with respect to the LMRDA claim for medical insurance benefits, asserting that ERISA preempted the claim. The district court granted the union's motion, and the employee appealed. On appeal, the Eleventh Circuit disagreed with the district court’s conclusion. The court emphasized that ERISA would preempt only state law claims, and after reviewing the broad language of the LMRDA's remedial provision, the court concluded that it could not say as a matter of law that the type of damages plaintiff sought were not "appropriate" under the LMRDA.

The Eleventh Circuit’s decision in Hester illustrates that ERISA’s preemptive scope, while broad, extends only to state law claims. ERISA does not "preempt" claims based on other federal laws, such as the LMRDA, simply because an ERISA-covered plan is involved.

93. Id.
94. Id. at 1177; 1181.
95. 941 F.2d 1574 (11th Cir. 1991).
96. Id. at 1578.
98. 941 F.2d at 1583.
99. Id. at 1578, 1583-84.
100. Id. at 1584.
101. Id.
IV. THE FAIR LABOR STANDARDS ACT (FLSA)

A. Jurisdiction to Decide FLSA Claims Against the Federal Government

In *Parker v. King*, the Eleventh Circuit considered whether a federal district court has subject matter jurisdiction over FLSA claims brought by non-residents of the district against the federal government. In *Parker*, employees of the Social Security Administration brought an action in the Northern District of Georgia for alleged overtime violations of the FLSA. Plaintiffs contended that the district court's subject matter jurisdiction was based on the "federal question" statute and the "Little Tucker Act." The Social Security Administration characterized the allegations as claims arising solely under the Little Tucker Act and requested that the district court transfer the claims of all plaintiffs not residing in the Northern District of Georgia to the United States Claims Court. The district court granted the request and the plaintiffs petitioned for permission to appeal to the Eleventh Circuit.

The Social Security Administration opposed the petition, contending that the Eleventh Circuit did not have jurisdiction to hear the appeal because the Little Tucker Act vested subject matter jurisdiction of the appeal of non-resident plaintiffs solely in the Court of Appeals for the Federal Circuit. The Eleventh Circuit then granted interlocutory review pursuant to 28 U.S.C. 1292(b).

In considering whether it had jurisdiction to hear the merits of the appeal, the Eleventh Circuit applied the general rule that "specific provisions controlling suits against the government should govern over general ones." The court noted that it was "clear that Congress enacted the Little Tucker Act as the primary vehicle for adjudicating monetary claims against the government" and that the Little Tucker Act conferred jurisdiction of such claims not sounding in tort on the United States Claims Court.

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103. 935 F.2d at 1177.
104. Id. at 1176.
107. Under the Little Tucker Act's "venue provision," 28 U.S.C. § 1402(a)(1), the district court had "jurisdiction only over the claims of resident plaintiffs." 935 F.2d at 1176.
108. 935 F.2d at 1176.
109. Id. at 1178 (citations omitted).
110. Id. at 1177.
The court relied on *Brooks v. Weinberger*\(^{111}\) and concluded that "the Little Tucker Act, rather than the FLSA, more easily accommodates the sort of allegations [presented]."\(^{112}\) The court, quoting *Brooks*, held "that 'jurisdiction for claims to recover compensation for violations of the [FLSA] rests in the federal courts by virtue of the Tucker Act'" and concluded that it did not have "jurisdiction to hear the merits of an appeal based . . . on allegations which derive solely from the Little Tucker Act."\(^{113}\) In accordance with its holding, the court transferred the appeal to the Federal Circuit.\(^{114}\)

**B. The Motor Carrier Exemption**

In *Baez v. Wells Fargo Armored Service Corp.*,\(^{115}\) the Eleventh Circuit considered the scope of the exemption contained in section 13(b)(1) of the FLSA\(^{116}\) for employees of motor carriers.\(^{117}\) In *Baez*, plaintiffs alleged that their former employer failed to pay them overtime compensation in violation of section 7(a) of the FLSA.\(^{118}\) The employer, a security armored truck pickup and delivery service, engaged in the pickup and delivery of coins and currency, checks (both in-state and out-of-state), mail, and other items of value, to and from banks and commercial establishments, including the Federal Reserve Bank, the United States Postal Service, and the United Parcel Service. Plaintiffs had served as driver-guards, messenger-guards, and guards on the employer's armored trucks in the Miami, Florida area.\(^{119}\)

In the district court, the employer moved for summary judgment on the basis of plaintiffs' exempt status under the motor carrier exemption of

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112. 935 F.2d at 1178. The court quoted the following language from *Brooks*:

First . . . the FLSA does not vest jurisdiction in a particular court. [S]econd, the legislative history of the FLSA amendments of 1966 . . . indicates that the purpose for adding that language was not to supplant the Tucker Act, but rather to allow state and local employees to bring FLSA claims in federal court . . . . Third, the language of the Tucker Act is all-inclusive . . . . Absent a specific Congressional grant of jurisdiction in a particular court . . . . the Tucker Act applies to any claim brought against the United States.

*Id.* (citations omitted).
113. *Id.*
114. *Id.* at 1178-79.
116. 29 U.S.C. § 213(b)(1). Section 13(b)(1) of the FLSA provides that section 7 of the FLSA "shall not apply with respect to . . . any employee with respect to whom the Secretary of Transportation has power to establish qualifications and maximum hours of service pursuant to the provisions of Section 304 of Title 49 . . . ." *Id.*
117. 938 F.2d at 181.
119. 938 F.2d at 181.
section 13(b)(1) of the FLSA. Plaintiffs argued that they were not within the scope of the exception because the trucks did not cross state lines and because their duties did not directly affect the safety of operation of the trucks in interstate commerce. The district court granted the employer's motion, and plaintiffs appealed.

On review, the Eleventh Circuit held that the decision of the Fifth Circuit in *Opelika Royal Crown Bottling Co. v. Goldberg*, controlled. In that decision, the Fifth Circuit held that section 13(b)(1) of the FLSA exempted from overtime compensation drivers and drivers helpers who only traveled intrastate but handled property destined for another state. The court held that the decision in *Opelika* controlled because the checks and other instruments transported by the trucks driven and guarded by plaintiffs were bound for banks outside of Florida. The court also rejected plaintiffs' argument that their duties as "guards" did not directly affect the safety of operation of the trucks, noting that the Fifth Circuit in *Opelika* had relied on an Interstate Commerce Commission opinion concluding that "guards on armored bank trucks . . . perform services which affect the safety of the vehicle."

C. The "Professional" Exemption

In *Dybach v. State of Florida Department of Corrections*, a probation officer brought an action against the Florida Department of Corrections for alleged violations of the overtime provisions of the FLSA. The employer contended that the employee was a professional employee exempt from the overtime provisions under section 13(a)(1) of the FLSA. The employee claimed that she was not an exempt, professional employee.

The duties of the probation officer "included the investigation of defendants in criminal cases, the making of recommendations to judges concerning sentencings, supervision of probationers and the reporting to Florida courts of probation violations." To qualify for the position, an

120. Id.
121. 299 F.2d 37 (5th Cir. 1962).
122. Id. at 44.
123. 938 F.2d at 182.
124. Id. (citations omitted).
125. 942 F.2d 1562 (11th Cir. 1991).
126. Section 13(a) of the FLSA provides, *inter alia*, that the overtime compensation provisions of the Act "shall not apply with respect to . . . any employee employed in a bona fide . . . professional capacity . . . as such term[] [is] defined and delimited from time to time by regulations of the Secretary . . . " 29 U.S.C. § 213(a)(1) (1988).
127. 942 F.2d at 1563-64.
128. Id. at 1564.
individual had to have at least one year of law enforcement or corrections experience and a college degree in a generalized field of study. The degree did not have to be related to corrections or law enforcement or a similar specialty.  

On review of the district court’s finding that the probation officer was an exempt professional, the Eleventh Circuit reversed.  

According to the court, “before a particular position can qualify as one which climbs to the level of the professional exemption of section 213(a)(1), the duties of that position must call for a person who is in a learned profession with at least a college degree in a specialized type of learning.” The court held that a general college degree requirement did not meet that standard. The court acknowledged that the employee in Dybach did possess a degree in a specialized field, criminal justice, but concluded that “the determinative factor is the job requirement and not the education in fact acquired by the employee.”

D. Reduction Of Wage Rate to Offset Increased Cost of Compliance

In Wethington v. City of Montgomery, the Eleventh Circuit considered the lawfulness of a city’s adoption before the city’s coverage by the FLSA of a budget-neutral wage plan that was intended to avoid the added expense of compliance with the FLSA’s overtime requirement after state and local government units became covered by the FLSA.  

The FLSA became applicable to state and local governments in April 1986, after the Supreme Court extended the FLSA to state and local government employers in Garcia v. San Antonio Metro Transit Authority. Before April 1986, the City of Montgomery, Alabama paid fire fighters on a fixed salary for all time worked. In order to avoid the anticipated expense of compliance with the pending application of the FLSA, the city devised a wage plan to comply with the FLSA without increasing the wage expense portion of the city’s budget. Under this budget-neutral plan, the city adopted a wage scale that did not change the fire fighters’ total wage compensation or total hours worked. The new plan simply reduced the effective hourly rate of pay by precisely the amount of overtime premiums that would be due after the FLSA covered the city.
To calculate the rate of pay under the new plan, the city divided the total weekly salary by the sum of the average hours worked and one-half the average overtime hours worked. This calculation set the new rate of pay low enough to offset the estimated overtime liability after coverage. The fire fighters' hourly rate was $6.38 under the new plan compared with an effective regular rate of $6.57 per hour without any overtime premium under the old plan.\textsuperscript{138}

The fire fighters commenced an action alleging that the city invalidly created the new system by using a fictitious hours adjustment in its calculations to determine their hourly rate of pay. Plaintiffs argued that the city's ability to conform its wage payments under the newly adopted plan to the requirements of the FLSA after the city's coverage did not save the invalidly created system. The district court ruled in favor of the fire fighters.\textsuperscript{139}

On review, the Eleventh Circuit reversed and remanded the case because the city had adopted the plan before the FLSA was effective and had complied with the FLSA after the law became applicable.\textsuperscript{140} The Eleventh Circuit held that the city's reducing the wage rate based on a calculation using fictitious hours before the FLSA applied to the city did not invalidate the resulting wage system once the FLSA covered the city.\textsuperscript{141}

The court acknowledged that the post-coverage "regular rate" needed to be calculated based upon actual hours worked, and found that the fire fighters were being paid a regular rate of $6.38 per hour for regular hours actually worked, and one and one-half times that regular rate for overtime hours.\textsuperscript{142} The court thus concluded that the city's new payment system properly considered actual hours worked and the regular rate as the basis for overtime payments and that the city's plan therefore complied with the FLSA.\textsuperscript{143}

The Eleventh Circuit also rejected the fire fighters' argument that the reduction of their wage rate "for the sole purpose of avoiding the effects" of the FLSA constituted a violation of the FLSA.\textsuperscript{144} The Eleventh Circuit acknowledged that the city's calculation of the new rate of pay involved the use of fictitious hours and was meant to lower the wage rate upon which overtime was to be paid, but noted that the method used by the city was "simply its most convenient method of lowering the equivalent of

\textsuperscript{138} Id.
\textsuperscript{139} Id.
\textsuperscript{140} Id. at 227 n.6.
\textsuperscript{141} Id. at 228.
\textsuperscript{142} Id. at 225.
\textsuperscript{143} Id. at 226-30.
\textsuperscript{144} Id. at 228-29.
an hourly rate to the precise level needed to avoid increasing or lowering total salary payments. The court noted that nothing in the FLSA prohibited such a reduction.

V. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

A. Availability of Extra-Contractual Damages

In McRae v. Seafarers’ Welfare Plan, the Eleventh Circuit reviewed a district court’s judgment in an action under section 502(a)(3) of ERISA that awarded extra-contractual damages for emotional distress, embarrassment, humiliation, and damage to financial reputation to insured beneficiaries of a multiemployer employee welfare benefit plan. The damages were allegedly caused by the plan administrator’s bad faith and misrepresentation in connection with the failure to pay certain covered medical expenses incurred by the beneficiaries.

In reversing the district court, the Eleventh Circuit relied on the reasoning in Massachusetts Mutual Life Insurance Co. v. Russell and decisions of the Eleventh Circuit, holding that ERISA’s limitation of remedies available to those of an equitable nature precluded extra-contractual remedies that are legal in nature. The court gave little weight to a 1988 Report of the House Education and Labor Committee indicating that the Committee intended for federal courts to fashion a federal common law of remedies, including the right to punitive damages for a failure to pay claims in a timely manner. The court commented that it could not create a federal common law of remedies for the benefit of the plaintiff on the sole authority of the House Committee Report and noted that the existence of the report indicated that the House Education and Labor Committee itself believed that a need existed to amend ERISA to include extra-contractual and punitive damages as remedies.

145. Id. at 228.
146. Id. (relying on Walling v. A.H. Belo Corp., 316 U.S. 624 (1942)).
147. 920 F.2d 819 (11th Cir. 1991).
148. 29 U.S.C. § 1132(a)(3). Section 502(a)(3) of ERISA provides: “(a) . . . A civil action may be brought . . . (3) by a participant, beneficiary, or fiduciary . . . (B) to obtain other appropriate equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan; . . . .” Id.
149. 920 F.2d at 820, 822.
150. 473 U.S. 134 (1985). In Russell, the Supreme Court held that section 409(a) of ERISA did not authorize extra-contractual or punitive damages. 473 U.S. at 148.
151. 920 F.2d at 821.
152. Id. at 822-23.
153. Id. at 821-23.
B. Standing to Assert Retaliation Claims

In *McKinnon v. Blue Cross & Blue Shield of Alabama*, the Eleventh Circuit considered whether an individual who is not a plan participant or beneficiary has standing to assert a claim under ERISA's anti-retaliation provisions. In *McKinnon*, a former employee of Blue Cross and Blue Shield of Alabama ("Blue Cross") alleged that Blue Cross had terminated her employment because (1) she had been substituted as plaintiff in a lawsuit commenced by her deceased father against Blue Cross as administrator of an employee welfare benefit plan in which he was a participant, and (2) because she had testified in support of claims of fraud and bad faith against Blue Cross in that lawsuit.

The employer moved for summary judgment on the grounds that plaintiff was not a participant or beneficiary of a plan entitled to assert a claim based on ERISA's anti-retaliation provision. The district court granted the employer's motion. The employee appealed and the Eleventh Circuit affirmed.

The Eleventh Circuit first emphasized that plaintiff's status in the lawsuit on behalf of her deceased father was representative and not personal to her as a plan "participant" or "beneficiary." The court then determined that ERISA's civil enforcement provisions expressly empowered only "participants," "beneficiaries," "fiduciaries," and the "Secretary of Labor" to bring actions to enforce ERISA. Based on this determination, the court held that although plaintiff was a "person" protected against retaliation for testifying in an ERISA proceeding, she did not have standing to assert a claim for retaliation. The court rejected plaintiff's argument that ERISA gave all "persons" retaliated against an implied private right of action, noting that "persons" claiming retaliation were not left without a remedy because the Secretary of Labor could assert a retaliation claim on their behalf.

154. 935 F.2d 1187 (11th Cir. 1991).
155. *Id.* at 1191. 29 U.S.C. § 1140 states in relevant part:

It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, . . . or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan . . . . It shall be unlawful for any person to discharge, fine, suspend, expel, or discriminate against any person because he has given information or has testified or is about to testify in any inquiry or proceeding relating to this chapter . . . .

156. 935 F.2d at 1190.
157. *Id.* at 1193.
158. *Id.* at 1192.
159. *Id.*
160. *Id.*
C. Rights of Trustees of Employee Benefit Trust Funds

In Plumbers & Steamfitters Local No. 150 Pension Fund v. Vertex Construction Co., the Eleventh Circuit considered whether the terms of a trust agreement for an employee benefit trust fund bind an employer who makes contributions to the fund pursuant to a collective bargaining agreement despite the fact that the employer has not expressly agreed to be bound by the trust agreement and the trust agreement is not incorporated by reference in the collective bargaining agreement.

In Vertex Construction, trustees of union-sponsored pension and welfare funds sought to conduct an audit of a contributing employer's cash disbursement records to determine whether the employer was concealing any payments to employees. The trust agreements authorized the funds' trustees to conduct audits of the employer's records, but the employer had not signed the trust agreements. The employer refused to permit the audit. The employer argued that no collective bargaining agreement gave the trustees authority to conduct the audit and that it was not bound by provisions of the trust agreements.

The trustees then commenced an action in the district court requesting the court to order the employer to comply with the demand for the audit, apparently invoking the court's jurisdiction to hear federal claims under ERISA. The district court granted summary judgment to the trustees and ordered that the employer produce the records in question. The employer appealed.

In affirming the district court, the Eleventh Circuit held that the trust agreement was binding on contributing employers and that the trustees therefore had the authority to conduct the audit. According to the court, the nature of the relationship between the employer, the union, and the trusts dictated that the trustees may direct their activities toward parties who are not signatories to the trust documents. The court reasoned that the employer understood that contributions to the funds bound the trustees to provide benefits to the employer's employees.

The court determined that, by availing itself of the benefits of the funds, the employer was subject to the rules governing the funds. The court emphasized that to hold otherwise would allow contributing employers and sponsoring unions to bargain away the rights and powers of layoffs, sick days, and other benefits for their employees.

161. 932 F.2d 1443 (11th Cir. 1991).
162. Id. at 1450.
163. Id. at 1445-47.
164. Id. at 1447.
165. Id. at 1450.
166. Id.
167. Id. at 1451.
168. Id.
fund trustees in collective bargaining agreements to which the trustees were not a party.\textsuperscript{169}

\textbf{D. Existence of an ERISA-Covered Plan}

In \textit{Williams v. Wright},\textsuperscript{170} the Eleventh Circuit considered whether a letter agreement between an employer and an employee providing for the retirement of the employee, payment of monthly retirement benefits out of an employer's general assets, and health and life insurance constituted an ERISA-covered plan.\textsuperscript{171} In reversing the district court, which held that the letter agreement was not an ERISA-covered plan, the Eleventh Circuit applied the standard set forth in \textit{Donovan v. Dillingham}.\textsuperscript{172} In \textit{Donovan}, as a general guideline, the Eleventh Circuit stated that a "'plan, fund, or program' under ERISA is established if from the surrounding circumstances a reasonable person can ascertain [1] the intended benefits, [2] a class of beneficiaries, [3] the source of financing, and [4] procedures for receiving benefits."\textsuperscript{173} The Eleventh Circuit in \textit{Williams} concluded that the district court had misapplied the \textit{Donovan} standard and that the letter agreement in issue satisfied that standard.\textsuperscript{174}

First, the court found that monthly payments of five hundred dollars and health and life insurance coverage mentioned in the letter agreement were readily ascertainable benefits.\textsuperscript{175} Second, the court concluded that the financing of benefits out of the employer's general assets contemplated by the letter agreement did not affect the threshold question of ERISA coverage.\textsuperscript{176} The court reasoned that an employer should not be able to evade ERISA's requirements simply by paying benefits out of general assets.\textsuperscript{177} Third, the court found that the retirement contract provided sufficiently ascertainable, though simple, procedures for receiving benefits.\textsuperscript{178} The letter set forth the simple procedure that the employer would issue the employee a monthly check until his death or until he had no use for the benefits. Fourth, the court concluded that a plan covering only a single employee, where all other requirements are met, is covered by ERISA.\textsuperscript{179}

\textsuperscript{169} Id.
\textsuperscript{170} 927 F.2d 1540 (11th Cir. 1991).
\textsuperscript{171} Id. at 1541.
\textsuperscript{172} 688 F.2d 1367 (11th Cir. 1982) (en banc).
\textsuperscript{173} 688 F.2d at 1373.
\textsuperscript{174} 927 F.2d at 1544-46.
\textsuperscript{175} Id. at 1544.
\textsuperscript{176} Id.
\textsuperscript{177} Id.
\textsuperscript{178} Id.
\textsuperscript{179} Id. at 1545.