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Labor and Employment

by Patrick L. Coyle^{*}
and Alexandra V. Garrison^{**}

Courts within the Eleventh Circuit handed down a number of important opinions affecting labor and employment during the January 1, 2011 to December 31, 2011 survey period.¹ The following is a discussion of those opinions.

I. LABOR MANAGEMENT RELATIONS ACT

In *Jim Walter Resources, Inc. v. United Mine Workers of America*,² the United States Court of Appeals for the Eleventh Circuit reversed a district court order that required an Alabama coal mining company to arbitrate its claim that the United Mine Workers and four local unions engaged in work stoppages in violation of a collective bargaining agreement, remanding the matter to the district court.³ In so doing, the court rejected the expansive approach applied by the Second, Third, and Fourth Circuits (on which the district court had, in part, relied), which required arbitration in cases where a collective bargaining agreement reflected a general commitment to arbitration.⁴ Instead, the court in *Jim Walter Resources* held that parties to a collective bargaining

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1. For an analysis of Eleventh Circuit labor and employment law during the prior survey period, see Patrick L. Coyle & Alexandra V. Garrison, *Labor and Employment, Eleventh Circuit Survey*, 62 MERCER L. REV. 1199 (2011).

2. 663 F.3d 1322 (11th Cir. 2011).

3. *Id.* at 1328.

4. *Id.* at 1327-28.

agreement were only required to arbitrate disputes contemplated by the arbitration clause of the agreement.⁵

Jim Walter Resources, Inc. (Jim Walter) owned and operated coal mining properties and other facilities in Alabama, and its employees were represented by the United Mine Workers and its four local unions (the Union).⁶ According to the collective bargaining agreement between Jim Walter and the Union, the United Mine Workers “may designate memorial periods not exceeding a total of ten (10) days during the term of this Agreement at any mine or operation provided it shall give reasonable notice to the Employer.”⁷ The parties also entered into a Memorandum of Understanding which stated, in part, that, “[t]he memorial period will be designated for legitimate reasons.”⁸

In October 2008, the Union observed two memorial periods away from work at Jim Walter mines.⁹ Jim Walter determined that these work stoppages were not “legitimate” memorial periods as provided in the Memorandum of Understanding.¹⁰ The Union disagreed, contending that the work stoppages were proper memorial periods that allowed its members to attend local hearings conducted by the Department of Labor, Mine Safety and Health Administration. Jim Walter countered that the Union’s proffered explanation for the work stoppages was pretextual, asserting that the actual motivation stemmed from a workplace dispute regarding work scheduling and other conflicts with Jim Walter’s Industrial Relations Supervisor.¹¹ Consequently, Jim Walter filed suit under the Labor Management Relations Act¹² in the United States District Court for the Northern District of Alabama, requesting a declaratory judgment (1) “that the dispute between the parties [regarding the memorial periods] is subject to the [contractual] arbitration procedure”; and (2) an award of damages “for these illegal work stoppages.”¹³ The Union moved for summary judgment, arguing

5. *Id.* at 1328.

6. *Id.* at 1323.

7. *Id.* (internal quotation marks omitted).

8. *Id.* (internal quotation marks omitted).

9. *Id.*

10. *Id.* (internal quotation marks omitted).

11. *Id.*

12. 29 U.S.C. § 185(a) (2006). Section 185 of the Labor Management Relations Act provides in part that “[s]uits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce . . . may be brought in any district court of the United States having jurisdiction of the parties.”

13. *Jim Walter Res., Inc.*, 663 F.3d at 1323 n.4 (second alteration in original) (noting that “[i]t is an irony of the case that Jim Walter depends upon the arbitration provisions of the contract from which to infer a no strike obligation on the part of the Union (i.e., that the employees at Mine No. 7 should have grieved and sought arbitration of their disputes)

that the collective bargaining agreement required Jim Walter to arbitrate its claims rather than pursue a lawsuit in federal court.¹⁴

The collective bargaining agreement between Jim Walter and the Union contained dispute resolution procedures under Article XXVII that provided for the resolution of disputes and claims in accordance with the “machinery provided in the ‘Settlement of Disputes’ Article of this Agreement . . . and by collective bargaining without recourse to the courts.”¹⁵ The “Settlement of Disputes” section of the agreement (Article XXIII) contained an employee grievance procedure requiring the resolution of disputes through arbitration. Other provisions in the agreement discussed arbitration in the context of disputes stemming from employee complaints and relating to the employee-oriented grievance system.¹⁶

The Union argued that Jim Walter’s claim for damages was subject to arbitration because Article XXVII of the collective bargaining agreement reflected the parties’ intent “to resolve all disputes and claims . . . without recourse to the courts.”¹⁷ Jim Walter, however, argued that Article XXIII, governing Settlement of Disputes, applied only to employee-related disputes and claims and that the agreement did not “contemplate or provide for any claim or grievance, or the arbitration of any claim or grievance, asserted by the employer.”¹⁸

In reaching its decision that the collective bargaining agreement’s arbitration provisions did not apply to Jim Walter’s damages claim, the Eleventh Circuit relied on several Supreme Court decisions, precedent from the former Fifth Circuit, and the First, Third, Seventh, and Ninth Circuits.¹⁹ First, the court noted that the 1960 cases known as the *Steelworkers Trilogy*²⁰ established several basic principles governing the application of arbitration provisions contained in collective bargaining agreements, including the principles that “arbitration is a matter of contract and a party cannot be required to submit to arbitration any

while contending that the Company has no reciprocal contractual obligation to arbitrate its claim for damages”).

14. *Id.* at 1323-24; *see also* Memorandum in Support of Defendant’s Motion for Summary Judgment at 19-20, *Jim Walter Res., Inc. v. United Mine Workers of Am. Int’l Union*, No. 7:08-CV-02033 (N.D. Ala. Oct. 5, 2009).

15. *Jim Walter Res., Inc.*, 663 F.3d at 1324.

16. *Id.*

17. *Id.* at 1325 (internal quotation marks omitted).

18. *Id.*

19. *Id.* at 1325-28.

20. *United Steelworkers of Am. v. Am. Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers of Am. v. Warrior & Gulf Navigation Co.*, 363 U.S. 574 (1960); *United Steelworkers of Am. v. Enter. Wheel & Car Corp.*, 363 U.S. 593 (1960).

dispute which he has not agreed so to submit" and if the contract contains an arbitration clause, a presumption of arbitrability exists, and "[d]oubts should be resolved in favor of coverage."²¹

Next, the court analyzed two United States Supreme Court cases, *Atkinson v. Sinclair Refining Co.*²² and *Drake Bakeries, Inc. v. Local 50, American Bakery & Confectionery Workers International*,²³ both of which involved employers that had filed damages lawsuits against the respective unions representing their employees for violating a "no strike clause" in the respective collective bargaining agreements.²⁴ Although both cases involved collective bargaining agreements that contained arbitration clauses, the Supreme Court found that only one of the agreements (the one in *Drake Bakeries*) allowed for arbitration of that particular employer/union dispute.²⁵ What was the difference? In *Drake Bakeries*, the grievance procedure in the bargaining agreement contemplated arbitrability of both union and employer grievances.²⁶ The contract in *Atkinson*, however, contained an employee grievance procedure that was tailored specifically to the adjudication of employee grievances.²⁷ Like the employee grievance procedure in *Atkinson*, the grievance procedure in *Jim Walter* was narrowly tailored to employee grievances.²⁸

The court also considered its own prior precedent and that of four other circuits in concluding that the instant dispute was not arbitrable.²⁹ In *Firestone Tire & Rubber Co. v. International Union of United Rubber, Cork, Linoleum & Plastic Workers of America*³⁰ and *Friedrich v. Local Union No. 780*,³¹ the former Fifth Circuit considered the same issue presented in the instant case (albeit with different agreements). In both cases, the former Fifth Circuit held that the employer was not required to arbitrate a claim for damages resulting from an alleged breach of a "no strike clause" where "the contractual grievance machin-

21. *Jim Walter Res., Inc.*, 663 F.3d at 1325-26 (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83).

22. 370 U.S. 238 (1962).

23. 370 U.S. 254 (1962).

24. *Jim Walter Res., Inc.*, 663 F.3d at 1326.

25. *Id.*

26. *Id.* (citing *Drake*, 370 U.S. at 257).

27. *Id.* (citing *Atkinson*, 370 U.S. at 249).

28. *See id.* at 1328.

29. *Id.* at 1327.

30. 476 F.2d 603 (5th Cir. 1973).

31. 515 F.2d 225 (5th Cir. 1975).

ery is wholly employee oriented.³² Further, the court in *Jim Walter Resources* acknowledged that courts of appeal in the First, Third, Seventh, and Ninth Circuits reached the same result when interpreting collective bargaining agreements containing employee grievance and arbitration clauses.³³

The court observed, however, that other federal circuits had taken a different approach to arbitration clauses in collective bargaining agreements.³⁴ Decisions from the Second, Third, and Fourth Circuits applied a presumption of arbitrability in cases where a collective bargaining agreement expressed a general commitment to arbitrating disputes.³⁵ Those cases concluded that if the parties intended to exclude employer initiated claims or disputes from arbitration, they could have and should have specifically said so in the contracts.³⁶ Indeed, the district court in *Jim Walter Resources* relied on the Second Circuit decision in *ITT World Communications, Inc. v. Communications Workers of America*³⁷ to conclude that Jim Walter must arbitrate its claims.³⁸

ITT World Communications involved contractual provisions very similar to the ones in *Jim Walter Resources*. There, the Second Circuit stressed that "an order to arbitrate a labor contract dispute should not be denied unless it may be said with positive assurance that the arbitration clause is not susceptible of an interpretation that covers the asserted dispute. Doubts should be resolved in favor of coverage."³⁹ Rather than following *ITT World Communications* and affirming the district court's decision, however, the Eleventh Circuit chose to follow the precedent established by the former Fifth Circuit in *Firestone Tire &*

32. *Jim Walter Res., Inc.*, 663 F.3d at 1327 (quoting *Firestone Tire & Rubber Co.*, 476 F.2d at 605 and *Friedrich*, 515 F.2d at 227, 230).

33. *Id.* See *Gen. Truck Drivers, Office, Food & Warehouse Union*, 353 F.3d 668 (9th Cir. 2003); *Lehigh Portland Cement Co. v. Cement, Lime, Gypsum & Allied Workers Div.*, 849 F.2d 820 (3d Cir. 1988); *Latas Libby's Inc. v. United Steelworkers of Am.*, 609 F.2d 25 (1st Cir. 1979); *Faultless Div. v. Local Lodge No. 2040 of Dist. 153 Int'l Ass'n of Machinists & Aerospace Workers*, 513 F.2d 987 (7th Cir. 1975); *G.T. Schjeldahl Co., Packaging Mach. Div. v. Dist. Lodge No. 64*, 393 F.2d 502 (1st Cir. 1968); *Boeing Co. v. Int'l Union*, 370 F.2d 969 (3d Cir. 1967).

34. *Jim Walter Res., Inc.*, 663 F.3d at 1327.

35. *Id.*; see *Domino Sugar Corp. v. Sugar Workers Local Union 392*, 10 F.3d 1064 (4th Cir. 1993); *Eberle Tanning Co. v. Section 63L, FLM Joint Bd.*, 682 F.2d 430 (3d Cir. 1982); *H.K. Porter Co. v. Local 37, United Steelworkers of Am.*, 400 F.2d 691 (4th Cir. 1968).

36. *Jim Walter Res., Inc.*, 663 F.3d at 1327.

37. 422 F.2d 77 (2d Cir. 1970).

38. *Jim Walter Res., Inc.*, 663 F.3d at 1327.

39. *Id.* (quoting *Warrior & Gulf Navigation Co.*, 363 U.S. at 582-83).

Rubber Company and Friedrich.⁴⁰ In fact, in declining to follow the Second Circuit, the court noted that the Supreme Court recently criticized the approach in *ITT World Communications*.⁴¹

In *Jim Walter Resources*, the Eleventh Circuit ultimately concluded that "the employee oriented grievance machinery in the parties' contract qualifies and limits the universe of claims and grievances subject to arbitration, and the language negates the intention that the employer's claim for damages must be submitted to arbitration."⁴² The court reinforced that parties are required to arbitrate disputes only that they specifically contemplated arbitrating in the bargaining agreement. By so holding, the court rejected the more expansive approach applied by the Second, Third, and Fourth Circuits. The holding in *Jim Walter Resources* clarifies the law in the Eleventh Circuit, confirming that in the absence of a provision in a collective bargaining agreement specifically requiring that a claim be arbitrated, it may be litigated. To the extent employers and unions have understood the general provisions that all doubts should be resolved in favor of arbitration and have broadly interpreted the arbitration clauses in their arbitration agreements, *Jim Walter Resources* could furnish a strong argument that the arbitration clause is limited in application to only those types of claims specified in the agreement. More specifically, if the agreement was drafted similarly to the agreement in *Jim Walter Resources*, employers may have the right to commence litigation that employees would be required to arbitrate under the plain terms of the agreement. Given this development in Eleventh Circuit law, parties may wish to include more explicit provisions in their collective bargaining agreements regarding the types of claims that must be arbitrated.

II. FAIR LABOR STANDARDS ACT

Through *Versiglio v. Board of Dental Examiners of Alabama*,⁴³ the Eleventh Circuit demonstrated its deference to state court determina-

40. *Id.* at 1328.

41. *Id.* In *Granite Rock Co. v. International Brotherhood of Teamsters*, the Supreme Court explained as follows:

Although *Warrior & Gulf* contains language that might in isolation be misconstrued as establishing a presumption that labor disputes are arbitrable whenever they are not expressly excluded from an arbitration clause, the opinion elsewhere emphasizes that even in LMRA cases, "courts" must construe arbitration clauses because "a party cannot be required to submit to arbitration any dispute which he has not agreed so to submit."

130 S. Ct. 2847, 2859 (2010).

42. *Jim Walter Res., Inc.*, 663 F.3d 1328.

43. 651 F.3d 1272 (11th Cir. 2011).

tions of state agencies' sovereign immunity, even when an analysis of sovereign immunity under Eleventh Circuit precedent would support the opposite conclusion from the one the state court reached.⁴⁴ The Eleventh Circuit in *Versiglio* relied on a previous state appellate court ruling that Alabama's Board of Dental Examiners (the board) is not an arm of the state, refusing to grant the board sovereign immunity from a federal overtime wage suit brought under the Fair Labor Standards Act (the FLSA).⁴⁵ The court affirmed the district court's decision, finding that the board is not an arm of the state and denying the board immunity from suit.⁴⁶

In her complaint filed in the Northern District of Alabama, the plaintiff Natalie Versiglio claimed that the board, a "quasi-state agency for the State of Alabama," violated the FLSA by failing to pay her overtime for time worked in excess of forty hours per week.⁴⁷ Versiglio alleged that in her role as an administrative assistant, she was typically required to work more than forty hours each week, and that in lieu of overtime pay, she received one hour of "comp time" (paid leave) for each hour worked over forty per week.⁴⁸ Versiglio further contended that she accumulated a significant amount of "comp time" during her employment with the board for which she was not paid upon the termination of her board employment.⁴⁹ The board filed a motion to dismiss for lack of subject matter jurisdiction, arguing that it had sovereign immunity from lawsuits for money damages brought pursuant to section 16(b) of the FLSA.⁵⁰ The district court denied the motion, and the Board appealed.⁵¹

The Eleventh Circuit began its analysis of the board's position that it was immune from damages claims under section 16(b) of the FLSA by acknowledging that "Eleventh Amendment immunity bars suits brought in federal court when the State itself is sued and when an arm of the

44. *Id.* at 1277.

45. *Id.*; Fair Labor Standards Act, 29 U.S.C. §§ 201-219 (2006).

46. *Versiglio*, 651 F.3d at 1277.

47. Complaint of Plaintiff at 1, 4-5, *Versiglio v. Bd. of Dental Examiners of Ala.*, No. 2:10-cv-01850-WMA (N.D. Ala. July 12, 2010).

48. *Id.* at 3.

49. *Id.*

50. Motion to Dismiss of Defendant, *Versiglio v. Bd. of Dental Examiners of Ala.*, No. 2:10-cv-01850-WMA (N.D. Ala. July 12, 2010); see 29 U.S.C. § 216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable to the employee or employees affected in the amount of their unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages.")

51. *Versiglio*, 651 F.3d at 1272.

State is sued.”⁵² However, whether an agency such as the Board of Dental Examiners qualifies as an arm of the state is a federal question determined by a federal standard, and this federal question “can be answered only after considering the provisions of state law that define the agency’s character.”⁵³

The four part test established in *Miccosukee Tribe of Indians v. Florida State Athletic Commission*⁵⁴ guided the court’s analysis regarding whether state law established the board as an arm of the state immune from the FLSA’s requirements. In *Miccosukee*, the Eleventh Circuit explained that,

[i]n determining whether the Eleventh Amendment provides immunity to a particular entity, this court examines the following factors: (1) how state law defines the entity; (2) what degree of control the state maintains over the entity; (3) where the entity derives its funds; and (4) who is responsible for judgments against the entity.⁵⁵

In *Versiglio*, the Eleventh Circuit reviewed each of these factors in turn to determine whether the board was entitled to sovereign immunity.⁵⁶

With respect to the first factor, the court determined that state law defines the board in a manner that suggests it is an arm of the state.⁵⁷ When the Alabama state legislature created the board, it made findings that “the practice of dentistry affects the public health, safety and welfare and should be subject to regulation.”⁵⁸ The court in *Versiglio* noted that these findings demonstrate that the legislature considered the board to be an arm of the state.⁵⁹

Next, the court analyzed the amount of control the state of Alabama maintained over the board.⁶⁰ This factor also weighed in favor of a finding of immunity. Here, the court observed that although the board has some independence, the statutory scheme that created the board allows the state to maintain control over its operations.⁶¹ Section 34-9-

52. *Id.* at 1273 (quoting *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003)).

53. *Id.* (quoting *Regents of the Univ. of Cal. v. Doe*, 519 U.S. 425, 429 n.5 (1997)).

54. 226 F.3d 1226 (11th Cir. 2000).

55. *Versiglio*, 651 F.3d at 1273-74 (quoting *Miccosukee Tribe of Indians*, 226 F.3d at 1231).

56. *Id.* at 1274-76.

57. *Id.* at 1274.

58. *Id.* (internal quotations omitted); see also ALA. CODE § 34-9-2(a), (c) (2012), available at <http://alisondb.legislature.state.al.us/acas/ACASLoginie.asp>.

59. *Versiglio*, 651 F.3d at 1274.

60. *Id.*

61. *Id.*

43 of the Alabama Code⁶² grants the board power to impose certain rules and regulations, but the Code, not the board, outlines the specific powers and duties that the board must exercise.⁶³ In contrast, the board maintains independence in appointing its members; the state does not select the board.⁶⁴ The Code, however, does establish detailed guidelines regarding the selection of board members.⁶⁵

Third, the Court examined the source of the board's funds and its ability to spend those funds at its discretion.⁶⁶ Although the board obtains its funds from licensing fees and can spend its money at its own discretion, the Code explains, "[a]ll money, including license fees, annual renewal license certificate fees, examination fees and any and all other fees and receipts . . . are hereby appropriated to the Board of Dental Examiners to be used as herein provided."⁶⁷ Indeed, the board is able to collect licensing fees because the state grants the board this power through Alabama Code § 34-9-41.⁶⁸ Further, the board does not have complete discretion to spend its funds. Instead, the Code only authorizes the board to

expend such funds as shall be necessary to enforce the provisions of this chapter; to pay salaries, expenses and other costs herein provided; to promote the arts and science of dentistry; and for such other purposes as the board shall consider to be in the best interest of dentistry in this state.⁶⁹

With respect to this factor, the court found that the board's funds were state funds which weighed in favor of finding immunity.⁷⁰

The fourth factor was whether the state would be responsible for a judgment against the agency. The court concluded that if the plaintiff's lawsuit were permitted to continue, the State of Alabama would

62. ALA. CODE § 34-9-43, available at <http://alisondb.legislature.state.al.us/acas/ACASLoginie.asp>.

63. *Versiglio*, 651 F.3d at 1274; see also ALA. CODE § 34-9-43.

64. *Versiglio*, 651 F.3d at 1275.

65. *Id.*; see ALA. CODE § 34-9-40, available at <http://alisondb.legislature.state.al.us/acas/ACASLoginie.asp>.

66. *Versiglio*, 651 F.3d at 1275.

67. *Id.* (internal quotation marks omitted); ALA. CODE § 34-9-41, available at <http://alisondb.legislature.state.al.us/acas/ACASLoginie.asp>.

68. *Versiglio*, 651 F.3d at 1275; see ALA. CODE § 34-9-41.

69. *Versiglio*, 651 F.3d at 1275 (internal quotation marks omitted); ALA. CODE § 34-9-41.

70. *Versiglio*, 651 F.3d at 1275.

ultimately be responsible for any judgment entered against the board.⁷¹ Hence, this factor also weighed in favor of a finding of immunity.⁷²

Although the court concluded that the board presented a potentially viable defense of sovereign immunity under the *Miccosukee* test, the court looked beyond the *Miccosukee* factors in reaching a determination that the board was not immune from suit.⁷³ The Court looked to state court precedent to see if the highest state court in Alabama had determined whether the agency was immune from suit or not.⁷⁴ On April 1, 2010, the Alabama Court of Civil Appeals analyzed the board's status as a state agency in *Wilkinson v. Board of Dental Examiners of Alabama*.⁷⁵ In that case, the board argued that it was immune from suit under Article 1, Section 14 of the Alabama Constitution, which provides that "the State of Alabama shall never be made a defendant in any court of law or equity."⁷⁶ Applying the state's test for entities seeking immunity, the Court of Civil Appeals concluded that the board was not an arm of the state and accordingly was not entitled to immunity under section 14.⁷⁷

The Eleventh Circuit in *Versiglio* observed that finding the board to be entitled to sovereign immunity from suits for overtime pay under the FLSA would require the court to construe Alabama law in a manner that is squarely at odds with the ruling of the highest state court to address the issue.⁷⁸ Further, reaching such a conclusion would create an inconsistency where a state agency would be immune from suit under federal law, but not state law.⁷⁹ Accordingly, the Eleventh Circuit concluded that it would be inappropriate to hold that the board is an arm of the state receiving sovereign immunity.⁸⁰

While the analysis in *Versiglio* primarily focuses on whether the board satisfied the criteria to be considered an arm of the state under *Miccosukee*, the fact that the board would likely have been considered an arm of the state under that test did not matter in this instance because the highest state court in Alabama to address the issue had reached a different conclusion. Accordingly, *Versiglio* amplifies the significance of a state court's ruling that an agency is not protected by sovereign

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 1276-77.

75. No. 2100175, 2011 WL 1205669 (Ala. Civ. App. Apr. 1, 2011).

76. *Id.* at *2 (internal quotation marks omitted); see also ALA. CONST. art. I, § 14.

77. *Wilkinson*, 2011 WL 1205669, at *5.

78. *Versiglio*, 651 F.3d at 1277.

79. *Id.*

80. *Id.*

immunity; if that court is the highest in the state to address the issue, *Versiglio* suggests that the Eleventh Circuit will likely defer to that court's determination in relation to sovereign immunity, even applying that holding to liability under federal statutes. This mitigates the significance of the *Miccosukee* test and increases the potential liability to which the state agency could be exposed to include federal claims (including, but not necessarily limited to claims arising under the FLSA).

In *Clincy v. Galardi South Enterprises*,⁸¹ the United States District Court for the Northern District of Georgia decided whether exotic dancers/entertainers at Club Onyx in Atlanta, Georgia, were independent contractors or employees.⁸² Discovery in the case was bifurcated, with the first phase addressing whether the plaintiffs, former and current entertainers at Onyx, were independent contractors or employees. The plaintiffs filed a motion for partial summary judgment arguing they were employees entitled to receive the minimum wage in accordance with the Fair Labor Standards Act (FLSA). The court ultimately granted partial summary judgment to the entertainers, finding that the application of the economic realities test revealed that the entertainers were employees of Club Onyx.⁸³

The plaintiffs argued that “[c]ourts determine whether an employer/employee relationship exists by examining the economic realities of the relationship between the putative employee and putative employer.”⁸⁴ The defendants, the owners of Onyx, argued in their own summary judgment motion that each plaintiff had to establish that she was a “putative employee” before the court could examine the economic reality of the relationship between the parties.⁸⁵ The court rejected the defendants’ argument and denied them summary judgment, noting that the defendants failed to support their contention with any binding case law requiring that an antecedent determination be made prior to employing the economic realities test.⁸⁶

In addressing the economic realities test, the court explained that several factors apply in determining whether an individual is an independent contractor or an employee:

- (1) the nature and degree of the alleged employer’s control as to the manner in which the work is to be performed;
- (2) the alleged employ-

81. 808 F. Supp. 2d 1326 (N.D. Ga. 2011).

82. *Id.* at 1328.

83. *Id.* at 1328, 1345.

84. *Id.* at 1338 (internal quotation marks omitted).

85. *Id.*

86. *Id.* at 1339.

ee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his [or her] task, or his [or her] employment of [other] workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; [and] (6) the extent to which the service rendered is an integral part of the alleged employer's business.⁸⁷

"No one factor is determinative, and each factor should be given weight according to how much light it sheds on the nature of the economic dependence of the putative employee on the employer."⁸⁸ Before applying each of these factors to the case at hand, the court observed that several other courts that had addressed the question had found that exotic dancers were employees entitled to minimum wage payments by the nightclubs where they worked.⁸⁹

The court examined each factor of the economic realities test in turn, beginning with the nature and degree of control exercised by Onyx.⁹⁰ The plaintiffs and defendants disagreed about how much control Onyx imposed on the dancers. The plaintiffs asserted as follows:

Defendants' control over entertainers' work starts from the moment an entertainer is hired, carries through nearly every aspect of work until employment is terminated, and dictates the most meaningful aspects of an entertainers' work such as how entertainers should look, exactly when and how entertainers will remove their clothing, when and how they will dance, and how much they will charge for their services.⁹¹

By contrast, the defendants contended as follows:

The evidence in this case shows that [p]laintiffs, not Club Onyx, control the most meaningful parts of their dancing careers: when and how they dance, for whom they perform, their appearance, their income, manner of dance, and when they come-and-go from the [c]lub. The few conditions identified by [p]laintiffs as beyond their control are also

87. *Id.* at 1343.

88. *Id.* (quoting *Perdomo v. Ask 4 Realty & Mgmt., Inc.*, 298 F. App'x 820, 821 (11th Cir. 2008)).

89. *Id.*; see *Reich v. Circle C. Invs., Inc.*, 998 F.2d 324 (5th Cir. 1993) (finding dancers are employees under the FLSA); *Reich v. Priba Corp.*, 890 F. Supp. 586 (N.D. Tex. 1995) (same); *Martin v. Priba Corp.*, No. 3:91-CV-2786-G, 1992 WL 486911 (N.D. Tex. Nov. 6, 1992) (same).

90. *Clincy*, 808 F. Supp. 2d at 1343.

91. *Id.*

beyond Club Onyx's complete control, and are mandated not by the [c]lub itself, but instead by State law and municipal ordinance.⁹²

The court found that the defendants' arguments were unavailing, citing another district court in the Eleventh Circuit which noted that

[t]he mere fact that [the club] has delegated a measure of discretion to its dancers does not necessarily mean that its dancers are elevated to the status of independent contractors. . . . The question this Court must resolve is whether a . . . dancer's freedom to work when she wants and for whomever she wants reflects economic independence, or whether these freedoms merely mask the economic reality of dependence.⁹³

The court in *Clinicy* also reviewed the various manners in which the defendants exercised control over the plaintiffs' employment.⁹⁴ First, the defendants required that each entertainer obtain an individual adult entertainment license specific to Onyx from the City of Atlanta.⁹⁵ After the entertainers obtained their licenses, the defendants gave each entertainer a packet containing rules regarding scheduling, conduct related to dancing on stage, dress and appearance, and the cost of table-side and VIP dances.⁹⁶ Further, Onyx's management had the authority to fine or discipline entertainers who failed to comply with the rules, and had actually done so.⁹⁷ Consequently, the court concluded that the defendants exercised a significant amount of control over the entertainers, weighing in favor of finding an employer-employee relationship.⁹⁸

Next, the court addressed the plaintiffs' opportunity to profit from their work as entertainers at Onyx.⁹⁹ The court rejected the defendants' argument that the plaintiffs' opportunity for profit stemmed from their own initiative with respect to how often they elected to work, their conduct at work, and advertising, marketing, and promotion.¹⁰⁰ Indeed, the court noted that it was "not aware of any decision in which

92. *Id.* at 1343-44 (noting that the defendants explained that the State of Georgia and City of Atlanta "control what types of activities can and cannot occur in the Club; control which permits and licenses dancers and club owners must have; control what hours the Club can legally be open for business; and impose a duty to reasonably monitor entertainers, such that they do not drive away from the Club intoxicated").

93. *Id.* at 1344 (second alteration in original) (quoting *Harrell v. Diamond A Entm't, Inc.*, 992 F. Supp. 1343, 1349 (M.D. Fla. 1997)).

94. *Id.*

95. *Id.* at 1330.

96. *Id.* at 1344.

97. *Id.* at 1345.

98. *Id.*

99. *Id.*

100. *Id.*

a court found that an exotic dancer has significant control over her opportunity for profit or loss relative to the club at which she works. Several courts, however, have rejected this argument.¹⁰¹ The court also noted that the defendants—not the entertainers—maintained the primary responsibility of advertising, marketing, and promoting the club to customers and made decisions with respect to the club’s location, maintenance, aesthetics, atmosphere, and availability and pricing of food and alcohol.¹⁰² Although there were nights that entertainers incurred a net loss as a result of fees and fines paid to the club, the risk of loss was significantly greater for the club than for the entertainers.¹⁰³ The court found that this factor weighed in favor of finding the existence of an employer-employee relationship.¹⁰⁴

The court next analyzed the relative investment factor of the economic realities test and rejected the defendants’ argument that the entertainers bore a greater investment in exotic dancing than the defendants.¹⁰⁵ Without citing any supporting authority, the defendants contended as follows:

[T]he [c]lub’s only direct investment in [the entertainers’] exotic dancing work are the stage and poles on which they dance The remaining investments, for facilities, maintenance, repairs, liquor licenses, and food would exist whether or not Plaintiffs performed at Club Onyx, [and therefore,] should not be considered in the Court’s analysis of the parties’ relevant degree of investment.¹⁰⁶

The court found this argument to be unavailing and noted that other courts addressing this factor rejected the same argument.¹⁰⁷ Indeed, while Club Onyx spent approximately \$900,000 each year between 2007 and 2009 on equipment, fixtures, improvements, insurance, rent, marketing, maintenance and repair, alcohol, licenses, and music, the entertainers spent between \$14,000 and \$50,000 on expenses related to hair, costumes, props, shoes, makeup, nails, and personal grooming.¹⁰⁸

101. *Id.* (citing *Circle C. Invs.*, 998 F.2d at 328).

102. *Id.* at 1346.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.* (third alteration in original) (internal quotation marks omitted).

107. *Id.* at 1346-47 (quoting *Priba Corp.*, 890 F. Supp. at 593) (“Entertainers at the club make no investment in its facilities or atmosphere aside from choosing what clothing to wear when performing. All investment and risk capital is provided by defendants. Indeed, but for defendants’ provision of the lavish work environment, the entertainers at the club likely would earn nothing.”).

108. *Id.* at 1347.

Accordingly, the court found that the entertainers' investment in exotic dancing was less than the defendants' investment in the club, weighing in favor of finding an employer-employee relationship.¹⁰⁹

Turning to the fourth factor regarding the necessity of a special skill, the court concluded that special skills were not required to perform at Onyx because although the defendants preferred dancers with previous exotic dancing experience, it was not a prerequisite for employment as an entertainer at the club.¹¹⁰ Accordingly, the court determined that this factor weighed in favor of finding an employer-employee relationship.¹¹¹

With respect to the permanency of the working relationship between the entertainers and the club, the court could not conclude whether this factor weighed in favor of finding an employer-employee relationship.¹¹² Although the plaintiffs had previously contended, and other courts have found that exotic entertainers tend to be "transient or itinerant," at least eleven of the plaintiffs in the action and ten other entertainers who were not parties to the action had working relationships with the club exceeding one year.¹¹³ The court concluded that reasonable jurors could reach different conclusions about this factor and declined to state whether this factor weighs in favor of an employer-employee relationship.¹¹⁴

Lastly, regarding whether exotic dancing was integral to the defendants' business, the court rejected the defendants' argument that "[n]ude dancing, while also contributing to the [c]lub's caché, is not its [sic] essential function."¹¹⁵ The court agreed with the plaintiffs assertion that the defendants' argument is "absurd," because based on the record, a reasonable juror could not find that the role of nude entertainers at the club is not integral to its business.¹¹⁶

The court rejected the defendants' additional argument that because several of the plaintiffs elected to be treated as independent contractors reported to the IRS that they were independent contractors, and because each entertainer must obtain an individual permit from the City of Atlanta to perform, the economic reality tilts in favor of finding that the

109. *Id.*

110. *Id.*

111. *Id.* at 1348.

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.* (alteration in original) (internal quotation marks omitted).

116. *Id.* at 1349 (internal quotation marks omitted). Indeed, the club's night manager testified that "[g]irls make the club busy. As far as if you don't have enough girls in the building, your customers won't stay . . ." *Id.* (alteration in original).

plaintiffs were independent contractors.¹¹⁷ The court noted that “[i]n deciding whether an individual is an ‘employee’ within the meaning of the FLSA, the label attached to the relationship is dispositive only to the degree it mirrors the economic reality of the relationship.”¹¹⁸ Hence, even though some of the plaintiffs reported to the IRS that they were independent contractors, the court refused to allow the club to treat them as non-employees for FLSA liability.¹¹⁹

The court concluded its analysis by examining the entire record and evaluating all of the factors in the economic realities test, noting that “[n]o one factor is determinative.”¹²⁰ Ultimately, the court concluded that the plaintiffs should have been classified as employees under the FLSA based on “the [c]lub’s degree of control over the work of entertainers, the entertainers’ opportunity for profit and loss, the entertainers’ relative investment, the lack of specialized skill required to be an entertainer, and the integral nature of nude entertainment to the [c]lub’s business”¹²¹ This decision is significant not only for clarifying the employee/independent contractor status of dancers in the adult entertainment industry in the Eleventh Circuit, but also in showing that the court will disregard how other independent contractors have been classified (and even how they classify themselves to the IRS) if the economic realities confirm that they should be treated as employees for liability for minimum wages and overtime under the FLSA.

III. EMPLOYEE POLYGRAPH PROTECTION ACT AND THE CONSOLIDATED OMNIBUS BUDGET RECONCILIATION ACT

In *Cummings v. Washington Mutual*,¹²² the Eleventh Circuit decided two important issues related to the Employee Polygraph Protection Act (EPPA)¹²³ and the Consolidated Omnibus Budget Reconciliation Act (COBRA)¹²⁴ in August 2011. First, the court concluded that a violation of the EPPA did not exist where the plaintiff’s employer requested that the plaintiff submit to a polygraph test in connection with an “ongoing investigation” of a specific incident in which the employer had a

117. *Id.*

118. *Id.* (quoting *Donovan v. Tehco, Inc.*, 642 F.2d 141, 143 (5th Cir. 1981)).

119. *Id.*

120. *Id.* (alteration in original) (quoting *Perdomo v. Ask 4 Realty & Mgmt., Inc.*, 298 F. App’x 820, 821 (11th Cir. 2008)).

121. *Id.* at 1350.

122. 650 F.3d 1386 (11th Cir. 2011).

123. 29 U.S.C. §§ 2001-2009 (2006).

124. 29 U.S.C. §§ 1161-1169 (2006).

“reasonable suspicion” that the plaintiff was involved.¹²⁵ Second, and more significantly, the court concluded that “a COBRA improper-notice claim accrues when the plaintiff either knows or should know the facts necessary to bring an improper-notice claim: specifically, that his former employer has failed to provide him with the required notice of his continuation right.”¹²⁶ Critically, this holding opens the door to plaintiffs bringing viable COBRA improper-notice claims *years* after the statute of limitations has run for such claims.

Dave Cummings worked as the manager of defendant Washington Mutual’s Piedmont Commons branch between January 2006 and December 2006 before transferring to become the manager at another branch. In February 2007, the new manager at the Piedmont Commons branch conducted a cash audit that revealed a cash shortage of approximately \$58,000. The money was missing from two Teller Cash Dispenser machines that Cummings had access to while he worked at the branch. Washington Mutual sent two fraud investigators to the branch to review surveillance camera still images and interview witnesses. The surveillance camera still images appeared to show Cummings and his employees repeatedly violating Washington Mutual’s Dual Control Policy which required that two people be present when cash is handled or when secure areas are accessed. Additionally, several current and former employees of the Piedmont Commons branch informed the investigators that Cummings repeatedly violated the Dual Control Policy when he worked as branch manager. The investigators also interviewed Cummings and asked if he would submit to a polygraph test. Cummings, however, declined to do so. On March 19, 2007, Washington Mutual terminated Cummings’s employment because of his violations of the Dual Control Policy, not because he declined to take a polygraph test.¹²⁷

After Cummings’s termination, Washington Mutual sent Cummings a notice required by COBRA informing Cummings of his right to continue his employer-provided health insurance coverage for a period of time after his discharge. Cummings contended that he never received the notice, his insurance was canceled, and he incurred over \$2,000 in medical expenses on behalf of his wife. Cummings later filed a complaint against Washington Mutual with the Department of Labor (DOL) alleging that Washington Mutual violated the EPPA. The DOL informed Cummings that his claims could not be confirmed, and he subsequently filed a lawsuit in the United States District Court for the

125. *Cummings*, 650 F.3d at 1390.

126. *Id.* at 1391.

127. *Id.* at 1388.

Northern District of Georgia, restating his EPPA claims and alleging that Washington Mutual violated COBRA by failing to inform him of his right to continue his healthcare coverage. The trial court granted summary judgment on both claims to Washington Mutual, and Cummings appealed. In his appeal to the Eleventh Circuit, Cummings challenged the district court's ruling in favor of Washington Mutual on his EPPA and COBRA claims.¹²⁸

With respect to Cummings's first claim, under the EPPA, an employer usually cannot "require, request, suggest, or cause any employee . . . to take or submit to any lie detector test."¹²⁹ An employer can, however, request that an employee take a polygraph test in four circumstances:

- (1) the test is administered in connection with an ongoing investigation involving economic loss or injury to the employer's business . . . ;
- (2) the employee had access to the property that is the subject of the investigation;
- (3) the employer has a reasonable suspicion that the employee was involved in the incident or activity under investigation;
- and (4) the employer executes a statement, provided to the examinee before the test, that [is signed and that describes with particularity the employee's alleged misconduct and the basis for the employer's reasonable suspicion].¹³⁰

Cummings only challenged the district court's conclusions that an "ongoing investigation" existed and that Washington Mutual had a "reasonable suspicion" that Cummings violated the Dual Control Policy.¹³¹

The Eleventh Circuit agreed with the district court, concluding that Washington Mutual was investigating the disappearance of \$58,000 from the Piedmont Commons branch during Cummings's tenure as manager of the branch.¹³² The court also found that the regulations to the EPPA do not require employers to have conclusive evidence of loss or injury before requesting or administering a polygraph test.¹³³ Instead, the "regulations require only 'additional evidence' suggesting that the employee in question 'was involved in the incident.'"¹³⁴ Here, Washington Mutual had obtained surveillance camera images and testimony from witnesses about Cummings's violations of the Dual Control

128. *Id.* at 1389.

129. *Id.*; *see also* 29 U.S.C. § 2002(1).

130. *Cummings*, 650 F.3d at 1389 (alteration in original); *see also* 29 U.S.C. § 2006(d).

131. *Cummings*, 650 F.3d at 1389 (internal quotation marks omitted).

132. *Id.*

133. *Id.* at 1390.

134. *Id.*

Policy.¹³⁵ Therefore, Washington Mutual's polygraph request was made in conjunction with an "ongoing investigation."¹³⁶

Next, the court determined that Washington Mutual had a "reasonable suspicion" that Cummings violated the Dual Control Policy.¹³⁷ The regulations to the EPPA define reasonable suspicion as "an observable, articulable basis in fact which indicates that a particular employee was involved in, or responsible for, an economic loss."¹³⁸ In support of its finding that a reasonable suspicion existed, the court noted that only four other employees had access to the area from which the money was taken and that Cummings managed all four of them; Cummings and his employees accessed money and secure areas in violation of the Dual Control Policy; and Cummings's coworkers confirmed the evidence, stating that Cummings repeatedly violated the policy.¹³⁹ Accordingly, Washington Mutual had a "reasonable suspicion" that Cummings was involved in the incident under investigation.¹⁴⁰ Thus, the court affirmed the district court's entry of summary judgment for Washington Mutual on Cummings's EPPA claim.¹⁴¹

With respect to Cummings's COBRA claim, the court evaluated whether Cummings's claim that he did not receive proper notice of his COBRA continuation right was timely filed.¹⁴² Under COBRA, an employer must notify an employee of his right to continue healthcare coverage through its healthcare administrator after the employee's termination.¹⁴³ The employer must notify the healthcare administrator within thirty days of the employee's termination.¹⁴⁴ Then, the administrator must notify the employee of his continuation right within fourteen days.¹⁴⁵ In this case, after Cummings's termination on March 19, 2007, Washington Mutual had until May 2, 2007, to notify Cummings of his continuation right.¹⁴⁶

A one-year statute of limitations period exists with respect to COBRA improper-notice claims, and Cummings and Washington Mutual

135. *Id.*

136. *Id.* (internal quotation marks omitted).

137. *Id.* (internal quotation marks omitted).

138. *Id.* (internal quotation marks omitted); 29 C.F.R. § 801.12(f)(1) (2011).

139. *Cummings*, 650 F.3d at 1390.

140. *Id.*

141. *Id.* at 1392.

142. *Id.* at 1391.

143. *Id.* at 1390; 29 U.S.C. § 1163(2).

144. *Cummings*, 650 F.3d at 1390; 29 U.S.C. § 1166(a)(2).

145. *Cummings*, 650 F.3d at 1390; 29 U.S.C. § 1166(a)(4)(A), (c).

146. *Cummings*, 650 F.3d at 1390.

disagreed about when this limitations period began to run.¹⁴⁷ Cummings argued that his claim accrued when he discovered that Washington Mutual failed to notify him of his COBRA continuation right. Cummings claimed that he learned of this on March 20, 2008, during a meeting with his lawyer. Washington Mutual, however, contended that the limitations period began to run on May 3, 2007, the day its time for notifying Cummings of his continuation right expired. Cummings filed his lawsuit on July 24, 2008, within the one year limitations period if the period began on March 20, 2008, but outside of the period if it began on May 3, 2007.¹⁴⁸

The Eleventh Circuit began its analysis by explaining that in some contexts, the court has applied a federal common law rule that a claim accrues when a plaintiff either knows or should have known that he suffered an injury.¹⁴⁹ The court decided to apply this claim-accrual rule to COBRA improper-notice claims, recognizing that the COBRA notification requirement exists because employees are not expected to know that their right to healthcare coverage continues after the end of employment.¹⁵⁰ In this regard, the court noted that under Washington Mutual's interpretation, starting the limitations period when the notification period expires could result in the limitations period running out before a plaintiff even knows that he or she has been injured.¹⁵¹ The court refused to adopt that rule and reversed the district court's decision granting summary judgment for Washington Mutual, concluding that the improper-notice claim accrues when the plaintiff either knows or should have known that his employer failed to notify him of his continuation right.¹⁵²

Cummings clarifies what constitutes an "ongoing investigation" and "reasonable suspicion" with respect to EPPA claims. More significantly, however, by determining that COBRA improper-notice claims do not accrue until an employee knows or should have known of the employer's failure to notify, *Cummings* has the potential to expand indefinitely the duration of an employer's liability for these claims. Indeed, the Eleventh Circuit acknowledged "that this claim-accrual rule will permit plaintiffs to go many years before discovering that their notification right has been violated, and then to bring suit for non-disclosure penalties long after

147. *Id.* at 1391.

148. *Id.*

149. *Id.*

150. *Id.*

151. *Id.*

152. *Id.*

the alleged failure of notification occurred.”¹⁵³ The court, however, noted that the statutory remedy for COBRA notification violations is “up to \$100 a day from the date of the notification failure and other relief the court ‘in its discretion . . . deems proper.’”¹⁵⁴ Since the court may decide the exact type and amount of relief, a plaintiff will not automatically recover the statutory penalties for the entire period before the lawsuit was filed.¹⁵⁵ Accordingly, even if a plaintiff asserts an improper-notice claim years after the end of his or her employment, the district court retains the discretion to limit the defendant’s liability.¹⁵⁶ Hence, while the court will not automatically grant a plaintiff \$100 a day in an improper-notice claim, employers and employees should beware that the decision in *Cummings* opens the door to extensive potential liability for these types of claims.

153. *Id.* at 1391 n.6.

154. *Id.* (alteration in original); 29 U.S.C. § 1132(c)(1).

155. *Cummings*, 650 F.3d at 1391 n.6.

156. *Id.*
