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I. INTRODUCTION

This Article surveys the 1992 decisions of the United States Court of Appeals for the Eleventh Circuit that impacted the area of traditional labor law. More specifically, the cases addressed in this Article include noteworthy decisions under the National Labor Relations Act ("NLRA"),[1] the Labor Management Relations Act ("LMRA"),[2] the Fair Labor Standards Act of 1938 ("FLSA"),[3] the Occupational Safety and Hazard Act ("OSHA"),[4] and the Employee Retirement Income Security Act of 1974 ("ERISA").[5]

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1. Pub L. No. 74-198, ch. 372, 49 Stat. 449 (1935) (codified as amended at 29 U.S.C. §§ 151-169 (1988)) [hereinafter "NCRA"].

2. Pub. L. No. 101, ch. 120, § 1, 61 Stat. 136 (1947) (codified as amended at 29 U.S.C. §§ 141-187 (1988)) [hereinafter "LMRA"].

3. Pub. L. No. 718, ch. 676, § 1, 52 Stat. 1060 (1938) (codified as amended at 29 U.S.C. §§ 201-219 (1988)) [hereinafter "FLSA"].

4. Pub. L. No. 91-596, 84 Stat. 1590 (1970) (codified as amended at 29 U.S.C. § 651-678 (1988)) [hereinafter "OSHA"].

5. Pub. L. No. 93-406, 88 Stat. 832 (1974) (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)) [hereinafter "ERISA"].

This Article does not discuss every case decided by the Eleventh Circuit addressing these federal labor laws during the survey year of 1992; also, this Article does not discuss every issue raised by the parties in the cases covered. Instead, this Article intends only to cover the major developments in the area of labor law this past year. As in years past, the Eleventh Circuit considered several cases covering a wide variety of issues in the labor law sector. While some cases covered new ground, the majority of the cases simply revisited the old rules and attempted to clarify their use through the facts in the case presently before the court.

II. The National Labor Relations Act and the Labor Management Relations Act

A. *Mixed Motivation for Discharge*

In *Northport Health Services v. NLRB*,[6] the Eleventh Circuit revisited the legal standard to be used in a mixed motivated discharge case. The Administrative Law Judge ("ALJ") found that the employer, a nursing facility, discharged six nursing assistants unlawfully due to the employees activity on behalf of the union.[7] The employer, however, argued that the discharges were for legitimate reasons due to the employees' alleged participation in the removal of call light bulbs from patient's rooms during an inspection by the state. The Eleventh Circuit conceded that a review of the record supported both theories of the employer's motivation for discharging the nursing assistants in this case.[8] Even so, the Eleventh Circuit remanded the case because the ALJ "utilized an erroneous legal standard, relied upon evidence that was not supported by the record, and failed to fully consider the relevant evidence tending to undermine the ALJ's position."[9]

The Eleventh Circuit noted that if the employer discharged the nursing assistants because of their union activity, it would necessarily be in violation of sections 8(a)(1) and 8(a)(3)[10] of the NLRA.[11] In a case involving the discharge of an employee due to matters of mixed motivation, however, the court stated that it utilized the guidelines established by the National Labor Relations Board ("NLRB" or "Board") in *NLRB v. Wright Line*.[12] The *Wright Line* test mandates three phases of proof:

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6. 961 F.2d 1547 (11th Cir. 1992).
7. *Id.* at 1549.
8. *Id.*
9. *Id.*
10. 29 U.S.C. § 158(a)(3), (a)(1) (1988).
11. 961 F.2d at 1550.
12. 662 F.2d 899 (1st Cir. 1981), *cert. denied*, 455 U.S. 989 (1982).

> First, the General Counsel must show by a preponderance of the evidence that a protected activity was a motivating factor in the employer's decision to discharge an employee. Such a showing establishes a section 8(a)(3) violation unless the employer can show as an affirmative defense that it would have discharged the employee for a legitimate reason regardless of the protected activity. The general counsel then may offer evidence that the employer's proffered "legitimate" explanation is pretextual—that the reason either did not exist or was not in fact relied upon—and thereby conclusively restore the inference of unlawful motivation.[13]

In reviewing the Board's motivational determination, the court stated that it reviewed the record in its entirety to determine if substantial evidence properly supported the Board's conclusion.[14] Specifically, the Eleventh Circuit may only enforce the Board's order if it finds "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[15]

After reviewing the facts of this case, the Eleventh Circuit did not find substantial evidence to support the Board's approval of the ALJ's decision. Specifically, the ALJ had proceeded on the erroneous belief that, after the Board proved a prima facia violation of the NLRA, the employer "must go forward with its evidence of asserted reasons for each of the discharges. If [the Company's] evidence sufficiently negates the presence of protected [union] activity in the [discharged nurses], General Counsel's prima facia case is rebutted and General Counsel has failed to sustain[sic] his burden of proving discrimination."[16]
The Eleventh Circuit emphatically stated that this standard used by the ALJ was a misstatement of the law.[17]

Under the *Wright Line* test, an employer has no duty to "negate the presence" of union activity.[18] In fact, the Eleventh Circuit stated it was possible that an employer could admit it discharged the most active union supporters within its company and still avoid a violation of the NLRA so long as the company demonstrated those union employees were actually fired for a reason that did not involve or concern their union activity.[19] The Eleventh Circuit stated, "[i]n suggesting that the company's evidence about the nurses' participation in the removal of the call

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13. 961 F.2d at 1550 (citing NLRB v. United Sanitation Serv., 737 F.2d 936, 939 (11th Cir. 1984)).
14. *Id.*
15. *Id.* (quoting Universal Camera Corp. v. NLRB, 340 U.S. 474, 477 (1951) (citations omitted)).
16. *Id.* at 1551 (emphasis added).
17. *Id.*
18. *Id.*
19. *Id.*

light bulbs was important only in so far as that evidence negated the nurses' support of the union, the ALJ adopted an incorrect legal standard."[20]

In addition to misstating the relevant law, the court found that the ALJ had relied upon evidence that was not supported by the record. Apparently, the allegation that several other nurses who had worked on the same floor where the call lights were missing had not been fired heavily influenced the ALJ. Evidently, the ALJ believed that the employer had selected the particular nurses to discharge because of their union involvement, but did not fire the other nurses because they did not support the union. The court reasoned that an inference such as this would be legitimate if it was supported by the facts in the record, but in this case it simply was not.[21]

Furthermore, the court noted that the ALJ had failed to give full and fair consideration to the employer's evidence tending to show the nurses were actually discharged due to their participation in the removal of call light bulbs.[22] "Given that there was no overt evidence of the company's intent and that the circumstantial evidence in this case was conflicting, the company deserved an explanation from the ALJ as to why its proffer failed to meet the second prong of the *Wright Line* test."[23] Since the ALJ's opinion provided no explanation to the company, his decision and opinion was inadequate.[24]

The Eleventh Circuit also commented on the inadequate review of the ALJ's decision by the Board. Specifically, the court stated that "[t]he Board summarily affirmed the ALJ's finding and conclusions in a two-page boilerplate order."[25] By not correcting the misstatement of law that the ALJ had used concerning the *Wright Line* test, the Board's decision could not be upheld. The court noted that the Board should have "disavowed each reliance upon evidence that was not supported by the record, insured that the body of evidence it was considering included the company's proof tending to undermine the ALJ's position, and applied the correct legal standard to the body of evidence."[26] Since the Board failed to do any of the analysis outlined above, the Eleventh Circuit remanded the case so the Board could properly analyze the case.[27] The court noted that the Board had the "primary responsibility" for attempt-

20. *Id.*
21. *Id.* at 1551-52.
22. *Id.* at 1552.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.* at 1553.
27. *Id.*

ing to strike a balance between appropriate and inappropriate employer motivations.[28] Consequently, it was the Board's duty, not that of the Eleventh Circuit, to properly apply the law and relevant facts in the case and come up with a reasonable conclusion.[29]

B. *Jurisdiction Under The NLRA*

Dowd v. International Longshoremen's Ass'n, AFL-CIO[30] was one of the more significant cases decided this survey year. In *Dowd* the Eleventh Circuit addressed whether an American labor union, which influences and pressures a foreign importer to affectively establish a secondary boycott in the United States, is guilty of violating the NLRA. The union contended it had not engaged in any unfair labor practices. Assuming, however, it had, the union argued that the unlawful acts occurred outside the geographic territory of the United States and were, therefore, beyond the intended application of the NLRA.[31] "Section 8(b)(4)(ii)(B) of the NLRA prohibits coercion or refusals to deal aimed at employers or others not principally involved in an underlying labor dispute, i.e., 'secondary' or 'neutral' employers, while preserving the right of labor organizations to bring such pressure against employers primarily involved in the dispute."[32]

After analyzing the facts of the case, the Eleventh Circuit held that the union had committed the unfair labor practice defined in section 8(b)(4)(ii)(B) of the NLRA.[33] Specifically, the court found that the union had put pressure on the Japanese unions to use only certain companies in the United States which employed union labor. In other words, at the request and encouragement of the union in the United States, the Japanese unions were effectively creating a boycott of any laborers in their industry that were not members of the union. Consequently, the court found the American union's behavior violated the NLRA.[34]

Even though the court held that the American union's actions violated the NLRA, further inquiry ensued. The union argued that any acts it committed with the Japanese union "occurred outside the geographic territory of the United States and therefore were beyond the intended application of the NLRA."[35] The union relied on the recent Supreme Court

28. *Id.* (citing NLRB v. Malta Constr. Co., 806 F.2d 1009, 1010 (11th Cir. 1986)).
29. *Id.*
30. 975 F.2d 779 (11th Cir. 1992).
31. *Id.* at 787.
32. *Id.* at 782.
33. *Id.* at 783.
34. *Id.* at 783-87.
35. *Id.* at 787.

case, *EEOC v. Arabian American Oil*,[36] in which the Court held that Title VII[37] does not protect an American citizen employed and terminated in Saudi Arabia by an American employer.[38] The Supreme Court in *Arabian American Oil* found that, even though Congress had the authority to enforce laws beyond the territorial boundaries of the United States, Congress did not intend for Title VII to be applied in these circumstances. Specifically, the Court held that Title VII focused purely upon domestic employment relationships and the plain language of the statute suggested that Congress intended only to regulate termination of American citizens by American employers.[39]

In support of the union's contention that its actions were outside the jurisdiction of the NLRA, the union cited the Supreme Court's earlier holding that the NLRA did not regulate the practice of foreign vessels when temporarily present in an American port.[40] Furthermore, the NLRA does not apply to any picketing done by an American labor union at an American port when such picketing is aimed at altering the employment relationship between the owners of foreign vessels and their foreign workers.[41] Consequently, the union argued that the presumption against the extra- territorial application of statutes affirmed in the cases cited above dictated that the NLRA did not regulate the conduct in the present case.[42]

The Eleventh Circuit, however, concluded that the NLRA reached the conduct of the American union because the American union had solicited a foreign entity to apply pressure overseas with the "intent and effect of gaining an unlawful advantage in a primary labor dispute in the United States by coercing American employers."[43] After reviewing the cases relied upon by the union, the court stated that those cases did not represent a general restriction against being involved in any activities committed outside the United States.[44] Instead, the union showed simply that Congress did not want to interfere with the internal operation of foreign vessels in order to avoid "clashes between our laws and those of other

36. 111 S. Ct. 1227, 1229 (1991).

37. Civil Rights Act of 1964, Pub. L. No. 88-352, Title VII, 78 Stat. 253, §§ 201-1106 (1964) (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)).

38. 975 F.2d at 787 (citing 111 S. Ct. at 1229).

39. *Id.* at 787-88 (citing 111 S. Ct. at 1229).

40. *Id.* at 788 (citing McCulloch v. Sociedad Nacional de Marineros de Honduras, 372 U.S. 10 (1963)).

41. *Id.* (citing American Radio Ass'n v. Mobile S.S. Ass'n, Inc., 419 U.S. 215 (1978); Windward Shipping, Ltd. v. American Radio Ass'n, 415 U.S. 104 (1974); Benz v. Compania Naviera Hidalgo, S.A., 353 U.S. 138 (1957)).

42. *Id.*

43. *Id.*

44. *Id.*

nations which could result in international discord."[45] In the present case, no clash existed between our laws and those of another nation.

Specifically, the court listed several factors that supported the exercise of jurisdiction:

> (1) . . . Congress intended, to protect persons in commerce from a secondary boycott, (2) the conduct [of the American union] was intended and had the effect of creating an unlawful secondary boycott in the United States, (3) certain significant conduct [by the Japanese union] in furtherance of the secondary boycott occurred within the geographic territory of the United States, and (4) . . . [the wrongdoer involved is] a domestic labor organization subject to regulation under the NLRA.[46]

In essence, since the object and effect of the conduct in question was to implement a secondary boycott within the United States, the Eleventh Circuit found the location of the conduct was not determinative. Thus, the Eleventh Circuit held the jurisdiction of the NLRA encompassed the acts complained of in the present case and, consequently, found that the American union was guilty of committing unfair labor practices.[47]

C. Employee Verses Non-Employee

This survey year, as in other years, the Eleventh Circuit again addressed the standard and guidelines used in determining an individual's employment status and how the individual's employment status affects his or her right to distribute literature in an effort to organize an employer. In *Southern Services, Inc. v. NLRB*,[48] the employer, Coca-Cola, owned and operated a secured industrial complex which hired outside contractors and subcontractors, including Southern Services, Inc. ("SSI") to perform a variety of services at the complex. The complex was the only "common workplace" of the SSI employees who provided janitorial services to Coca-Cola under subcontract. The Service Employees International Union No. 679 ("SEIU") had been trying since 1987 to recruit the SSI employees working at the Coca-Cola complex. SEIU regularly distributed union literature to SSI employees in the driveway and on the sidewalk outside of the Coca-Cola complex. This conduct continued for quite some time and Coca-Cola did not object to this distribution.[49]

Eventually, an SSI janitor who worked at the Coca-Cola complex on a regular basis took some SEIU pamphlets past the security gate and attempted to distribute them to other SSI employees. This SSI janitor dis-

45. *Id.* at 789 (citing 111 S. Ct. at 1230).
46. *Id.*
47. *Id.* at 791.
48. 954 F.2d 700 (11th Cir. 1992).
49. *Id.* at 701-02.

tributed literature until an SSI supervisor told her to stop because she was violating Coca-Cola's non-distribution policy. Coca-Cola had a rule that prohibited distribution by non-employees at any time on its property. However, the union argued that this employee enjoyed the status of a Coca-Cola employee for the purpose of distribution rights and, therefore, Coca-Cola and SSI had violated section 8(a)(1) of the NLRA by prohibiting her distribution of union literature on Coca-Cola's parking lot during non-working time.[50]

Under section 8(a)(1) it is an unfair labor practice for an employer to "interfere with, restrain, or coerce employees in the exercise of their organizing rights under section 7" of the NLRA.[51] Coca-Cola and SSI argued that the employee's status was analogous to that of a non-employee union organizer under section 7 and, therefore, Coca-Cola could treat her as a trespasser for the purpose of its non-employee no-distribution rule.[52]

Initially, the Eleventh Circuit reviewed the legal standards applicable to employee and non-employee distribution rights. In *Republic Aviation Corp. v. NLRB*,[53] the Supreme Court held that an *employee of a company* cannot be barred from distributing literature or attempting to organize a union during non-work time and in non-work areas, unless the company proved that it had to limit the distribution in order to maintain " 'production or discipline.' "[54] Consequently, in the present case, if Coca-Cola considered the SSI janitor a regular employee, she would have been within her rights to distribute SSI literature in the Coca-Cola parking lot during her off hours. If, however, the SSI janitor was a non-employee, a different rule would apply. In *NLRB v. Babcock & Wilcox Co.*,[55] the Supreme Court announced that an employer may prohibit a *non-employee* organizer "from distributing union literature on company property so long as the prohibition does not discriminate against the union and the union has reasonable alternative means to communicate its message to the employees."[56]

The Board found that the SSI janitor worked regularly and exclusively on Coca-Cola's premises, and on the day she allegedly violated Coca-Cola's policy, she was reporting to work pursuant to her employment relationship. Therefore, unlike a non-employee union organizer, the Board found that the SSI janitor was not a "trespasser" on Coca-Cola property. Thus, the Board concluded that the SSI janitor's status was analogous to

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50. *Id.* at 702.
51. *Id.*
52. *Id.*
53. 324 U.S. 793 (1945).
54. *Id.* at 803 (quoting 49 N.L.R.B. 828, at 843-44).
55. 351 U.S. 105 (1956).
56. 954 F.2d at 702 (citing 351 U.S. at 112).

that of a Coca-Cola employee.[57] Consequently, with respect to her section 7 rights, the Board "applied the standard of *Republic Aviation*,[58] and found that neither Coca-Cola nor SSI had demonstrated that prohibiting [this individual's] distribution to other SSI employees in non-working areas on non-working time was necessary to maintain production and discipline."[59]

In analyzing the rationale behind the different treatment between employee and non-employee union organizers, the Eleventh Circuit stated that the courts were attempting to strike a balance between section 7 rights of union workers and the employer's property rights.[60] The court found that the modern practice of subcontracting, which was the situation in the present case, did not automatically curtail union members' section 7 rights. In addition, the court stated that the conduct of distributing union literature did not transform the status of a subcontract janitor into that of a mere trespasser.[61] "When the relationship situates the subcontract employee's workplace, continuously and exclusively upon the contracting employer's premises, the contracting employer's rules purporting to restrict that subcontract employee's right to distribute union literature . . . must satisfy the test of *Republic Aviation*."[62]

Since these subcontract employees spent their entire working time on the work place of Coca-Cola, the Eleventh Circuit concluded they were entitled to be treated as Coca-Cola employees in this particular incident. The court was careful to state, however, that its holding was very narrow and it did not intend to extend distribution rights to casual visitors on the company's property or to the host of other business invitees who entered the company's premises.[63]

D. Mandatory Verses Non-Mandatory Subject of Bargaining

In *Reichhold Chemicals, Inc. v. NLRB*,[64] the determinative issue on appeal was whether the employer had insisted that the union bargain to impasse about a non-mandatory subject of bargaining and, therefore, committed an unfair labor practice. The employer operated several facilities in Alabama, Louisiana, and Florida. The AFL-CIO-CLC union represented the relevant employees. At each site, however, there was also a local union that was affiliated with the national union. The recognized

57. 324 U.S. 973 (1945).
58. 954 F.2d at 703.
59. *Id.*
60. *Id.*
61. *Id.* at 704.
62. *Id.*
63. *Id.*
64. 953 F.2d 594 (11th Cir. 1992).

bargaining unit had historically been a multi-plant bargaining unit composed of the production and maintenance employees at all three sites. The last collective bargaining agreement had been between the company and the union on behalf of the three local unions. Since this agreement was near expiration, the company and the union negotiated to reach a new settlement. The company's final proposal during these negotiations was a master contract between the company and the union on behalf of all three local units. In addition, the company wanted three supplemental agreements, one for each site, resulting from negotiations between the company and the national union on behalf of each respective local union.[65]

Based on the company's demands, the negotiations broke down and the union called a strike. The company then unilaterally implemented the terms and conditions of its final proposal and hired certain replacements for striking employees. Shortly thereafter, the union filed an unfair labor practice charge against the company.[66]

The Board found that the company had improperly insisted the union bargain to impasse on an issue that was non-mandatory and therefore, the company had committed an unfair labor practice. After carefully reviewing the applicable law and the facts of the case, the Eleventh Circuit agreed with the Board's ruling and held that the company was in violation of the NLRA.[67]

The Eleventh Circuit noted that generally the subjects of bargaining fell into two categories, mandatory and non-mandatory. Mandatory subjects of bargaining are those designated in section 8(d) of the NLRA which include the following: "wages, hours and other terms and conditions of employment."[68] The general rule is that both parties have a duty to bargain in good faith as to the mandatory subjects of bargaining, and may insist to impasse as to such mandatory subjects.[69] With respect to non-mandatory matters, however, both parties are free to bargain or not to bargain, but "it is an unfair labor practice for either party to insist to impasse upon a non-mandatory subject."[70] The determination of whether a party has insisted upon bargaining to impasse upon any particular subject is necessarily a question of fact. Any question of fact is subject to review by the Eleventh Circuit under the "substantial evidence" rule.[71]

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65. *Id.* at 595.
66. *Id.*
67. *Id.* at 597.
68. *Id.* at 595 (citing 29 U.S.C. § 158(d) (1988)).
69. *Id.*
70. *Id.* at 595-96 (citing NLRB v. Wooster Div. of Borg-Warner Corp., 356 U.S. 342 (1958)).
71. *Id.* at 596.

After reviewing the record, the court found that the company had insisted upon bargaining to impasse on the issue that certain matters be made the subject of bargaining as between the company and each local union rather than between the company and the union itself. The court noted that this particular matter was not a mandatory subject of bargaining given the fact it was not listed among the subjects designated in section 8(d). Instead, this type of matter was more properly categorized as a non-mandatory issue.[72]

The Eleventh Circuit referred to and relied upon the Supreme Court case of *NLRB v. Wooster Division of Borg-Warner*.[73] In *Borg-Warner* the employer had insisted that the union accept a "recognition" clause which sought to make the local union, rather than the international union, the sole representative of the employees. The Supreme Court held that any such "recognition" clause was not a mandatory subject of bargaining and that insisting that the parties bargain to impasse constituted an unfair labor practice.[74]

In the present case, the Eleventh Circuit found that the company had insisted upon a subject very similar to the "recognition" clause outlined in *Borg-Warner*. Essentially, the employer in the present case had insisted that certain matters be negotiated between the company and the local unions and, consequently, the company had insisted upon bargaining to impasse over a non-mandatory subject of bargaining.[75] Since this was a non-mandatory subject, the company's actions constituted an unfair labor practice.[76]

E. Injunctive Relief Under The NLRA

Several cases this past survey year dealt with the appropriateness of injunctive relief in alleged unfair labor practice cases. One of the most comprehensive and significant decisions on this issue was in *Arlook v. Lichtenberg & Co.*[77] The employer in *Arlook* owned two plants which employed approximately 600 workers to make curtains and drapes. The recent history of the company demonstrated a pattern of protracted labor disputes between management and its workers. Starting in the late 1980s, the employees began organizing with the help of the Amalgamated Clothing and Textile Workers Union, AFL-CIO-CLC ("Union"). Despite strong management resistance, the Union won a Board conducted election by a

72. *Id.*
73. 356 U.S. at 342.
74. *Id.* at 344.
75. 953 F.2d at 596-97.
76. *Id.* at 597.
77. 952 F.2d 367 (11th Cir. 1992).

large majority vote in 1989 and the Union was certified by the Board as the collective bargaining agent for the company's employees.[78]

Beginning at the end of 1989 and through August 1990, the parties met often, but could never agree upon a first contract. Over the same period of time, the company's management engaged in what was characterized as a variety of "questionable tactics," which were later challenged as unfair labor practices.[79] Specifically, "[s]everal employees reported being threatened and chastised by management for engaging in Union activities."[80] Over the course of four months, management was alleged to have fired nine employees who were actively supporting the Union. The company also began to enforce two policies which the Board considered "new rules." First, the management began enforcing a more strict compliance of their "discretionary absenteeism policy." Second, even though employees had historically been permitted to return to their work stations after a second "work buzzer" sounded, the management began disciplining employees who were not in position before the sound of the second buzzer.[81]

After initiating these new rules, the company eventually broke off negotiations with the Union claiming that one employee had allegedly violated a ground rule of the negotiations, because she was the second representative from the same work department. Since the Union broke a ground rule, the company was no longer obligated to negotiate.[82] Although the affidavits of the company told a different story, the circuit court found sufficient evidence to warrant an injunction.[83] Section 10(j)[84] of the NLRA provides the following:

> The Board shall have power, upon issuance of a complaint . . . charging that any person has engaged in or is engaging in an unfair labor practice, to petition any district court . . . for appropriate temporary relief or restraining order. [The district court] shall have jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper.[85]

The Eleventh Circuit stated that the reason Congress enacted this particular section of the NLRA was because it was aware that the administrative resolutions provided by the NLRA could go on for several years and often render a final order "ineffectual" or even "futile." In light of these

78. *Id.* at 369-70.
79. *Id.* at 370.
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* at 374-75.
84. 29 U.S.C. § 160(j) (1988).
85. 952 F.2d at 371 (citing 29 U.S.C. § 160(j) (1988)).

problems, Congress enacted section 10(j), but the court noted not the district courts should only utilize this section in exceptional circumstances.[86]

In demonstrating that the court should apply section 10(j) equitable relief, a party has to show two factors: "(1) there is reasonable cause to believe that the alleged unfair labor practices have occurred, and (2) the requested injunctive relief is 'just and proper.' "[87] The district court's role in determining the first prong of the section 10(j) test, that being whether there was reasonable cause to believe a labor violation had occurred, involves both a legal question and a factual question.[88] With respect to the legal question, the Eleventh Circuit stated that the standard of review clearly required that the Board must present "a substantial, non-frivolous, coherent legal theory of [a] labor violation."[89] In relation to the factual question, the Board must present "enough evidence in support of its coherent legal theory to permit a rational factfinder, considering the evidence in the light most favorable to the Board, to rule in favor of the Board."[90]

In addition to proving the first prong under section 10(j), the court noted that the Board must also show that injunctive relief was "just and proper."[91] The court stated that injunctive relief was just and proper when the facts demonstrate that "without such relief, any final order of the Board [would] be meaningless or so devoid of force that the remedial purposes of the [NLRA] will be frustrated."[92] Although the Eleventh Circuit refused to make an entire list of factors that would constitute "just and proper" relief, the court noted that section 10(j) would necessarily become "just and proper" when "organizational efforts are highly susceptible to being extinguished by unfair labor practices, when unions and employees have already suffered substantial damage from probable labor violations, and when the violations reasonably found to have been committed will be repeated absent an injunction."[93]

The district court concluded that the Board had not met its burden of proof on either count in order to justify injunctive relief. After a thorough review of the case, however, the Eleventh Circuit disagreed with the district court and overruled its decision. Specifically, the Eleventh Circuit found that the district court had improperly construed its role in deter-

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86. *Id.*

87. *Id.* (quoting Boire v. Pilot Freight Carriers, Inc., 515 F.2d at 1185, 1188-89 (5th Cir. 1975), *cert. denied*, 426 U.S. 934 (1976)).

88. *Id.*

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* (citing *Pilot Freight*, 515 F.2d at 1192).

93. *Id.* at 372.

mining whether "reasonable cause" existed to believe that an unfair labor practice had occurred. The Eleventh Circuit found that the district court was attempting to determine whether the company had literally participated in the unfair labor practices rather than determining whether there was "reasonable cause" to believe such activity had occurred. In other words, the court said it was not the district court's role to be an ultimate factfinder in this case. Instead, the district court was to take the evidence in the light most favorable to the Board and determine whether a rational factfinder might "eventually rule in favor of the Board."[94] The Eleventh Circuit found that, as a matter of law, the district court should have ruled this evidence was sufficient to establish the Board's reasonable cause requirement and failure to do so was reversible error.[95]

In relation to the second prong of section 10(j), the Eleventh Circuit held that the district court's conclusion regarding whether relief was "just and proper" was clearly erroneous and necessarily an abuse of discretion. Specifically, the court found there was sufficient evidence to suggest that, if an injunction was not issued, any final order of the Board would be meaningless or void. First, the Eleventh Circuit emphasized the fact that these were the initial organizational efforts of the employees and the employees were bargaining for their first contract. Given these two factors, their bargaining units were highly susceptible to management misconduct.[96] Second, the Eleventh Circuit found that the Board had submitted substantial evidence showing that actual damage already had occurred to several employees as the result of the management's actions. Specifically, several employees testified that they had become afraid to wear union clothing, to participate in union activities, and to recruit any new members.[97] Third, the Eleventh Circuit found that the Board had established sufficient evidence that damage would likely occur unless there was some type of interim relief granted. The court noted that the Board had shown there was direct and circumstantial evidence of the company's intent to dismantle the union. Specifically, several employees reported that they were told by management that their discipline had originated because of their union support. At least nine employees had been recently terminated, lending credence to the argument that the company terminated their employment in retaliation for their union support. More importantly, the Eleventh Circuit noted that the company had not merely fired a few employees or altered only one or two minor rules. Instead, the allegations against the company spanned the gamut of labor violations.[98]

94. *Id.* at 372-73 (emphasis added).
95. *Id.* at 373.
96. *Id.*
97. *Id.*
98. *Id.* at 374.

Given this concern and the history of management resistance, the Eleventh Circuit held that interim relief was warranted.[99]

III. The Fair Labor Standards Act

A. *Overtime Provisions for Public Employees*

In *Birdwell v. Gadsden, Alabama*,[100] the City of Gadsden appealed a jury verdict in favor of its police officers for alleged violations of the Fair Labor Standards Act. One group of officers alleged that the city was obligated to pay them for fifteen minutes per day during which they were required to attend a roll call meeting prior to their shift. A group of detectives alleged that they should be paid for periods of time in which they were on-call.[101]

With regard to the first claim, the officers testified at trial that they were required to appear fifteen minutes prior to the beginning of their shift for role call. During this time, officers from the preceding shift were required to continue working until the end of the next shift's role call. The city argued that the officers' shift was only eight hours, running from the beginning of each officer's role call until the beginning of role call for the next shift. The jury found that plaintiffs worked an eight hour and fifteen minute shift per day.[102]

On appeal, the City challenged the sufficiency of the evidence for the jury's determination and, further, argued that it was exempt from paying overtime under 29 U.S.C. § 207(k)[103] ("7(k)" exemption). Under this exemption, the city would not be liable for any overtime unless the employee worked over forty-three hours during a seven day work period. The district court had ruled that the 7(k) exemption did not apply.[104]

While the FLSA generally requires employers to pay employees overtime for hours worked in excess of forty per week,[105] section 7(k) provides an exemption for public employers with regard to their fire protection and law enforcement employees. In such circumstances, there is no violation of the FLSA's overtime provisions if:

> [I]n the case of such an employee to whom a work period of at least 7 but less than 28 days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which

99. *Id.*
100. 970 F.2d 802 (11th Cir. 1992).
101. *Id.* at 804.
102. *Id.*
103. 29 U.S.C. § 207(k) (1988).
104. 970 F.2d at 804.
105. 29 U.S.C. § 207(a)(1) (1988).

> bears the same ratio to the number of consecutive days in his work period as 216 . . . bears to 28 days, compensation at a rate not less than one-half times the regualar rate at which he is employed.[106]

Therefore, if the city had adopted a work period for the police officers of at least seven consecutive days, then the city would not be required to pay overtime compensation until the employee worked forty-three hours, rather than forty hours.[107]

The jury had found that the officers worked 41 and ¼ hours per week. Based on the testimony of the officers regarding their requirement to attend fifteen minute role calls, there was sufficient evidence to support this finding. Accordingly, the Eleventh Circuit affirmed the jury's finding that the city had breached its contractual obligation to compensate the officers for time over forty hours.[108]

The court noted, however, that while the city may have been in breach of its contract to the individual officers, this did not necessarily constitute a violation of the FLSA.[109] Therefore, if the city had adopted a seven day workweek under 7(k), it would have only violated the FLSA if it had failed to compensate the officers for work after forty-three hours. The district court had ruled that the 7(k) exemption did not apply and instructed the jury that the FLSA required overtime if the employees worked longer than 40 hours in a given workweek.[110]

The city presented evidence that it had adopted a seven day pay period through the testimony of the city's personnel director and the city's contract with the officers. The officers worked five days, and their two days off would vary from period to period. Given this evidence, the Eleventh Circuit held that it was error for the district court to hold that the 7(k) exemption did not apply and not permit the issue to reach the jury for a determination.[111]

The court held that the issue of whether an employer has proved that he had adopted a 7(k) work period was properly a question for the jury.[112] The court had, therefore, committed an error by not allowing the jury to consider the evidence presented by the city with regard to the 7(k) exemption.

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106. 29 U.S.C. § 207(k)(2) (1988).

107. 970 F.2d at 804.

108. *Id.*

109. *Id.* at 805 (citing Atlanta Professional Firefighters Union v. Atlanta, 920 F.2d 800, 806 (11th Cir. 1991)).

110. *Id.*

111. *Id.*

112. *Id.* (citing Lamon v. City of Shawnee, 754 F. Supp. 1518 (D. Kan. 1991); Nixon v. Junction City, 707 F. Supp. 473 (D. Kan. 1988)).

B. On-Call Claim

During a one week period in which the City of Gadsden's non-law enforcement employees were on strike, the city issued a memorandum to its plain clothes detectives stating the following: "Effective this date and until further notice, all officers of this division are required to leave a telephone number, location or other means by which you can be immediately contacted both on or off duty. Be prepared to report for duty, in uniform, immediately."[113]

The detectives argued that they were entitled to compensation for their off duty times that were subjected to these restrictions. The city countered that the officers were not working during this time for purposes of the FLSA. At the close of the evidence, the city moved for a directed verdict, arguing that there was insufficient evidence for a jury to find that the detectives were working during this time period. The district court denied this motion, and the jury found for plaintiffs. The city then moved for a judgment notwithstanding the verdict or, in the alternative, for a new trial or remittitur. The district court denied these motions, and the city appealed.[114]

The Eleventh Circuit confirmed that the operative question in determining whether employees are on-call for purposes of compensation under the FLSA is whether the employees are engaged to wait for their employer's call to duty. That is, the question turns on the degree to which the employees are free to use the time for their own personal activities.[115]

The court of appeals ruled that this posed a question of law for the court's resolution. "Whether a certain set of facts and circumstances constitute work for purposes of the FLSA is a question of law."[116] The court went on to note, however, that this distinction is sometimes blurred.

> Certain sets of facts, if found by a fact finder, will give rise to liability under the FLSA while other sets of facts will not. It is for the court to determine if a set of facts gives rise to liability; it is for the jury to determine if those facts exist.[117]

After comparing the facts to those which had arisen in other cases, the court found that plaintiffs' on-call time was not used predominantly for the city's benefit. Accordingly, the circuit court reversed the district

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113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.* (citing Bright v. Houston Northwest Medical Ctr. Survivor, Inc., 934 F.2d 671 (5th Cir. 1991) (en banc) *cert. denied*, 111 S. Ct. 882 (1992)).

117. *Id.* at 808.

court's denial of the city's motion for judgment notwithstanding the verdict.[118]

C. *Child Labor Provisions*

In *Labor Secretary v. Burger King Corp.*,[119] the Eleventh Circuit held that the Secretary of Labor's suit to enjoin defendant from violating the child labor provisions of the FLSA was not rendered moot by defendant's assertion of a new employment policy that would require the termination of all fourteen and fifteen year old employees and forbade the future hire of any minors under the age of sixteen.[120] The Eleventh Circuit dealt with the issue of whether the district court appropriately dismissed the case on grounds of mootness. The court noted that the possibility existed of defendant returning to its former method of operation. "The test for mootness in cases such as this is a stringent one . . . . A case might become moot if subsequent events made it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[121] On review the court found that Burger King had failed to meet this heavy burden, based largely on its past behavior.[122]

Plaintiff introduced evidence that the Department of Labor had filed this suit following five years of investigations of restaurants owned and operated by Burger King. Based on these investigations, the Department of Labor's allegations focused not on single isolated and correctable wrongdoings, but rather repeated violations notwithstanding directives from high level executives employed by defendant. Despite corporate instructions to the contrary, defendant had been unable to insure compliance in the past. Accordingly, the court found that defendant had failed to show with absolute clarity that the alleged wrongful conduct could not recur. Accordingly, the Eleventh Circuit reversed the district court and remanded to the trial court for a proceeding on the merits.[123]

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118. *Id.*

119. 955 F.2d 681, 683 (11th Cir. 1992).

120. *Id.* at 682, 684.

121. *Id.* at 684 (quoting Greenwood Utils. Comm'n v. Hodel, 764 F.2d at 1459, 1462-63 (11th Cir. 1985)).

122. *Id.*

123. *Id.* at 686.

IV. OSHA

A. *Rulemaking*

In *AFL-CIO v. OSHA*,[124] a number of industry groups, unions, and specific individual companies petitioned the court for a review of OSHA's issuance of its Air Contaminant Standard.[125] The petitioners challenged both the procedure used by OSHA in generating this standard, and OSHA's findings on numerous specific substances included in the new standard. In reviewing the Secretary of Labor's decision to adopt the standard, the court applied the "substantial evidence" standard.[126]

The court held that "OSHA's policy decisions must be: (1) consistent with the language and purpose of the OSH Act, and (2) reasonable under the rulemaking record."[127] Further, the court held that the agency's determination must state reasons for making that determination.[128]

The industry petitioners challenged the Air Contaminant Standard on the grounds that it lumped together too many substances in one rulemaking, the time period provided for comment by interested persons was inadequate and, therefore, the record was inadequate to support the standard. The unions, on the other hand, challenged the rulemaking procedure on the grounds that the procedures utilized systematically failed to protect the health of the employees. Additionally, the unions argued that OSHA's decision to limit the scope of the rulemaking ignored certain air contaminants in need of regulation. Finally, the unions argued against a four year delay for compliance under the new standard given OSHA's determination that the technology for immediate compliance with the standard presently exists.[129]

Unlike the majority of standards previously promulgated by OSHA and reviewed by the courts, the Air Contaminant Standard regulates not a single toxic substance, but 428 different substances.[130] In an effort to encompass the large number of alleged workplace hazards, as well as to account for future potentially hazardous materials, OSHA engaged in what it termed "generic" rulemaking to simultaneously cover a number of sub-

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124. 965 F.2d 962 (11th Cir. 1992).

125. 29 C.F.R. § 1910.1000 (1992).

126. 965 F.2d at 970 (adopting 29 U.S.C § 655(f) (1988)). *See* American Textile Mfrs. Inst., Inc. v. Donovan, 452 U.S. 490, 522, (1981) ("such relevant evidence as a reasonable mind might accept as adequate to support a conclusion"). *Id.*

127. 965 F.2d at 970 (citing Texas Indep. Ginners Ass'n v. Marshall, 630 F.2d 398, 404 (5th Cir. 1980)).

128. *Id.*

129. *Id.* at 971.

130. *Id.*

stances.[131] Unlike previous generic rulemakings by OSHA, the Air Contaminant Standard is an amalgamation of 428 unrelated specific substances sought to be regulated. Although this represented a departure from OSHA's past practice, the court found nothing in the OSH Act that would prevent OSHA from addressing a large number of substances in a single rulemaking.[132] However, the court held that the regulations relating to each potentially toxic substance must be able to stand independently. OSHA could not avoid the requirements of the OSH Act by engaging in multi-substance rulemaking.[133]

While OSHA found that each of the substances addressed in the standard constituted material health impairments, the court found that OSHA failed to meet its burden of showing that these existing exposure levels in the workplace of these substances presented a significant risk of material health impairment or that the proposed standard eliminated or substantially lessened such a risk.[134] The court also found that OSHA had failed to establish that the proposed standards were either technologically or economically feasible.[135] Additionally, the court found insufficient evidence in the record to explain OSHA's proposed four year delay in the implementation of the rulemaking standard.[136] Based on these flaws to the rulemaking procedures followed by OSHA, the Eleventh Circuit vacated the entire revised Air Contaminant Standard.[137]

B. Procedural Rights

In *Ed Taylor Construction Co. v. Occupational Safety & Health Review Commission*,[138] the employer petitioned for review of an order citing it for three separate violations of the OSH Act on the grounds that the vacancies on the Occupational Safety and Health Review Commission ("Commission") resulted in a denial of the employee's procedural rights. After receiving the ALJ's decision affirming the employer's citation and assessing a penalty of seven hundred dollars, Taylor filed a timely petition for review with the three member Commission. The Commission took no action on the employer's petition during the following thirty days. Accordingly, the ALJ's decision became a final order of the Commission.[139]

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131. *Id.*
132. *Id.* at 972.
133. *Id.*
134. *Id.* at 974-80.
135. *Id.* at 981-82.
136. *Id.* at 986.
137. *Id.* at 987.
138. 938 F.2d 1265 (11th Cir. 1991).
139. *Id.* at 1269. *See* 29 U.S.C. § 661(i) (1988).

Taylor argued that the order of the ALJ could not become a final order since all three seats on the Commission were vacant at the time of its issuance. Taylor argued that the Act required a three member board to at least consider any petition for review prior to an ALJ's order becoming final. Because there were no members of the Commission to even consider his petition for review, Taylor contended that the underlying order by the ALJ lacked finality.[140]

On appeal, the Eleventh Circuit squarely rejected this argument. The court held that 29 U.S.C. § 661(j)[141] was clear that the order of an ALJ becomes final within thirty days after its issuance unless any Commission member has intervened and directed a Commission review of the ALJ report. Absent such action, the order automatically becomes final at the expiration of the thirty day period. The reason why the Commission may not have directed an outside review was immaterial for purposes of determining the finality of any order.[142]

Taylor further contended that the total absence of any Commission member denied his procedural rights under OSHA. On this point, the court agreed with Taylor.[143] However, the court found that Taylor had only suffered actual prejudice on one of the three counts in the ALJ's order.[144] There was conflicting evidence as to whether Taylor provided for regular inspections of the job site in question with "competent" individuals. On this count, the court found that Taylor's denial of a more favorable standard of review offered by the Commission was prejudicial to Taylor. The remaining two allegations, however, involved interpretations of definitions under OSHA. The court held that both of these issues were purely questions of law and were easily resolvable in favor of the Secretary of Labor. Accordingly, Taylor suffered no actual prejudice with regard to these issues.[145]

V. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

The Employer Retirement Income Security Act[146] ("ERISA" or the "Act") was the subject of several Eleventh Circuit decisions this past survey year. While the cases covered various areas of the Act, many of the ERISA claims dealt with the issue of pre-emption over state law claims

140. 938 F.2d at 1269.
141. *See* 29 U.S.C. § 661(j).
142. 938 F.2d at 1269.
143. *Id.*
144. *Id.* at 1270.
145. *Id.* at 1271.
146. *See supra* note 5.

and what entity [that is, the employer, insurer or administrator], if any, should be liable for ERISA violations.

A. *ERISA Pre-Emption*

In *First National Life Insurance Co. v. Sunshine-Jr. Food Stores, Inc.*,[147] plaintiff, First National Life Insurance Company ("insurer"), brought suit against Sunshine Food ("employer") after the employer terminated its benefit policy with the insurer.[148] Specifically, the insurer filed an action asserting various state law claims against the employer, including breach of contract and misrepresentation.[149] The insurer also filed a claim for relief under ERISA. One of the main issues determined by the district court was that ERISA pre-empted all state law claims asserted by the insurer. Therefore, the insurer appealed to the Eleventh Circuit.[150]

In determining whether ERISA pre-empted the state law claims, the Eleventh Circuit restated its holding in the seminal case of *Amos v. Blue Cross-Blue Shield of Alabama*.[151] In *Amos* the Eleventh Circuit specifically addressed the question of whether ERISA pre-empted certain state law claims arising out of an alleged wrongful denial of benefits under an employee welfare plan.[152] The Eleventh Circuit concluded that ERISA pre-empted all state law claims if "no dispute that the common law cause of action asserted by the plaintiff . . . 'relate[d] to' an employee benefit plan . . . ."[153]

In *Sunshine* the insurer sought damages based on the employer's alleged mishandling of the benefit payments and its failure to adhere to certain terms of the group policy.[154] While the insurer argued these claims did not "relate to" the employee benefit plan, the Eleventh Circuit noted that Congress intended to use the words "relate to" in the broadest sense possible and did not intend to only pre-empt state laws specifically designed to affect employee benefits plans.[155] Consequently, the Eleventh Circuit found that a state law "relates to" an employee benefit plan if it " 'has a connection with or reference to [an ERISA] plan.' "[156] Thus, the Eleventh Circuit held that the state law claims of the insurer in this case

147. 960 F.2d 1546 (11th Cir. 1992), *cert. denied*, 113 S. Ct. 1045 (1993).
148. 960 F.2d at 1548.
149. *Id.*
150. *Id.* at 1549.
151. 868 F.2d 430 (11th Cir. 1989), *cert. denied*, 493 U.S. 855 (1986).
152. 868 F.2d at 431.
153. *Id. See* Pilot Life Ins. v. Dedeaux, 481 U.S. 41, 47 (1987).
154. 960 F.2d at 1550.
155. *Id.* (citing Shaw v. Delta Air Lines, Inc., 463 U.S. 85, 97 (1983)).
156. *Id.* (quoting *Shaw*, 463 U.S. at 97).

"related to" the welfare benefit plan. Consequently, ERISA pre-empted those claims.[157]

Even though the state law claims were "related to" the welfare benefit plan, ERISA should not pre-empt the insurer because the state law claims were consistent with the purposes behind ERISA and its pre-emption provision. Specifically, the insurer contended that Congress enacted the section in ERISA, which provides for pre-emption of state laws, in its effort to preserve consistency and prevent conflicting requirements in a benefit plan. Accordingly, since the state law claims relied upon by the insurer did not conflict with any of the objectives of ERISA, pre-emption was not appropriate.[158] After considering the insurer's arguments regarding consistency, the Eleventh Circuit found pre-emption still appropriate.[159] Specifically, the court stated that "the question of pre-emption is a matter of congressional intent; it is not a question of which body of law—state or federal—offers more protection to an aggrieved party."[160]

Another case this survey year that discussed the pre-emptive effect of ERISA was *Sanson v. General Motors Corp.*[161] In *Sanson* the question before the court was whether ERISA pre-empted a Georgia law claim for fraudulent misrepresentation.[162] In *Sanson* plaintiff filed suit under a Georgia statute alleging fraudulent misrepresentation on the part of his employer, General Motors Corporation, concerning a special retirement program.[163] Specifically, plaintiff alleged that General Motors fraudulently represented to him that General Motors would not offer the benefits under a special retirement program to the employees at his assembly plant. Relying on this information, plaintiff voluntarily retired under General Motors' early retirement program. Essentially, plaintiff alleged that "but for" the misrepresentation, he would have continued his employment until it became clear that General Motors would offer this special retirement program to his plant.[164] General Motors moved for summary judgment asserting that ERISA pre-empted plaintiff's state law claims. The district court found that ERISA pre-empted plaintiff's state law claims, and plaintiff filed an appeal.[165]

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157. *Id.*

158. *Id.*

159. *Id.*

160. *Id.* (citing Phillips v. Amoco Oil Co., 799 F.2d 1464, 1470 (11th Cir. 1986), *cert. denied*, 481 U.S. 1016 (1987)).

161. 966 F.2d 618 (11th Cir. 1992), *petition for cert. filed*, 61 U.S.L.W. 3455 (U.S. Dec. 14, 1992) (No. 92-1015).

162. 966 F.2d at 619.

163. *Id.*

164. *Id.*

165. *Id.* at 619-20.

After reviewing the relevant case law, the Eleventh Circuit found that ERISA pre-empted plaintiff's state law claim based on fraudulent misrepresentation. In making this holding, the Eleventh Circuit reiterated its finding that ERISA pre-empted a state law if the state law "relate[d] to any employee benefit plan described in section 1003(a) of [ERISA] . . . ."[166] Furthermore, the court noted that a state law "relate[d] to" an employee benefit plan when the law "ha[d] a connection with or reference to such a plan."[167]

In *Sanson*, as in *Sunshine* discussed above, the court found that the existence of a pension plan was critical. Specifically, the alleged misrepresentation related to plaintiff's retirement benefit plan available under General Motors' special retirement plan.[168] Therefore, plaintiff's measure of damages would be the amount of benefits he would have received under the retirement plan. Such a determination of damages necessarily demonstrated the close relationship between plaintiff's current claim and his retirement plan.[169] Given the fact that ERISA was closely related to plaintiff's state law claims, the court found that ERISA pre-empted plaintiff's state law claims and, therefore, dismissed plaintiff's complaint.[170]

In the case of *Swerhun v. Guardian Life Insurance Co.*[171] the court addressed not only the pre-emptive effect of ERISA, but also the applicability of ERISA's exception provisions that preclude certain state law claims from pre-emption. Specifically, in *Swerhun*, plaintiff filed a two count complaint in a Florida state court alleging that Guardian had (1) breached its insurance contract by failing to recognize and pay plaintiff's claims in a timely manner, and (2) construed its insurance policy contrary to a Florida statute and refused to pay plaintiff's claims in a timely manner constituting bad faith in violation of another Florida statute.[172] Guardian moved the case to federal district court asserting that ERISA pre-empted plaintiff's state law claims. After filing a motion to dismiss and conducting oral arguments, the district court granted Guardian's motion and dismissed plaintiff's complaint with prejudice.[173]

On appeal, the Eleventh Circuit noted that ERISA's pre-emption effect specifically provided that ERISA "supersede[s] any and all State laws in-

166. *Id.* at 621 (quoting ERISA § 514(a) (codified as amended at 29 U.S.C. § 1144(a) (1988)).

167. *Id.* (quoting Shaw v. Delta Airlines, Inc., 463 U.S. 85, 96-97 (1983)).

168. *Id.*

169. *Id.*

170. *Id.*

171. 979 F.2d 195 (11th Cir. 1992).

172. *Id.* at 196.

173. *Id.* at 197.

sofar as they may now or hereafter relate to any employee benefit plan" covered by ERISA.[174] Specifically, the court found that ERISA's pre-emptive effect upon state law operates in three stages. First, ERISA pre-empts all state laws that "relate to" ERISA-covered plans.[175] Second, an exception to the general rule is the "saving clause" which provide[s] "that nothing in ERISA 'shall be construed to exempt or relieve any person from any law of any State which regulates insurance . . . .' "[176] Third, the one exception to the "saving clause exception" is the "deemer clause," which provides "that no employee benefit plan 'shall be deemed to be an insurance company or other insurer . . . or to be engaged in the business of insurance . . . for purposes of any law of any State purporting to regulate insurance companies . . . .' "[177]

In *Swerhun* plaintiff did not dispute that the Guardian plan was an ERISA-covered plan, nor did it contend that its state law claims were not related to an ERISA plan. Therefore, the only issue was whether the state law claims fell under the "saving clause" exception and, as such, were laws "regulating insurance."[178] The court found, however, that plaintiff's state law claims constituted basic breach of contract claims and, as such, did not constitute laws "regulating insurance." Consequently, the Eleventh Circuit concluded that ERISA pre-empted all counts of plaintiff's complaint and accordingly affirmed the district court's order dismissing plaintiff's complaint.[179]

B. Liability For ERISA Violations

In *Rosen v. TRW, Inc.*,[180] plaintiff, an employee of Chilton Corporation, in 1986 became a participant in Chilton's Executive Security Plan ("ESP") and began making monthly payments.[181] In 1989, TRW acquired all of Chilton's stock and became the successor in interest to Chilton under the ESP. After being denied a request for distribution of benefits as provided for by the ESP, plaintiff filed suit against TRW alleging an ERISA violation in that TRW denied his request of benefits owed under the terms of the ESP. Plaintiff did not name either the ESP or the "administrative committee" of the ESP as defendants in his complaint. Consequently, TRW filed a motion to dismiss on the grounds that plaintiff

174. *Id.* (quoting 29 U.S.C. § 1144(a) (1988)).
175. *Id.* (quoting 29 U.S.C. § 1144(a)).
176. *Id.* (quoting 29 U.S.C. § 1144(b)(2)(A) (1988)).
177. *Id.* (quoting 29 U.S.C. § 1144(b)(2)(B) (1988)).
178. *Id.*
179. *Id.* at 199.
180. 979 F.2d 191 (11th Cir. 1992).
181. *Id.* at 191.

failed to sue the proper party. The district court granted TRW's motion for dismissal and plaintiff appealed to the Eleventh Circuit.[182]

In reaching its decision that TRW was an improper party to the suit, the district court relied upon certain statutory provisions of ERISA.[183] Specifically, "ERISA provides that a money judgment against an employee benefit plan is only enforceable against the plan as an entity, unless liability against some other person is established."[184] The Eleventh Circuit noted that liability against some other person could be established by proving "that the person is a plan administrator and thus responsible for decisions regarding benefits."[185] Specifically, "ERISA defines the term 'administrator' as 'the person specifically so designated by the terms of the instrument under which the plan is operated.' "[186] If a plan, however, does not designate an "administrator," ERISA may deem the employer as the plan administrator.[187]

In the present case, the ESP provided for a "Committee" to be the acting and designated "administrator" of the plan.[188] Plaintiff contended, however, that the Committee was not solely responsible for the administration of the ESP and that the employer, TRW, retained some control over the decisions regarding certain benefits. Consequently, plaintiff argued that TRW is liable for violating ERISA.[189]

The Eleventh Circuit noted that this was the first time the question of whether an employer who actively takes a role in the administration of a plan could be held liable for ERISA claims.[190] Relying heavily on a case from the United States Court of Appeals for the First Circuit, *Law v. Ernst & Young*,[191] the Eleventh Circuit held that the employer, TRW, could be held liable for ERISA violations due to the fact that it retained some control over the administration of the plan.[192] The Eleventh Circuit found that, although the ESP document vested exclusive administrative power in the "Committee," plaintiff alleged, and produced some evidence to suggest, which TRW still maintained an appreciable amount of control over the ESP.[193] While expressly reserving any opinion as to whether plaintiff could actually establish a claim against TRW, the court held that

182. *Id.* at 191-92.
183. *Id.*
184. *Id.* at 192 (citing 29 U.S.C. § 1132(d)(1) (1988)).
185. *Id.*
186. *Id.* (quoting 29 U.S.C. § 1002(16)(A)(i) (1988)).
187. *Id.*
188. *Id.*
189. *Id.*
190. *Id.* at 193.
191. 956 F.2d 364 (1st Cir. 1992).
192. 979 F.2d at 193.
193. *Id.*

the possibility of liability did exist and, therefore, it remanded plaintiff's complaint to the district court for determination on the merits.[194]

In another interesting case involving liability, the Eleventh Circuit in *Willett v. Blue Cross/Blue Shield of Alabama*,[195] addressed the issue of which party (that is, the insurer or the employer) had the responsibility for providing necessary notice to the employees of the suspension or discontinuation of a certain benefit plan.[196] In *Willett* Blue Cross & Blue Shield entered into a contract with the employer, Mayes Enterprises, Inc., to provide group health insurance for Mayes' employees.[197] After Mayes failed to make monthly payments, Blue Cross & Blue Shield terminated its health insurance policy. Several employees filed claims with Blue Cross & Blue Shield after the cancellation of the health insurance policy under the mistaken impression that they still had insurance through Mayes Enterprises.[198]

After Blue Cross & Blue Shield denied some of plaintiffs' insurance claims, seven employees asserted Alabama common law claims and ERISA claims against Blue Cross & Blue Shield. The employees alleged that Blue Cross & Blue Shield breached its fiduciary duty by failing to inform them that Mayes Enterprises had not paid the required premiums.[199] Blue Cross & Blue Shield removed the case to federal district court in Alabama and the district court granted plaintiffs' motion for summary judgment finding plaintiffs' damages to be equal to the amount of benefits plaintiffs would have collected under the policy if it had still been in effect.[200]

On appeal, Blue Cross & Blue Shield argued that Mayes Enterprises, not Blue Cross & Blue Shield, was the proper party designated to provide all necessary notices, including notice of a suspension or discontinuation of coverage.[201] Consequently, Blue Cross contended that Mayes Enterprises should be liable for any alleged ERISA violations.[202] The Eleventh Circuit noted that ERISA allowed for a fiduciary to delegate a fiduciary duty. Specifically, 29 U.S.C. § 1105(c)(1)[203] states that "[t]he instrument under which a plan is maintained may expressly provide for procedures (A) for allowing fiduciary responsibilities . . . among named fiduciaries, and (B) for named fiduciaries to designate persons other than named fi-

194. *Id.* at 194.
195. 953 F.2d 1335 (11th Cir. 1992).
196. *Id.* at 1340.
197. *Id.* at 1338.
198. *Id.*
199. *Id.* at 1339.
200. *Id.*
201. *Id.*
202. *Id.*
203. 29 U.S.C. § 1105(c)(1) (1985).

duciaries to carry out fiduciary responsibilities . . . under the plan."[204] The court agreed with Blue Cross & Blue Shield that the contract between Blue Cross & Blue Shield and Mayes Enterprises clearly delegated the responsibility for providing all necessary notices to Mayes.[205] Thus, the court stated that "Mayes had the primary responsibility for notifying the beneficiaries that their coverage had been suspended for non-payment of premiums."[206]

Notwithstanding the court's determination above, the Eleventh Circuit explained that a contractual delegation, such as the one in the present case, was not always absolute.[207] Specifically, the court stated that a "delegation of a duty by a fiduciary does not . . . vitiate the fiduciary's obligations under section 1105(a)."[208] Moreover, 29 U.S.C. § 1105(a)[209] states the following:

> [A] fiduciary with respect to a plan shall be liable for a breach of fiduciary responsibility of another fiduciary with respect to the same plan in the following circumstances: (3) if he has knowledge of a breach by such other fiduciary, unless he makes reasonable efforts under the circumstances to remedy the breach.[210]

Furthermore, "[a] fiduciary who attempts to delegate a duty to another person or entity may nevertheless be liable for the breach of that duty if 'the named fiduciary would otherwise be liable' " under the Act.[211] Consequently, relying on section 1105(c)(2), the Eleventh Circuit found that Blue Cross & Blue Shield could be liable for the losses incurred by the beneficiaries if it was clear that Blue Cross & Blue Shield was either aware that Mayes had not informed its employees of coverage termination, or if Blue Cross & Blue Shield should have been aware that Mayes had not informed its employees to that effect.[212] Consequently, the court remanded plaintiffs' complaint to the district court to determine the extent of Blue Cross & Blue Shield's knowledge concerning the relevant issues discussed above.[213]

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204. *Id.*
205. 953 F.2d at 1341.
206. *Id.*
207. *Id.*
208. *Id.*
209. 29 U.S.C. § 1105(a) (1988).
210. *Id.* § 1105(a)(3).
211. 953 F.2d at 1340 (quoting 29 U.S.C. § 1105(c)(2)(B)).
212. *Id.* at 1341.
213. *Id.* at 1342.

V. Conclusion

As can be seen by a review of the relevant cases above, the area of traditional labor law is constantly growing and expanding. As this area increases, the need for attorney proficiency in this practice becomes even more demanding. In addition, the Eleventh Circuit will no doubt continue to be a leading circuit in understanding and developing this area of the law.