Mercer Law Review

Volume 52
Number 4 *Eleventh Circuit Survey*

Article 11

7-2001

Labor and Employment Law

Richard Gerakitis

James P. Ferguson Jr.

Dorothy E. Larkin

Labor and Employment Law

by Richard Gerakitis*
James P. Ferguson, Jr.**
and
Dorothy E. Larkin***

I. INTRODUCTION

This Article surveys the 1999 and 2000 decisions of the United States Court of Appeals for the Eleventh Circuit in which the court addressed issues in the areas of labor and employment law. Specifically, this Article examines decisions by the Eleventh Circuit under the (1) Family Medical Leave Act ("FMLA");[1] (2) Age Discrimination in Employment Act ("ADEA");[2] (3) Title VII of the Civil Rights Act of 1964 ("Title VII");[3] (4) Employee Retirement Income Security Act ("ERISA");[4] (5) Fair Labor Standards Act ("FLSA");[5] and (6) Americans With Disabilities Act ("ADA").[6] During the past two years, the Eleventh Circuit decided numerous cases involving issues of interest concerning labor and employment law. Because of the volume of cases, this Article does not attempt to address each significant case decided by the Eleventh Circuit on these issues. Still, several particularly noteworthy cases, including cases of first impression, were decided by the Eleventh Circuit in 1999 and 2000.

---

* Partner in the firm of Troutman Sanders LLP. University of Georgia (B.A., magna cum laude, 1978); Walter F. George School of Law, Mercer University (J.D., 1981).

** Associate in the firm of Troutman Sanders LLP. University of Georgia (B.A., 1994); Walter F. George School of Law, Mercer University (J.D., 2000).

*** Associate in the firm of Troutman Sanders LLP. University of North Carolina at Chapel Hill (B.A., 1996); University of Georgia School of Law (J.D., 2000).

1. 29 U.S.C. §§ 2601-2654 (1994).
2. 29 U.S.C. §§ 621-634 (1994).
3. 42 U.S.C. §§ 2000e-2000e-17 (1994).
4. 29 U.S.C. §§ 1001-1461 (1994).
5. 29 U.S.C. §§ 201-219 (1994).
6. 42 U.S.C. §§ 12101-12213 (1994).

II. FAMILY MEDICAL LEAVE ACT

A. *Termination of Employee on FMLA Leave*

In *O'Connor v. PCA Family Health Plan, Inc.*,[7] the primary issue, which was one of first impression in this circuit, regarded the scope of employment protection afforded by the FMLA; specifically, the Eleventh Circuit addressed "the circumstances under which an employer may terminate an employee on FMLA leave."[8] Affirming the district court's grant of summary judgment to defendant employer, the court held that the FMLA does not preclude an employer from terminating an employee who is on FMLA leave if the employer can demonstrate it would have terminated the employee regardless of the employee's FMLA leave.[9]

Plaintiff O'Connor brought suit against PCA Family Health Plan, Inc. ("PCA"), "her former employer, claiming PCA violated the FMLA by terminating her employment and attendant benefits while she was exercising her statutory right to FMLA leave."[10] The employer undertook a reduction in force ("RIF") while plaintiff was on FMLA leave. Plaintiff was one of the employees whose job was slated to be eliminated due to the RIF. After finding out that she had been terminated, plaintiff contacted her employer's human resources department to inquire about her termination. The human resources manager informed plaintiff that she had been inadvertently placed on the RIF list and offered to reinstate her employment. However, plaintiff declined reinstatement and sued her employer for violation of the FMLA.[11]

The court concluded that, in terminating plaintiff's employment, her employer did not violate the FMLA, because plaintiff would have been terminated regardless of her FMLA leave.[12] The court noted that "an employee has no greater right to reinstatement or to other benefits and conditions of employment than if the employee had been continuously employed during the FMLA leave period."[13] Because plaintiff's job would have been eliminated by the RIF even if she had not been on FMLA leave, there was no FMLA violation. The court stated that the burden was on the employer to show that it would have taken the same

---

7. 200 F.3d 1349 (11th Cir. 2000).
8. *Id.* at 1350.
9. *Id.* at 1354-55.
10. *Id.* at 1350.
11. *Id.*
12. *Id.* at 1354.
13. *Id.*

action even if the employee was not out on FMLA leave.[14] Given the evidence presented, specifically the loss of jobs resulting from the RIF, the court concluded that the employer had met its burden and dismissed plaintiff's claim.[15]

B. *Eleventh Amendment Immunity for States*

In *Garrett v. University of Alabama at Birmingham Board of Trustees*[16] ("UAB"), two consolidated cases raised a question being litigated in various jurisdictions—whether a state is immune from suits by state employees asserting rights under certain federal laws.[17] The federal laws in question were the FMLA, the ADA, and section 504 of the Rehabilitation Act of 1973.[18] Reversing the summary judgment of the district court entered for UAB on plaintiffs' ADA claims, the Eleventh Circuit held that a state is not immune from suit under the ADA or the Rehabilitation Act.[19] However, the court held that states do have Eleventh Amendment immunity from suit under the provision of the FMLA dealing with leave for a state employee due to her own serious health condition.[20]

According to the Eleventh Circuit, even if the expression of congressional intent to abrogate states' sovereign immunity from FMLA claims was sufficiently clear (which the court declined to decide), Congress did not have authority to abrogate the sovereign immunity of the states on

---

14. *Id.* (citing 29 C.F.R. § 825.216(a) (1999)).

15. *Id.* at 1354-55.

16. 193 F.3d 1214 (11th Cir. 1999), *rev'd* Board of Trustees of Univ. of Ala. v. Garrett, 531 U.S. 356 (2001). The Supreme Court held in a 5-4 decision that state employees may not bring suit to recover money damages for the state's violation of Title I of the Americans with Disabilities Act of 1990. 531 U.S. at __. The Court found that Congress did not validly abrogate states' immunity from suit as guaranteed under the Eleventh Amendment because the legislative history and record supporting the ADA lacked any substantial pattern of "irrational state discrimination in employment against the disabled." *Id.* at __. Moreover, the Court stressed that the incongruence of the rights and remedies afforded by the ADA did not indicate Congress intended to abrogate the states' sovereign immunity. *See id.* at __.

17. *Id.* at 1216.

18. *Id.*

19. 193 F.3d at 1218.

20. *Id.* at 1219. The court noted that

> [a]lthough the FMLA may be most commonly known for its provisions affording employees leave for the birth or adoption of a child or to care for a child, spouse or parent with a serious health condition, the provision at issue here deals with leave for the employee due to her own serious health condition.

Id. (citing 29 U.S.C. 2612(a)(1)(D)).

claims arising under the FMLA.[21] The court reached this conclusion by finding that the FMLA's invocation of the Equal Protection Clause did not relate to the leave provision allowed an employee with a serious health condition.[22]

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

In *Chapman v. AI Transportation*,[23] the Eleventh Circuit decided two important issues that arise frequently in job discrimination cases: (1) whether an employer can select its own criteria for making employment decisions; and (2) whether an employer can use subjective criteria in making employment decisions.[24] The court first reaffirmed that an employer may offer any honest explanation for its employment decision provided that the decision was not motivated by the employee's membership in a protected category.[25] Second, the court held that a subjective reason can constitute a legally sufficient legitimate, nondiscriminatory reason provided the employer "articulates a clear and reasonably specific factual basis upon which it based its subjective opinion."[26]

In *Chapman* plaintiff filed a lawsuit alleging age discrimination after he was not hired for the position of Casualty Claims Manager. The focus of his ADEA case surrounded the employer's two legitimate, nondiscriminatory reasons for its failure to hire plaintiff.[27] First, plaintiff was not selected because of his lack of "stability in light of the number of jobs he had held in a short period of time," an objective reason.[28] Second,

---

21. *Id.* at 1219-20.

22. *Id.* at 1220.

23. 229 F.3d 1012 (11th Cir. 2000).

24. *Id.* at 1016.

25. *Id.* at 1030. The rule remains that

> [f]ederal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices, no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior."

Id. (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991)).

26. *Id.* at 1034. "Indeed, subjective evaluations of a job candidate are often critical to the decisionmaking process, and if anything, are becoming more so in our increasingly service-oriented economy." *Id.* at 1033.

27. *Id.* at 1017-18. In his lawsuit, plaintiff also alleged a violation of the ADA. He was terminated for his refusal to travel, which he claimed to be a result of a heart condition. *Id.* The Eleventh Circuit affirmed a panel of the Eleventh Circuit's decision upholding the district court's refusal to grant a new trial for plaintiff after the jury returned a verdict against him on his ADA claims. *Id.* at 1037.

28. *Id.* at 1028.

plaintiff's "poor interview" was the subjective reason he was not selected.[29] Plaintiff asserted in response to the employer's legitimate reasons that he had "established a record as evidenced by his performance appraisals which were a more immediate indication of his stability," and he offered evidence that several other candidates for the position had worked for numerous employers.[30] The Eleventh Circuit noted that plaintiff did not rebut the employer's legitimate reasons for its decision.[31] Instead, plaintiff recast the employer's reasons. The court concluded: "Provided that the proffered reason is one that might motivate a reasonable employer, an employee must meet that reason head on and rebut it, and the employee cannot succeed by simply quarreling with the wisdom of that reason."[32] The Eleventh Circuit found that the employer's justification for its employment decision was reasonable; therefore, the fact that plaintiff did not rebut the reason shows that plaintiff failed to create a genuine issue of pretext.[33]

As for the subjective reason why the employer did not hire plaintiff, the court held that this was a legally sufficient, legitimate, nondiscriminatory reason.[34] The employer noted that plaintiff was not aggressive in his interview, and his answers were imprecise, especially with regard to his work history.[35] Plaintiff did not attempt to rebut the employer's subjective reason, nor did plaintiff properly rebut the employer's objective reason (job instability).[36] Because the employer backed up its subjective reason with "clear and reasonably specific bases," the Eleventh Circuit ultimately affirmed the district court's grant of summary judgment in favor of the employer.[37]

IV. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. *Quid Pro Quo Sexual Harassment*

In *Mendoza v. Borden, Inc.*,[38] the Eleventh Circuit addressed several factors in examining sexual harassment claims. In the absence of a

29. *Id.*
30. *Id.* at 1029.
31. *Id.* at 1029-30.
32. *Id.*
33. *Id.* at 1031.
34. *Id.* at 1033.
35. *Id.* at 1035.
36. *Id.* at 1036.
37. *Id.* at 1036-37.
38. 195 F.3d 1238 (11th Cir. 1999).

tangible employment action,[39] what exactly constitutes conduct that is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment'" includes both a subjective and an objective component.[40] After examining the evidence in the context of the totality of the circumstances, the court held the conduct alleged by plaintiff "falls well short of the level of either severe or pervasive conduct sufficient to alter [plaintiff's] terms or conditions of employment."[41]

Specifically, in *Mendoza*, the court analyzed the fact-intensive inquiry under the objective component of the sexual harassment analysis.[42] The Supreme Court, along with the Eleventh Circuit, identified four factors to be considered in determining whether alleged conduct has "objectively altered" the terms and conditions of employment: "(1) the frequency of the supervisor's conduct; (2) the severity of his conduct; (3) whether his conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with employee's job performance."[43]

In *Mendoza* plaintiff brought an action against her former employer alleging numerous discrimination claims in addition to her claim of sexual harassment under Title VII.[44] Her sexual harassment claim centered on four categories of conduct by her supervisor: (1) one statement by plaintiff's supervisor to plaintiff when he said "I'm getting fired up"; (2) one occasion when plaintiff's supervisor rubbed his hip against plaintiff's hip while touching her shoulder and smiling; (3) two instances in which her supervisor looked at her groin and sniffed and one instance of sniffing without looking at plaintiff's groin; and (4) in plaintiff's words, her supervisor's pattern of constantly following her and staring at plaintiff in a "very obvious fashion."[45]

In reaching its conclusion that the supervisor's conduct was not actionable under Title VII, the court analyzed numerous sexual

---

39. "When a Plaintiff proves that a tangible employment action resulted from a refusal to submit to a supervisor's sexual demands, he or she establishes that the employment decision itself constitutes a change in the terms and conditions of employment that is actionable under Title VII." Burlington Indus., Inc. v. Ellerth, 542 U.S. 742, 753-54 (1998).

40. 195 F.3d at 1245 (quoting Meritor & Sav. Bank, FSB v. Vinson, 477 U.S. 57, 67 (1986)).

41. *Id.* at 1247.

42. *Id.* at 1246.

43. *Id.* (citing Harris v. Forklift Sys., Inc., 510 U.S. 17, 23 (1993)).

44. *Id.* at 1242. The only claim at issue in this appeal, however, was plaintiff's claim of sexual harassment. All of plaintiff's other claims were dismissed on summary judgment or at trial on defendant's motion for judgment as a matter of law. *Id.*

45. *Id.* at 1242-43.

harassment cases from various circuits in which comparable conduct was found not actionable under Title VII.[46] In analyzing plaintiff's claim under the four-factor analysis, the Eleventh Circuit found three of the four factors—physically threatening or humiliating conduct, interference with job performance, and severity—"clearly absent."[47] Finally, plaintiff did not create a jury issue on whether her testimony of constant staring and following established the fourth factor of the analysis, frequency.[48] The court reasoned that plaintiff did not characterize this "staring" and "following" as stalking or leering and further reasoned, taking into account normal office interaction, these allegations are not examples of conduct actionable under Title VII.[49] Even considering all of the allegations together and in context, plaintiff still did not have a case of actionable sexual harassment: "Were we to conclude that the conduct established by [plaintiff] was sufficiently severe or pervasive to alter her terms or conditions of employment, we would establish a baseline of actionable conduct that is far below that established by other circuits."[50] As such, the Eleventh Circuit affirmed the district court's grant of judgment as a matter of law to the employer on plaintiff's Title VII claim.[51]

B. Title VII Class Actions

In *Rutstein v. Avis Rent-A-Car Systems* ("Avis"),[52] the Eleventh Circuit reversed the district court's class certification of plaintiffs' class action alleging that Avis denied plaintiffs the right to make and enforce contracts because of their (Jewish) ethnicity in violation of 42 U.S.C. § 1981.[53] Specifically, plaintiffs alleged that defendant's reservation center instructed its employees not to open corporate rental accounts for Jewish individuals. Plaintiff Rutstein moved that the district court certify a class, under Federal Rules of Civil Procedure 23(b)(2) and

---

46. *Id.* at 1246-47. Four judges dissented in the case, taking issue with the majority's analysis of plaintiff's sexual harassment claim; the dissent accused the majority of analyzing each allegation of harassment individually instead of considering all the circumstances in context. *Id.* at 1257-58 (Tjoflat, J., dissenting). In a second dissent, two judges did not believe the majority should have affirmed the directed verdict for defendant on plaintiff's sexual harassment claim. *Id.* at 1269 (Barkett, J., dissenting).

47. *Id.* at 1248.

48. *Id.* at 1249.

49. *Id.*

50. *Id.* at 1251.

51. *Id.* at 1253.

52. 211 F.3d 1228 (11th Cir. 2000).

53. *Id.* at 1230-31.

23(b)(3), of Jewish individuals who were allegedly denied such corporate accounts.[54]

Finding that the district court's class certification was an abuse of discretion, the Eleventh Circuit reversed class certification because "most, if not all, of the plaintiffs' claims will stand or fall, not on the answer to the question whether [Avis] has a practice or policy of [ethnic] discrimination, but on the resolution of . . . highly case-specific factual issues."[55] The court reasoned that whether Avis has a policy of discriminating against Jewish individuals may be relevant, but that policy "cannot establish that the company intentionally discriminated against every member of the putative class."[56] The court remanded for determination of case-specific issues such as (1) whether defendant actually denied each particular plaintiff a corporate account; (2) whether each plaintiff met the financial criteria for a corporate account; and (3) whether the nature of each plaintiff's expected use of defendant's vehicles was cost efficient to defendant.[57]

Notably, the court stated that its decision does not represent the end of disparate treatment class actions in this circuit.[58] To determine whether class action status is appropriate, however, the court stated that parties should examine the substantive law "relating to the cause of action that is common to each class member . . . as well as to the type of relief sought and whether that relief is capable of class-wide resolution or is necessarily individualized."[59] The predominant element of compensatory and punitive damages thus triggers a case-specific inquiry inimical to class-wide resolution.[60]

V. EMPLOYEE RETIREMENT INCOME SECURITY ACT

A. *Statute of Limitations*

Harrison v. Digital Health Plan[61] decided the statute of limitations applicable to plaintiff's claim for wrongful denial of benefits under ERISA. The Eleventh Circuit held that the district court should have borrowed the six-year statute of limitations period governing contract

---

54. *Id.* at 1231.

55. *Id.* at 1235 (quoting Jackson v. Motel 6 Multipurpose, Inc., 130 F.3d 999, 1006 (11th Cir. 1997)).

56. *Id.*

57. *Id.*

58. *Id.* at 1241.

59. *Id.*

60. *Id.*

61. 183 F.3d 1235 (11th Cir. 1999).

actions instead of the one-year limitations period applicable to workers' compensation claims.[62]

Plaintiff was employed by Digital Equipment Corporation and participated in the company's self-funded employee health plan. The plan covered employees' expenses for care that is medically necessary and nonexperimental for treatment of injury or disease. During her employment, plaintiff was diagnosed with several medical conditions and was treated extensively for her illnesses. The majority of the claims she submitted were denied.[63]

Plaintiff filed suit in district court raising a claim for wrongful denial of benefits under ERISA, several state law claims, failure to provide proper notification of her rights under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), and breach of fiduciary duty. The district court dismissed the state law claims as preempted by ERISA and found that plaintiff failed to state a cause of action for her claim of breach of fiduciary duty. Finally, the district court found plaintiff's ERISA and COBRA claims were barred by the statute of limitations. Plaintiff appealed the district court's judgment as to the dismissal of her complaint because her claim was outside the statute of limitations and to the dismissal of her breach of fiduciary duty claim.[64]

The only issue on appeal was whether the district court correctly applied the one-year statute of limitations for plaintiff's ERISA claim.[65] The Eleventh Circuit found no error in the dismissal of plaintiff's COBRA and breach of fiduciary duty claims.[66] In its opinion, the court first examined the statute of limitations applicable to ERISA claims. Because ERISA has no statute of limitations provision, federal courts borrow from the forum state the statute of limitations period most analogous to the cause of action under the state law.[67] This process is known as "closing the gap" left by Congress in ERISA so as to fashion federal common law to supplement ERISA.[68]

The Eleventh Circuit first characterized the essence of plaintiff's claim. The court considered plaintiff's claim under ERISA for the wrongful denial of medical benefits, which was a contract action because her benefits were guaranteed under the terms of plaintiff's self-funded

62. *Id.* at 1237.
63. *Id.*
64. *Id.* at 1237-38 & n.3.
65. *Id.* at 1237.
66. *Id.*
67. *Id.* at 1238.
68. *Id.* at 1239.

employee health plan.[69] In reaching this decision, the Eleventh Circuit noted that other circuits have adopted the limitations period for contract claims for wrongful denial of benefits claims under ERISA.[70] The Eleventh Circuit rejected the district court's finding that plaintiff's claim was most analogous to a workers' compensation claim.[71] Instead, the court determined that, while many of her claims were for medical treatment for work-environment related illnesses, the nature of a workers' compensation claim is not a contractual program but rather a form of strict liability requiring employers to compensate employees for work-related injuries.[72] In contrast, a claim for denial of medical benefits, even if the claims are work-related, is an action that rests on the benefits provided in the employee health plan. Therefore, this action was most like a contract.[73] Thus, the Eleventh Circuit reversed the part of the district court's order that dismissed plaintiff's ERISA claim and remanded for further proceedings not inconsistent with its holding that the six-year statute of limitations provided by Georgia law for simple contract actions applies to plaintiff's ERISA claim.[74]

B. Exhaustion of Administrative Procedures

In *Perrino v. Southern Bell*,[75] the Eleventh Circuit was confronted with the question whether plaintiffs who bring a claim arising under ERISA must exhaust administrative procedures when their employer does not comply with ERISA's procedural requirement that an employer must establish a reasonable claims procedure.[76] Because plaintiffs had access to a grievance and arbitration procedure through their collective bargaining agreement ("CBA"), and because this complaint procedure provided an adequate legal remedy for their ERISA claims, plaintiffs were required to exhaust this process before filing an action in federal court.[77]

Plaintiffs were all former covered employees of BellSouth Communications, Inc. ("BellSouth"). During their employment, plaintiffs became disabled and received long-term disability benefits from BellSouth. Under plaintiff's CBA, certain employees were entitled to a termination

69. *Id.* at 1239-40.
70. *Id.* at 1240.
71. *Id.* at 1240-42.
72. *Id.* at 1241.
73. *Id.*
74. *Id.* at 1242.
75. 209 F.3d 1309 (11th Cir. 2000).
76. *Id.* at 1311.
77. *Id.*

pay allowance separate from any disability benefits paid to employees.[78] The CBA also contained a grievance and arbitration procedure for the resolution of disputes "adversely affecting the rights of any employee."[79] Under the CBA, a person had sixty days to present a grievance for review.[80]

Plaintiffs filed suit against BellSouth essentially alleging that they were entitled to termination pay allowance pursuant to the CBA and that the termination pay provisions under the CBA qualified as an employee welfare benefit plan under ERISA. The district court entered summary judgment for BellSouth on the theory that plaintiffs failed to exhaust administrative remedies available prior to filing suit, and plaintiffs appealed.[81]

The Eleventh Circuit first ruled that the termination pay provisions constituted an ERISA plan, and, as such, plaintiffs were obligated to exhaust available administrative remedies before bringing an action in federal court.[82] Plaintiffs did not file grievances as provided in the CBA and argued that they should be excused from the exhaustion requirement for two reasons: (1) exhaustion should not be required when an ERISA plan fails to comply with ERISA regulations, and (2) the grievance procedures were not available to ex-employees and, therefore, resorting to this procedure was futile.[83]

As for plaintiffs' first argument, the Eleventh Circuit noted that courts strictly enforce the ERISA exhaustion requirement.[84] Courts have only carved out two exceptions to the exhaustion requirement: (1) when "'resort to administrative remedies would be futile or the remedy inadequate,'"[85] and (2) when "'meaningful access'" to the administrative review scheme is denied.[86] Plaintiffs argued that the failure of the employer to comply with ERISA's technical requirements should excuse exhaustion. In fact, BellSouth had not complied with ERISA regulations in two ways: (1) Bell South did not formalize its plan with a separate summary plan description, and (2) the grievance and arbitration procedure provided by the CBA did not explicitly indicate that "employ-

78. *Id.* at 1311-12.
79. *Id.* at 1312.
80. *Id.* at 1313.
81. *Id.* at 1311, 1313-14.
82. *Id.* at 1315.
83. *Id.*
84. *Id.*
85. *Id.* at 1316 (quoting Counts v. American Gen. Life & Accidental Ins. Co., 111 F.3d 105, 108 (11th Cir. 1997)).
86. *Id.* (quoting Curry v. Contract Fabricators, Inc. Profit Sharing Plan, 891 F.2d 842, 846-47 (11th Cir. 1990)).

ees could file termination allowance claims or obtain independent review of these claims if they were denied by the plan administrator."[87]

The Eleventh Circuit rejected plaintiffs' argument, noting that the district court found that the grievance and arbitration procedure was available to plaintiffs to address their eligibility for termination allowances.[88] Further, there was no evidence that plaintiffs were unaware or lacked knowledge of the grievance procedure, and there was evidence that similarly situated ex-employees had grieved a denial of termination pay pursuant to the CBA's grievance procedure.[89] The Eleventh Circuit concluded that, "while technically deficient, the Agreement's [CBA] administrative scheme was available to Appellants for the review and arbitration of their ERISA termination allowance claims, and that if the process had been invoked, Appellants could have received independent arbitration and an adequate legal remedy for their claims."[90] Further, the court reasoned: "[I]f a reasonable administrative scheme is available to a plaintiff and offers the potential for an adequate legal remedy, then a plaintiff must first exhaust the administrative scheme before filing a federal suit."[91]

The Eleventh Circuit rejected plaintiffs' second argument that utilizing the grievance procedure would be futile because plaintiffs never attempted to invoke the grievance procedure and several ex-employees had had grievances filed for them by the Union regarding termination-related grievances.[92] The court concluded that a theoretical assertion of futility does not excuse plaintiffs' failure to exhaust administrative remedies.[93] Thus, the court affirmed in full the district court's grant of summary judgment.[94]

VI. FAIR LABOR STANDARDS ACT

In *Falken v. Glynn County, Georgia*,[95] the Eleventh Circuit addressed the issue of whether the county violated the Fair Labor Standards Act by not paying certain fire department employees compensation for overtime hours worked.[96] Specifically, the court analyzed whether the

87. *Id.*
88. *Id.* at 1316-17.
89. *Id.* at 1317.
90. *Id.*
91. *Id.* at 1318.
92. *Id.*
93. *Id.* at 1319.
94. *Id.*
95. 197 F.3d 1341 (11th Cir. 1999).
96. *Id.* at 1344.

partial exemption under section 207(k) of the FLSA for employees engaged in "fire protection activities" applied to the county's emergency medical services ("EMS") responders trained and certified as firefighters.[97] The Eleventh Circuit applied the 1995 Department of Labor ("DOL") opinion letter discussing the test for whether dual-function EMS/firefighters fall within the FLSA fire protection activities exemption.[98]

Although employed by the fire department, plaintiffs are both certified firefighters and EMS workers. Because of their dual role, these EMS workers' functions overlap with the firefighters, meaning these dual-function EMS employees have the responsibility to fight fires even if no medical assistance is required at the emergency.[99]

The county appealed the district court's grant of summary judgment to plaintiffs. The district court held that the EMS workers were not exempt employees under the "fire protection activities" exception, and thus, the county was obligated to pay the EMS workers overtime compensation.[100] The district court found that the EMS employees did not satisfy part three of the DOL's regulations implementing the FLSA, which states that a "person who spends more than 20 percent of his/her working time on nonexempt activities is not considered to be an employee engaged in fire protection . . . activities."[101] The district court noted that the county's EMS employees engaged in nonexempt medical functions outside the scope of firefighting dispatches for more than twenty percent of the EMS employees' total worktime.[102]

The Eleventh Circuit concluded that the district court applied the wrong legal standard in analyzing whether the county's EMS employees are exempt under the FLSA. The district court applied the test for EMS-only employees, whereas the EMS employees were both EMS employees and firefighters.[103] This misapplication of standards could have been significant because the exempt activities of dual-function

97. *Id.*

98. *Id.* at 1353.

99. *Id.* at 1344.

100. *Id.* at 1344-45.

101. *Id.* at 1347 (quoting 29 C.F.R. § 553.212(a)).

102. *Id.* at 1351. The district court reviewed the Eleventh Circuit case of *O'Neal v. Barrow County Board of Commissioners*, 980 F.2d 674, 681 (11th Cir. 1993), which articulated what is considered exempt and nonexempt work for EMS employees. 197 F.3d at 1345. The court in *O'Neal* concluded that activities such as medical activities not related to firefighting are nonexempt activities. 980 F.2d at 682.

103. 197 F.3d at 1351.

EMS/firefighter employees are broader in scope than those for EMS-only employees.[104]

In 1995 the DOL issued an opinion letter concluding that dual-function EMS/firefighters should be evaluated under a different standard than EMS-only employees.[105] The primary difference in the analysis between dual function and EMS-only employees is the third part of the test, the 80/20 rule. For dual-function employees, medical functions are exempt activities, whereas medical functions are not exempt activities for EMS-only employees.[106] The DOL letter requires two additional tests to determine whether a dual-function employee is exempt under the FLSA: (1) that the employee is a firefighter,[107] and (2) that the EMS units are trained in rescue and EMS units are dispatched regularly to emergencies related to firefighting.[108] These two tests are also required for the EMS-only employees. The Eleventh Circuit agreed that the district court correctly evaluated these tests as applied to plaintiffs.[109] However, finding that the district court incorrectly treated the dual-function EMS/firefighter medical functions as nonexempt, the Eleventh Circuit remanded for a clarification regarding the EMS activities completed during the EMS employees' waiting time to determine what percentage of the dual function employees' day consisted of performing either firefighting or EMS medical functions.[110]

VII. AMERICANS WITH DISABILITIES ACT

In *Shields v. BellSouth Advertising & Publishing Co.*,[111] plaintiff, a former employee, sued his former employer for wrongful termination under the ADA. Prior to his suit in federal court, plaintiff sought unemployment benefits through a Georgia superior court. The superior court held that plaintiff was not terminated because of his status as an HIV-positive male, and relying on the superior court's ruling, the federal district court dismissed plaintiff's lawsuit based on collateral estoppel.[112]

The Eleventh Circuit found no violation of federal due process, but instead, certified to the Georgia Supreme Court the state law question

---

104. *Id.* at 1349.
105. *Id.*
106. *Id.*
107. 29 C.F.R. § 553.210(a)(1)-(4).
108. *Id.* § 553.215.
109. 197 F.3d at 1353.
110. *Id.* at 1352.
111. 228 F.3d 1284 (11th Cir. 2000).
112. *Id.* at 1285-86.

of whether plaintiff's wrongful termination claim would be collaterally estopped under Georgia law based on the superior court's ruling.[113] Noting the extensive procedures of Georgia's unemployment benefits compensation scheme, the Eleventh Circuit held that plaintiff was given a "full and fair opportunity" to pursue his wrongful termination claim at the state court level.[114] Despite reasoning that plaintiff's federal due process requirements were not violated, the Eleventh Circuit certified its question to the Georgia Supreme Court because "this case turns on a difficult interpretive question concerning Georgia collateral estoppel law."[115] The court noted that "[w]hen such doubt exists as to the application of state law, a federal court should certify the question to the state supreme court to avoid making unnecessary state law guesses and to offer the state court the opportunity to interpret or change existing law."[116]

113. *Id.* at 1290.
114. *Id.* at 1289.
115. *Id.*
116. *Id.* at 1289-90 (quoting Pogue v. Oglethorpe Power Corp., 82 F.3d 1012, 1017 (11th Cir. 1996)).

* * *