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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, 2010 to December 31, 2010 survey period.¹ The following is a discussion of those opinions.

I. FAMILY MEDICAL LEAVE ACT

In *Krutzig v. Pulte Home Corp.*,² the United States Court of Appeals for the Eleventh Circuit addressed an issue of first impression and aligned itself with several other circuits, concluding that the right to commence leave under the Family and Medical Leave Act of 1993 (FMLA)³ is not absolute.⁴ In *Krutzig* the court of appeals addressed a plaintiff's claim that her employer interfered with her right to take FMLA leave when her employer terminated her employment.⁵ In affirming the holding of the United States District Court for the Middle District of Florida, the Eleventh Circuit held that "an employee who requests FMLA leave has no greater protection against her employment

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1. For an analysis of Eleventh Circuit labor and employment law during the prior survey period, see W. Christopher Arbery & Valerie N. Njiiri, *Labor and Employment, 2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1177 (2010).

2. 602 F.3d 1231 (11th Cir. 2010).

3. 29 U.S.C. §§ 2601-2654 (2006 & Supp. III 2009).

4. *Krutzig*, 602 F.3d at 1236.

5. *Id.* at 1233.

being terminated for reasons unrelated to an FMLA request than she did before submitting the request.”⁶

In the underlying proceedings, the district court granted summary judgment on the plaintiff’s FMLA interference claim in favor of the defendant employer on three alternate grounds.⁷ First, the district court found that the plaintiff “failed to provide any medical evidence substantiating her alleged medical condition and entitlement to FMLA leave.”⁸ Second, the district court concluded that the plaintiff failed to prove that she submitted a valid FMLA leave request. Finally, the district court held that the plaintiff would have been terminated despite her request for FMLA leave. On appeal, the plaintiff argued that the first two grounds for granting summary judgment were not raised by the defendant in its motion and, therefore, those grounds should not have been a basis for summary judgment.⁹ Regardless, the Eleventh Circuit only addressed the third ground for summary judgment: the plaintiff’s employment would have been terminated regardless of the plaintiff’s request for FMLA leave.¹⁰

The plaintiff, Betsy Krutzig, began working for the defendant, Pulte Home Corporation (Pulte), as a sales associate selling homes in Sarasota, Florida, in January 2005. In June 2007, Krutzig injured her foot at work, but she did not initially request leave for the injury. The following month, Krutzig was placed on a thirty-day performance plan after receiving two written warnings from Janet Parsons, her immediate supervisor. On Friday, August 17, 2007, Krutzig contacted Pulte’s human resources representative, Jessica Hernandez-Parkman, who worked at the Estero, Florida facility, and requested FMLA leave to coincide with her scheduled surgery on her injured foot. Hernandez-Parkman faxed forms pertinent to medical leave to Krutzig and provided contact information so Krutzig could file a claim for short-term disability-benefits with an insurance company. Krutzig responded by faxing Hernandez-Parkman a form signed by her doctor. Krutzig also attempted to have Parsons sign her leave form that same day; however, Krutzig was never able to ask for approval.¹¹

On Friday, August 17, 2007, Krutzig met with an angry customer who had complained to the CEO of Pulte about a situation involving a home the customer was purchasing. After the meeting, the customer spoke

6. *Id.* at 1236.

7. *Id.* at 1234.

8. *Id.*

9. *Id.* at 1235.

10. *Id.* at 1235-36.

11. *Id.* at 1233.

with Jill Hoffman, Pulte's Vice President of Sales. Hoffman contacted Jeff Cooper, Pulte's Director of Sales in Sarasota, to discuss the problem. The following day, Cooper called Hoffman and notified her of his decision to terminate Krutzig.¹² When Krutzig returned to work on Monday, Cooper informed Krutzig "that her employment had been terminated."¹³

On appeal, the Eleventh Circuit addressed the district court's grant of summary judgment to Pulte on Krutzig's claims for FMLA retaliation and Employment Retirement Income Security Act (ERISA)¹⁴ interference; however, the most significant part of the decision in *Krutzig* stems from the Eleventh Circuit's conclusion regarding the plaintiff's FMLA interference claim.¹⁵ To establish a claim for interference, "an employee need only demonstrate by a preponderance of the evidence that he was entitled to the benefit denied."¹⁶ The employee does not need to "allege that [her] employer intended to deny the benefit, because 'the employer's motives are irrelevant.'"¹⁷ The Eleventh Circuit "previously concluded that, if an employer [could] show that it refused to reinstate an employee for a reason unrelated to FMLA leave, the employer [would] not [be] liable for failing to reinstate the employee after the employee [had] taken FMLA leave."¹⁸ However, "[o]ther circuits have extended the same analysis to FMLA claims based on interference with the right to commence FMLA leave."¹⁹ These circuits explained that the "right to non-interference with the commencement of leave is not absolute, and if a dismissal would have occurred regardless of the request for FMLA leave, an employee may be dismissed, preventing her from exercising her right to leave or reinstatement."²⁰

Prior to *Krutzig*, the Eleventh Circuit had not decided whether the right to FMLA leave commencement was absolute.²¹ When presented with this issue, the court decided to follow the reasoning of its sister circuits who have determined "that the right to commence FMLA leave

12. *Id.* at 1233-34.

13. *Id.* at 1234.

14. 29 U.S.C. §§ 1001-1461 (2006).

15. *See Krutzig*, 602 F.3d at 1233, 1236.

16. *Id.* at 1235 (quoting *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1207 (11th Cir. 2001)) (internal quotation marks omitted).

17. *Id.* (quoting *Strickland v. Water Works & Sewer Bd.*, 239 F.3d 1199, 1208 (11th Cir. 2001)).

18. *Id.* at 1236.

19. *Id.*; *see, e.g., Phillips v. Mathews*, 547 F.3d 905 (8th Cir. 2008); *Bones v. Honeywell Int'l, Inc.*, 366 F.3d 869 (10th Cir. 2004); *Arban v. West Publ'g Corp.*, 345 F.3d 390 (6th Cir. 2003).

20. *Krutzig*, 602 F.3d at 1236; *see, e.g., Phillips*, 547 F.3d at 911-12; *Bones*, 366 F.3d at 877-78; *Arban*, 345 F.3d at 401.

21. *Krutzig*, 602 F.3d at 1236.

is not absolute, and that an employee can be dismissed, preventing her from exercising her right to commence FMLA leave, without thereby violating the FMLA, if the employee would have been dismissed regardless of any request for FMLA leave.²² The court related this analysis to Krutzig's situation and explained that the un rebutted evidence of Cooper's lack of awareness of Krutzig's request to commence leave when he terminated her employment, established as a matter of law that Krutzig's termination was for circumstances separate from her requested leave.²³ At his deposition, Cooper testified that his decision to terminate Krutzig was based on her failure to correct the problems in her performance plan, such as her attitude, teamwork, and lack of communication with customers. Krutzig failed to provide evidence to support a conclusion that Cooper knew of her FMLA leave request when he decided to terminate her employment.²⁴

Krutzig clarified a previous conflicting assertion that the Eleventh Circuit made about the existence of an absolute right to commence FMLA leave.²⁵ In *O'Connor v. PCA Family Health Plan, Inc.*,²⁶ the Eleventh Circuit set forth the standard for establishing an interference claim under the FMLA.²⁷ The court stated that "[u]nlike the right to commence leave, an employer can deny the right to reinstatement in certain circumstances, because United States Department of Labor regulation qualifies the right."²⁸ This suggests that an employee has an absolute right to commence FMLA leave. The court in *Krutzig*, however, noted that its opinion in *O'Connor* unnecessarily distinguished between the right of reinstatement and the right to commence leave under the FMLA.²⁹ The court explained that *O'Connor* only involved a reinstatement claim and observed that its comment about the right of an employee to commence FMLA leave was non-binding dicta.³⁰ In addition to clearing up this ambiguity, *Krutzig* is significant because it brings the Eleventh Circuit in line with the United States Courts of Appeals for the Sixth, Eighth, and Tenth Circuits, which previously

22. *Id.*

23. *Id.*

24. *Id.* at 1234.

25. *See id.* at 1236.

26. 200 F.3d 1349 (11th Cir. 2000).

27. *See id.*

28. *Id.* at 1354 (citation omitted).

29. *Krutzig*, 602 F.3d at 1236 n.1.

30. *Id.*

reached the same conclusion that no absolute right to commencing FMLA leave exists.³¹

II. FAIR LABOR STANDARDS ACT

*Polycarpe v. E&S Landscaping Service, Inc.*³² is a highly technical case that clarifies which employers are subject to the minimum wage and overtime pay requirements of the Fair Labor Standards Act of 1938 (FLSA).³³ In *Polycarpe*, the question before the Eleventh Circuit was whether the defendant employers had sufficiently engaged in interstate commerce to fall within the scope of enterprise coverage under the FLSA.³⁴ The court held that in the enterprise liability context, the proper analysis for determining whether an employer must comply with the FLSA is whether its employees handle, sell, or work on “goods” or “materials” that were previously produced in or moved interstate, regardless of whether the goods were purchased intrastate.³⁵ In applying this analysis, the Eleventh Circuit clarified that the scope of the FLSA is broader than the United States District Court for the Southern District of Florida had held.³⁶

The plaintiffs in *Polycarpe* were landscapers, security-system technicians, and construction workers who alleged that their employers—the defendants—failed to pay them a federally mandated minimum wage, overtime, or both under the FLSA. The defendants provided services to customers locally within the state of Florida, but some of the defendants also offered products along with their services. The district court dismissed the cases, concluding that the FLSA did not cover the defendants’ businesses.³⁷ The district court reasoned that “because the employers had purchased potentially qualifying ‘goods’ or ‘materials’ intrastate after those items had ‘come to rest,’ no sufficient interstate-commerce connection existed to [trigger] FLSA coverage.”³⁸ In several of the cases, the district court also concluded that the plaintiffs did not handle the type of “goods” or “materials” that would subject the employer to FLSA coverage.³⁹ One of the cases, *Flores v. Nuvoc, Inc.*,⁴⁰ was

31. *Id.* at 1236; see *Phillips*, 547 F.3d at 911-12; *Bones*, 366 F.3d at 877-78; *Arban*, 345 F.3d at 401.

32. 616 F.3d 1217 (11th Cir. 2010).

33. 29 U.S.C. §§ 201-219 (2006 & Supp. III 2009).

34. *Polycarpe*, 616 F.3d at 1219-20.

35. *Id.* at 1228.

36. *See id.*

37. *Id.* at 1219-20.

38. *Id.* at 1220 (internal quotation marks omitted).

39. *Id.*

40. 610 F. Supp. 2d 1349 (S.D. Fla. 2008).

dismissed because the defendant allegedly failed to meet the minimum annual sales requirement to receive FLSA coverage.⁴¹ On appeal the plaintiffs' cases were consolidated.⁴²

The FLSA requires compliance from both individuals and enterprises engaged in interstate commerce.⁴³ In *Polycarpe*, the Eleventh Circuit first laid out the framework for analyzing what kinds of employers are subject to the enterprise coverage section of the FLSA.⁴⁴ Employers who meet the FLSA's preconditions must pay their employees minimum wage and overtime pay if the employees work more than forty hours per week.⁴⁵ The court focused its analysis on enterprise coverage, explaining that

[a]n employer falls under the enterprise coverage section of the FLSA if it (1) "has employees engaged in commerce or in the production of goods for commerce, or . . . has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person" and (2) has at least \$500,000 of "annual gross volume of sales made or business done."⁴⁶

Next, the Eleventh Circuit explained the "coming to rest" doctrine and its relation to FLSA enterprise coverage.⁴⁷ "The 'coming to rest' doctrine [states] that interstate goods or materials can lose their interstate quality if the items have already come to rest within a state before intrastate purchase by a business."⁴⁸ The Eleventh Circuit clarified that the "coming to rest" doctrine is inapplicable in the enterprise liability context.⁴⁹ Accordingly, the court explained that if a district court applies the "coming to rest" doctrine by focusing on where a defendant buys an item instead of where the item was produced and enters judgment for a defendant on the basis that the goods or materials had "come to rest" before being purchased intrastate, the judgment cannot stand.⁵⁰

The court proceeded by acknowledging and resolving the disagreement about the interplay of the terms "goods" and "materials" under the FLSA's handling clause by clarifying the definition of the term "materi-

41. *Polycarpe*, 616 F.3d at 1220.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*; 29 U.S.C. §§ 206(a), 207(a).

46. *Polycarpe*, 616 F.3d at 1220.

47. *See id.* at 1221.

48. *Id.*

49. *Id.*

50. *Id.*

als.”⁵¹ The court defined “materials” in the FLSA as “tools or other articles necessary for doing or making something.”⁵²

Next, the above analysis was applied to five of the six cases consolidated in the appeal.⁵³ In the installation or repair and landscaping company cases, the Eleventh Circuit held that the district court erroneously applied the “coming to rest” doctrine in granting the defendants’ motions for summary judgment.⁵⁴ The Eleventh Circuit emphasized that “[t]he inquiry for enterprise coverage under the FLSA is whether the ‘goods’ or ‘materials’ were in the past produced in or moved interstate, not whether they were most recently purchased intrastate.”⁵⁵ Furthermore, the district court failed to address whether the items presented by the plaintiffs to support enterprise coverage under the handling clause were “goods” not subject to the ultimate consumer exception or “materials.”⁵⁶ In the final case, *Flores*, the court affirmed the district court’s judgment as a matter of law, finding that the plaintiffs were unable to satisfy the minimum \$500,000 of annual gross sales required for the FLSA to cover an enterprise.⁵⁷

Before the decision in *Polycarpe*, “the applicability of the ‘coming to rest’ doctrine in the FLSA enterprise coverage context was an unsettled question in this Circuit.”⁵⁸ The decision in *Polycarpe* clarified this area of the law by concluding that the “coming to rest” doctrine is inapplicable in the enterprise liability context.⁵⁹ The Eleventh Circuit emphasized that the handling of goods or materials that were purchased in intrastate commerce (as opposed to interstate commerce) does not

51. *Id.* at 1221, 1223; see 29 U.S.C. 203(s)(1)(A)(i) (emphasis added) (stating that the handling clause imposes enterprise liability on an employer that “has employees engaged in commerce or in the production of goods for commerce, or . . . has employees handling, selling, or otherwise working on goods or materials that have been moved in or produced for commerce by any person”).

52. *Polycarpe*, 616 F.3d at 1224.

53. *Id.* at 1227-29.

54. *Id.* at 1227-28.

55. *Id.* at 1228.

56. *Id.* at 1227-29. The ultimate consumer exception is found in the definition of “goods” in the FLSA. See 29 U.S.C. 203(i). “Goods” are defined as “goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.” *Id.*

57. *Polycarpe*, 616 F.3d at 1229.

58. *Lira v. Matthew’s Marine Air Conditioner, Inc.*, 741 F. Supp. 2d 1305, 1319 (S.D. Fla. 2010).

59. *Polycarpe*, 616 F.3d at 1221.

necessarily exclude a business from FLSA coverage but rather the origin of the alleged goods and materials controls coverage.⁶⁰

The Eleventh Circuit's conclusion is consistent with holdings in other circuits. For example, in 1981 the United States Court of Appeals for the Ninth Circuit concluded that "even a business engaged in purely intrastate activities can no longer claim exemption from FLSA coverage if the goods its employees handle have moved in interstate commerce."⁶¹ In *Dole v. Bishop*,⁶² the District Court for the Southern District of Mississippi reached the same conclusion.⁶³ In that case, the district court explained that the "coming to rest" doctrine was viable under previous versions of the FLSA but can no longer be used in the context of enterprise coverage.⁶⁴ The Eleventh Circuit's rejection of the "coming to rest" doctrine in *Polycarpe* not only settles a disputed issue in Eleventh Circuit employment law, but the decision also clarifies that the group of employers liable under the FLSA's enterprise coverage doctrine is broader than previously understood in the Eleventh Circuit.

III. LABOR MANAGEMENT RELATIONS ACT

In *Mulhall v. Unite Here Local 355*,⁶⁵ the Eleventh Circuit determined that a nonunionized employee had standing to prosecute a claim under section 302 of the Labor Management Relations Act (LMRA)⁶⁶ where the employee alleged that an agreement between his employer and a local union violated that statute.⁶⁷ The Eleventh Circuit decision is particularly significant because it potentially undermines the ability of an employer and a union to contract without risking a legal challenge from an individual employee.

Plaintiff Martin Mulhall's grievance stemmed from a Memorandum of Agreement (MOA) entered into between defendants Mardi Gras Gambling (Mardi Gras) and UNITE HERE Local 355 (Unite). In the MOA, Mardi Gras and Unite agreed that Unite, the local union, would provide financial support to a ballot initiative concerning casino gaming, from which Mardi Gras, Mulhall's employer, would benefit.⁶⁸ Furthermore, if identified as the sole bargaining agent for employees of Mardi

60. *Id.* at 1228.

61. *Donovan v. Scoles*, 652 F.2d 16, 18 (9th Cir. 1981).

62. 740 F. Supp. 1221 (S.D. Miss. 1990).

63. *Id.* at 1225.

64. *Id.* at 1225-26.

65. 618 F.3d 1279 (11th Cir. 2010).

66. 29 U.S.C. § 186 (2006).

67. *Mulhall*, 618 F.3d at 1283-84.

68. *Id.*

Gras, Unite agreed “to refrain from picketing, boycotting, striking, or undertaking ‘other economic activity’ against Mardi Gras.”⁶⁹ As consideration for the agreement, Mardi Gras agreed to help Unite organize its nonunionized workforce. Mardi Gras promised to provide a complete list of its employees, including their home addresses, job classifications, and departments.⁷⁰ Moreover, the assistance included

the use of Mardi Gras’ property, including non-public areas, for organizing; a “neutrality agreement” prohibiting any speech or actions by Mardi Gras or its agents that state or imply opposition to the union; a waiver of Mardi Gras’ right to seek NLRB-supervised *secret* elections to verify the union’s majority status, and an agreement to abide by a less formal “card-check” procedure instead; and a promise not to file unfair labor practice charges against Unite for violations of employee rights during the union’s organizing campaign.⁷¹

Pursuant to its obligations under the MOA, Unite spent over \$100,000 in a campaign for the ballot initiative supported by Mardi Gras. Describing its intent to organize Mardi Gras’ employees, Unite sent written notices that demanded Mardi Gras provide the union organization assistance the MOA promised. Mardi Gras refused to provide the assistance, claiming that the MOA was unenforceable and illegal.⁷²

Unite responded to Mardi Gras by filing a petition compelling arbitration in the Southern District of Florida in accordance with the MOA’s arbitration clause.⁷³ Unite requested that the MOA be enforced and emphasized that

if the MOA were found unlawful, it would “request restitutionary damages . . . based on quantum meruit for the time and money the Union and its members spent on the political campaign to obtain a gaming license for Mardi Gras (estimated at over \$100,000) and over \$100,000 in business which Mardi Gras would have lost from a boycott.”⁷⁴

Mardi Gras responded by counterclaiming “for a declaration that the MOA was invalid.”⁷⁵ The district court ordered the parties to arbitrate.

69. *Id.* at 1284.

70. *Id.*

71. *Id.* at 1284-85 (footnotes omitted).

72. *Id.* at 1285.

73. *Id.*

74. *Id.*

75. *Id.*

Consequently, an arbitrator ruled in favor of Unite, enforcing the MOA and requiring Mardi Gras to provide the promised union assistance.⁷⁶

Throughout the dispute between Mardi Gras and Unite, Mulhall sought to prevent enforcement of what he believed to be "an illegal and collusive arrangement between a union and an employer."⁷⁷ Mulhall filed the present action seeking an injunction on the grounds that § 302(a)-(b) of the LMRA was violated by the MOA.⁷⁸ Section 302 of the LMRA prohibits employers from paying, lending, and delivering any money or thing of value to any labor organization that attempts to represent any of the employer's employees that are employed in an industry that affects commerce.⁷⁹ Mulhall's complaint was dismissed by the district court for lack of standing. The district court held that Mulhall failed to prove an actual or imminent injury-in-fact because even if Unite received the organizing assistance from Mardi Gras, it was possible that Mulhall would never be unionized.⁸⁰

Mulhall appealed, "claiming [he had] both Article III and prudential standing to seek to enjoin the MOA pursuant to § 302."⁸¹ On appeal, the Eleventh Circuit explained that Mulhall had the burden of demonstrating standing to sue by proving the following: "(1) he has suffered, or imminently will suffer, an injury-in-fact; (2) the injury is fairly traceable to the defendants' conduct; and (3) a favorable judgment is likely to redress the injury."⁸²

In analyzing the standing issue, the Eleventh Circuit explained that employees like Mulhall have a legally cognizable associational interest; "[j]ust as [t]he First Amendment clearly guarantees the right to join a union,"⁸³ the First Amendment⁸⁴ also "presupposes a freedom not to associate with a union."⁸⁵ The court concluded that Mulhall sufficiently alleged that there was an imminent risk of invasion with this associational interest.⁸⁶ The court further held that Mardi Gras' provision of extensive and varied union organization assistance under the MOA

76. *Id.*

77. *Id.*

78. *Id.*

79. 29 U.S.C. § 186(a)(2).

80. *Mulhall*, 618 F.3d at 1285-86.

81. *Id.* at 1286.

82. *Id.*

83. *Id.* at 1287 (second alteration in original) (quoting *Hobbs v. Hawkins*, 968 F.2d 471, 482 (5th Cir. 1992)) (internal quotation marks omitted).

84. U.S. CONST. amend I.

85. *Mulhall*, 618 F.3d at 1287 (quoting *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984)) (internal quotation marks omitted).

86. *Id.* at 1288.

substantially increased the likelihood that Mulhall would be organized against his will.⁸⁷ The court further explained that “probabilistic harm” is a cognizable injury for the purposes of standing.⁸⁸ The Eleventh Circuit determined that Mulhall’s claim satisfied the causation element of standing because his alleged injury flowed from Mardi Gras’ grant of union organization assistance under the MOA.⁸⁹ Lastly, the court concluded that “Mulhall’s allegations satisf[ie]d the redressability requirement [that] . . . ‘a favorable decision would amount to a significant increase in the likelihood that the plaintiff would obtain relief that directly redresses the injury suffered.’”⁹⁰ The Eleventh Circuit explained that the considerable increase in the possibility of unionization due to the MOA would be removed if Mulhall obtained an injunction for the enforcement of the MOA.⁹¹

In response to Unite’s suggestion that the prudential standing doctrine barred Mulhall’s claim, the Eleventh Circuit found that Mulhall’s “claim raise[d] no prudential standing concerns.”⁹² The prudential standing doctrine consists of “three non-constitutional, non-jurisdictional, policy-based limitations on the availability of judicial review.”⁹³ The court concluded that Mulhall satisfied the requirements “that the complaint not require the court to pass on abstract questions or generalized grievances better addressed by the legislative branches[] and . . . that the plaintiff assert his or her own legal rights and interests rather than the legal rights and interests of third parties.”⁹⁴ After a more significant analysis, the Eleventh Circuit determined that Mulhall satisfied “the ‘zone-of-interests’ test, which limits judicial review to claims of injury that are sufficiently related to the core concerns of a given statute.”⁹⁵

In response to Unite’s argument that Mulhall’s claim was not ripe because his injury was contingent on the outcome of Mardi Gras’ lawsuit, the Eleventh Circuit determined that there was only a remote contingency created by Mardi Gras’ parallel litigation.⁹⁶ The court

87. *Id.*

88. *Id.* (quoting Fla. State Conference of the NAACP v. Browning, 522 F.3d 1153, 1163 (11th Cir. 2008)) (internal quotation marks omitted).

89. *Id.* at 1290.

90. *Id.* (quoting Harrell v. Fla. Bar, 608 F.3d 1241, 1260 n.7 (11th Cir. 2010)) (internal quotation marks omitted).

91. *Id.*

92. *Id.* at 1291.

93. *Id.* at 1290.

94. *Id.*

95. *Id.*

96. *Id.* at 1291-92.

explained that it would be unlikely that Mardi Gras would succeed in its appeal of the district court's judgment confirming the arbitration award and upholding the validity of the MOA.⁹⁷

The Eleventh Circuit ultimately held "that Mulhall ha[d] constitutional and prudential standing to maintain his claim for injunctive relief under § 302 of the Labor Relations Management Act, and that his claim [was] ripe for review."⁹⁸ Accordingly, the Eleventh Circuit reversed the district court and remanded the case.⁹⁹

This case presents an emerging issue in Eleventh Circuit labor law, and although the court resolved the standing and ripeness issues, it emphasized that the question of whether LMRA § 302 provides an Eleventh Circuit claimant with "a private right of action is an issue 'separate and distinct' from the issue of standing."¹⁰⁰ The court also refused to decide the question of whether the organizing assistance specified in the MOA actually violates LMRA § 302, stating that "[t]he merits [are] for the district court to decide on remand."¹⁰¹

Courts in other circuits have also addressed the standing, private right of action, and injunctive issues that were presented in *Mulhall*. For example, in *Patterson v. Heartland Industrial Partners, LLP*,¹⁰² the United States District Court for the Northern District of Ohio decided a case with facts strikingly similar to those in *Mulhall*.¹⁰³ The district court found that the plaintiffs opposing a neutrality agreement between

97. *Id.* at 1292.

98. *Id.* at 1294.

99. *Id.*

100. *Id.* at 1293 (quoting *Wilderness Soc'y v. Kane Cnty.*, 581 F.3d 1198, 1215 (10th Cir. 2009)).

101. *Id.* at 1294.

102. 428 F. Supp. 2d 714 (N.D. Ohio 2006).

103. *See id.* at 716-17. The employer and union formed an agreement providing the union with company cooperation to organize membership drives in exchange for specific terms of how union representation would look at the company if the drive proved successful. *Id.* In exchange for organizing the campaign, "the company agreed to provide full names and addresses; access to the workplace to permit the union [to] conduct its campaign; and the company would refrain from speaking unfavorably about the union." *Id.* at 717. In exchange the employer gained

the union's agreement to limit its organizing campaign to a ninety day period; to agree not to speak unfavorably about the employer during the campaign; and in the event that the organizing was unsuccessful, the union agreed to only conduct one organizing campaign per year and no more than [three] organizing campaigns in a five year period.

Id. Also, a "card-check process" would be established to determine the campaign's success instead of holding an election to determine the union's representation. *Id.* According to the agreement, most of the agreement's terms were to be submitted to arbitration in the event of a dispute. *Id.*

their employer and a union had “both constitutional and prudential standing” and that they could maintain a private cause of action under the LMRA.¹⁰⁴ The district court also concluded that the employer had not violated LMRA § 302 because the neutrality agreement was not a “thing of value” under the LMRA.¹⁰⁵

Although the Eleventh Circuit has not addressed this substantive issue, the holding in *Mulhall* demonstrates that the confidence with which unions and employers contract in neutrality agreements may be weakened because employees have standing to challenge the agreements.¹⁰⁶ It remains to be seen if, when presented with a substantive challenge, the Eleventh Circuit will join its sister circuits and determine that agreements between an employer and a union like the agreements in *Mulhall* and *Patterson*, do not constitute an impermissible “thing of value” under the LMRA.¹⁰⁷ Finally, the Eleventh Circuit’s holding in *Mulhall* weakens an employer’s and union’s ability to control the forum for a dispute relating to a neutrality agreement.¹⁰⁸ Although the agreement between the employer and union in *Mulhall* featured an arbitration clause, because the employee was not a party to that agreement and had standing to challenge the legality of it, the employee could and did attack the agreement through litigation.¹⁰⁹

IV. COMPUTER FRAUD ABUSE ACT

In *United States v. Rodriguez*,¹¹⁰ the Eleventh Circuit held that an employee may violate the Computer Fraud Abuse Act (CFAA)¹¹¹ by violating his employer’s policy prohibiting employees from obtaining information from its databases for nonbusiness reasons.¹¹² The CFAA prohibits “intentionally access[ing] a computer without authorization or

104. *Id.* at 719-21, 724-25.

105. *Id.* at 724-25.

106. *See Mulhall*, 618 F.3d at 1294.

107. On January 24, 2011, the United States District Court for the Southern District of Florida entered an order granting the defendant Unite Here 355’s motion to dismiss, finding that “[b]ecause the assistance promised in the MOA does not constitute a thing of value, Unite Here’s Motion to Dismiss is granted.” Order Granting motion to Dismiss at 1, *Mulhall v. Unite Here Local 355*, No. 08-61766-CIV-SEITZ/O’SULLIVAN (S.D. Fla. Jan. 24, 2011). On February 2, 2011, the plaintiff appealed to the Eleventh Circuit. Plaintiff’s Notice of Appeal, *Mulhall v. Unite Here Local 355*, No. 08-CV-61766-Seitz/O’Sullivan (S.D. Fla. Feb. 2, 2011).

108. *See Mulhall*, 618 F.3d at 1292-93 (reversing the district court’s decision of mandatory arbitration for employees due to an arbitration agreement).

109. *See id.* at 1279.

110. 628 F.3d 1258 (11th Cir. 2010).

111. 18 U.S.C. § 1030 (2006 & Supp. III 2009).

112. *Rodriguez*, 628 F.3d at 1260.

exceed[ing] authorized access, and thereby obtain[ing] . . . information from any department or agency of the United States.”¹¹³ An employee who violates this section of the CFAA can receive a fine, maximum sentence of one year imprisonment, or both.¹¹⁴ The decision in *Rodriguez* is particularly significant because it bolsters an employer’s ability to protect its electronic databases and computer systems from unscrupulous employees and demonstrates that criminal punishment for those employees who violate the CFAA is a legitimate risk.

In *Rodriguez*, the defendant, Roberto Rodriguez (Rodriguez), was employed by the Social Security Administration (Administration) as a TeleService representative. Rodriguez’s job duties included taking and answering questions about social security benefits from the public. To complete these duties, Rodriguez was able to access the Administration’s databases containing sensitive information. This information included social security numbers, personal addresses, birth dates, individuals’ parents’ names, the amounts and types of social security benefits received by beneficiaries, and a person’s personal annual income.¹¹⁵

The Administration maintains a policy prohibiting employees from obtaining information from its databases absent a legitimate business reason. The Administration conducted mandatory training sessions, posted notices in its office, and programmed a banner to appear daily on every computer screen to inform its TeleService employees about this policy. The Administration also warned employees that criminal penalties could be enforced if the policy was violated. Furthermore, the Administration notified its employees of the policy in writing and required TeleService employees to acknowledge receipt of the forms in writing.¹¹⁶ Between 2006 and 2008, Rodriguez refused to acknowledge receipt of the forms, retorting, “Why give the government rope to hang me?”¹¹⁷ Although Rodriguez refused to sign the acknowledgment forms, the Administration nonetheless allowed Rodriguez to continue in his role as a TeleService representative. In August 2008, the Administration flagged Rodriguez’s employee identification number because of suspicious activity, and the Administration’s records indicated that Rodriguez had obtained the records of seventeen individuals without an apparent legitimate business reason. Even after the Administration told

113. 18 U.S.C. § 1030(a)(2)(B).

114. *Id.* § 1030(c)(2)(A).

115. *Rodriguez*, 628 F.3d at 1260.

116. *Id.*

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

Rodriguez it was investigating his database use, he continued the unauthorized activity.¹¹⁸

In April 2009, Rodriguez was indicted on seventeen counts of violating the CFAA.¹¹⁹ After a trial in July 2009, the jury rejected Rodriguez's testimony "that he had accessed the personal information as part of a whistle-blowing operation to test whether his unauthorized use of the databases would trigger the [Administration's] attention."¹²⁰ The jury found Rodriguez guilty on every count. During sentencing, the government argued that the statutory maximum sentence of twelve months provided for in 18 U.S.C. § 1030(c)(2)(A) did not sufficiently account for the harm suffered by the victims.¹²¹ The Southern District of Florida agreed and "sentenced Rodriguez to [twelve] months of imprisonment and [twelve] months of supervised release."¹²²

On appeal Rodriguez argued "that he did not exceed his authorized access to his former employer's databases and that he did not use the information to further another crime or to gain financially."¹²³ Rodriguez contended that his actions did not violate the CFAA because he only accessed authorized databases.¹²⁴ The CFAA, however, makes it a crime to "intentionally access[] a computer without authorization or exceed[] authorized access, and thereby obtain . . . information from any department or agency of the United States"¹²⁵ and defines "exceeds authorized access" as "to access a computer with authorization and to use such access to obtain or alter information in the computer that the accesser is not entitled to obtain or alter."¹²⁶ At trial, Rodriguez admitted "that his access of the victims' personal information was not in furtherance of his duties as a TeleService representative and that he did access things that were unauthorized."¹²⁷ Thus, his actions violated both the Administration's policy about accessing databases for nonbusiness purposes and the CFAA.¹²⁸

Rodriguez relied on the Ninth Circuit's interpretation of the CFAA in *LVRC Holdings, LLC v. Brekka*¹²⁹ in arguing that he had not violated

118. *Id.*

119. *Id.* at 1262.

120. *Id.*

121. *Id.*

122. *Id.*

123. *Id.* at 1260.

124. *Id.* at 1263-64.

125. 18 U.S.C. § 1030(a)(2)(B).

126. 18 U.S.C. § 1030(e)(6).

127. *Rodriguez*, 628 F.3d at 1263.

128. *Id.*

129. 581 F.3d 1127 (9th Cir. 2009).

the CFAA by accessing databases without authorization.¹³⁰ The Eleventh Circuit, however, held that his reliance on *Brekka* was misplaced.¹³¹ In *Brekka*, the Ninth Circuit held that Brekka, an employee at a residential addiction treatment center, had not violated the CFAA when he e-mailed documents that he was authorized to obtain to his personal e-mail account.¹³² The Eleventh Circuit in *Rodriguez* distinguished this case on the basis that the Administration had informed Rodriguez via its policy that he was not authorized to use the computer system for nonbusiness reasons, but in *Brekka* no such policy existed.¹³³

Rodriguez also relied on *United States v. John*¹³⁴ to argue that his conduct did not violate the CFAA because he did not access the unauthorized databases in furtherance of a crime.¹³⁵ The Eleventh Circuit held that his reliance on that case was also misplaced.¹³⁶ In *John* a Citigroup employee, who was authorized to use her employer's computers and to view and print account information, used that information to incur fraudulent charges on Citigroup customers.¹³⁷ The United States Court of Appeals for the Fifth Circuit affirmed the conviction under the CFAA, noting that although the employee was authorized to access all of the information, "'authorization' as used in the Act, 'may encompass limits placed on the use of information obtained by permitted access to a computer system and data available on that system' if the use is in furtherance of a crime."¹³⁸ Rodriguez argued that unlike the employee in *John*, he had not used unauthorized information to commit a crime; thus, he had not violated the CFAA.¹³⁹ The Eleventh Circuit, however, reasoned that under the CFAA, Rodriguez's "use of [the] information [was] irrelevant if he obtained the information without authorization or as a result of exceeding authorized access."¹⁴⁰ The court further explained that the plain language of the CFAA bars Rodriguez's argument that his conviction could not stand

130. *Rodriguez*, 628 F.3d at 1263.

131. *Id.*

132. *Brekka*, 581 F.3d at 1130-32, 1137.

133. *Rodriguez*, 628 F.3d at 1263 (citing *Brekka*, 581 F.3d at 1129).

134. 597 F.3d 263 (5th Cir. 2010).

135. *Rodriguez*, 628 F.3d at 1263.

136. *Id.*

137. 597 F.3d at 269, 271.

138. *Rodriguez*, 628 F.3d at 1263 (quoting *John*, 597 F.3d at 271) (internal quotations omitted).

139. *Id.*

140. *Id.*

because he never used the unauthorized personal information he accessed to defraud anyone or to gain financially.¹⁴¹

The decision in *Rodriguez* highlights the need for employers to inform their employees about the permissible purposes for which employees may access information stored on computer databases. The case further identifies the need for employers to incorporate rules about accessing computer systems in a written policy: the existence of such a policy may support criminal liability of employees who violate such a policy and therefore violate the CFAA. Such potential criminal liability could be used by employers as a strong deterrent to protect sensitive electronic information on their databases if they implement appropriate policies and effectively communicate to employees the limitations of their database access. Furthermore, the Eleventh Circuit's broad construction of the CFAA serves as a warning to employees of the potential consequences from unauthorized access to their employers' computer systems.

141. *Id.* at 1264.
