Labor Law

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I. INTRODUCTION

This Article surveys the 1994 decisions of the United States Court of Appeals for the Eleventh Circuit that impacted on the areas of traditional labor law. This Article specifically addresses decisions by the Eleventh Circuit under the National Labor Relations Act ("NLRA").\footnote{29 U.S.C. §§ 151-169 (1988).} the Labor Management Relations Act ("LMRA").\footnote{Id. §§ 141-187.} the Fair Labor Standards Act of 1938 ("FLSA").\footnote{Id. §§ 209-219.} the Occupational Safety and Hazard Act ("OSHA").\footnote{Id. §§ 651-678.} and the Employee Retirement Income Security Act of 1974 ("ERISA").\footnote{Id, §§ 1001-1461.}

Given the volume of cases decided by the Eleventh Circuit in the area of traditional labor law this past survey year, this Article does not address every case. It does attempt, however, to address the noteworthy decisions issued by the Eleventh Circuit in 1994. As in years past, this survey year the Eleventh Circuit considered several cases covering a wide variety of issues. The majority of cases revisited old rules and attempted to clarify their use through the facts presently before the
court. Some cases, however, addressed new issues and broke new ground in the area of traditional labor law.

II. THE NATIONAL LABOR RELATIONS ACT AND THE LABOR MANAGEMENT RELATIONS ACT

A. Judicial Review of Arbitration Awards

As in the years past, the Eleventh Circuit again addressed the standard for judicial review of an arbitration award. In *Interstate Brands Corp. v. Local 441 Retail, Wholesale & Department Store Union AFL-CIO*, the court of appeals reiterated the long-standing policy that although the court generally gave a great deal of deference to an arbitrator's award, when the award did not "draw its essence from the [labor] contract," then the reviewing court need not defer to the arbitrator's conclusions. In this particular case, the employer, Merita Bakery, employed several truck drivers to deliver bakery goods throughout the Southeast. These drivers were represented by a local union. In May 1993, a driver named Willard Hamrick was informed by his supervisor that he was due for a physical examination, which also included the Department of Transportation ("DOT") mandated drug testing. This testing was subsequently performed and Mr. Hamrick tested positive for illegal drugs. Consequently, he was terminated from his position.

Shortly thereafter, pursuant to the labor contract, Mr. Hamrick requested that his termination be reviewed by an arbitrator which would then be binding on all parties. The arbitrator framed the issue to be determined as "whether the urine test . . . [met] the criteria of the [DOT's] standards and, if so, whether the penalty of discharge [was] appropriate under the company drug policy." The arbitrator did not find fault with the collection site or the laboratory procedures but, instead, held that the DOT Regulation 40.25(c) required a chain of custody in the handling of the specimen and that there was a break in the chain in this case (i.e. couriers of specimen between collection site and laboratory did not sign the shipping box). Based upon this break in chain of custody, the specimen could not be considered in his analysis of

6. 39 F.3d 1159 (11th Cir. 1994).
7. Id. at 1162.
8. Id. at 1160-61.
9. Id. at 1161.
whether or not Mr. Hamrick's termination was proper; thus, he excluded it from the arbitration and ordered Mr. Hamrick to be reinstated.\textsuperscript{10}

The employer, Merita Bakery, then brought suit against the union challenging the arbitration award.\textsuperscript{11} The district court granted summary judgment to the union and upheld the arbitration award in its entirety. Merita then appealed the award to the Eleventh Circuit.\textsuperscript{12}

On appeal, the Eleventh Circuit noted that although their review of arbitration awards was generally very limited, this did not mean that they were bound by each and every arbitration award that was issued.\textsuperscript{13} The court reiterated the long-standing principle that they would not consider the merits of an award if it was argued that the award rested on errors of fact or on a misinterpretation of the contract.\textsuperscript{14} When the award, however, [did] not “draw its essence from the contract, but rather reflect[ed] the arbitrator’s ‘own brand of industrial justice,' the [Eleventh Circuit held that the] reviewing court need not defer to the arbitrator's conclusions.”\textsuperscript{15}

The Eleventh Circuit then went on to find that the arbitrator in this case went beyond the collective bargaining agreement when he attempted to interpret the actual DOT regulations requiring a “chain of custody" for the specimen.\textsuperscript{16} Since the arbitrator's analysis was confined to the DOT regulations and his interpretation of them, rather than his interpretation of the actual contract between the union and the employer, the court was not bound by his findings of fact. Thus, the issue became whether or not the arbitrator was correct when he found that section 40.25(k) required such a stringent chain of custody requirement and, specifically, whether it required the signature of each and every individual who handled the sealed shipping box between the collection site and the testing laboratory.\textsuperscript{17}

In reviewing the DOT regulations concerning chain of custody requirements, the court paid special attention to the interpretation of the regulations shared by the DOT.\textsuperscript{18} The DOT contended they had never interpreted their regulations to require couriers, postal employees, or other intervening personnel involved in the transportation of urine

\begin{itemize}
  \item \textsuperscript{10} \textit{Id.}
  \item \textsuperscript{11} \textit{Id. at 1160.}
  \item \textsuperscript{12} \textit{Id.}
  \item \textsuperscript{13} \textit{Id. at 1161-62.}
  \item \textsuperscript{14} \textit{Id. at 1162.}
  \item \textsuperscript{15} \textit{Id. (citing United Paperworkers Int'l Union v. Misco, Inc., 484 U.S. 29, 36 (1987) (citations omitted)).}
  \item \textsuperscript{16} \textit{Id.}
  \item \textsuperscript{17} \textit{Id.}
  \item \textsuperscript{18} \textit{Id. at 1163.}
\end{itemize}
specimens, to make specific chain of custody entries.\textsuperscript{19} The court of appeals pronounced the general rule that "[a court] owe[d] substantial deference to an agency's interpretation of its own regulation."\textsuperscript{20} Since the DOT's construction of its custody and control regulation was reasonable, the Eleventh Circuit found that such stringent chain of custody procedures, as ruled upon by the arbitrator, did not have to be followed as was ruled upon by the arbitrator.\textsuperscript{21} Thus, the court of appeals held that the specimen was incorrectly excluded from the arbitrator's consideration; therefore, they reversed the district court's grant of summary judgment and remanded the case for further proceedings.\textsuperscript{22}

B. Exhaustion of Contract Remedies as a Requirement for Bringing Breach of Contract Suit

In \textit{Thomas v. Kroger Co.},\textsuperscript{23} a discharged employee brought an action against her employer alleging that she was terminated on the basis of her race in violation of her collective bargaining agreement and Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2.\textsuperscript{24} The employer filed a motion for summary judgment arguing, among other things, that the plaintiff had failed to exhaust the contract remedies outlined in her collective bargaining agreement; thus, she had not met the prerequisites needed to bring a breach of contract claim in federal court.\textsuperscript{25} The district court agreed with the employer and dismissed the plaintiff's breach of contract claim. The plaintiff then filed an appeal to the Eleventh Circuit.\textsuperscript{26}

The Eleventh Circuit reiterated the earlier United States Supreme Court holding that "federal labor policy requires that individual employees wishing to assert contract grievances must [initially] attempt use of the contract grievance procedure agreed upon by the employer and union as a means of redress."\textsuperscript{27} Thus, the analysis became whether or not the plaintiff had exhausted the grievance procedures outlined in her union contract; if not, her claim would necessarily be dismissed.\textsuperscript{28}

\begin{enumerate}
\item\textsuperscript{19} \textit{Id.} at 1162.
\item\textsuperscript{20} \textit{Id.} at 1163 (citing \textit{Thomas Jefferson Univ. v. Shalala}, 114 S. Ct. 2381, 2386 (1994)).
\item\textsuperscript{21} \textit{Id.}
\item\textsuperscript{22} \textit{Id.} at 1164.
\item\textsuperscript{23} 24 F.3d 147 (11th Cir. 1994).
\item\textsuperscript{24} \textit{Id.} at 148.
\item\textsuperscript{25} \textit{Id.} at 148-50.
\item\textsuperscript{26} \textit{Id.} at 149.
\item\textsuperscript{27} \textit{Id.} at 149-50 (citing \textit{Republic Steel Corp. v. Maddox}, 379 U.S. 650, 652 (1965)).
\item\textsuperscript{28} \textit{Id.} at 150 (citing \textit{Mason v. Continental Group, Inc.}, 763 F.2d 1219, 1222 (11th Cir. 1985)).
\end{enumerate}
The facts in this case demonstrated that the plaintiff was a member of the United Food and Commercial Workers Local 1063 Union and was covered by its collective bargaining agreement with the employer. This contract provided for a four step procedure for dispute resolution; and, if the parties agreed, they could skip the intermediary steps in favor of an immediate "step three" conference. If those conferences failed, the matter would then be referred to arbitration.

After the plaintiff's termination, she did file a grievance with the union to initiate the dispute resolution process. A "step three" meeting was scheduled between the union, the plaintiff, and the company's representative. The plaintiff was informed of this meeting, and she explained that she wished to have her lawyer present. The union representative told her that she could not bring her lawyer to the "step three" meeting, and on the night the meeting occurred, the plaintiff failed to attend. The meeting went forward in the plaintiff's absence, and she later received a letter from her employer stating that the investigation of her discharge was complete and that the termination decision was final.

Based on these facts, the Eleventh Circuit found that since the plaintiff was aware of the meeting and she simply failed to attend, she had not exhausted her contractual remedies. The fact that the plaintiff had wanted her lawyer to attend this meeting was not a relevant factor since the contract between the union and the employer did not allow for the attendance of lawyers at such meetings. Since the plaintiff had failed to exhaust her contractual remedies, the Eleventh Circuit affirmed the district court's order granting summary judgment to the employer.

C. Successorship Doctrine

This past survey year, the Eleventh Circuit addressed the successorship doctrine in detail and further delineated the reasoning behind the doctrine and what parties, if any, were subject to the doctrine. In Road Sprinkler Fitters Local Union No. 669 v. Independent Sprinkler Corp., the union commenced an action requiring arbitration against a union employer and a nonunion employer that signed a settlement agreement stating they would participate in arbitration. The union also,
however, commenced an action requiring an alleged "successor" nonunion employer to comply with arbitration that had not signed the agreement. The district court granted summary judgment in favor of the union and required all three employers to arbitrate the issues currently in dispute. The alleged "successor" employer appealed to the Eleventh Circuit.\footnote{35}

Specifically, the facts revealed that the union represented employees of Moore Pipe & Sprinkler Company ("Moore Pipe"), a union contractor with which the union had a collective bargaining agreement. A grievance arose over whether Moore Pipe was actually sending work to another company, Independent Sprinkler & Fire Protection Company ("Independent I"), a nonunion contractor. The union filed a section 301 suit against Moore Pipe to compel it to arbitrate their grievance, as was provided for in their collective bargaining agreement. A settlement agreement was eventually reached, and the union, along with Moore Pipe and Independent I, signed this agreement.\footnote{36}

A few months thereafter, another nonunion shop was organized named Independent Sprinkler Corporation ("Independent II"). Independent II performed the same type of work as Independent I. The union later alleged, however, that Independent II was also being awarded contracts for work within the union territory. The union objected and demanded that Moore Pipe, Independent I, and Independent II submit to arbitration pursuant to the arbitration provision of the earlier-reached settlement agreement. All three companies declined to arbitrate, and the union filed suit attempting to enforce arbitration. The main thrust of the union's argument to compel arbitration was that Moore Pipe and Independent I had agreed to arbitrate based upon the earlier settlement agreement and, more importantly, the new nonunion shop, Independent II, was actually a "successor" of Independent I and was, therefore, also bound by the earlier settlement agreement.\footnote{37}

The union moved for summary judgment and the district court granted such requiring all three companies to arbitrate. All three defendants appealed.\footnote{38} Eventually, however, Moore Pipe and Independent I voluntarily participated in arbitration and withdrew their appeals. Thus, the only issue presently before the Eleventh Circuit was whether or not the district court correctly held that the "successorship doctrine" required the new nonunion shop, Independent II, to arbitrate pursuant to the provisions of the settlement agreement.\footnote{39} 

\footnote{35. \textit{Id.} at 1565-66.}
\footnote{36. \textit{Id.} at 1565.}
\footnote{37. \textit{Id.} at 1565.}
\footnote{38. \textit{Id.} at 1566.}
\footnote{39. \textit{Id.}}
The Eleventh Circuit initially reiterated the general principles behind the "successor doctrine." Specifically, the court stated that the successor relationship created by labor law principles actually arose by operation of law and was not dependent upon any agreement by the successor that it should have successor status. The court noted that this labor law based relationship originally came about simply to protect the collective bargaining interests of employees of predecessor employers who had been employed by a successor company that had "substantial and sufficient continuity" with the predecessors themselves. This doctrine was simply an extension of the presumption in labor law that during the term of a collective bargaining agreement and one year thereafter, the certified union was and should remain the proper bargaining agent. Therefore, based on this doctrine, the successor corporation was then required to engage in collective bargaining with the union.

Even though a successor was required to engage in the collective bargaining with the union, the court stated that, ordinarily, the successor would not be bound by substantive provisions of a preexisting collective bargaining agreement between the union and the predecessor. In addition, the court noted that there were several factors that one should review carefully before determining whether an employer was the successor of another. In the present case, however, the Eleventh Circuit found that they did not need to analyze the detailed relationship between Independent I and Independent II. Instead, since there had been no collective bargaining agreement drawn out between the union and the alleged predecessor, Independent I, there was no such collective bargaining agreement that could have been "passed on" to the alleged successor company, Independent II.

Since the only preexisting collective bargaining agreement was between the union and Moore Pipe, the successorship doctrine could not be utilized to force an alleged successor employer into a collective bargaining relationship in which the alleged predecessor was not even

40. Id.
41. Id.
42. Id.
43. Id. (citing NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272 (1972); Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27 (1987)).
44. Id. at 1566-67.
45. Id. at 1567 (citing International Union of Operating Eng'rs v. Centor Contracts, 831 F.2d 1309 (7th Cir. 1987)).
46. Id.
47. Id.
a participant.48 Thus, the Eleventh Circuit found that the district court erred in granting summary judgment in favor of the union as against Independent II and in denying summary judgment to Independent II based upon this issue.49

D. Union Elections

In Reich v. International Alliance of Theatrical Stage Employees & Moving Picture Machine Operators, AFL-CIO,50 the Eleventh Circuit again analyzed in detail the appropriateness of a union election. In this case, the Secretary of Labor filed a complaint alleging that a local union officer election violated the Labor Management Reporting and Disclosure Act51 by allowing ineligible candidates to run for and hold union office.52 Specifically, the Secretary of Labor challenged the election of Victor Meyrich as president of the local union contending that Mr. Meyrich was a manager in his place of employment and was, therefore, not eligible to run for office under the terms of the constitution of the union. Following a nonjury trial, the district court held that Meyrich fell within the category of persons prohibited from running for union office, and accordingly, the district court ordered a new election for the president of Local 412.53 The union then appealed this issue to the Eleventh Circuit.54

The facts revealed that Meyrich had served as president of Local 412 for several years, but at the time of the election in question, December 1990, Meyrich was actually the “production supervisor for the Asolo Center for the Performing Arts.”55 His job description stated that he was specifically responsible for all overall physical aspects of the Asolo Theater operations and that he was to spend thirty percent of his time maintaining production schedules, twenty-five percent of his time advising department heads on building techniques, twenty percent of his time maintaining the building and equipment, ten percent of his time purchasing equipment and supplies, ten percent of his time maintaining accounts, and only five percent of his time on other duties. The record revealed that Meyrich spent only approximately three percent of his time

48. Id.
49. Id. at 1568.
50. 32 F.3d 512 (11th Cir. 1994).
52. 32 F.3d at 513.
53. Id.
54. Id. at 512.
55. Id. at 513.
performing true "stage work" and that such work was only incidental to his functions as the production supervisor.\textsuperscript{56}

Moreover, as production supervisor, Meyrich was over four departments, with each department having a supervisor who reported directly to him. Meyrich had the authority to hire, fire, and even discipline employees in these departments, and he received managerial employee benefits that nonmanagers did not receive. It was uncovered that Meyrich's position as president of Local 412 did conflict with his duties as production supervisor when he was unable to participate with management in the preparation of a strike plan, which a production supervisor would ordinarily participate in.\textsuperscript{57}

In analyzing this case, the court noted that following a union election, and after exhausting all internal remedies, any member could file a complaint with the Secretary of Labor "alleging the violation of any provision of Section 481 of [Title 29]. . . ."\textsuperscript{58} Once they filed this complaint, however, the Secretary of Labor was obligated to investigate and determine if there was probable cause to believe a violation of Section 481 had occurred.\textsuperscript{59} If a violation had occurred, the Secretary of Labor must then file a civil action to set aside the invalid election. Specifically, subsection 481(e) provided: "The election shall be conducted in accordance with the constitution and bylaws of such organization insofar as they are not inconsistent with the provisions of this subchapter."\textsuperscript{60} When reviewing the Secretary of Labor's claim, however, the Eleventh Circuit noted that a court must accept the interpretation placed upon the constitution by the union if that interpretation is in any way fair and reasonable.\textsuperscript{61}

In the present case, the union argued initially that Meyrich was not a manager.\textsuperscript{62} Based on the overwhelming evidence and facts cited above, the Eleventh Circuit found that argument to be without merit.\textsuperscript{63} Second, the union argued that even if Meyrich was a manager, he did not fall within the disqualifications set out in the constitution because he did not function solely as a manager.\textsuperscript{64} The court noted, however, that section 15 of the union constitution disqualified any member who "accepted a position as a manager . . . except where the duties of such

\textsuperscript{56} Id. at 513-14.
\textsuperscript{57} Id. at 514.
\textsuperscript{58} Id. at 515.
\textsuperscript{59} Id.
\textsuperscript{60} Id. (citing 29 U.S.C. § 481(e)).
\textsuperscript{61} Id. (citations omitted).
\textsuperscript{62} Id.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
person shall also be those of a projectionist or stage employee." The court of appeals held that the local union's interpretation of this provision was not reasonable; therefore, the court was not bound by their interpretation.

Specifically, the court went on to state that in interpreting labor union constitutions, courts should follow the well-settled rules of statutory construction, one of which was that each word, if possible, should be given some type of "operative effect." Under the union's interpretation of section 15, however, the court of appeals stated that any manager who performed the work of his subordinates, no matter how infrequently, could avoid disqualification. That interpretation would render section 15 essentially meaningless; therefore, the Eleventh Circuit found that Meyrich's occasional performance of stage work did not bring him within the exception to disqualification under section 15 of the union contract.

The union tried to argue that the Secretary of Labor lacked authority to seek to invalidate an election on the grounds that the union permitted managers or supervisors to seek and hold office. In support of this argument, they relied upon *Brock v. Writers Guild of America, West, Inc.*, in which the Ninth Circuit found the Secretary of Labor was not authorized to challenge a union's decision to permit supervisors to participate as candidates in a union election. The Eleventh Circuit noted, however, that *Writers Guild* was distinguishable from the present one because the Writers Guild's constitution had not imposed any restrictions on supervisory candidacy for office. The court in *Writers Guild* had simply held that the Secretary of Labor could not unilaterally allege a violation of section 481(e) when the union contract itself did not delineate such behavior as unlawful. Therefore, *Writers Guild* was not controlling.

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65. Id.
66. Id.
67. Id. at 515-16.
68. Id. at 516.
69. Id.
70. Id.
71. 762 F.2d 1349 (9th Cir. 1985).
72. 32 F.3d at 516.
73. Id.
74. Id.
75. Id.
E. Criminal and Civil Penalties

This survey year, the Eleventh Circuit addressed two noteworthy cases, both of which evolved out of the same set of facts. The first case, *United States v. Phillips*, 76 involved criminal penalties for unlawful behavior by union employees and the second case, *Cox v. Administrator, United States Steel & Carnegie*, 77 involved civil sanctions applicable against a union for unlawful behavior of union employees. Both of these cases are important in emphasizing the harsh repercussions union members, unions themselves, and employers can suffer if they participate in unlawful behavior while entering into contract negotiations.

To understand the gravity of the violations involved in both of these cases, it is necessary to have a good understanding of the underlying facts. The employer involved in both of these cases was a major steel producer in Pittsburgh, Pennsylvania, named USX Corporation ("USX"). USX owned and operated a number of mills throughout the United States. The steel workers in these mills were represented by the United Steel Workers of America, International Union ("Union"). A basic collective bargaining agreement was negotiated by USX and the Union's principle officers every three years. There were also, however, "local collective bargaining agreements" between the USX and the Union's locals, which were negotiated after the basic agreement was reached. The local agreements were usually negotiated by the Union's district directors and sub-district directors responsible for the Union's district in whatever area the steel mill was located. 78

The incident that precipitated the criminal convictions and subsequent civil lawsuit began during the negotiations of a local agreement between USX and ten locals at USX's Fairfield steel mill in Birmingham, Alabama. The negotiations started in September 1983, and at that time, the steel market was very depressed and many of USX's mills were not operating. USX had stated earlier that they were not willing to resume production at these mills unless the local unions agreed to a permanent reduction in the labor force and several other concessions to reduce the cost of salaries. 79

Thurman Phillips and E.B. Rich, the Union officials located in the Fairfield district, were district director and sub-district director, respectfully. The Union assigned them to negotiate the local agreement for the Fairfield steel workers, and Phillips and Rich were full-time

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76. 19 F.3d 1565 (11th Cir. 1994).
77. 17 F.3d 1386 (11th Cir.), modified, 30 F.3d 1347 (11th Cir. 1994).
78. 19 F.3d at 1567-72.
79. Id.
employees. Prior to coming to work for the Union full time, both Phillips and Rich had worked for USX, and when they left USX's employment, the basic collective bargaining agreement provided that a worker who wanted to leave USX to become a Union employee could request that USX grant them a one-year "leave of absence." During this leave of absence, the worker would continue to stay on the payroll and accrue additional time needed for pension purposes. If requested, USX could extend the leave for another year, but they could not extend it past two consecutive years. Thus, to prevent a break in an employee's continuous service and ultimately save their pension monies, a worker who left USX to accept Union employment had to return to USX before their leave of absence expired. 80

Neither Phillips nor Rich returned to USX after leaving its employment, and at the time they were negotiating the local agreement, they had lost whatever rights they might have had to receive a USX pension. While negotiating the local agreement and, thus, the resumption of production at the Fairfield plant, Phillips and Rich demanded from USX that they award them enough "continuous service" to entitle them to immediately retire from USX's employment and receive a pension. They also demanded similar treatment for six other Union members of Phillips' staff. 81

After several months of negotiations, an agreement was finally reached between the Union and USX. This agreement called for a reduction in the work force at the Fairfield mill, a reduction in the incentive pay for its workers, as well as an elimination of most of the restrictive work practices. In addition, USX agreed to Phillips' and Rich's demand that they, along with several of their employees, begin receiving pension payments immediately. 82


80. Id.
81. Id.
82. Id.
83. Id. at 1573 (citing 29 U.S.C. § 186(a)(4) and (b) (1978 & Supp. 1993)).
charged USX with failing to notify the pension plan participants of the modification of their pension plan in violation of ERISA, 29 U.S.C. § 1131.84

After the criminal trial in March 1990, the district court granted the government's motion to dismiss the mail fraud charges against Phillips. The case went to the jury on all of the remaining charges, and but for an acquittal for Rich on the mail fraud counts, they returned verdicts of guilty on all remaining counts against all three defendants. USX, Phillips, and Rich then appealed their convictions to the Eleventh Circuit.85

Although numerous claims of error were raised on appeal, the Eleventh Circuit only addressed three issues: (1) defendants argued that the court's jury instructions on an exception to the prohibitions of the Taft-Hartley Act precluded a "legitimate defense" argument that payment by an employer to his former employee was not prohibited by the Act, so long as the payment was made "by reason of" the employee's service and was not a bribe; (2) defendants argued that the district court's charge to the jury on the criminal enforcement provisions of the Taft-Hartley Act allowed the jury to convict on Counts II through V without finding the requisite level of criminal intent; and (3) defendants argued that the court's jury instructions on the issue of criminal enforcement provisions of ERISA also allowed them to convict on Count XVI without a finding of the appropriate requisite of criminal intent.86

After reviewing the facts and law in this case thoroughly, the court of appeals upheld the jury's convictions in their entirety.87

First, the court found that section 186(a) of the Taft-Hartley Act did prohibit employers and industries affecting interstate commerce from paying anything of value to representatives of their employees or union officials.88 The court also noted that section 186(b) prohibited representatives and union officials from receiving such payments.89 The defendants argued, however, that section 186(c)(1) contained an exception to the broad prohibitions of section 186(a) and (b). Specifically, section 186(c)(1) provided that the prohibitions outlined above were not applicable "in respect to any money . . . payable by an employer to . . . any officer or employee of a labor organization, who was also an employee or former employee of such employer, as compensation for, or

84. Id. at 1572.
85. Id. at 1573.
86. Id.
87. Id. at 1567.
88. Id. at 1574.
89. Id.
by reason of, his service as an employee of such employer." Thus, defendants contended that the pension payments USX made to Phillips and Rich qualified for this exception because the payments were given "by reason of" their services as former employees.

The court of appeals, however, disagreed with the defendants' interpretation of section 186(c)(1), as well as their interpretation of the trial court's jury instructions. Specifically, the court of appeals held that all payments given by an employer to a former employee must be for past services actually rendered by them while they were employed by the employer in order for any monies they received to qualify for the exception under section 186(c)(1). Since neither Rich nor Phillips were actually employees of USX at the time they began receiving their pension monies, their payments would only fall under the Section 186(c)(1) exception if their right to such payments vested fully before their leave of absence began. The facts clearly revealed that Rich and Phillips did not have a right to the pension payments at the time they ceased working for USX Corporation and, thus, these monies did not fall under the exception as provided for under Section 186(c)(1).

Second, the court of appeals addressed the defendants' claim that the district court misinterpreted the term "willfully" as used both in 29 U.S.C. § 186(d)(2) and in 29 U.S.C. § 1131, the applicable criminal enforcement provisions of the Taft-Hartley Act and ERISA. In their analysis, the Eleventh Circuit recognized that there was a split of opinion between the circuit courts on the correct interpretation of "willful" under these Acts. Some circuits required a showing of a specific intent to violate the provisions outlined above, whereas other circuits required only a finding of a general intent to violate the statutes. After reviewing the legislative history involved in the criminal enforcement provisions of both the Taft-Hartley Act and ERISA, the Eleventh Circuit held that the appropriate mens rea needed to show "willfulness" was only that of general intent, not specific intent, to commit a crime.

90. Id.
91. Id. at 1574-75.
92. Id. at 1575.
93. Id.
94. Id. at 1575-76.
95. Id. at 1576.
96. Id. at 1577-78.
97. Id. (citations omitted).
98. Id. at 1582-84.
2. Cox v. Administrator, United States Steel & Carnegie. In the civil case involving the same facts cited above, the union members brought an action against the Union and USX based upon Rich's and Phillips' agreement to concede certain issues in the collective bargaining agreement in exchange for pension payments directly to them from USX. The union members' complaint asserted five claims against USX, the Pension Fund, and the Union. Count I alleged that the defendants violated the Racketeer Influenced and Corrupt Organizations Act ("RICO"). Count II alleged that the Union breached its duty of fair representation and that USX breached its contractual duties in violation of Section 301 of the Labor Management Relations Act ("LMRA"). Count III alleged that USX and the Union committed an unfair labor practice in violation of the National Labor Relations Act ("NLRA") by failing to negotiate in good faith. Count IV alleged that defendants violated their fiduciary duties under the Employee Retirement Income Security Act ("ERISA") by failing to notify the plaintiffs or the Department of Labor of the change of the company's leave policy. Count V alleged violations of 29 U.S.C.A. § 186 and sought an order enjoining the defendants from future violations.

The district court granted the defendants' motion for summary judgment against USX and the Union on the plaintiffs' claims under RICO and the LMRA, section 301. The district court also dismissed the unfair labor practice claim on the ground that the National Labor Relations Board had exclusive jurisdiction over such claims. The district court then granted the defendants' motion for summary judgment on the plaintiffs' ERISA claim against the Union and entered final judgment on those claims as to which summary judgment was granted, with the exception of the claim against the Union for violation of the duty of fair representation under section 310 of the LMRA. In appealing the district court's final judgment, the plaintiffs abandoned the ERISA claim against USX for breach of contract. The Eleventh Circuit reversed the district court's grant of summary judgment on the RICO claim against

99. 17 F.3d at 1392.
101. Id. (citing 29 U.S.C. § 185(a) (1988)).
104. Id. at 1394-95.
105. Id.
106. Id.
USX and the Union, as well as the court's grant of summary judgment on the plaintiffs' section 301 claim against USX for breach of contract.\textsuperscript{107}

Specifically, after reviewing the facts of the case in detail, the Eleventh Circuit found that, contrary to the district court's opinion, the plaintiffs were able to create a genuine issue of material fact about the existence of a violation of the RICO Act against the negotiators, Phillips and Rich.\textsuperscript{108} The court then turned their attention to whether the Union itself could be held liable under RICO for acts of its representatives.\textsuperscript{109} The Union argued that because it was "the victim of the racketeering activity of its negotiators," it could not be held liable for their violations.\textsuperscript{110} The plaintiffs, however, contended that the Union could be liable under RICO under several theories. First, the plaintiffs contended that the Union was liable under the principle of respondeat superior. In addition, they contended that the Union was liable under the principle of respondeat superior. In addition, they contended that the Union was liable under RICO for violation of a fiduciary duty, ratification of their agents' RICO violations, aiding and abetting liability under RICO, and co-conspirators' liability under RICO.\textsuperscript{111} The court addressed each theory separately and, interestingly enough, found that the Union could be responsible for a RICO violation of their agents under several theories.\textsuperscript{112}

\textit{a. Liability of "Victim" Enterprise Under RICO.} The Union argued that Congress did not intend RICO liability to attach to legitimate enterprises when they were used as "passive instruments for the racketeering activities of employees or others."\textsuperscript{113} Specifically, the Union contended that liability attached only to the wrongdoing individual, not the enterprise itself. The Eleventh Circuit stated that the Union's main authority for the proposition that an enterprise was not liable under RICO was the Seventh Circuit case of \textit{Haroco, Inc. v. American National Bank & Trust Co.}\textsuperscript{114} In \textit{Haroco}, the Seventh Circuit found that a corporation could only be liable under RICO when it was actually the direct or indirect beneficiary of the pattern of racketeering activity, but if it was merely the victim, or a "passive instrument of racketeering," then liability would not attach.\textsuperscript{115}

\textsuperscript{107} \textit{Id.} at 1423.
\textsuperscript{108} \textit{Id.} at 1396-1403.
\textsuperscript{109} \textit{Id.} at 1403.
\textsuperscript{110} \textit{Id.} at 1404.
\textsuperscript{111} \textit{Id.} at 1403.
\textsuperscript{112} \textit{Id.}
\textsuperscript{113} \textit{Id.} at 1403-04.
\textsuperscript{114} \textit{Id.} at 1404 (citing 747 F.2d 384 (7th Cir. 1984), \textit{aff'd}, 473 U.S. 606 (1985)).
\textsuperscript{115} \textit{Id.} (citing \textit{Haroco}, 747 F.2d at 402).
After reviewing the reasoning behind Haroco, as well as others, the Eleventh Circuit found that the RICO exception to the application of vicarious liability was truly a very narrow exception and had been created solely to preserve the "nonidentity rule." Therefore, it actually protected only employers who were also the RICO enterprise for purposes of section 1962(c). The court went on to hold, however, that they: "Squarely rejected the nonidentity rule, observing that liability for the acts of one's agent 'was simply a reality to be faced by corporate entities.' With the advantages of incorporation must come the appendant responsibilities.' Consequently, the Eleventh Circuit found that the "victim" enterprise theory was inapplicable in this circuit and refused to adopt the nonidentity rule.

b. Respondeat Superior Liability Under RICO. The Eleventh Circuit also held that the Union could be liable under the RICO Act based upon the theory of respondeat superior. Specifically, the court noted that the elements of respondeat superior for RICO violations were laid out in their previous opinion in Quick v. Peoples Bank of Cullman County. In Quick, the court outlined the principles for general agency liability and how they should be applied in determining whether a prima facie case of vicarious liability under RICO had been made out. The court in Quick held that a corporation could be vicariously liable when the wrongful acts of the employee were: (1) related to and committed within the course of employment; (2) committed in furtherance of the business of the corporation; and (3) authorized or subsequently acquiesced in by the corporation.

In the present case, the Eleventh Circuit found that, because Rich and Phillips had made the demand for personal pension while performing their duties as Union representatives, a reasonable jury could conclude that their actions were committed in the course of their employment. Moreover, since the request for the personal pension benefits related to their "function of negotiating on behalf of the Union," the court of appeals held that a reasonable jury could conclude their actions were committed in furtherance of the business of the Union and, therefore, the

116. Id. at 1406.
117. Id.
118. Id.
119. Id. (citations omitted).
120. Id.
121. Id. at 1408.
122. Id. at 1406 (citing 993 F.2d 793 (11th Cir. 1993)).
123. Id.
124. 993 F.2d at 797 (citations omitted).
125. 17 F.3d at 1407.
plaintiffs had satisfied the second element needed for establishing respondeat superior liability. 126 The Eleventh Circuit found that the Union's failure to investigate the allegations against their agents, their failure to discipline them in a timely manner, along with their attempt to cover up the wrongdoing, could lead a reasonable jury to find that the Union had "acquiesced in their misdeeds." 127 Consequently, the Eleventh Circuit reversed the district court's grant of summary judgment on this issue and allowed the plaintiffs to proceed with their claim of liability against the Union based upon the theory of respondeat superior. 128

c. RICO Liability for Violation of Fiduciary Duty. In contrast, the court of appeals held that the Union could not be liable for the acts of its representatives under the theory that it had violated a fiduciary duty to its members. 129 The court reasoned that a breach of fiduciary duty was not, in and of itself, the same as a racketeering activity needed in order to state a claim under RICO. 130 Therefore, the plaintiffs' fiduciary duty theory of liability was subject to defendant's summary judgment motion, and the Eleventh Circuit upheld the district court's ruling on this issue. 131

d. Liability for Ratification of Agents' RICO Violations. The plaintiffs also contended that the Union was liable for the agents' RICO violations because it had failed to investigate or discipline the agents in a timely manner and that it also actually tried to conceal the pensions that the agents had received. These actions on the part of the Union the plaintiffs contended constituted ratification. 132 The Union argued that it could not be liable for the acts of its negotiators under the theory of ratification unless they had "full knowledge" of the bribery scheme, and since there was no evidence that they did, liability under this theory was not appropriate. 133

The Eleventh Circuit held, however, that a "principle can ratify the unauthorized act of an agent purportedly done on behalf of the principle either expressly or by implication through conduct that is inconsistent with an intention to repudiate the unauthorized act." 134 Thus, proof

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126. Id.
127. Id.
128. Id. at 1407-08.
129. Id. at 1409.
130. Id. at 1408.
131. Id. at 1408-09.
132. Id. at 1409.
133. Id.
134. Id. (citing McDonald v. Hamilton Elec., Inc., 666 F.2d 509, 514 (11th Cir.), cert denied, 459 U.S. 879 (1982)).
of ratification could be based upon circumstantial evidence, and there was substantial circumstantial evidence that the Union did ratify Phillips' and Rich's acts in this case. Therefore, the Eleventh Circuit reversed the district court's grant of summary judgment on this issue and allowed the plaintiff to proceed on this theory.\footnote{135}

e. Aiding and Abetting Liability Under RICO. Based on this theory, the plaintiffs contended that the Union was liable under RICO for aiding and abetting the violations that Rich and Phillips committed, either because they failed to take any action against them or because they actively and affirmatively attempted to conceal their misdeeds.\footnote{136} The district court held that the Union could not be liable under this theory because there must have been evidence that the Union committed some overt act, not a mere acquiescence in the misdeeds.\footnote{137}

The court of appeals, however, reversed this ruling of the district court and clearly stated that to establish civil liability for aiding and abetting under the RICO Act, the plaintiffs must only show: (1) that the defendants were generally aware of the defendants' role as part of an overall improper activity at the time when he provided the assistance and (2) that the defendants knowingly and substantially assisted the principle violation.\footnote{138} Again, the court reiterated that the defendants' knowledge on this issue could be shown by circumstantial evidence or by only reckless conduct.\footnote{139} Given the facts of this case, the Eleventh Circuit found that there was evidence to support a jury finding that the Union "knowingly tolerated" the agents' actions and, therefore, the Union could be liable under RICO for actually aiding and abetting the actions of its agents.\footnote{140}

f. Co-Conspirators Liability Under RICO. The plaintiffs argued that the Union was liable for violating 18 U.S.C. § 1962(d), which made it a crime for any person to "conspire to violate any of the" RICO provisions.\footnote{141} The district court found that if the plaintiffs were able to show that the Union had concealed the racketeering activities, then a jury could reasonably infer that the Union had joined in the conspiracy.\footnote{142} The Eleventh Circuit agreed with this analysis and stated that the Union could be liable under this co-conspirator theory as well.\footnote{143}
III. THE FAIR LABOR STANDARDS ACT

A. Statute of Limitations and the Continuing Violation Doctrine

In Knight v. Columbus, plaintiffs brought suit against the city's fire department alleging various violations of the Fair Labor Standards Act. The plaintiffs consisted of former, present, and future nonofficer and officer employees with the fire department of Columbus, Georgia.

In relation to the nonofficer plaintiffs, the facts revealed that the city had always treated them as being employees covered by the overtime provisions of the FLSA. The nonofficers alleged, however, that on July 1, 1987, in order to evade the financial effects of the FLSA, the city denied a 7.5 percent pay increase to the nonofficers, yet granted such a pay increase to all other city public safety employees not eligible for overtime. The officer plaintiffs, on the other hand, alleged that the city had misclassified them as exempt executive or administrative employees and had, therefore, failed to pay them the overtime they were owed. The city moved for summary judgment arguing, among other things, that the nonofficer and officer claims were barred by the statute of limitations. The district court agreed with the defendants and granted summary judgment against both groups of plaintiffs' claims in their entirety. Both groups of plaintiffs appealed, contending that their claims were timely filed under the "continuing violation" doctrine.

In relation to the officer plaintiffs, the city argued before the district court that first, the officer plaintiffs were exempt from the FLSA overtime requirements since the FLSA exempts from its overtime provisions "any employee employed in a bona fide executive, administrative, or profession capacity..." In the alternative, the city argued that even if the officer plaintiffs were not exempt, their claim was untimely because the city adopted this classification system more than three years ago. The FLSA states that actions are "forever barred" unless "commenc[ed] within two years after the cause of the action

144. 19 F.3d 579 (11th Cir.), cert. denied, 115 S. Ct. 318 (1994).
145. 19 F.3d at 580.
146. Id.
147. Id.
148. Id.
149. Id.
151. 19 F.3d at 581.
accrue[s].”\textsuperscript{152} This statute of limitations, however, is extended to three years if the violation of the FLSA is found to be “willful.”\textsuperscript{153}

After reviewing the case law on the issue of the FLSA statute of limitations, the court of appeals reversed the district court’s finding that the officer plaintiffs’ claims were time barred.\textsuperscript{154} Specifically, the court noted that each failure to pay overtime to the officer plaintiffs constituted a new violation of the FLSA.\textsuperscript{155} The theory upon which the officer plaintiffs relied to demonstrate that their claims were not time barred was called the “continuing violation theory.” The court of appeals, however, noted that this term was somewhat of a misnomer in the present circumstances.\textsuperscript{156} The court stated that it was not so much that the city refused to change their policy or had one continuous violation that enabled the plaintiffs to continue to state a claim.\textsuperscript{157} What was determinative for statute of limitation purposes was that the officer plaintiffs were able to show that they had “worked unpaid overtime hours during the statute of limitations window.”\textsuperscript{158}

Moreover, because each violation gave rise to a new cause of action, the court stated that each failure to pay overtime began a new statute of limitations as to that particular event.\textsuperscript{159} Thus, the Eleventh Circuit found that the officer plaintiffs had a nonbarred cause of action with respect to any claim that accrued within two years, or three years if the city’s violations were found to be willful, from the date the complaint was actually filed with the court.\textsuperscript{160} The plaintiffs, however, would be allowed to recover only overtime hours worked dating back to the beginning of the statute of limitations period, even though the original misclassification occurred outside of this statute of limitations period.\textsuperscript{161}

In relation to the nonofficer plaintiffs, however, the Eleventh Circuit upheld the district court’s grant of summary judgment to defendants.\textsuperscript{162} The court found in this instance that the nonofficers had not suffered from repeated violations of the FLSA.\textsuperscript{163} Instead, the non-

\textsuperscript{152} Id. (citing 29 U.S.C.A. § 255(a) (1985)).

\textsuperscript{153} Id.

\textsuperscript{154} Id.

\textsuperscript{155} Id. (citations omitted).

\textsuperscript{156} Id. at 582.

\textsuperscript{157} Id. at 580-81.

\textsuperscript{158} Id. at 582.

\textsuperscript{159} Id.

\textsuperscript{160} Id.

\textsuperscript{161} Id. (citations omitted).

\textsuperscript{162} Id. at 584.

\textsuperscript{163} Id.
officers alleged that on July 1, 1987 the city failed to grant them a raise as they granted to overtime-exempt city employees. In this case, the claim of discrimination was premised upon a “discrete act,” and at the time of this act, the statute of limitations began to run upon the non-officer plaintiffs. Since the nonofficer plaintiffs failed to timely file their complaint based upon this one act on July 1, 1987, their claims were time-barred entirely.\(^{164}\)

B. Jurisdiction and the “Window of Correction” Provision Under the FLSA

The case of Lee v. Flightsafety Services Corp.\(^{165}\) contained several interesting issues on appeal. The plaintiffs in this case consisted of four types of employees: (1) firefighters, (2) engineers, (3) fire captains, and (4) assistant chiefs, all of which worked at the Kings Bay Naval Submarine Base in Camden County, Georgia. The firefighters and engineers were paid based upon an hourly wage and worked under a collective bargaining agreement between the contractor and their local union.\(^{166}\) The union represented all union employees at Kings Bay, not just the firefighters and the engineers. The firefighters and engineers, however, worked twenty-four-hour shifts. They received their full hourly wage for the first eight hours and time and a half for the second eight-hour period. During the third eight-hour period, however, they were free to do what they wanted, including sleeping in the facilities that were provided as long as they remained on the premises if called to duty.\(^{167}\)

The captains and assistant chiefs worked three twenty-four-hour shifts per week. These individuals, however, did not belong to a union. On November 25, 1991, the fire department published a memorandum stating that salary to firemen working less than three twenty-four-hour shifts per week would have leave time charged against them. This policy was rescinded approximately one year later after learning that the FLSA and its regulations prohibited charging salaried employees leave time when they worked less than an entire shift. The employer then reimbursed each captain and assistant chief those wages which had been reduced because of the incorrect policy of November 1991.\(^{168}\)

The firefighters and engineers filed suit arguing that their FLSA right to overtime pay had been improperly bargained away by their union when the union conceded that they would not receive overtime pay

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164. Id. at 584-85.
165. 20 F.3d 428 (11th Cir. 1994).
166. Id. at 430.
167. Id.
168. Id. at 430-31.
during the period of time they were in their twenty-four-hour shift entitled “sleep time.” The captains and assistant chiefs filed suit alleging that the defendant had violated the Fair Labor Standards Act when they issued the erroneous policy charging leave time against them in November 1991. The district court granted summary judgment to the defendants on the firefighters' and engineers' claims entirely. The defendants had also argued that they were entitled to summary judgment against all plaintiffs because the court lacked subject matter jurisdiction. The district court disagreed with the defendants’ argument on the issue of jurisdiction and denied their motion to dismiss the case entirely. In addition, however, the plaintiffs had requested summary judgment on the claims for the captains and assistant chiefs, but the district court denied their request as well.

1. Subject Matter Jurisdiction. As noted above, the defendants moved for dismissal or, in the alternative, summary judgment against all plaintiffs claiming that: (1) the Service Contract Act (“SCA”) applied to the employment relation at hand; (2) the plaintiffs lacked standing under the SCA; and (3) the plaintiffs could not file a claim under the FLSA in this matter. The defendants contended that because the firefighters and engineers had been hourly employees of government contractors who were, in turn, subject to the SCA, the SCA alone, and not the FLSA, controlled any wage-related claim. After reviewing the case law on this issue, the court of appeals found that this court did have proper subject matter jurisdiction and that the FLSA was the appropriate avenue for the plaintiffs to pursue. The court noted that “Congress intended that the FLSA overlap with other federal legislation.” Moreover, the FLSA was not mutually exclusive from other statutes and the provisions of it, along with the SCA, could apply at the same time as long as they did not conflict. The court then held that since there was no conflict with the SCA, and the FLSA

169. Id. at 431-32.
170. Id. at 432-33.
171. Id. at 433.
172. Id. at 431-33.
174. 20 F.3d at 431.
175. Id.
176. Id.
177. Id. (citations omitted).
178. Id.
in this case, the plaintiffs were perfectly within their rights to pursue any remedies they might have under the FLSA.\textsuperscript{179}

2. Bargained Away Overtime Pay. In relation to the claim of the firefighters and engineers, the defendants argued that these employees were not entitled to overtime pay during their “sleep time” because in the union contract with the company, the firefighters and engineers had agreed not to receive overtime pay during this eight-hour shift. The firefighters and engineers, however, contended that their FLSA right to overtime pay had been improperly bargained away by the union contract.\textsuperscript{180}

The court noted that, in general, FLSA rights could not be abridged by contract or otherwise waived because this would “nullify the purposes” of the FLSA statute itself.\textsuperscript{181} In the present case, however, the Eleventh Circuit found that no statutory right of the firefighters and engineers had been abridged or waived by the contract.\textsuperscript{182} The Code of Federal Regulation provided:

Where an employee is required to be on duty for 24 hours or more, the employer and the employee may agree to exclude bona fide meal periods and a bona fide regularly scheduled sleep period of not more than eight hours from the hours worked, provided adequate sleeping facilities are furnished by the employer and the employee can usually enjoy an uninterrupted night’s sleep.\textsuperscript{183}

Since the above regulation specifically allowed for this type of arrangement that the union had entered into with the employer, there had been no attempt to waive a statutory right. Consequently, the court of appeals found that the district court’s grant of summary judgment to the defendants on this issue was proper.\textsuperscript{184}

3. Window of Correction. Plaintiffs appealed the district court’s denial of their motion for summary judgment on the claims of the captains and assistant chiefs. In denying the plaintiffs’ motion, the district court had found that the defendants had not properly compensated the captains and the assistant chiefs but that the defendants had adequately addressed the issue through the “window of correction”

\textsuperscript{179} Id.
\textsuperscript{180} Id. at 431-32.
\textsuperscript{181} Id. at 432 (citations omitted).
\textsuperscript{182} Id.
\textsuperscript{183} Id. (citing 29 C.F.R. § 785.22(a)).
\textsuperscript{184} Id.
allowed under 29 C.F.R. § 541.118(a)(6). This regulation in pertinent part provided:

Where deductions are generally made when there is no work available, it indicates that there was no intention to pay the employee on a salary basis. In such a case the exemption would not be applicable to him during the entire period when such deductions were being made. On the other hand, where a deduction not permitted by these interpretations is inadvertent, or is made for reasons other than lack of work, the exemption will not be considered to have been lost if the employer reimburses the employee for such deduction and promises to comply in the future.

The plaintiffs argued that this particular language meant that the window of correction was available only if the error was inadvertent. The Eleventh Circuit emphasized, however, the language in the regulation stating “or is made for reasons other than lack of work.” The court reasoned that this additional language in the statute clearly showed that the window of opportunity was unavailable only if the deduction was inadvertent. Clearly, under either circumstance noted above in the regulation, the window of correction would have been available for the defendants.

IV. OSHA

A. Unconstitutionally Vague Regulations

In Georgia Pacific Corp. v. Occupational Safety & Health Review Commission, the Secretary of Labor brought an action to enforce the Occupational Safety and Health Administration’s citation against an employer for alleged violations of a standard relating to the operation of a forklift. The administrative law judge rejected the employer’s argument that the standard was unenforceably vague, but concluded the company had not violated the standard and vacated the citation. The Secretary of Labor then appealed to the Occupational Safety and Health Review Commission, which found that the employer had violated the standard and assessed a penalty. At that time, the employer

185. Id. at 433.
186. Id. (citing 29 C.F.R. § 541.118(a)(6)).
187. Id.
188. Id.
189. 25 F.3d 999 (11th Cir. 1994).
190. Id. at 1001.
appealed the Occupational Safety and Health Review Commission's award to the court of appeals.\textsuperscript{191}

The facts revealed that a fork lift being operated by Donald Garrett, an employee of Georgia Pacific Corporation, was traveling in a forward direction carrying a load of plywood from a press to a stacking area in the plant. The load Garrett was carrying was approximately sixty inches high, and as Garrett turned into the intersection of the press and rail-to-stacking aisles, the forklift struck and killed another Georgia Pacific employee who was squatting down painting a column.\textsuperscript{192} The Secretary of Labor then investigated the situation and issued a citation to Georgia Pacific relying upon the standard involving powered industrial trucks. Specifically, this standard stated: "[While traveling] the driver shall be required to slow down and sound the horn at cross aisles and other locations where vision is obstructed. If the load being carried obstructs forward view, the driver shall be required to travel with the load trailing."\textsuperscript{193} The Secretary found that Georgia Pacific had violated this standard and that the operator should have been traveling in reverse with his load trailing.\textsuperscript{194} After Georgia Pacific contested the citation, the administrative law judge found that the words "obstructs forward view" as used in the standard meant that the operator did not have a clear view of the path of travel, but this only applied when the operator could not see any part of a pedestrian walking or standing in an upright position.\textsuperscript{195} Since this particular individual was killed in a squatting position, the administrative law judge held that Georgia Pacific had not violated this standard.\textsuperscript{196}

On appeal, the Commission interpreted the phrase "obstructs forward view" as meaning any obstruction whatsoever, whether the individual was in an upright position or a squatting position.\textsuperscript{197} The Commission then concluded that the Secretary had proven that the operator's view was obstructed under the conditions present at the Georgia Pacific plant; therefore, the citation was reinstated along with a civil penalty.\textsuperscript{198}

The Eleventh Circuit, however, reversed the Commission's award finding: (1) the Secretary's definition of the standard was unreasonable and (2) the standard itself was unconstitutionally vague.\textsuperscript{199} Specifical-

\textsuperscript{191} \textit{Id.} at 1001.
\textsuperscript{192} \textit{Id.} at 1002.
\textsuperscript{193} \textit{Id.} at 1001. 29 C.F.R. § 1910.178(n)(4).
\textsuperscript{194} 25 F.3d at 1002.
\textsuperscript{195} \textit{Id.} at 1003.
\textsuperscript{196} \textit{Id.}
\textsuperscript{197} \textit{Id.}
\textsuperscript{198} \textit{Id.}
\textsuperscript{199} \textit{Id.} at 1004-06.
ly, the Eleventh Circuit acknowledged that usually an agency's construction of its own regulation was entitled to substantial deference. The court found that the Secretary's interpretation of the regulation in this case, however, was unreasonable because such strict interpretations would require all forklifts, regardless of the size of the load carried or the degree of obstruction, to travel with the load trailing, and the facts were clear that sometimes this mode of transportation was just as unsafe as traveling with the view obstructed. Moreover, the court noted that the Secretary's interpretation was for all purposes impractical and could end up banning the use of forklifts altogether.

In addition, the Eleventh Circuit held that the actual litigation which ensued after this citation demonstrated that the regulation itself was extremely vague.

A statute or regulation is considered unconstitutionally vague under the due process clause of the 5th or 14th Amendments if it "forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application."

Interestingly enough, the court of appeals made special mention of the fact that when a regulation such as this was so vague, it would be best for the Secretary to remedy the situation himself by promulgating a clear regulation rather than "forcing the judiciary to press the limits of judicial construction." Based upon the foregoing, the Eleventh Circuit vacated the citation and encouraged the Secretary of Labor to promulgate a reasonable and more specific standard on the operation of forklifts.

B. Willful Violations

Reich v. Trinity Industries, Inc. was one of the more noteworthy decisions concerning OSHA regulations in the survey year of 1994. In this case, the Secretary of Labor brought an enforcement action against Trinity, the employer, for violating 29 U.S.C. §§ 654(a) and 655 which required that employers establish and maintain a hearing conservation

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200. Id. at 1004 (citations omitted).
201. Id. at 1004-05.
202. Id. at 1005.
203. Id. at 1005-06.
204. Id. at 1005 (citing Connally v. General Constr. Co., 269 U.S. 385, 391 (1926); Donovan v. Royal Logging Co., 645 F.2d 822, 831 (9th. Cir. 1981)).
205. Id. at 1006 (citations omitted).
206. Id.
207. 16 F.3d 1149 (11th Cir. 1994).
program when information indicated that the noise exposure level equaled or exceeded an eight hour time-weighted average sound level of 85 decibels.\textsuperscript{208} Testimony at trial clearly indicated that Trinity was aware that their noise levels exceeded 85 decibels but decided not to provide monitoring as required. Trinity admitted that they were aware of the OSHA regulations under Section 1910.95, but instead of implementing these procedures, the company decided that they would provide their employees with hearing protection devices which they believed to be a superior program to the hearing conservation program as outlined in the OSHA regulations.\textsuperscript{209}

When the Secretary brought this enforcement action, the administrative law judge determined that Trinity had not "willfully" failed to comply with this OSHA regulation. The administrative law judge then labeled the citation as being "nonserious."\textsuperscript{210} The Secretary then appealed the administrative law judge's decision to the Occupational Safety and Health Review Commission. The Commission rejected the Secretary's determination that the citation was willful and agreed with the administrative law judge that Trinity's violation was not serious based upon its finding that Trinity acted in "good faith," and the employees were "largely protected." After the Commission's ruling, the Secretary filed this appeal, and the Eleventh Circuit reversed the Commission's findings entirely.\textsuperscript{211}

The court of appeals specifically held that whether or not an employer acted in good faith in refusing to cooperate with an OSHA requirement was not the determining factor as to whether or not they had "willfully" not complied with the statute.\textsuperscript{212} Specifically, the Eleventh Circuit noted that the language of section 654 was mandatory when it stated that employers "shall comply with Occupational Safety and Health Standards promulgated under this chapter."\textsuperscript{213} Thus, the employer's good faith belief that its alternative program was superior to OSHA's requirement had no bearing on whether or not the employer had willfully violated Section 654.\textsuperscript{214}

The court went on to state that if Trinity had truly believed their program was superior to that of the OSHA regulation, they could have requested a variance of exemption from OSHA's mandatory requirements.
as allowed by 29 U.S.C. § 655(d).^{215} The facts revealed, however, that Trinity did not apply for a variance until August 15, 1988, almost two months after the Secretary issued the citation. Trinity contended that the variance was requested because OSHA compliance was infeasible.^{216} The Eleventh Circuit held, however, that the burden of showing infeasibility was placed upon the employer, and in the present case, Trinity had not met this burden.\textsuperscript{217} Thus, the court of appeals found that Trinity had "willfully" failed to comply with the OSHA regulations concerning hearing conservation programs and, thus, assessed a penalty against Trinity for their violation of the Act.\textsuperscript{218}

V. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

The Employee Retirement Income Security Act ("ERISA") was the subject of several Eleventh Circuit decisions this past survey year. Quite frankly, the litigation in this area has become so prevalent over the past few years that a survey article addressing solely ERISA issues might be of benefit in the future. While the cases this past survey year covered various areas of the Act, this article addresses only a few of the cases which addressed issues of first impression.

A. ERISA Pre-Emption

As in years past, many of the ERISA claims in 1994 dealt with the issue of pre-emption over state law claims. In \textit{Smith v. Jefferson Pilot Life Insurance Co.},\textsuperscript{219} plaintiff brought suit against Jefferson Pilot Life Insurance Company seeking damages for tortious termination of their major medical health coverage. Plaintiffs moved for a partial summary judgment contending, among other things, that if the coverage were part of an ERISA plan, the state statute underlying their tort claim escaped preemption through application of the ERISA "savings clause."\textsuperscript{220} The district court granted the plaintiff's motion on this issue, and the defendants appealed to the Eleventh Circuit.\textsuperscript{221}

In addressing the preemption issue in this case, the Eleventh Circuit reiterated the clause in ERISA which provided that ERISA "shall supersede any and all state laws insofar as they may now or hereafter

\begin{footnotesize}
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\item \textsuperscript{215} \textit{Id.}
\item \textsuperscript{216} \textit{Id.}
\item \textsuperscript{217} \textit{Id. at 1155.}
\item \textsuperscript{218} \textit{Id.} (citations omitted).
\item \textsuperscript{219} 14 F.3d 562 (11th Cir.), \textit{cert. denied}, 115 S. Ct. 57 (1994).
\item \textsuperscript{220} 14 F.3d at 564.
\item \textsuperscript{221} \textit{Id.}
\end{itemize}
\end{footnotesize}
relate to any employee benefit plan. The ERISA “savings clause,”
however, allows for “any law of any state which regulates insurance,
banking, or securities,” to be exempt from the original ERISA pre-
emption clause. The plaintiff’s tort claim was based upon a Georgia
insurance regulation which provided that when a policy was cancelled
for failure of the named insured to properly pay premiums, the policy
holder was required to give notice of the termination by delivering or
mailing written notice to the named insured at least ten days prior to
the effective date of the cancellation.

Defendants argued that this Georgia statute was preempted by the
ERISA Act, but the plaintiff in turn contended that the statute regulated
insurance and, thus, escaped pre-emption by operation of the ERISA
savings clause. The Eleventh Circuit noted that the Supreme Court
case of Metropolitan Life Insurance Co. v. Massachusetts set forth
the analysis for determining whether the state law in question was
actually an insurance regulation. First, the state law must regulate
insurance within a common sense view of the word “regulate.” Second,
the court in Metropolitan noted that state law must also regulate the
“business of insurance.” Whether a particular law met the “business
of insurance” test was based upon three factors: (1) whether the state
law had the effect of transferring or spreading a policy holder’s risk, (2)
whether the law impacted an intrical part of the policy relationship
between the insurer and the insured, and (3) whether the law was truly
directed only at entities within the insurance industry.

The court of appeals initially held that the statute in question clearly
regulated insurance within the common sense portion of the test. Then
after reviewing the three prongs for the “business of insurance”
test, the court concluded that the Georgia notice statute was pre-
empted. Specifically, the Eleventh Circuit found that the Georgia
statute did not have the effect of transferring or spreading the policy
holder’s risk. Since it was only a notice requirement, no risk

222. Id. at 568 (citing 29 U.S.C. § 1144(a) (1988)).
223. Id. (citing 29 U.S.C. § 1144(b)(2)(A) (1988)).
224. Id. (citing O.C.G.A. § 33-24-44(d) (Supp. 1995)).
225. Id. at 568-69.
227. 14 F.3d at 569 (citing Metropolitan Life Ins. Co. v. Massachusetts, 471 U.S. 724, 743 (1985)).
228. Id. (citing Metropolitan Life, 471 U.S. at 743).
229. Id.
230. Id.
231. Id. at 570-71.
232. Id. at 569.
spreading was even involved. Moreover, the notice requirement failed the second prong of the "business of insurance" analysis in that the notice requirement did not truly effect the substantive terms of the contract. The court further found, however, that the statute did satisfy the third prong of the "business of insurance" test since it was aimed solely at entities within the insurance industry. Since this statute failed two out of the three prongs, however, the Eleventh Circuit held that the district court had correctly pre-empted the Georgia statute.

In the case of Forbus v. Sears Roebuck & Co., the Eleventh Circuit again addressed whether an employee's state law fraud claims were pre-empted by ERISA. In this case, the plaintiffs were employed by Sears and they were informed that the facility where they worked would be closing in the near future. The plaintiffs expressed their desire to continue employment with Sears, but Sears informed them that they had "no choice but to 'voluntarily' retire." After the plaintiffs elected voluntary retirement, the warehouse where they worked was not closed, and their jobs were in fact filled by younger employees. The plaintiffs brought suit against Sears alleging fraudulent inducement to resign based upon the closing of their facility. One of the defendants' defenses was that ERISA preempted the plaintiffs' state law claim of fraudulent inducement. The district court found that the plaintiffs' claim actually "related to" an ERISA plan and, therefore, granted summary judgment to the defendant on this issue. Plaintiffs appealed to the Eleventh Circuit.

In analyzing this case, the Eleventh Circuit noted that it had long recognized the limits of the ERISA preemption. Specifically, in Sanson v. General Motors Corp., the Eleventh Circuit held: "The mere existence of an ERISA plan [was] not enough for preemption. Rather, the state law in question must make reference to or function with respect to the ERISA plan in order for preemption to occur." In the present case, the court of appeals found that the plaintiffs' claims

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233. *Id.* at 570.
234. *Id.*
235. *Id.* at 571.
237. 30 F.3d at 1403-04.
238. *Id.*
239. *Id.*
240. *Id.* at 1405.
242. 30 F.3d at 1405 (citing Sanson v. General Motors Corp., 966 F.2d 618, 621 (11th Cir. 1992)).
centered on Sears' alleged fraud concerning the elimination of their jobs, not fraud concerning an ERISA plan or any other benefit package. Since plaintiffs did not claim any fraud as it related to the amount of pension benefits received, the court of appeals held that their claim was not preempted by ERISA.

Furthermore, the Eleventh Circuit addressed ERISA preemption in the case of Lordmann Enterprises v. Equicor, Inc. In Lordmann Enterprises, a home health care provider sued the administrator of the Employee Retirement Income Security Act group health insurance plan seeking to recover charges for long-term rehabilitation services that had been provided to the insured. The plaintiff sued in state court asserting two claims: (1) a state law claim based upon alleged fraudulent misrepresentation and (2) a state law claim based upon alleged negligent misrepresentation. The defendants moved the case to federal court asserting a federal question and diversity jurisdiction. After removal, the plaintiff amended his complaint and added two additional federal claims. In relation to the state law claims, however, defendants moved for summary judgment arguing that ERISA preempted the state law claim based upon fraud, as well as the state law claim based upon negligent misrepresentation. The district court granted the defendants' motion for summary judgment on this issue and the plaintiff appealed.

While other issues were also discussed in this case, the court of appeals specifically analyzed whether the plaintiff's state law claims were preempted by the ERISA statute. In relation to the fraud claim, the Eleventh Circuit found that the plaintiff had failed to show it could prevail under Georgia law on this issue; therefore, the court did not even address the pre-emption issue. As to the negligent misrepresentation claim, however, the Eleventh Circuit found that the plaintiff could state a claim based upon negligent misrepresentation; therefore, the court turned to the issue of preemption.

The court noted that both the Fifth and Tenth Circuits had found that state law claims brought by health care providers against plan insurers were too tenuously connected with ERISA plans as to be preempted by

243. Id. at 1406.
244. Id.
246. 32 F.3d at 1531.
247. Id.
248. Id. at 1532.
249. Id.
250. Id.
the Act.\textsuperscript{251} After analyzing the reasoning behind these cases, the Eleventh Circuit noted that Congress enacted ERISA to protect the interest of employees and beneficiaries covered by benefit plans.\textsuperscript{252} Since third-party health care providers were not sought to be protected by congress, the court found that ERISA should not preempt their potential causes of action for misrepresentation.\textsuperscript{253} Thus, the court of appeals held that ERISA did not pre-empt a health care provider’s negligent misrepresentation claim against an insurer under an ERISA plan.\textsuperscript{254} The court reversed the district court’s grant of summary judgment on this issue.\textsuperscript{255}

B. Standard of Review for Arbitrator’s Determination

Another interesting ERISA case addressed by the Eleventh Circuit this survey year was that of Kirwan v. Marriott Corp.\textsuperscript{256} In Kirwan, the plaintiff brought suit against his former employer to recover long-term disability benefits under a disability plan governed by ERISA.\textsuperscript{257} The district court granted summary judgment in favor of the employer, holding that the plan administrator’s denial of benefits was not arbitrary and/or capricious.\textsuperscript{258} The Eleventh Circuit reversed this finding, holding that the district court erred in applying an arbitrary and capricious standard.\textsuperscript{259} The court of appeals found, instead, that the standard of review of an administrator’s determination of benefits was that of a de novo review.\textsuperscript{260} Under a de novo review, the court found there were genuine issues of material fact that precluded summary judgment.\textsuperscript{261}

Specifically, the Eleventh Circuit noted that in Firestone Tire & Rubber Co. v. Brunch,\textsuperscript{262} the United States Supreme Court held that a “denial of benefits challenged under Section 1132(a)(1)(B) [was] to be reviewed under a de novo standard unless the benefit plan gives the

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{251} Id. at 1533 (citing Hospice of Metro Denver, Inc. v. Group Health Ins., 944 F.2d 752 (10th Cir. 1991); Memorial Hosp. Sys. v. Northbrook Life Ins. Co., 804 F.2d 236 (5th Cir. 1990)).
\item \textsuperscript{252} Id.
\item \textsuperscript{253} Id.
\item \textsuperscript{254} Id. at 1534.
\item \textsuperscript{255} Id.
\item \textsuperscript{256} 10 F.3d 784 (11th Cir. 1994).
\item \textsuperscript{257} Id. at 785.
\item \textsuperscript{258} Id.
\item \textsuperscript{259} Id.
\item \textsuperscript{260} Id.
\item \textsuperscript{261} Id.
\item \textsuperscript{262} 489 U.S. 101 (1989).
\end{enumerate}
\end{footnotesize}
administrator or fiduciary discretionary authority to determine eligibility for benefits or to construe the terms of the plan.\(^{263}\) The Eleventh Circuit interpreted *Firestone* as mandating a *de novo* review unless the plan expressly provided the administrator with discretionary authority.\(^{264}\) The court stated that only when there was an express provision of discretion, would the arbitrary and capricious standard apply.\(^{265}\)

The plan at issue in this case provided that the named fiduciary had "authority to control and manage the operation and administration of the plan."\(^{266}\) The plan did not, however, specifically grant the administrator the authority to deny claims, although it did allow the administrator the right to promulgate such rules and regulations as they deem necessary.\(^{267}\) The Eleventh Circuit took a very literal approach in analyzing this particular plan and held that it did not contain express language "unambiguous in its design" to give the administrator discretionary authority to construe the terms of the plan.\(^{268}\) Thus, the court held that a *de novo* review was appropriate, and applying such review, reversed the district court's grant of summary judgment to the defendants.\(^{269}\)

VI. CONCLUSION

As can be seen by a review of the cases cited above, the area of traditional labor law continues to grow and expand by leaps and bounds. As noted above, ERISA claims are becoming more popular and the need for attorney proficiency in this area of practice is crucial. Moreover, a review of this year's NLRB cases demonstrate that the Eleventh Circuit is more than willing to assess criminal, as well as civil penalties, against violators of the Act. As in years past, the Eleventh Circuit will no doubt continue to be a leading circuit in understanding and developing this area of traditional labor law.

\(^{263}\) 10 F.3d at 788 (citing *Firestone*, 489 U.S. at 115).
\(^{264}\) *Id.*
\(^{265}\) *Id.*
\(^{266}\) *Id.*
\(^{267}\) *Id.*
\(^{268}\) *Id.* at 789.
\(^{269}\) *Id.* at 789-90.