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Labor and Employment

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I. INTRODUCTION

This Article focuses on recent cases concerning federal labor and employment laws.[1] The following is a discussion of those opinions.[2]

II. TITLE VII OF CIVIL RIGHTS ACT

Title VII of the Civil Rights Act (Title VII)[3] does not allow employers to discriminate based on the protected classes of: race, color, religion, sex, or national origin.[4] This includes limiting, segregating, or classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[5] For employees to prove disparate impact under Title VII, they must demonstrate that the

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1. For analysis of labor and employment law during the prior Survey period, *see* W. Jonathan Martin II & Patricia-Anne Brownback, *Labor and Employment Law*, *Eleventh Circuit Survey Law,* 72 MERCER L. REV. 1219 (2021).

2. This Article will focus solely on published opinions by the Eleventh Circuit because these are binding precedent on the court.

3. Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e–2000e-17.

4. 42 U.S.C. § 2000e-2(a) (1991).

5. *Id.*

employer used a particular employment practice on the basis of one of the above protected classes and the employer cannot show that the alleged practice is job related and related with business necessity.[6] "[T]he plaintiff in an employment discrimination lawsuit always has the burden of demonstrating that, more probably than not, the employer took an adverse employment action against him on the basis of a protected personal characteristic."[7] Generally, employees are unable to utilize the "traditional framework" of direct evidence to prove their case, so the Supreme Court of the United States developed a three-part, burden-shifting analysis to "make matters somewhat easier for plaintiffs in employment discrimination suits" using circumstantial evidence.[8]

Under the *McDonnell Douglas* framework, one must first present a prima facie case of discrimination.[9] Once a plaintiff meets this initial burden, the burden of production shifts to the employer to "articulate some legitimate, nondiscriminatory reason for the employe[r]'s [action]."[10] After this, the plaintiff, who retains the burden of persuasion throughout, must then "show by a preponderance of the evidence that the defendant's legitimate reasons were not the reasons that actually motivated its conduct, that the reasons were merely a 'pretext for discrimination.'"[11]

A. Adverse Action under Title VII

In *Davis v. Legal Services Alabama, Inc.*,[12] the United States Court of Appeals for the Eleventh Circuit held, as a matter of first impression, a paid suspension alone was not an adverse action for the purposes of Title VII and Section 1981 claims.[13] Arthur Davis, an African American, became the Executive Director of Legal Services Alabama (LSA) in 2016 and started having issues with his employees shortly after he began. Subsequently, some of the employees complained to LSA's Executive Committee. The Executive Committee voted to suspend Davis with pay pending investigation into the complaints. Following the suspension, LSA posted a security guard outside of the office and hired a political consultant, who happened to be a foe of Davis, to handle any public

6. 42 U.S.C. § 2000e-2(k)(1)(A) (1991).
7. Wright v. Southland Corp., 187 F.3d 1287, 1292 (11th Cir. 1999).
8. *Id.* at 1290 (citing McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973)).
9. *McDonnell Douglas*, 411 U.S. at 802.
10. *Id.*
11. MacPherson v. Univ. of Montevallo, 922 F.2d 766, 774 (11th Cir. 1991).
12. 19 F.4th 1261 (11th Cir. 2021).
13. *Id.* at 1267.

relations related to the matter. Four days after notification of his suspension, Davis submitted his resignation. He filed suit alleging race discrimination under 42 U.S.C. § 1981 and Title VII. The United States District Court for the Middle District of Alabama determined that Davis was not subject to an adverse action. This was fatal to his claims as Davis could not overcome the initial burden[14] under the *McDonnell Douglas* burden-shifting analysis.[15]

Here, the question considered by the court was whether a simple paid suspension was an adverse action under Title VII or section 1981.[16] Consistent with every other circuit, the court held that it was not, reasoning that a paid suspension is a "useful tool for an employer to hit 'pause' and investigate when an employee has been accused of wrongdoing."[17] Here, Davis did not disagree. However, Davis argued that his suspension was not just a simple paid suspension. Davis argued that the paid suspension was converted into an adverse action because LSA also disclosed the suspension to the political consultant; the suspension occurred days before a high-profile LSA reception with the State Bar; the Executive Committee issued a suspension letter; and LSA placed a guard outside the building.[18] The Eleventh Circuit disagreed, concluding that there was no evidence that any of these actions were intended to embarrass Davis, or that any of LSA's actions were out of the ordinary from their normal practice.[19] Therefore, the paid suspension was not an adverse action and his claim failed.[20]

B. Religious Discrimination

In *Bailey v. Metro Ambulance Services, Inc.*,[21] the Eleventh Circuit affirmed the United States District Court for the Northern District of Georgia's grant of summary judgment for the plaintiff, Bataski Bailey's claims of religious discrimination, religious failure to accommodate, and retaliation.[22] Bailey applied online for a part-time paramedic position

14. To establish a prima facie case of Title VII discrimination, a plaintiff must show that "(1) she is a member of a protected class; (2) she was subjected to adverse employment action; (3) her employer treated similarly situated white employees more favorably; and (4) she was qualified to do the job." McCann v. Tillman, 526 F.3d 1370, 1373 (11th Cir. 2008).

15. *Davis*, 19 F.4th at 1264–65.

16. *Id.* at 1266.

17. *Id.* at 1267.

18. *Id.*

19. *Id.*

20. *Id.*

21. 992 F.3d 1265 (11th Cir. 2021).

22. *Id.* at 1268–69.

with Metro Ambulance Services, Inc. (AMR). On his application Bailey selected that he had never been fired or asked to resign from a job. Bailey was subsequently hired and during orientation Bailey was informed that his facial hair, a goatee, was in violation of the grooming policy for emergency transports. Bailey was a practicing Rastifarian, and an important part of the religion is growing facial hair because it is seen as sacred.[23]

Bailey disagreed with the policy and took his concerns up the chain from his lieutenant to Human Resources.[24] Bailey was told that if he wanted to keep the facial hair that he could work on the non-emergency transport side for AMR.[25] Unhappy with this response, Bailey threatened suit. Upon learning of the threat of litigation, AMR's in-house counsel started to conduct due diligence on Bailey by googling him. During this investigation, the in-house counsel found a lawsuit Bailey brought against his former employer for wrongful termination. Bailey submitted a declaration stating that he was terminated from the Company, which was inconsistent with his answer on his application for AMR. Because Bailey refused to work non-emergency and he was not in compliance with the grooming policy to work emergency transports, he was placed on unpaid leave. Eventually, Bailey was terminated for falsifying information on his application. Bailey sued, and the district court granted summary judgment on all of his claims.[26]

On appeal, the Eleventh Circuit affirmed.[27] The court held that the option for working non-emergency transport was a reasonable accommodation because Bailey's salary, hours, and duties would all have remained the same.[28] Lastly, the court agreed with the district court that Bailey could not maintain a claim of retaliation because Bailey failed to demonstrate that his protected activity, suing his former employer, was the but-for cause of his termination.[29] AMR had a history of terminating employees who falsified information on their application, including employees who were not Rastafarians and employees who did not request accommodation for their religious beliefs.[30]

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23. *Id.* at 1269.
24. *Id.*
25. *Id.* at 1270.
26. *Id.* at 1270–72.
27. *Id.* at 1281.
28. *Id.* at 1276.
29. *Id.* at 1277–78.
30. *Id.* at 1278.

C. Retaliation

In *Babb v. Secretary, Department of Veterans Affairs*,[31] the Eleventh Circuit revisited claims asserted by Babb for Title VII retaliation and hostile work environment.[32] Previously, the Supreme Court granted certiorari in *Babb v. Wilkie*,[33] and reversed the Eleventh Circuit's prior ruling on Babb's age discrimination claim.[34] On remand, the Eleventh Circuit remanded that claim and the gender discrimination claim and affirmed summary judgment on the Title VII retaliation and hostile work environment claim.[35] Subsequently, the Eleventh Circuit granted rehearing on the latter issues because Babb argued that the prior precedent relied upon by the court for the Title VII retaliation claim was invalidated by the Supreme Court decision, and an intervening decision undermines the grant of summary judgment for the hostile work environment claim.[36]

Plaintiff Norris Babb was a clinical pharmacist for the VA medical center in Florida.[37] The VA instituted a new promotions program, which Babb and her colleagues believed discriminated on the basis of age and gender. Babb alleged that her "advanced scope" designation that made her eligible for promotion was taken away; she was denied training opportunities and was passed over for positions in the hospital's anti-coagulation clinic; and her holiday pay was reduced when she was placed in a new position.[38] She relied on evidence that supervisors made age-based comments to support her allegations that these personnel decisions were based at least in part on her age.[39]

The Supreme Court determined that "age need not be a but-for cause of an employment decision in order for there to be a violation of [the federal sector provision under The Age Discrimination in Employment Act (ADEA)]."[40] The key statutory language in the ADEA that the Court relied on was that plaintiffs must only show that "'age discrimination plays *any part* in the way a decision is made.'"[41] With this determination and reliance on that language, Babb argued that the

31. 992 F.3d 1193 (11th Cir. 2021).
32. *Id.* at 1195.
33. 140 S. Ct. 1168 (2020).
34. *Id.* at 1178; *see also* Martin II & Brownback, *supra* note 1, at 1219–20.
35. *Babb*, 992 F.3d at 1195.
36. *Id.*
37. *Id.* at 1196.
38. *Id.* at 1196–97.
39. *Id.* at 1197.
40. *Id.* at 1197 (quoting *Babb*, 140 S. Ct. at 1172).
41. *Id.* (emphasis in original).

Eleventh Circuit's precedent in *Trask v. Secretary, Department of Veterans Affairs*,[42] which addresses the federal sector provision under Title VII, must also be overturned.[43] The relevant language in Title VII states: "[a]ll personnel actions affecting employees . . . in executive agencies . . . shall be made free from any discrimination based on race, color, religion, sex, or national origin."[44] This language mirrors that in the ADEA statute. Thus, the Eleventh Circuit held that the Supreme Court's analysis of the causation standard in its *Babb* decision should also apply to Title VII retaliation claims.[45] The grant of summary judgment on the Title VII claim was vacated and the claim was remanded for adjudication under the new, correct standard.[46]

As for Babb's hostile work environment claim, she contended that the court's recent decision in *Monaghan v. Worldpay U.S. Inc.*[47] effectively overruled *Gowski v. Peake*.[48] Babb argued the court's previous analysis regarding the hostile work environment claim was based on *Gowski*.[49] *Monaghan* outlined the separate claims permitted under Title VII which include disparate treatment based on protected characteristics, hostile-environment claim, and retaliation.[50] In *Babb*, the Eleventh Circuit differentiated between typical and retaliatory hostile work environment claims and concluded that retaliatory hostile-environment claims arose under the retaliation prong of Title VII rather than the hostile-environment prong. [51] Thus, that claim was not subject to the typical severe and pervasive standard. Rather, retaliatory hostile work environment claims should use the less onerous standard of "might have dissuaded a reasonable worker from making or supporting a charge of discrimination."[52] This determination effectively overruled *Gowski*.[53]

On rehearing, Babb asked the court to vacate the grant of summary judgment and remand for reconsideration by the United States District

42. 822 F.3d 1179 (11th Cir. 2016).
43. *Babb*, 992 F.3d at 1200.
44. 42 U.S.C. § 2000e-16(a) (2009).
45. *Babb*, 992 F.3d at 1205.
46. *Id.*
47. 955 F.3d 855 (11th Cir. 2020).
48. 682 F.3d 1299 (11th Cir. 2012).
49. *Babb*, 992 F.3d at 1205–06.
50. *Monaghan*, 955 F.3d at 861.
51. *Babb*, 992 F.3d at 1207.
52. *Id.*
53. *Id.*

Court for the Middle District of Florida under the correct standard.[54] The court agreed, vacating and remanding the issue to the district court.[55]

Likewise, in *Tonkyro v. Secretary, Department of Veterans Affairs*,[56] the Eleventh Circuit remanded Tonkyro's retaliation and retaliatory hostile work environment claims to be reevaluated under the *Babb* and *Monaghan* standards.[57]

III. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA)[58] prohibits discrimination by employers against qualified disabled individuals.[59] A "disability" under the ADA includes "a physical or mental impairment that substantially limits one or more major life activities . . . a record of such impairment; or [] being regarded as having such an impairment."[60] Cases brought under the ADA are examined under the *McDonnell Douglas* burden-shifting analysis and employees must first establish a prima facie case of discrimination.[61] To establish a prima facie case of ADA discrimination, an employee must show "(1) a disability, (2) that she was otherwise qualified to perform the job, and (3) that she was discriminated against based upon the disability."[62] If successful, the burden shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for its actions.[63] Once established, "the presumption of discrimination disappears; however the employee can still prove discrimination by offering evidence demonstrating that the employer's explanation is pretextual."[64]

In *Todd v. Fayette County School District*,[65] the Eleventh Circuit reiterated that employee misconduct may lead to termination even where the ultimate cause of the employee's misconduct was an ADA-

54. *Id.* at 1209.

55. *Id.*

56. 995 F.3d 828 (11th Cir. 2021).

57. *Id.* at 839.

58. 42 U.S.C. §§ 12101–12113 (2008).

59. 42 U.S.C. § 12101(a)(3) (2008).

60. 42 U.S.C. § 12102(1) (2008).

61. Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004).

62. *Id.* at 1193.

63. Collado v. United Parcel Service, Co., 419 F.3d 1143, 1150 (11th Cir. 2005).

64. Martin II & Brownback, *supra* note 1 at 1222; 2 Americans with Disabilities: Practice and Compliance Manual § 7:409 (2022); Raytheon Co. v. Hernandez, 540 U.S. 44, 51–52 (2003).

65. 998 F.3d 1203 (11th Cir. 2021).

protected disability.[66] Plaintiff Jerri Todd, a middle school art teacher, suffered from "major depressive disorder" and successfully managed the condition for years.[67] Unfortunately, Todd's condition began to spiral out of control in January of 2017, when she confessed to a coworker that she had consumed an excessive amount of Xanax while at school. Todd also repeatedly threatened to kill herself and her son, who was a student at the school. As a result, Todd was involuntarily admitted to a behavioral health facility for four days.[68] The school would not allow Todd to resume teaching until the school completed its investigation and there was assurance that Todd was no longer a threat. During this time, Todd took leave under the Family and Medical Leave Act (FMLA).[69] Todd was later permitted to return to work after clearance from her doctor.[70]

Within a month of returning to work, Todd made threatening statements against her co-workers and administration.[71] On April 26, 2017, the school district notified Todd of its decision not to renew her teaching contract. Todd was provided the opportunity to request a formal hearing concerning the non-renewal decision, but Todd never requested such a hearing. Instead, Todd proceeded to file suit against the school district under the ADA alleging disability discrimination, FMLA interference, and retaliation under the ADA and FMLA. The United States District Court for the Northern District of Georgia granted summary judgment on all claims. Todd thereafter appealed.[72]

The Eleventh Circuit affirmed the grant of summary judgment.[73] The court noted that although Todd's detrimental behavior likely stemmed from her ADA-protected disability, the decision to terminate was not due to the disorder itself, but rather Todd's conduct as a result of the disorder.[74] Specifically, the court stated that "the ADA does not 'require that employers countenance dangerous misconduct, even if that misconduct is the result of a disability.'"[75] For the issue of pretext, Todd argued that an issue of material fact existed as to whether she actually

66. *Id.* at 1221.
67. *Id.* at 1209.
68. *Id.* at 1212.
69. 29 U.S.C. §§ 2601–2654.
70. *Todd*, 998 F.3d at 1212–13.
71. *Id.* at 1213.
72. *Id.* at 1213–14.
73. *Id.* at 1221.
74. *Id.* at 1220.
75. *Id.* at 1217 (quoting Sista v. CDC Ixis N. Am., Inc., 445 F.3d 161, 172–73 (2d Cir. 2006)).

made the threatening statements. The court disposed of this argument by reaffirming that the focus of a pretext analysis "centers on the employer's beliefs, not the employee's beliefs and, to be blunt about it, not on reality as it exists outside of the decision maker's head."[76] Here, Todd presented no evidence that the decision maker did not honestly believe that she engaged in this behavior, so her pretext argument failed.[77]

IV. SECTION 1983

In *Bell v. Sheriff of Broward County*,[78] Bell, a deputy sheriff, brought a claim against the Sheriff of Broward County. Deputy Bell alleged retaliation in violation of his right of free speech under the First Amendment.[79] The Eleventh Circuit upheld the United States District Court for the Southern District of Florida's dismissal of the suit and concluded that a five-day paid suspension did not establish an adverse action for a First Amendment retaliation claim.[80]

Bell was placed on paid suspension after writing an opinion article for the *South Florida Sun Sentinel*.[81] In that article, Bell opined that although the Sheriff stated otherwise, the Sheriff was not prepared for the COVID-19 pandemic and had failed to provide sufficient personal protective equipment to the employees of the Broward County Sheriff's Office. Four days after Bell's article was published, Bell emailed a letter to the Sheriff requesting a meeting to discuss personal protective equipment and as an opportunity to curtail threats the Sheriff had made. The Sheriff claimed that Bell's statements were untrue. On the same day that the Sheriff received Bell's email, Bell was suspended with pay pending an investigation into whether Bell's statements constituted violations of the Broward County Sheriff's Office's policies involving truthfulness, corrupt practices, and conduct unbecoming. Bell's investigation was conducted by the Office's Internal Affairs Department. Subsequently, just five days after being placed on this paid suspension, Bell filed suit against the Sheriff pursuant to 42 U.S.C. § 1983. Bell claimed that in the Sheriff's official capacity, he had violated Bell's First Amendment rights of free speech and association by

76. *Id.* at 1218.
77. *Id.*
78. 6 F.4th 1374 (11th Cir. 2021).
79. *Id.* at 1375.
80. *Id.*
81. *Id.*

suspending him with pay. In response, the Sheriff moved to dismiss Bell's action.[82]

The district court concluded that Bell's comments in the article were made as a citizen, and not in his capacity as a deputy of the Broward County Sheriff's Office.[83] Applying the balancing test enunciated in *Pickering v. Board of Education of Township High School District 205*,[84] the district court further found that Bell's comments regarding the COVID-19 pandemic and personal protective equipment involved a matter of public concern, which outweighed the interests of the Sheriff.[85] Nevertheless, the district court granted the Sheriff's motion to dismiss due to its finding that Bell failed to allege that he had been subjected to adverse employment action. Bell's suspension with pay during the pendency of an internal investigation into his alleged misconduct was not an adverse employment action under controlling Eleventh Circuit precedent. [86]

The Eleventh Circuit upheld the district court's dismissal, holding that an adverse employment action must involve an important condition of employment, such as discharge, demotion, refusal to hire or promote, and reprimands.[87] Bell's paid five-day suspension pending an investigation into his conduct was not an adverse action.[88]

V. FAMILY MEDICAL LEAVE ACT

The FMLA prohibits employers from interfering with, restraining, or denying the exercise of or the attempt to exercise, certain enumerated rights.[89] The Eleventh Circuit recognizes two claims from aggrieved employees—retaliation and interference claims.[90] Under the FMLA, an employee is entitled to take twelve weeks of leave over a twelve-month period for their own serious health condition or the serious health condition of a family member and then be reinstated upon their return from leave.[91] For interference claims, employees must prove that they

82. *Id.* at 1375–76.

83. *Id.* at 1376.

84. 391 U.S. 563 (1968).

85. *Bell,* 6 F.4th at 1376.

86. *Id.*

87. *Id.* at 1379 (citing Stavropoulos v. Firestone, 361 F.3d 610, 618 (11th Cir. 2004)).

88. *Id.* at 1379.

89. 29 U.S.C. § 2615 (a)(1) (1993).

90. Jones v. Gulf Coast Health Care of Del., LLC, 854 F.3d 1261, 1267 (11th Cir. 2017).

91. *Id.* at 1267.

were denied their benefits under the FMLA.[92] However, the denial of a benefit is not the only way employers can interfere with the rights of an employee; an employer may also be responsible for interference for conduct that discourages employees from using the leave to which they are entitled.[93]

As for retaliation, an employee must prove that the employer "intentionally discriminated against him in the form of an adverse employment action for having exercised a FMLA right."[94] This can be shown either through direct or circumstantial evidence.[95] Where there is only circumstantial evidence, the courts will apply the *McDonnell Douglas* burden shifting analysis.[96]

In *Ramji v. Hospital Housekeeping Systems, LLC*,[97] the Eleventh Circuit overturned the grant of summary judgment for the defendant.[98] The court held that Hospital Housekeeping (HH) failed to provide notice of FMLA rights and interfered with its employee Noorjahan Ramji's right to job-protected leave under the FMLA.[99] Ramji injured her knee while at work, and HH handled the injury solely under Workers' Compensation policies and procedures. Following her accident, Ramji was out of work for eleven days before returning to a light-duty position.[100]

Ramji used sick time to cover these days.[101] During that period, Ramji had an appointment with an orthopedic doctor who diagnosed her with right knee pain and derangement and prescribed physical therapy and light duty. Ramji participated in physical therapy as prescribed, and HH provided her a light-duty position that fit within her restrictions for approximately a month until her follow-up appointment with the orthopedic doctor. At her follow-up appointment, Ramji was released to full duty.[102] Ramji returned to work that day and was required to complete an Essential Functions Test, which required that she successfully complete a number of tasks related to her job duties. If Ramji could not successfully complete these tasks, she would

92. *Id.*

93. *Id.*

94. *Id.* at 1270 (citing Strickland v. Water Works & Sewer Bd. of City of Birmingham, 239 F.3d 1199, 1207 (11th Cir. 2001)).

95. *Jones*, 854 F.3d. at 1270.

96. *Id.* at 1271; *see also McDonnell Douglas*, 411 U.S. at 802.

97. 992 F.3d 1233 (11th Cir. 2021).

98. *Id.* at 1248.

99. *Id.* at 1236–37.

100. *Id.* at 1236.

101. *Id.* at 1237.

102. *Id.* at 1238.

be subject to termination. Ramji could not complete the task because the pain returned in her knee. Ramji asked if she could have additional leave and use her accrued sick and vacation leave to recover and continue physical therapy. This was denied, and Ramji was terminated.[103]

Ramji filed suit against HH, claiming it interfered with the exercise of her rights under the FMLA.[104] On cross-motions for summary judgment, the United States District Court for the Northern District of Georgia granted summary judgment for HH and denied it for Ramji. The court held that because Ramji's doctor cleared her and stated that Ramji reached maximum medical improvement, Ramji was not entitled to the protections of the FMLA. Because Ramji was cleared, the court reasoned that HH could not have concluded that Ramji was entitled to any leave under the FMLA.[105] On appeal, the Eleventh Circuit vacated this decision and remanded the case for further proceedings.[106]

First, the Eleventh Circuit held that Ramji clearly met all of the requirements to be eligible under the FMLA.[107]

> An employee is entitled to FMLA leave if she has "a serious health condition that makes [her] unable to perform the functions of [her] position . . . ." 29 U.S.C. § 2612(a)(1)(D). A "serious health condition" means "an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider." *Id.* § 2611(11)(B). To qualify as "continuing treatment" under FMLA regulations, treatment (1) must involve a period of incapacity of more than three consecutive, full calendar days, and (2) must require either (a) treatment by a healthcare provider at least twice within 30 days of the first day of incapacity or (b) treatment by a healthcare provider at least once that results in a regimen of continuing treatment under the supervision of the healthcare provider. 29 C.F.R. § 825.115(a)(1)–(a)(2).[108]

Following her injury, Ramji was excused from work for more than three consecutive days.[109] Ramji then sought treatment from an orthopedic physician who prescribed recurring physical therapy and a follow-up appointment to assess Ramji's injury. Therefore, Ramji had a

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103. *Id.* at 1236–39.
104. *Id.* at 1240.
105. *Id.* at 1240–41.
106. *Id.* at 1248.
107. *Id.* at 1242.
108. *Id.* (alterations in original).
109. *Id.*

serious health condition that caused Ramji to be unable to perform the essential functions of her job. Interestingly, Pamela Merriweather, HH's FMLA Administrator, attended all appointments with Ramji and was acutely aware of everything going on with her injury.[110] Therefore, the court was not convinced that HH was not on notice or provided with enough information that Ramji was possibly qualified for protected leave.[111]

HH argued that it was not required to provide notice because the injury was handled through workers' compensation, so Ramji was paid for all of the excused time off.[112] Further, HH claimed that since Ramji was allowed to return to light duty on the final day that HH could provide notice under FMLA deadlines, it no longer needed to provide her with notice because she did not qualify.[113] The court found no merit to these arguments.[114] First, FMLA regulations specifically state that "the workers' compensation absence and FMLA leave may run concurrently."[115] Second, as to the light-duty designation, "FMLA regulations unambiguously prohibit precisely this employer conduct: '[i]f FMLA entitles an employee to leave, *an employer may not, in lieu of FMLA leave entitlement*, require an employee to take a job with a reasonable accommodation.'"[116] Ramji never had an option to decline the light-duty position in favor of taking FMLA leave to continue recovering.[117]

HH argued that even if she had been offered the protected leave, Ramji was not harmed or prejudiced because it took her eight months to completely recover since she ultimately needed total knee replacement.[118] The court rejected this assertion and found that Ramji could demonstrate harm on two fronts: (1) she was not reinstated to her position, and (2) she was denied a lump sum payment for her sick leave/vacation.[119] By denying Ramji the opportunity to make an informed decision about whether to take FMLA leave, she continued with the Essential Functions Test, which very well could have exacerbated her injury and because of her termination, she was unable

110. *Id.* at 1242–43.
111. *Id.* at 1243.
112. *Id.* at 1244.
113. *Id.*
114. *Id.*
115. *Id.* at 1244 (quoting 29 C.F.R. § 825.702(d)(2) (2013)).
116. *Id.* at 1244–45 (emphasis in original) (quoting 29 C.F.R. § 825.702(d)(1)).
117. *Id.* at 1245.
118. *Id.* at 1241.
119. *Id.* at 1246–48.

to attend continuous physical therapy because costs were prohibitive.[120] This caused her harm both physically and financially.[121] Based on the foregoing, the court vacated the grant of summary judgment to HH and remanded the case to the district court for further proceedings.[122]

In *Matamoros v. Broward County Sheriff's Office*,[123] the Eleventh Circuit held that Matamoros was not entitled to FMLA leave because there were no adverse actions against Matamoros in retaliation of her exercising her FMLA rights.[124] The Eleventh Circuit ultimately affirmed the United States District Court for the Southern District of Florida's grant of summary judgment in favor of the employer on Matamoros's claims.[125]

Carolina Matamoros worked for the Broward County Sheriff's Office as a communications operator beginning in 2010.[126] Her son suffered from severe asthma, and in March 2016 she took FMLA leave to care for him. At some point later in her employment, Matamoros applied for a part-time position but did not receive it. Irritated by that fact, Matamoros filed an internal grievance which was also denied. Soon thereafter, Matamoros requested additional FMLA leave, which the Sheriff's Office did not approve. Eventually, Matamoros did receive a part-time position, but she began receiving several kinds of disciplinary actions because of recurrent attendance issues. The Sheriff's Office initiated an internal affairs investigation into Matamoros frequently missing work.[127]

The internal investigation revealed that Matamoros's attendance issues were due to Matamoros simultaneously working another job.[128] This was even though Matamoros had previously given a sworn statement to the Sheriff's Office stating that she did not have a second job. The investigation revealed that Matamoros had worked more for her other employer than for the Sheriff's Office, and on seventeen occasions, Matamoros had called in sick or taken sick leave from the Sheriff's Office while working her other job. Due to these investigative findings, the Sheriff's Office suspended Matamoros without pay for two months. Matamoros then filed a charge with the Equal Employment

120. *Id.* at 1248.
121. *Id.*
122. *Id.*
123. 2 F.4th 1329 (11th Cir. 2021).
124. *Id.* at 1331.
125. *Id.* at 1335–36.
126. *Id.* at 1331.
127. *Id.*
128. *Id.*

Opportunity Commission (EEOC), alleging disparate treatment because of her son's disability. Shortly thereafter, Matamoros again requested additional FMLA leave in order to care for her asthmatic son. However, the Sheriff's Office denied her request for additional FMLA leave and suspended Matamoros for a third time. Eventually, the Sheriff's Office terminated Matamoros.[129]

In analyzing Matamoros's FMLA claims, the court noted that Matamoros's FMLA interference claim failed because she had not demonstrated that she was even entitled to receive FMLA leave.[130] In order to be eligible to receive FMLA leave, Matamoros had to prove that she had worked at least 1,250 hours in the twelve months preceding her leave request; however during that time, she had worked fewer than 1,100 hours for the Sheriff's Office.[131] Although the Eleventh Circuit's determination that Matamoros was not eligible for protection under the FMLA, similarly defeating her FMLA retaliation claim; the court still noted that the Sheriff's Office had set forth legitimate business reasons for its suspensions and termination of Matamoros, including providing a false statement under oath, calling in sick while simultaneously reporting for work for another employer, and poor job performance.[132] Thus, the court affirmed the district court's grant of summary judgment on all of Matamoros's claims.[133]

VI. FAIR LABOR STANDARDS ACT

The Fair Labor and Standards Act (FLSA)[134] requires employers to pay covered employees engaged in commerce a minimum of $7.25 for all hours worked.[135] Unless an employee falls within one of the statutory exemptions, if an employee works over forty hours in any workweek, the employer is also required to pay that employee overtime at a rate of one and one-half times the employee's regular rate.[136] Employees can be "covered" by the FLSA in one of two ways: enterprise coverage or individual coverage.[137] For enterprise coverage, an employee must work for an employer that has at least two employees and has an annual

129. *Id.* at 1331–32.
130. *Id.* at 1338.
131. *Id.*
132. *Id.*
133. *Id.* at 1339.
134. 29 U.S.C. §§ 201–219.
135. 29 U.S.C. § 206(a) (2016).
136. 29 U.S.C. § 207(a)(1) (2010).
137. 29 U.S.C. § 203(s) (2018).

dollar of sales or business done of at least $500,000.[138] An employee may be covered individually if their work regularly involves them in commerce between the states and they are "engaged in commerce or in the production of goods for commerce[.]"[139]

In *Rafferty v. Denny's*,[140] the Eleventh Circuit held that a waitress presented questions of fact as to the non-tipped labor she was performing, and thus overturned a grant of summary judgment for the employer and sent the case to trial.[141] A Denny's server, Lindsey Rafferty, claimed that she was not paid all compensation owed because Denny's was paying her the sub-minimum wage rate for both her tipped work and her untipped duties that were not related to her tipped work.[142] To determine the correct amount of compensation, the court conducted an in-depth analysis of the history of the 1967 Dual-Job regulation,[143] at issue and the Department of Labor's (DOL) subsequent interpretations of that regulation, including a 2018 Opinion Letter.[144]

Generally, under the tip credit rule, employers are permitted to pay tipped employees a sub-minimum wage rate, only if the tips the employee received are at least equal to the difference in the rate and federal minimum wage of $7.25.[145] The DOL promulgated the dual-job regulation that outlines the situations where an employee is performing separate jobs and must be paid different wages, as opposed to performing untipped duties related to his or her tipped occupation.[146] The DOL refined its guidance on this regulation over the years to guide employers on when they could take the tip-credit, and the court extracted the following rules from that guidance:

> (1) An employer cannot take the tip credit for time an employee spent performing duties that were *unrelated* to the tipped occupation.
>
> (2) An employer can take the tip credit for time an employee performed duties related to her tipped occupation, provided that

138. *Id.*
139. *Id.*
140. 13 F.4th 1166 (11th Cir. 2021).
141. *Id.* at 1169.
142. *Id.*
143. 29 C.F.R. § 531.56 (2021).
144. *Rafferty*, 13 F.4th at 1171–72.
145. *Id.* at 1172.
146. *Id.* at 1173.

> those duties were not performed by that employee for more than twenty percent of her working hours.[147]

In 2018, the DOL issued an Opinion Letter[148] that abandoned the "limitation on the amount of duties related to a tip-producing occupation that a tipped employee may perform, 'so long as those duties are performed *contemporaneously* with direct customer-service duties and all other requirements of the Act are met.'"[149] Further the Opinion Letter was set to create a database that employers could use to determine whether certain duties were related to their employees' tip-producing occupation.[150] The DOL issued a proposed rule that captured the guidance outlined in the Opinion Letter, but the rule underwent multiple revisions before the DOL again changed course in 2021 and reverted back to the 80/20 rule.[151]

Here, Rafferty claimed that she spent more than 20% of her time conducting side work such as cleaning, food preparation, hosting, etc.[152] In granting summary judgment to Denny's, the United States District Court for the Southern District of Florida relied on the 2018 Opinion Letter to determine that Rafferty "had not provided any evidence that she had conducted 'sidework' at any time that was not 'contemporaneous' with her tip-related activities."[153] In reversing the grant of summary judgment, the Eleventh Circuit held that the 2018 Opinion Letter was owed no deference under either the *Auer*,[154] or *Skidmore*[155] deference standards because the letter was "not a reasonable interpretation of the dual-jobs regulation[.]"[156] Because no deference was to be given to this Opinion Letter, a question of fact remained as to whether Rafferty performed related duties more than 20% of the time and to what extent Rafferty participated in activity that

147. *Id.* at 1175 (emphasis in original).

148. U.S. Dep't Labor, Wage & Hour Div., Op. Ltr. FLSA-2018-27, 2018 WL 5921455 at *1 (Nov. 18, 2018).

149. *Id.* at 1176 (emphasis in original) (quoting DOL WHD Op. Ltr. 2018 WL 5921455).

150. *Id.* at 1176.

151. *Id.* at 1177–78.

152. *Id.* at 1190.

153. *Id.* at 1171.

154. Auer v. Robbins, 519 U.S. 452 (1997).

155. Skidmore v. Swift & Co., 323 U.S. 134 (1944).

156. *Rafferty*, 13 F.4th at 1185. (emphasis omitted)

was not related to her tipped work.[157] Therefore, the court remanded the case to determine those issues.[158]

In *Hernandez v. Plastipak Packaging, Inc.*,[159] the Eleventh Circuit held that the fluctuating work week method is not precluded by providing the employee with additional shift premium or holiday pay.[160] Hector Hernandez worked as a process and maintenance technician in Plastipak Packaging's Plant City (Plastipak), a Florida facility from 2011 until 2016. He was classified as a salaried, non-exempt employee with a fixed biweekly salary of $1,964.99, and his hours varied from week to week. Plastipak also paid Hernandez a shift premium when he worked the night shift for a week, prorated if he worked less than a week, and holiday pay. Hernandez now claimed that the shift premium and holiday pay precluded Plastipak from using the fluctuating workweek method. Thus, he should have been paid time and a half for all overtime worked. The district court agreed and awarded Hernandez a total of $1,870.52 in back pay for the statutory period.[161] The Eleventh Circuit disagreed, overturning and remanding this decision for the district court to determine if overtime was owed consistent with its decision.[162]

Interestingly, Plastipak paid more to salaried, non-exempt employees under the fluctuating workweek model than is required under the law.[163] Under the fluctuating workweek:

> For workers with a fixed salary and variable weekly hours, the employer can use the fluctuating workweek method to determine overtime pay. Under this approach, the employer calculates the employee's regular rate by "dividing [the weekly] salary by the number of hours actually worked" that week. *Lamonica v. Safe Hurricane Shutters, Inc., 711 F.3d 1299, 1311 (11th Cir. 2013)*. When using this method, an employer need only pay for overtime hours at a rate of one-half times the employee's regular rate—not at one and one-half times. That's because the employee "has already been compensated at the straight time regular rate" for those hours "under the salary arrangement." *Id.* (citation omitted); *see also Condo v. Sysco Corp., 1 F.3d 599, 605 (7th Cir. 1993)* ("The fixed salary compensates the employee [working variable hours] for all his hours,

157. *Id.* at 1190.
158. *Id.* at 1195.
159. 15 F.4th 1321 (11th Cir. 2021).
160. *Id.* at 1322.
161. *Id.* at 1323–25.
162. *Id.* at 1332.
163. *Id.* at 1322–23.

> the overtime ones included. He therefore receives 100% of his regular rate for each hour that he worked. As such, he is entitled only to an additional fifty percent of his regular rate for the hours that he worked in excess of forty." (emphasis omitted)).[164]

In contrast, the fluctuating workweek for Plastipak divided employees' weekly salary by forty hours, no matter how many hours they worked, and then multiplied the regular rate by the number of overtime hours instead of using a half-time rate.[165] This would always result in more overtime pay for the employee than is required under the fluctuating workweek.[166]

In overturning the district court, the Eleventh Circuit disagreed with the conclusion that the shift premium and holiday pay "offended" the requirement under the fluctuating workweek that there be a "fixed weekly salary."[167] In coming to its conclusion, the court differentiated between a "fixed weekly salary" and a "fixed total compensation package."[168] Here, the court viewed the bonuses and holiday pay, which were previously permitted by DOL guidance and regulations, as additional compensation apart from the fixed salary that Hernandez received on a weekly basis.[169] Therefore, the court held that the requirements of the fluctuating workweek were met and applied to Hernandez's situation.[170] It remanded the case to ensure that all overtime requirements were met under the fluctuating workweek. [171]

In *Gelber v. Akal Security, Inc.*,[172] the Eleventh Circuit held that an employer could not automatically deduct a one-hour meal period from its employees' compensable overtime.[173] Akal Security (Akal) transports detainees who have been ordered to be removed from the United States either domestically to another detention center or internationally to another country. These transportation flights are staffed with air security officers to ensure safety. However, after the detained persons have been transported, the staff is essentially relieved from duty on the return flight—namely, free to sleep, watch TV, and play video games—

164. *Id.* at 1323. (alterations in original).
165. *Id.*
166. *Id.*
167. *Id.* at 1325.
168. *Id.* at 1326–27.
169. *Id.* at 1328.
170. *Id.* at 1322.
171. *Id.*
172. 14 F.4th 1279 (11th Cir. 2021).
173. *Gelber*, 14 F.4th at 1280–81.

until they get back to the airport where employees have some administrative tasks to perform. Akal did not dispute that it must compensate these employees for the time spent on the return flight despite being free to do whatever they want. However, Akal had a practice of automatically deducting one-hour meal periods for flights in excess of ninety minutes. During this one-hour meal period they were to cease all work activities and use the time as they wished.[174] The district court determined that this automatic deduction violated the FLSA, but Akal acted in good faith and did not willfully violate the FLSA.[175] The Eleventh Circuit affirmed.[176]

Under 29 C.F.R. § 785.19,[177] whether a meal break is compensable depends on if it is a "bona fide" meal break—that is, the employee is "completely relieved from duty for the purposes of eating regular meals."[178] If the employee "is required to perform any duties, whether active or inactive, while eating" then it is not a "bona fide" meal break.[179] To analyze these issues it is necessary to determine who bears the burden of proof and what evidence is required to overcome the employee's claim that the time is compensable.[180] The court determined as a matter of first impression that there should be a burden shifting analysis in these situations.[181] Specifically, "once an employee satisfies his burden by showing that his logged work hours are generally compensable, the employer bears the burden of proving that the carved-out meal periods were bona fide."[182]

Here, by Akal's own admission the idle time on the return trips was compensable time.[183] Through this admission, Akal acknowledged that the idle time on the return trip is "spent predominantly for Akal's benefit."[184] So to overcome its burden, Akal had to point to something other than the fact that the employees were idle on the flight, and it failed to do so.[185] Akal failed to carry this burden, and thus the

174. *Id.* at 1281.
175. *Id.* at 1289.
176. *Id.*
177. 29 C.F.R. § 785.19 (1961).
178. *Gelber*, 14 F.4th at 1281–82 (quoting 29 C.F.R. § 785.19(a) (1961)).
179. *Id.*
180. *Id.* at 1282.
181. *Id.* at 1282–83.
182. *Id.*
183. *Id.* at 1284.
184. *Id.*
185. *Id.* at 1284–85.

employees were entitled to back pay for the meal period that was automatically deducted on the return trip.[186]

As for the issues of willfulness and good faith, the Eleventh Circuit determined that the district court did not err in finding good faith and no willfulness by Akal.[187] A finding of good faith precludes recovery of liquidated damages by the employees, and a finding of no willfulness sets the statute of limitations at two years instead of three.[188] Here, there was an adequate showing that Akal sought guidance from outside counsel on this issue, and outside counsel advised that Akal's procedures were legal under the FLSA.[189] Being that the court has not addressed this issue prior to this case, it held that this interpretation was reasonable.[190] Further, there was no evidence that Akal knew its conduct was prohibited by the FLSA.[191] Thus, the Eleventh Circuit upheld the findings of the district court on these issues.[192]

The FLSA provides unique exemptions from its overtime provisions. The Eleventh Circuit in *Ramirez v. Statewide Harvesting & Hauling, LLC*,[193] addressed a nuanced issue under an agricultural exemption.[194] The agricultural exemption applies to "any employee employed in agriculture[.]"[195] Agriculture is defined as "the cultivation and tillage of the soil, dairying, the production, cultivation, growing, and harvesting of any agricultural or horticultural commodities . . . , and the raising of livestock, bees, fur-bearing animals, or poultry."[196] Agriculture can also mean "any practices . . . performed by a farmer or on a farm as an incident to or in conjunction with primary farming operations, including preparation for market and delivery to storage or to market or to carriers for transportation to market."[197]

Statewide Harvesting & Hauling, LLC (Statewide) facilitates the harvesting of fruit from various farms across Florida, and most of its employees are temp workers under the federal H-2A program.[198] As part of the program, employers must provide these employees with

186. *Id.* at 1286.
187. *Id.* at 1288.
188. *Id.*
189. *Id.*
190. *Id.*
191. *Id.* at 1288–89.
192. *Id.* at 1289.
193. 997 F.3d 1356 (11th Cir. 2021).
194. *Id.* at 1357.
195. *Id.* at 1359.
196. *Id.*
197. *Id.*
198. *Id.* at 1358.

basic necessities such as housing, meals or kitchen facilities, and laundry facilities. To abide by this requirement, Statewide required that its crew leaders not only supervise the workers while they were in the field, but also take them on weekly trips to the grocery store, laundromat, and bank. This amounted to about four hours per week. The crew leaders sued Statewide claiming they were entitled to overtime for the hours spent transporting the workers. The district court agreed and held that the exemption did not apply to these activities because the trips did not fall under either definition of "agriculture," and specifically were "activities performed neither by a farmer nor on a farm" as prescribed in the secondary definition.[199]

On appeal, the Eleventh Circuit affirmed the finding for the employees.[200] The court reasoned that transportation for necessities could not fall under the secondary definition for multiple reasons.[201] First, the definition required that the activities be "performed . . . on a farm," and nothing about these necessity trips was in the geographical area of the farm.[202] Second, the statute requires that the activities be performed on a single farm.[203] Here, the workers were assigned to work in various farms across the state at any given time, so these necessity trips could not be tied to a singular farm.[204] For these reasons, the court held that Statewide could not claim the agricultural exemption for the time spent by the crew leaders on these trips, and if the crew leaders worked more than forty hours in a given workweek, then they would be entitled to overtime pay for the time spent on these trips.[205]

VII. NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA)[206] was enacted in 1935 to give employees the right to form and join unions while also requiring employers to engage in the collective bargaining process with the bargaining representative chosen by its employees.[207] The NLRA achieves this by protecting employees' "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their

199. *Id.*
200. *Id.* at 1358.
201. *Id.* at 1359–60.
202. *Id.* at 1360.
203. *Id.*
204. *Id.* at 1361.
205. *Id.* at 1362–63.
206. 29 U.S.C. §§ 151–169.
207. 29 U.S.C. § 151 (1947).

employment or other mutual aid or protection."[208] The NLRA is enforced by the National Labor Relations Board (NLRB).[209] The NLRB is comprised of five members nominated by the President and confirmed by the Senate, with its primary responsibilities being to protect employee rights under the NLRA, to prevent unfair labor practices, and to interpret the NLRA.[210] The NLRA and the NLRB protect not only unionized work forces but also non-unionized employees' rights to self-organize and to bargain collectively through representatives of their choosing, "and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection[.]"[211]

In *Ridgewood Health Care Center, Inc. v. National Labor Relations Board*,[212] the employer, Ridgewood, petitioned the Eleventh Circuit to review a decision of the NLRB. The NLRB decision found that Ridgewood committed several unfair labor practices.[213] Ridgewood owned a nursing home and leased it to Preferred Health Holdings, LLC (Preferred). Preferred handled all of the operations, employees, and so forth, and Ridgewood's only involvement in the facility was collecting lease payments. This lease was terminated effective September 30, 2013, and Ridgewood took steps to start its own operations on October 1, 2013.[214]

Ridgewood sought to recruit Preferred employees, encouraged those employees to apply, and offered a three-week application period exclusively for these employees.[215] A total of eighty-three Preferred employees applied and ultimately fifty-three were hired for positions at Ridgewood. When hiring was opened to the general public, Ridgewood Services added another fifty-six hires. With Preferred, the employees were represented by a union. As a result, during the hiring process, the union and Ridgewood disputed the application of the collective bargaining agreement (CBA) to the newly hired group of employees.[216] When Ridgewood refused to bargain under the current CBA, the union filed a series of unfair labor charges for certain occurrences. The union filed unfair labor charges against Ridgewood for failure to bargain,

208. *Id.*

209. 29 U.S.C. § 153(a)–(c) (1982).

210. Mercedes-Benz U.S. Int'l, Inc. v. Int'l Union, UAW, 838 F.3d 1128, 1131 (11th Cir. 2016).

211. 29 U.S.C. § 157 (1947).

212. 8 F.4th 1263 (11th Cir. 2021).

213. *Id.* at 1267.

214. *Id.* at 1268.

215. *Id.* at 1269.

216. *Id.* at 1270.

scheming to "create a workforce composed of less than a majority of the predecessor's employees[,] . . . coercively 'interrogat[ing] job applicants . . . about their union membership and union activities,' [and] 'refus[ing] to hire Preferred employees . . . because of their union and protected activities[.]'"[217]

Following a hearing on these charges, an Administrative Law Judge (ALJ) determined that Ridgewood was a successor employer under *NLRB v. Burns International Security*,[218] and was obligated to bargain with the union.[219] Because it was a successor employer, its actions violated sections 58(a)(1), (3), and (5) of the NLRA when it refused to bargain with the union; unilaterally changed the terms of employment; refused to provide the union with information it requested; interrogated job applicants about their union status; threatened to terminate an employee if she engaged in union activity; and engaged in a discriminatory hiring scheme to avoid bargaining obligations.[220] The NLRB affirmed this decision, and Ridgewood appealed to the Eleventh Circuit, which was ultimately granted in full.[221] On review, the Eleventh Circuit denied enforcement against Ridgewood for all contested findings. [222]

The Eleventh Circuit held that Ridgewood did not participate in coercive interrogations of applicants.[223] The NLRA allows employees to inquire on matters that relate to unionizing and collective bargaining without violating the statute as long as the words used or the context do not "suggest an element of coercion or interference."[224] Here, the NLRB did not conduct any analysis of the legal factors outlined in *NLRB v. Gaylord Chem. Co.*,[225] instead the NLRB declared as a matter of law that Ridgewood violated the NLRA by interrogating the applicants about their union membership.[226] When the Eleventh Circuit reviewed the factors,[227] it concluded that "the record evidence can support only

217. *Id.* at 1272.

218. 406 U.S. 272 (1972).

219. *Ridgewood*, 8 F.4th at 1273.

220. *Id.*

221. *Id.* at 1273, 1275.

222. *Id.* at 1285. Ridgewood did not contest the NLRB's determination that the threat to terminate an employee if she engaged in union activity was an unfair labor charge, so this claim was granted enforcement.

223. *Id.* at 1276.

224. *Id.* at 1275.

225. 824 F.3d 1318, 1333 (11th Cir. 2016).

226. *Ridgewood*, 8 F.4th at 1276.

227. These factors are:

one conclusion: Ridgewood did not coercively interrogate Preferred job applicants."[228] The court reasoned that the applicants told the truth in the interview, which cuts against the element of coercion or interference; no one who was asked questions about the union suffered adverse consequences—they were all offered positions; "[T]here was no systematic effort to inquire about Union status" and lastly, no applicant testified that they felt coerced.[229]

It is well established that "a new owner cannot refuse to hire the employees of her predecessor solely because they were union members or to avoid having to recognize the union."[230] The court utilized the burden shifting analysis outlined in *Wright Line*[231] to determine whether Ridgewood violated the NLRA in their hiring process.[232]

To begin, the claimant must show "by a preponderance of the evidence that a protected activity was a motivating factor in the employer's adverse decision."[233] The burden then shifts to the employer to show by a preponderance of the evidence that it would not have hired the employee because of some legitimate reason regardless of their protected activity.[234] If the employer can show this affirmative defense, then the burden shifts back to the claimant to show that the proffered reason or explanation is pretextual.[235] The court held that the refusal to hire four employees because they were previously marked ineligible for rehire was a legitimate reason, and there was no showing of pretext.[236]

Despite the findings of the NLRB, the court held that Ridgewood did not engage in a discriminatory scheme to deny union members employment.[237] The NLRB based its determination on three things: (1)

> (1) the history of the employer's attitude toward its employees; (2) the type of information sought; (3) the rank of the official of the employer in the employer's hierarchy; (4) the place and manner of the conversation; (5) the truthfulness of the employee's reply; (6) whether the employer has a valid purpose in obtaining information concerning the union; (7) whether this valid purpose, if existent, is communicated to the employees; and (8) whether the employer assures the employees that no reprisals will be taken if they support the union.

Id. at 1275–76.

228. *Id.* at 1277.

229. *Id.*

230. *Id.* at 1279.

231. 251 N.L.R.B. 1083, 1088–89 (1980).

232. *Ridgewood*, 8 F.4th at 1279.

233. *Id.*

234. *Id.*

235. *Id.*

236. *Id.* at 1284.

237. *Id.*

coercive interrogation of applicants; (2) the owner threatening to close the Ridgewood facility if employees unionized; and (3) a supervisor threating to terminate an employee if she was involved in union organizing.[238] As outlined above, the court was not persuaded by the coercive interrogation reasoning.[239] As for the owner's statement—that it was possible that the facility would shut down if a union came in—the court stated that there is "nothing unlawful about a company's opposition to a union[,]" especially when the statement is not actually threatening.[240] Specifically, the court stated that "'general references to 'possibilities' are inadequate to establish that the employer threatened' employees."[241] Lastly, it rejected the assertion that a statement from a supervisor, who was not involved in the hiring process, four months after hiring was complete was enough to infer animus or bias on the hiring process.[242] It held that there was no basis for imputing a bias of a lower-level supervisor on individuals involved in the hiring process.[243] In rejecting the reasoning asserted by the NLRB below, the Eleventh Circuit held that there was not in fact substantial evidence to find a discriminatory hiring scheme.[244]

The last issue resolved by the Eleventh Circuit on appeal was whether Ridgewood was a successor under the *Burns* analysis and was thereby obligated to engage in bargaining with the union.[245] "Under *Burns*, a successor employer is obligated to bargain with the predecessor union when (1) there is a 'substantial continuity' of business operations 'between the enterprises,' and (2) a majority of the successor's substantial complement of employees was employed by the predecessor."[246] The court overruled the idea that Ridgewood was a successor.[247] The parties only disputed whether a majority of employees was employed by the predecessor.[248] On October 1, 2013, 101 employees showed up for work when Ridgewood took over the operations.[249] Of

238. *Id.* at 1279–80.

239. *Id.* at 1280.

240. *Id.*

241. *Id.* at 1281 (quoting Decision and Order, Miller Industries Towing Equipment, Inc., 342 N.L.R.B. 1074, 1075 (2004)).

242. *Id.* at 1284.

243. *Id.*

244. *Id.*

245. *Id.*

246. *Id.*

247. *Id.*

248. *Id.*

249. *Id.*

those 101 employees, only forty-nine were former Preferred employees and the remaining fifty-two were non-Preferred employees.[250] The NLRB, below, held that if there was not a discriminatory scheme in place to keep out union members—three employees who were not hired that were members of the union—then there would have been a majority.[251] However, the court disposed of this argument on multiple fronts.[252] First, as outlined above, there was no discriminatory hiring scheme, therefore the union should not have received credit for these employees who were not hired.[253] Second, the court held that there was no evidence that these employees would have replaced non-Preferred employees in positions—the hiring was not capped at 101, and this is supported by the fact that Ridgewood continued to hire employees for positions after October 1.[254] In conclusion, the court granted Ridgewood's petition in full and denied the General Counsel's petition for enforcement as to all the findings by the NLRB.[255]

VIII. CONCLUSION

As this Article demonstrates, the issues arising under labor and employment law are becoming progressively more challenging each year. Regardless of whether a practitioner specializes in state, federal, administrative, or other matters pertaining to labor and employment, it is important to recognize and stay abreast of the ever-evolving trends, policies, cases, and federal guidelines. While the way in which the law will evolve and change remains to be seen, the cases above give practitioners some guidance for the time being.

250. *Id.*
251. *Id.*
252. *Id.*
253. *Id.* at 1284–85.
254. *Id.* at 1285.
255. *Id.*