Labor Law

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I. INTRODUCTION

This Article surveys the 1998 decisions of the United States Court of Appeals for the Eleventh Circuit that addressed issues in the areas of traditional labor law. This article specifically discusses decisions by the Eleventh Circuit under the Labor Management Relations Act ("LMRA"), the National Labor Relations Act ("NLRA"), the Fair Labor Standards Act of 1938 ("FLSA"), and the Employee Retirement Income Security Act of 1974 ("ERISA"). As in the years past, the Eleventh Circuit decided several cases that involved issues of interest in the area of traditional labor law. Due to page limitations, however, this Article cannot survey every relevant case. Thus, this Article focuses upon only the noteworthy cases and the cases of first impression decided by the Eleventh Circuit in 1998.

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II. THE LABOR MANAGEMENT RELATIONS ACT

A. Preemption of State Law Claims for Assault, Battery, and Intentional Infliction of Emotional Distress

In Peterson v. BMI Refractories, the main legal issue addressed by the Eleventh Circuit was whether section 301(a) of the LMRA prevented former employees' state law tort claims. In this case, the Eleventh Circuit held the LMRA did not preempt the state law claims for assault, battery, and intentional infliction of emotional distress.

Plaintiffs were black males employed as laborers at BMI's Birmingham, Alabama facility. Both men were members of the Laborers International Union of North America, AFL-CIO. During the period of plaintiffs' employment, the union and BMI were parties to a collective bargaining agreement that contained a grievance and arbitration procedure.

Giangrosso, a white supervisor, was a major source of racial hostility against plaintiffs in their workplace. The racial problems were not simply limited to verbal abuse. Eventually, they escalated to the level of violence and physical intimidation, including an incident when a black laborer was kicked by a white brick mason and another incident when, in Giangrosso's presence, the same brick mason threatened to throw one of plaintiffs off of a fifty foot scaffold. Giangrosso's only response was laughter.

The situation came to a head when plaintiffs returned from lunch one day and found a pallet of gunnite bags had been overturned near where they had been working. When one of the plaintiffs leaned over to pick up the bags, he was kicked from behind by Giangrosso. Later, during that same shift, Giangrosso told plaintiffs to get in his truck with him. Then, Giangrosso pulled a nine millimeter pistol out of the glove box and pointed the gun in one of the plaintiff's general direction while saying, "[Y]ou see this here, well, I just wanted you to see it, that's all." Following this incident, plaintiffs returned to the job site, received their final paychecks, and were fired. The reason given to plaintiffs was that Giangrosso said they were no longer needed.

5. 132 F.3d 1405 (11th Cir. 1998).
6. Id. at 1412.
7. Id. at 1413.
8. Id. at 1408.
9. Id. at 1409.
10. Id.
The following day, plaintiffs went to their union office to file a grievance in the matter. However, the union representative informed plaintiffs that the union would not involve itself with their grievances, even though the collective bargaining agreement contained articles that addressed both nondiscrimination and grievances.\footnote{11}

This action originally was filed in the Circuit Court of Jefferson County, Alabama. BMI removed the action to the United States District Court for the Northern District of Alabama and moved for summary judgment on all counts. The magistrate judge assigned to the case issued a report recommending that BMI's motion be granted on all counts. The district court entered an order granting BMI's motion for summary judgment and dismissed the action in all respects without prejudice. In entering its findings, the district court adopted the magistrate's recommendations, but also determined that the state law tort claims were preempted by the LMRA. Plaintiffs then filed a timely notice of appeal.\footnote{12}

Plaintiffs contended the district court erred in finding that their state law claims of assault, battery, and intentional infliction of emotional distress were preempted by section 301(a) of the LMRA. Section 301(a) provides that suits for violation of contracts between an employer and a labor organization may be brought in any district court having jurisdiction of the parties, without respect to the amount in controversy or the citizenship of the parties.\footnote{13}

The Eleventh Circuit's analysis of the section 301(a) preemption issue focused on whether the state tort claims "confers nonnegotiable state-law rights on employers or employees independent of any right established by contract, or, instead, whether evaluation of the tort claim is inextricably intertwined with consideration of the terms of the labor contract."\footnote{14} The court analyzed the elements of each challenged state law claim to determine whether the claims required an interpretation of the collective bargaining agreement.\footnote{15}

The Eleventh Circuit first examined the state law claims for assault and battery.\footnote{16} Here, the court rejected BMI's contention that adjudication of the merits of the claims required an interpretation of the collective bargaining agreement.\footnote{17} Instead, the court said the inquiry

\footnote{11} Id. at 1409-10.
\footnote{12} Id. at 1410.
\footnote{13} Id. at 1412 (citing 29 U.S.C. § 185(a)).
\footnote{14} Id. (quoting Allis-Chalmers Corp. v. Lueck, 471 U.S. 202, 213 (1985)).
\footnote{15} Id.
\footnote{16} Id.
\footnote{17} Id. at 1413.
was purely factual in nature and did not turn on any interpretation of the collective bargaining agreement. Finally, the Eleventh Circuit held that plaintiffs' "right to be free from assault and battery rests firmly on a nonnegotiable state right." Thus, section 301(a) of the LMRA did not preempt plaintiffs' state law claims for assault and battery.

The Eleventh Circuit also found the state law claim for intentional infliction of emotional distress was not preempted by the LMRA. Here, however, the court recognized that analysis of an employee's claim for intentional infliction of emotional distress could foreseeably require interpretation of an employment contract or a collective bargaining agreement. Nevertheless, the court found that the employer's conduct in the instant case was so extreme and outrageous that examination of the collective bargaining agreement was unnecessary because BMI's conduct could not be arguably sanctioned by the terms of the collective bargaining agreement. Therefore, the Eleventh Circuit held plaintiffs' state law claim for intentional infliction of emotional distress was not preempted by section 301(a) of the LMRA.

B. Preemption of State Law Claim for Tortious Interference with Employment

The case of Turner v. American Federation of Teachers Local 1565 also examined the preemption of a state law claim by the LMRA. However, in this case, the Eleventh Circuit found the former employee's state law claim for tortious interference with employment was preempted by section 301(a) of the LMRA.

Here, plaintiff had been employed as a field representative by the American Federation of Teachers Local 1565 ("AFT"). Her employment contract with AFT was governed by the collective bargaining agreement between AFT and the Atlanta Staff Union ("ASU"). In 1995 the president of AFT fired plaintiff for insubordination and involvement in internal political activity.

18. Id.
19. Id.
20. Id.
21. Id.
22. Id.
23. Id.
24. Id.
25. 138 F.3d 878 (11th Cir. 1998).
26. Id. at 884.
27. Id. at 880.
Plaintiff filed suit against AFT in Georgia Superior Court, alleging tortious interference with employment. She also alleged a violation of the terms and conditions of her employment contract and defamation. AFT removed the case to federal district court on the grounds that the case involved a federal question, specifically, preemption by the LMRA. After AFT moved for summary judgment, the district court granted summary judgment for AFT on the contract claim. Similarly, the district court also granted AFT summary judgment on the tortious interference with employment claim because there was no interference by one who was a stranger to the employment relationship. Plaintiff appealed the district court's rulings on summary judgment of both the tortious interference with employment claim and the contract claim.28

The Eleventh Circuit declined to follow the district court's decision to resolve the tortious interference with employment claim under Georgia law.29 Rather, the Eleventh Circuit focused on whether resolution of the state law claim for tortious interference with employment turned on an interpretation of the terms of the collective bargaining agreement.30

The Eleventh Circuit noted this circuit has not addressed this issue directly, but that other circuits have ruled tortious interference with employment claims necessarily require an examination of the terms of the relevant collective bargaining agreement.31 Therefore, these circuits have held tortious interference with employment claims are preempted by the LMRA.32

Accordingly, the Eleventh Circuit found plaintiff's state law claim for tortious interference with employment required an analysis of the collective bargaining agreement.33 In plaintiff's case, analysis of the collective bargaining agreement was particularly important because her tortious interference claim rested solely on the theory of wrongful discharge. Therefore, interpretation of whether the collective bargaining agreement's terms precluded such action was paramount. Consequently, the Eleventh Circuit found plaintiff's state law claim for tortious interference with employment was preempted by section 301(a) of the LMRA.34

28. Id. at 881.
29. Id. at 884-85.
30. Id. at 884 (citing Lueck, 471 U.S. at 220).
31. Id.
32. Id.
33. Id.
34. Id. at 884 n.14.
III. THE NATIONAL LABOR RELATIONS ACT

A. Sections 8(a)(1) and 8(a)(3) Unfair Labor Practices Violations

In National Labor Relations Board v. McClain of Georgia, Inc., the Eleventh Circuit addressed the issue of what is, and what is not, considered to be an unfair labor practice under section 8 of the NLRA. Specifically, the court addressed whether the employer violated sections 8(a)(1) and (3) when it suddenly changed to a "zero tolerance" employee drug testing policy from its previous position of leniency shortly after the union filed its petition. The court also examined whether employee layoffs during the union campaign violated sections 8(a)(1) and (3). The Eleventh Circuit held both of the employer practices at issue were NLRA violations.

The company in this case manufactured solid waste containers and employed approximately fifty employees, including several temporary employees at its Macon, Georgia plant. In 1994 the company employees attempted to unionize after the union filed a petition with the NLRB. The NLRB dismissed the union's petition on the ground that it would have to include the temporary workers in the bargaining unit. Consequently, the union again filed a petition with the NLRB in 1995 including the temporary employees in the proposed bargaining unit.

Seven days after the 1995 union petition was filed, the company denied a temporary employee the opportunity to be retested following a positive drug test and fired him. Several weeks later the company ordered that all employees be drug tested. Seven employees tested positive and were immediately fired. Four of the employees that were fired had no known union connections. Prior to that time, the company had been lenient in the enforcement of its drug testing policy. In fact, the company's previous policy was to allow employees who tested positive for drugs to be retested and to give some employees with known drug and alcohol problems the opportunity to remedy their problems without facing termination.

Nine days after the 1995 union petition was filed, the company announced that it would lay off nineteen employees. Shortly before
these layoffs, several employees overheard the company president angrily state, “I'm getting rid of the people in the shop. I'm going to show them who is boss around here. I'm going to show them who they're fucking with.”

During the election, eighteen employees voted for unionization, twenty-one voted against, and the Board challenged ten ballots. The General Counsel for the Board also filed complaints alleging the employer engaged in numerous unfair labor practices during the union campaign in an effort to intimidate and retaliate against employees for exercising their statutory rights to engage in union activities.

The administrative law judge found, and the Board affirmed, the company violated section 8(a)(1) of the NLRA by interrogating employees about their union sympathies and those of other employees, by threatening employees with plant closures, by soliciting employees to spy on other employees, and by promising and granting benefits to employees to dissuade them from union support. However, none of these violations were at issue on appeal. The Board also found the company violated sections 8(a)(1) and (3) by issuing warnings for attendance violations, by suddenly changing its drug testing policy, and by employee layoffs, all in retaliation for union activity. The Board's order required the company to cease and desist from engaging in these unfair labor practices and to reinstate, with back pay, those employees who were fired pursuant to the new “zero tolerance” drug testing policy and who were laid off. On appeal, the company challenged the Board's findings regarding the layoffs and the drug testing policy.

In its review of the Board's findings regarding the layoffs, the Eleventh Circuit rejected the company's contention that the layoffs could not have been made in retaliation for union activity because most of the laid off employees were not known union supporters. The court noted that in order to show a section 8(a)(3) violation, the NLRB General Counsel must usually show the employee was fired because of union activity. However, the Eleventh Circuit recognized further that the General Counsel may also succeed under the theory that the employer ordered general layoffs “for the purpose of discouraging union activity

42. Id. at 1423.
43. Id. at 1421.
44. Id. at 1421-22.
45. Id. at 1425.
46. Id. at 1423 (citing NLRB v. United Sanitation Serv., Div. of Sanitas Serv. Corp., 737 F.2d 936, 939 (11th Cir. 1984)).
or in retaliation against its employees because of the union activities of some.\textsuperscript{47}

The Eleventh Circuit analyzed whether anti-union animus was the motivating factor underlying the company's decision to layoff employees under the \textit{Wright Line} test.\textsuperscript{48} The \textit{Wright Line} test, as articulated in this circuit, requires three phases of proof: (1) the General Counsel must show by a preponderance of the evidence that a protected activity was a motivating factor in the employer's decision to fire an employee; (2) such a showing establishes a section 8(a)(3) violation unless the employer shows, as an affirmative defense, that it would have fired the employee for a legitimate reason regardless of the protected activity; and (3) the General Counsel may offer proof that the employer's affirmative defense was based on a pretextual reason, which restores the inference of unlawful motivation.\textsuperscript{49}

In this case, the Eleventh Circuit noted first that motive is a question of fact and that the Board may rely on circumstantial evidence to infer anti-union animus.\textsuperscript{50} The Eleventh Circuit continued its examination of motive by concluding that, based on the other numerous section 8(a)(1) violations, the administrative law judge correctly found that the real motivation behind the layoffs was anti-union animus.\textsuperscript{51}

Next, the Eleventh Circuit also upheld the administrative law judge's decision that the company's proffered reason, that the layoffs were for economic reasons, was merely pretextual.\textsuperscript{52} Here, the Eleventh Circuit rejected the company's assertion that reversal was warranted in this case under the decision in \textit{Northport},\textsuperscript{53} which held the administrative law judge's failure to properly weigh the employer's proffered legitimate reasons warranted reversal.\textsuperscript{54} In rejecting this argument by the company, the Eleventh Circuit distinguished \textit{Northport} from the instant case because in \textit{Northport} the court held the administrative law judge inadequately explained its reasons for rejecting the employer's proffered

\textsuperscript{47} Id. (quoting Birch Run Welding & Fabricating, Inc. v. NLRB, 761 F.2d 1175, 1180 (6th Cir. 1985)).

\textsuperscript{48} Id. at 1424. The court noted that in \textit{National Labor Relations Board v. Transportation Management Corp.}, 462 U.S. 393 (1983), the Supreme Court approved the NLRB's test for determining motive in discharge tests as set forth in \textit{Wright Line, a division of Wright Line, Inc.}, 251 N.L.R.B. 1083 (1980), enforced on other grounds, 662 F.2d 899 (1st Cir. 1981).

\textsuperscript{49} 138 F.3d at 1424 (citing Northport Health Serv. v. NLRB, 961 F.2d 1547, 1550 (11th Cir. 1992)).

\textsuperscript{50} Id.

\textsuperscript{51} Id. at 1424-25.

\textsuperscript{52} Id.

\textsuperscript{53} 961 F.2d 1547.

\textsuperscript{54} 138 F.3d at 1425.
In sharp contrast, the administrative law judge in this case considered the company's reasons and then specifically enumerated his reasons for rejecting them as pretextual. Therefore, under the Wright Line test, the Eleventh Circuit upheld the Board's decision and found the company violated section 8(a)(3) when it laid off employees after the filing of the union petition.

Next, the Eleventh Circuit turned to an examination of the Board's finding that the company violated sections 8(a)(1) and (3) when it suddenly changed its drug testing policy and discharged eight employees under the new "zero tolerance" policy. Here, the Eleventh Circuit also upheld the Board's findings.

In entering its findings, the Eleventh Circuit said courts, historically, have acknowledged that an employer's initiation of new workplace rules or a change in existing rules in retaliation for union activity will violate sections 8(a)(1) and (3) of the NLRA. Although the court recognized employers must be allowed to enforce their disciplinary rules, the court also said an employer's defense, that a change in disciplinary rules was nondiscriminatory, will not carry weight when it is shown that the employer replaced its previously lax enforcement system with a new strict enforcement policy in retaliation for union activity. Also, the Eleventh Circuit noted that, although not dispositive, the timing of a policy change may be evidence of anti-union animus.

In this case, the Eleventh Circuit said the fact that the company changed its drug testing policy shortly after the union filed its 1995 petition, combined with the other evidence of anti-union animus and the other section 8(a)(1) violations, supported the Board's decision that the change to "zero tolerance" was part of the company's concerted efforts at retaliation. The court emphasized the importance of the fact that the company failed to produce any evidence that there was a legitimate business reason for its decision to abolish its former retest policy.
Perhaps most importantly, the Eleventh Circuit acknowledged the Fourth Circuit’s decision in *Eldeco, Inc. v. National Labor Relations Board*, a case strikingly similar in its retaliatory nature to this case, which found that the implementation of a new drug testing policy during a union campaign did not violate section 8(a)(1). In *Eldeco* the employer began drug testing all new job applicants one week after the union instituted a strike and filed an unfair labor practice charge with the NLRB. There, a supervisor also had told some of the employees the purpose of the new policy was to rid the company of union supporters, not of drug users. Although the court acknowledged that substantial evidence “facially” supported the inference that the new policy implementation was motivated by retaliation for union activities, the Fourth Circuit found the drug testing policy supported a valid employer interest in fighting drug abuse and it had not been disparately enforced.

**B. Sections 8(a)(1) and (5) Unfair Labor Practices Violations**

In *National Labor Relations Board v. Triple A Fire Protection, Inc.*, the Eleventh Circuit first looked at whether the relationship between the employer and the union had been converted into full section 9(a) status. Because the court did find the relationship had been converted, the main issue the court examined was whether the employer’s direct dealing and unilateral changes violated sections 8(a)(1) and (5) of the NLRA.

Triple A Fire Protection installed and maintained sprinkler and fire protection systems in Mobile, Alabama. At any given time, the highest number of employees at Triple A was eight employees. From the time the company was formed, the employees were represented by Road Sprinkler Fitters Union No. 669. In 1988 the employer signed an agreement to be bound by the 1988 to 1991 national agreement between the union and the National Fire Sprinkler Association. In December 1990 the union’s business manager sent Triple A a letter expressing the union’s desire to move forward with negotiating another collective bargaining agreement, to be effective in 1991. This letter included a warning that if a renewal contract was not reached by March 31, 1991, then lawful economic action might ensue. Also included were two copies of an “Assent and Interim Agreement” that would prohibit Triple A from

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65. 132 F.3d 1007, 1011-12 (4th Cir. 1997).
66. 138 F.3d at 1427.
67. *Id.* (citing *Eldeco*, 132 F.3d at 1011-12).
68. 136 F.3d 727 (11th Cir. 1998).
69. *Id.* at 734-35.
70. *Id.* at 735-36.
negotiating a separate deal with the union and mandate that they continue to abide by the terms of the expired agreement until the effective date of the successor agreement. Triple A's president, Turner, never signed this agreement.\textsuperscript{71}

During the spring of 1991, Turner approached employees on numerous occasions in an attempt to discuss their employment and the union's general status. Turner also offered several employees benefits in return for the employees' promise not to support the union.\textsuperscript{72}

Later that spring, the union representative attempted to set a meeting with Turner but was put off. Instead, the union representative made a surprise visit to Triple A, where he found Turner and tried to get him to sign the interim agreement. Turner refused to sign and informed the representative that he was submitting his own proposed contract to the union. Later that week, the union representative wrote Turner and accused him of refusing to negotiate with the union.\textsuperscript{73}

In April both parties met to begin formal bargaining sessions. At this meeting, Turner submitted a list of twenty-three jobs that Triple A had lost in the past year due to high bids based on union wages and benefit plans. However, there was very little discussion about these figures. The parties did discuss Triple A's proposed contract and then tentatively approved a limited number of provisions. Although the meeting lasted most of the day, very little was accomplished. At the close of the meeting, the union promised to submit counter-proposals, and a second meeting was set for April 30. However, neither party mentioned any deadlines for negotiation.\textsuperscript{74}

Three days later, Turner sent the union a letter accusing it of not seriously addressing Triple A's proposal. The letter also said that, because the union had failed to submit a meaningful proposal, Triple A would no longer tolerate the union's inaction. In short, Turner issued the union an ultimatum saying it would effectuate its proposed contract if no agreement was reached by April 22. The union representative responded by confirming the April 30 meeting date.\textsuperscript{75}

On April 22, Triple A ceased to abide by the terms of the expired collective bargaining agreement. However, the parties still met on April 30. In this meeting, the union told Turner that Triple A's implementation of its proposal on April 22 constituted an unfair labor practice. The union also told Turner that a section 9(a) relationship existed between
the union and Triple A, which required Triple A to bargain with the union until the parties reached an impasse or negotiated a new agreement. Turner then told the union he was willing to bargain until a new agreement was reached, but the union representative declined to bargain the next day.\textsuperscript{76}

Although the ALJ found the contract between the union and Triple A was only a section 8(f) prehire agreement, not a section 9(a) collective bargaining agreement, the Board reversed and held the agreement was a collective bargaining agreement under section 9(a) of the NLRA. In the supplemental decision, the ALJ found that Triple A violated sections 8(a)(1) and (5) when it dealt directly with employees, when it unilaterally reduced wages for bargaining unit employees, and when it unilaterally stopped making the fringe-benefit payments. The Board affirmed and adopted the ALJ's supplemental decision, and Triple A appealed.\textsuperscript{77}

First, the Eleventh Circuit affirmed the Board's decision that the relationship between Triple A and the union had been converted into full section 9(a) status when Triple A voluntarily recognized the union as having been designated by the majority of the employees as their exclusive bargaining representative.\textsuperscript{78} Because only eight employees, including Turner and his son, were involved, Turner would have actually verified that the clear majority of the employees had designated the union as their exclusive bargaining representative, as called for by the voluntary recognition form that Turner signed.\textsuperscript{79} The Eleventh Circuit further said the union was entitled to a presumption of full majority support upon the expiration of the collective bargaining agreement.\textsuperscript{80} Therefore, the parties had a duty to bargain in good faith, and Triple A also had a duty not to deal directly or to make unilateral changes in violation of sections 8(a)(1) and (5).\textsuperscript{81}

The Eleventh Circuit then moved to an analysis of Triple A's alleged violations of sections 8(a)(1) and (5).\textsuperscript{82} The court began its examination with a look at whether Triple A's direct dealing was a sections 8(a)(1) and (5) violation.\textsuperscript{83} Because section 8(a)(5) creates an employer duty to bargain with the incumbent union as the exclusive bargaining representative of its employees, Turner's numerous attempts to deal

\begin{itemize}
  \item \textsuperscript{76} Id. at 733-34.
  \item \textsuperscript{77} Id. at 734.
  \item \textsuperscript{78} Id. at 735.
  \item \textsuperscript{79} Id.
  \item \textsuperscript{80} Id.
  \item \textsuperscript{81} Id.
  \item \textsuperscript{82} Id.
  \item \textsuperscript{83} Id.
\end{itemize}
directly with his employees outside the collective bargaining channels were per se violations of sections 8(a)(1) and (5).\textsuperscript{84}

Next, the Eleventh Circuit rejected Triple A's affirmative defenses and found Triple A's unilateral changes in the terms and conditions of employment that were subject to negotiation were violations of sections 8(a)(1) and (5).\textsuperscript{85} First, the Eleventh Circuit refused to accept Triple A's argument that the parties had bargained to impasse at the time the unilateral changes were implemented.\textsuperscript{86} The court said an impasse inquiry requires the court to look to (1) the background and relationship of the parties, (2) their willingness to negotiate, (3) the extent and frequency of their bargaining, (4) the integrity of the bargaining, and (5) the good or bad faith of the parties.\textsuperscript{87} Under this analytical framework, the court found there had only been one formal bargaining session and the negotiations were still in the exploration stage.\textsuperscript{88} Therefore, the Eleventh Circuit held the parties had not bargained to impasse.\textsuperscript{89}

Similarly, the Eleventh Circuit also rejected Triple A's alternative affirmative defense that an exception to the impasse rule applied because the union unreasonably delayed or stalled the bargaining process.\textsuperscript{90} The court acknowledged that, after notifying the union of its intentions, an employer may make unilateral changes without bargaining when the union has unreasonably delayed or stalled.\textsuperscript{91} Nevertheless, the Eleventh Circuit found that negotiations had barely even gotten off the ground and that there was only minimal delay before Triple A had instituted the unilateral changes.\textsuperscript{92} The court also was persuaded by the fact that Triple A instituted the unilateral changes on April 22, which was prior to the already scheduled April 30 meeting.\textsuperscript{93} Thus, the Eleventh Circuit held Triple A did not meet the qualifications for the unreasonable delay exception to the impasse rule.\textsuperscript{94}

Finally, the court found no merit in Triple A's last affirmative defense that economic necessity justified the unfair labor practices.\textsuperscript{95} The court

\textsuperscript{84} Id.
\textsuperscript{85} Id. at 735-36.
\textsuperscript{86} Id. at 738.
\textsuperscript{87} Id. (citing Electric Mach. Co. v. NLRB, 653 F.2d 958, 963 n.5 (5th Cir. 1981)).
\textsuperscript{88} Id.
\textsuperscript{89} Id.
\textsuperscript{90} Id. at 738-39.
\textsuperscript{91} Id. at 738 (citing NLRB v. Pinkston-Hollar Constr. Servs., Inc., 954 F.2d 306, 311 (5th Cir. 1992)).
\textsuperscript{92} Id. at 739.
\textsuperscript{93} Id.
\textsuperscript{94} Id.
\textsuperscript{95} Id.
said an economic necessity showing requires that extenuating circumstances or compelling business justifications exist. A mere assertion that the required fringe benefit payments were beyond the company’s financial reach was insufficient. In fact, although Turner did present a list of the jobs lost due to bid price, the parties barely even touched on the subject in their brief April 9 meeting. Therefore, the Eleventh Circuit held Triple A did not satisfy its burden of showing that its economic status warranted its decision to implement the unilateral changes in the terms and conditions of employment.

IV. THE FAIR LABOR STANDARDS ACT

A. Compensable Overtime Work

In the case of Freeman v. City of Mobile, Alabama, the Eleventh Circuit examined whether the city of Mobile, Alabama was entitled to a FLSA section 7(k) exemption under which it would not have to pay officers overtime unless they worked more than eighty-six hours in a fourteen-day pay period. Although a section 7(k) exemption is narrowly construed against the employer, the Eleventh Circuit held there was sufficient evidence showing the city was entitled to the FLSA exemption.

Specifically, appellants were patrol officers, sergeants, and lieutenants in the Uniform Services Division of the Mobile Police Department (“MPD”). Under Alabama law, the Mobile County Personnel Board has the authority to establish job classification and compensation plans for the MPD. Consequently, the officers are subject to the Rules and Regulations adopted by the Personnel Board. However, the officers are actually employed by the city, which has the power under the Personnel Board’s Rules to choose a work period for its employees.

In 1974 the City Commission adopted Resolution 60-1440, which established a fourteen-day work period for all members of the MPD. The Personnel Board later amended its Rules to address “Payment for Overtime.” This amendment provided that all employees who are nonexempt from the FLSA will be paid overtime for all hours paid in

96. Id.
97. Id.
98. Id.
99. 146 F.3d 1292 (11th Cir. 1998).
101. 146 F.3d at 1296-97.
102. Id. at 1297.
103. 1939 ALA. ACTS 470.
104. 146 F.3d at 1294.
excess of forty hours per week at one-and-one-half times the employees' hourly rate, or, in the alternative, the employees will be awarded compensatory time. However, the Personnel Board failed to specify which positions it believed to be exempt from the FLSA. Moreover, the city retained its authority to establish employee pay periods and to set their work schedules. Under this authority, the city paid its patrol officers, sergeants, and lieutenants every other Friday, a fourteen-day pay period.105

The city's patrol officers were required to report for the roll call ten minutes before each eight-hour shift. When this time was taken into account, the patrol officers' regular work schedule was eighty-one hours and forty minutes for the ten work days in the fourteen-day payroll period. The city's sergeants and lieutenants were required to not only devote time to the roll call prior to their eight-hour shifts, but also to train, supervise, and discipline the patrol officer squads as part of their regular duties. Consequently, the sergeants and lieutenants worked over eighty-six hours in the fourteen-day payroll period. Although the city did pay the patrol officers time-and-a-half for work over eighty-one hours and forty minutes in a fourteen-day payroll period, the city did not pay overtime compensation for time devoted to roll call. Not only were the sergeants and lieutenants not paid overtime for the time spent on roll call, but they also were not paid any additional compensation for overtime work."106

In response to the city's overtime pay policies, a number of the police officers tried to secure overtime pay for the extra time spent on roll call. The city's police chief responded by issuing a memorandum saying the police department payroll period was fourteen days, and the MPD was not required to pay overtime unless someone worked over eighty-six hours in that pay period. The memorandum continued by saying that, because the officers were only scheduled for eighty-one hours and forty minutes, they were not entitled to overtime pay for roll call.107

The officers filed suit against the city in district court alleging the city violated their rights to overtime and straight pay under the FLSA. After the city moved for summary judgment, the officers cross-moved for summary judgment, asserting the city did not qualify for the section 7(k) exemption because it failed to affirmatively and expressly adopt a section 7(k) plan. The district court entered summary judgment for the city and found the city was entitled to the section 7(k) exemption.108

105. Id. at 1294-95.
106. Id. at 1295.
107. Id.
108. Id. at 1295-96.
The Eleventh Circuit first examined the language of the section 7(k) exemption which states:

no public agency shall be deemed to have violated subsection (a) of this section with respect to the employment of . . . any employee in law enforcement . . . if . . . (2) in the case of such employee to whom a work period of at least seven but less than twenty-eight days applies, in his work period the employee receives for tours of duty which in the aggregate exceed a number of hours which bears the same ratio to the number of consecutive days in his work period as 216 hours . . . bears to twenty-eight days, compensation at a rate not less than one and one-half times the regular rate at which he is employed.109

Based on this language, the Eleventh Circuit said that if a city adopts a work period from seven to twenty-eight days for its officers, the city may require the officers to work over forty hours per week without having to pay overtime.110 So, a city need not pay overtime unless an employee works in excess of eighty-six hours in the fourteen-day pay period.111

The Eleventh Circuit noted the city was required to show by clear and affirmative evidence that it has adopted a work period of between seven and twenty-eight days.112 Then, the court rejected the officers’ allegation that, following this evidentiary rule, the city did not take affirmative and express action to adopt a section 7(k) compensation plan.113 Instead, the court held that it was sufficient for the city to show through the resolution, the memorandum, and other circumstantial evidence that it adopted a fourteen-day work period.114 Thus, the Eleventh Circuit held the city was entitled to the section 7(k) exemption and, as a consequence, was not required to pay overtime compensation to any of the patrol officers, sergeants, and lieutenants for up to eighty-six hours of work in any fourteen-day work period.115

B. Jurors

The case of Brouwer v. Metropolitan Dade County,116 examined whether the relationship between jurors and the county is an employ-

109. Id. at 1296-97 (quoting 29 U.S.C. § 207(k)).
110. Id. at 1237 (citing Birdwell v. City of Gadsden, Ala., 970 F.2d 802, 804 (11th Cir. 1992)).
111. Id.
112. Id.
113. Id.
114. Id.
115. Id.
116. 139 F.3d 817 (11th Cir. 1998).
ment relationship covered by FLSA. The Eleventh Circuit determined the relationship was not an employment relationship covered by the FLSA, and, thus, the juror was not entitled to be paid minimum wage under the FLSA for her jury service.

The Eleventh Circuit acknowledged Dade County was indisputably an employer under the FLSA definition. To determine whether an employment relationship then existed between the county and the juror, the court turned to an examination of the economic reality of all of the circumstances.

The Eleventh Circuit said jurors are easily distinguished from other county employees for several reasons. Jurors do not apply for employment and are not interviewed to see who is better qualified for the position. Rather, jurors are randomly selected, and all available persons are summoned. Jurors are compelled to serve. They do not receive a salary, but are paid a statutorily mandated sum no matter how many hours they work. Jurors are not eligible for any of the employee benefits. Finally, the county cannot fire jurors. Thus, the Eleventh Circuit held there were no indications that the county had an employment relationship with jurors under the FLSA.

V. THE EMPLOYEE RETIREMENT INCOME SECURITY ACT

A. Preemption

In *Hall v. Blue Cross/Blue Shield of Alabama*, the insured sued the insurer of an employer-provided health benefit plan, alleging that agents of the insurer fraudulently induced her to enroll in a particular plan based upon a material misrepresentation about the scope of coverage for pre-existing conditions. The issue in this case was whether the insured's state law fraudulent inducement claim was preempted by

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117. *Id.* at 818-19.
118. *Id.* at 819.
119. *Id.* at 819.
120. *Id.* at 818.
121. *Id.*
122. *Id.*
123. *Id.*
124. *Id.*
125. *Id.*
126. *Id.*
127. *Id.*
128. *Id.*
129. 134 F.3d 1063 (11th Cir. 1998).
ERISA. After careful review, the court of appeals found this state law claim was preempted.

The facts revealed that plaintiff found out she needed surgery for a pre-existing tumor, and she consulted with Blue Cross/Blue Shield of Alabama. The insurer informed her it would deny any insurance claim arising out of the surgery because the surgery was due to a pre-existing condition. After plaintiff had the surgery, she filed suit against the insurer, claiming that agents of Blue Cross fraudulently induced her to enroll in their plan based upon a material misrepresentation about the scope of insurance coverage for pre-existing conditions. Plaintiff's state court complaint against Blue Cross asserted three counts: (1) "fraud in or around December of 1994"; (2) "suppression"; and (3) "fraud in the inducement." Plaintiff alleged that because of Blue Cross's misrepresentation, "she did not secure other coverage during the 270-day exclusion period and [she] did not request that Blue Cross modify its offer so as to cover unknown preexisting conditions." She sought compensatory and punitive damages.

Plaintiff contended her state law claims arose solely out of the state law fraud doctrine. Blue Cross, however, contended that plaintiff's claims implicated ERISA allegations and, therefore, ERISA preempted her state law action. The Eleventh Circuit started by addressing the well-established law that a "cause of action does not arise under federal law unless the plaintiff's 'well-pleaded complaint' presents a federal question.

Although plaintiff's complaint allegedly relied on state law, the Eleventh Circuit found she could not avoid federal jurisdiction if some of her allegations involved an area of law that the federal legislation had preempted. The court went on to note the United States Supreme Court had broadly interpreted the phrase "relate to" in ERISA preemption clauses so as to include any state law claim having a "connection with or reference to" an employee benefits plan. The Eleventh Circuit noted the Supreme Court had stated even more recently that any and all state law claims will be found to "relate to" an

130. *Id.* at 1064.
131. *Id.*
132. *Id.*
133. *Id.*
134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.* at 1065 (citations omitted).
138. *Id.*
139. *Id.* (citations omitted).
ERISA plan for preemption purposes if the "'alleged conduct at issue is intertwined with the refusal to pay benefits.'"\textsuperscript{140} Interestingly enough, plaintiff tried to argue her fraudulent inducement claim really arose out of the manner in which Blue Cross "marketed" its insurance policies, and, therefore, because ERISA did not govern the "sale of" insurance, it could not preempt her claim.\textsuperscript{141} The Eleventh Circuit noted, however, that there was no way a jury could determine whether plaintiff had been fraudulently induced into signing up with this plan unless they looked to the four corners of the ERISA governed policy itself.\textsuperscript{142} Therefore, the Eleventh Circuit found plaintiff could not go forward with her state law claims against Blue Cross because these state law claims were preempted by ERISA.\textsuperscript{143}

**B. ERISA Common Law**

In *Horton v. Reliance Standard Life Insurance Co.*,\textsuperscript{144} a beneficiary brought an ERISA action against the insurers, seeking benefits under her husband's life insurance policy. There was some question as to whether her husband had committed suicide, but the beneficiary argued the common-law presumption against suicide, in favor of accidental death, should be part of ERISA's common-law as well. In fact, the district court relied upon the legal presumption in deciding this case in favor of the beneficiary. The defendant-insurer, however, argued on appeal that the district court erred in using the legal presumption in determining this claim.\textsuperscript{145}

First, the Eleventh Circuit noted courts have the authority to "'develop a body of federal common law to govern issues in ERISA actions not covered by the act itself.'"\textsuperscript{146} When examining a body of common-law, the Eleventh Circuit stated the federal courts may look to state law as a model because of the state's greater experience in interpreting insurance contracts and resolving coverage disputes.\textsuperscript{147} Second, in deciding whether a particular rule should become a part of ERISA's common-law, the Eleventh Circuit stated a court must examine whether the rule, if adopted, would further ERISA's schemes and goals.\textsuperscript{148}

\textsuperscript{140} Id. (quoting Garren v. John Hancock Mut. Life Ins. Co., 114 F.3d 186, 187 (11th Cir. 1997)).
\textsuperscript{141} Id.
\textsuperscript{142} Id.
\textsuperscript{143} Id. at 1066.
\textsuperscript{144} 141 F.3d 1038 (11th Cir. 1998).
\textsuperscript{145} Id. at 1040-41.
\textsuperscript{146} Id. at 1041 (quoting Kane v. Aetna Life Ins., 893 F.2d 1283, 1285 (11th Cir. 1990)).
\textsuperscript{147} Id.
\textsuperscript{148} Id. (citing Nachwalter v. Christie, 805 F.2d 956, 960 (11th Cir. 1986)).
Specifically, ERISA has two central goals: (1) protection of the interest of employees and their beneficiaries in employee benefit plans, and (2) uniformity in the administration of employee benefit plans.

Specifically, the Eleventh Circuit held that both the negative presumption against suicide and the affirmative presumption of accidental death furthered ERISA's goals. Because these presumptions favor the protection of the interest of the beneficiaries over those of the insurance company, they meet the fundamental goals of ERISA. Because the majority of states recognize the presumption against suicide and in favor of accidental death, the Eleventh Circuit held this presumption could also become a part of the ERISA common-law in the Eleventh Circuit.

VI. CONCLUSION

As with the surveys conducted in the years past, in 1998 the Eleventh Circuit continued to be a leader in deciding issues of importance in the area of traditional labor law. It should be specifically emphasized that the ERISA area of law is growing rapidly and is becoming a very specialized area. In fact, an entire article could be dedicated to ERISA cases over the past year. That said, attorneys who practice in either the ERISA area of law or the traditional area of labor law need to be very aware of the continuing developments in this field so as to provide their clients with the most effective representation possible.

149. Id. (See Christie, 805 F.2d at 960).
150. Id. (See Smith v. Jefferson Pilot Life Ins. Co., 14 F.3d 562, 570-71 (11th Cir. 1994)).
151. Id.
152. Id.
153. Id.