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Labor and Employment

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Several significant opinions affecting labor and employment law in the Eleventh Circuit were handed down by the Supreme Court and the Eleventh Circuit's trial and appellate courts during this survey period (January 1, 2005 to December 31, 2005). For example, the United States Supreme Court clarified the meaning of a continuous workday in *IBP, Inc. v. Alvarez*,[1] expanding the amount of nonproductive time for which employers must pay their workers under the Fair Labor Standards Act ("FLSA").[2] Further, the Eleventh Circuit Court of Appeals and the United States District Court for the Middle District of Florida enforced a strict standard for placing an employer on notice when employees request leave under the Family and Medical Leave Act ("FMLA")[3] related to pregnancy.[4]

The most intriguing cases decided this year, however, came from outside the pale of the more commonly litigated labor and employment statutes. In *Williams v. Mohawk Industries, Inc.*,[5] the Eleventh Circuit Court of Appeals may have opened up a whole new battlefield in the labor and employment practice by holding that employees can sue their employers under federal and state RICO statues for hiring undocument-

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1. 126 S. Ct. 514 (2005).

2. *Id.* at 525. The FLSA is codified at 29 U.S.C. §§ 201-219 (2004).

3. 29 U.S.C. §§ 2601-2654 (2005).

4. *See* Cruz v. Publix Super Markets, Inc., 428 F.3d 1379, 1386 (11th Cir. 2005); Martinez v. Mercedes Home Realty, Inc., No. 6:04CV1467ORL31JGG, 2005 WL 2647884, *5-6 (M.D. Fla. Oct. 17, 2005).

5. 411 F.3d 1252 (11th Cir. 2005).

ed workers.[6] Additionally, in an area of labor and employment practice that promises to become more heavily litigated in the next few years, the Eleventh Circuit limited liability under the Uniformed Services Employment and Reemployment Rights Act of 1994 ("USERRA")[7] by limiting a "successor in interest" under the Act to a company involved in a merger or transfer of assets with the former employer.[8]

This Article will examine these and other cases in a look back at some of the significant decisions of 2005 affecting labor and employment law in the Eleventh Circuit.

I. THE FAIR LABOR STANDARDS ACT—COMPENSABLE TIME

The big news in FLSA law in the Eleventh Circuit in 2005 came from the United States Supreme Court. Time spent donning and doffing specialized protective gear in the workplace has long been held to be compensable time.[9] In *IBP, Inc. v. Alvarez*,[10] the Supreme Court unanimously expanded the definition of compensable time for employees required to wear protective gear to include time spent walking between their changing area and the production area, and time spent waiting to doff their protective gear.[11] The Court, however, excluded the time spent waiting to don protective gear at the beginning of the work day from compensable time.[12]

Alvarez is a consolidated opinion, in which the Court unanimously resolved similar issues raised in *IBP, Inc. v. Alvarez*[13] and *Tum v. Barber Foods, Inc.*[14] The employers in both cases owned meat processing plants. Employees working in the slaughter and processing divisions of these plants were required to wear protective equipment while they worked. These employees stored their protective gear in lockers provided by their employers. Despite requiring the slaughter and processing employees to report to the locker rooms at the beginning of their shifts to don their protective gear and to return to the locker rooms at the end of their shifts to doff their gear, the employers only paid these employees for time spent at their workstations. The time the employees spent donning and doffing their protective gear, waiting to don and doff

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6. *Id.* at 1265.
7. 38 U.S.C. §§ 4301-4334 (2005).
8. Coffman v. Chagach Support Servs., 411 F.3d 1231, 1237 (11th Cir. 2005).
9. *See* Steiner v. Mitchell, 350 U.S. 247, 256 (1956).
10. 126 S. Ct. 514 (2005).
11. *Id.* at 521.
12. *Id.* at 528.
13. 339 F.3d 894 (9th Cir. 2003).
14. 360 F.3d 274 (1st Cir. 2004).

their protective gear, and walking time between the locker rooms and the employees' work stations totaled approximately ten minutes per day of unpaid time.[15]

The first issue considered by the Court was whether "postdonning" and "predoffing" time spent walking between a changing area and the production area was compensable under the Portal-to-Portal Act of 1947,[16] which amended the original FLSA.[17] The Portal-to-Portal Act previously had been interpreted to exclude from FLSA coverage any time spent on an employer's premises walking to and from the location of the employee's "principal activities."[18] In *Alvarez*, however, the Court held that "during a continuous workday, any walking time that occurs after the beginning of the employee's first principal activity [e.g., donning protective gear] and before the end of the employee's last principal activity [e.g., doffing protective gear] is . . . covered by the FLSA."[19]

The second issue considered by the Court was whether time spent waiting to don and doff protective gear was compensable.[20] Applying its continuous workday analysis, the Court held that time spent waiting to don "the first piece of" protective gear was not compensable because such time was "preliminary" to, and not an "integral and indispensable" part of, the employee's first principal activity of the workday (i.e., donning protective gear).[21] In contrast, the Court held that time spent waiting to doff protective gear is compensable because waiting to doff the gear fell after the employee's first principal activity and before the employee's last principal activity, and therefore it was part of the continuous work day.[22]

Alvarez makes it clear that the workday for employees required to wear protective gear begins when they put on their gear at the beginning of their shift, and it stops only after they take their gear off at the end of their shift. The Supreme Court's emphasis on the "continuous workday" method of computing a worker's compensable time will require employers to pay their employees for more of their nonproductive time while at work.

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15. *Alvarez*, 126 S. Ct. at 521-22, 525-26.
16. 29 U.S.C. §§ 251-262 (2005).
17. *Alvarez*, 126 S. Ct. at 518.
18. *Id.* at 520.
19. *Id.* at 525.
20. *Id.* at 518.
21. *Id.* at 528.
22. *Id.* at 527.

II. THE FAMILY AND MEDICAL LEAVE ACT

A. Notice Requirements Under the FMLA

In *Cruz v. Publix Super Markets, Inc.*,[23] the Eleventh Circuit Court of Appeals ("Eleventh Circuit") held that an employee telling her employer that she would be absent from work due to her daughter's pregnancy was not sufficient to put her employer on notice that she was requesting FMLA leave.[24] The plaintiff in *Cruz* was a long-time employee of the defendant. When the plaintiff learned that her daughter was pregnant with the plaintiff's second grandchild, she requested two weeks of unpaid leave to be present for her grandchild's birth. The defendant authorized the plaintiff's leave request under its unpaid leave policy, not the FMLA.[25]

The plaintiff's daughter went into labor two weeks before the plaintiff's originally requested leave date. The plaintiff informed her assistant manager, who agreed to allow her to leave at an earlier date. The plaintiff also informed the assistant manager that she planned to return on her originally scheduled return date, thereby extending her leave from two weeks to four weeks long. The defendant refused to grant the extension of the leave period. Despite being told that she did not qualify for FMLA leave, the plaintiff completed the defendant's paperwork for FMLA leave requests with a letter from her daughter's physician. The letter stated that her daughter needed her to help with the labor and that the plaintiff's son-in-law would be unable to help with the coaching. The defendant denied the plaintiff's FMLA leave request and scheduled her to work regular hours beginning at the end of her two weeks of approved leave. When the plaintiff failed to return to work at the end of two weeks, the defendant terminated her for job abandonment. The plaintiff filed a complaint against the defendant, claiming that the defendant improperly denied her FMLA leave and that she was terminated in retaliation for exercising her FMLA rights.[26] The district court granted summary judgment in favor of the defendant because the plaintiff failed to give the defendant "sufficient notice that her leave was due to a potentially FMLA-qualifying reason."[27]

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23. 428 F.3d 1379 (11th Cir. 2005).
24. *Id.* at 1386.
25. *Id.* at 1380-81.
26. *Id.* at 1380-82.
27. *Id.* at 1382.

The Eleventh Circuit affirmed the district court's decision, holding that the plaintiff did not qualify for FMLA leave because she failed to notify the defendant that her daughter had a serious health condition.[28] The court emphasized that there was a distinction between being pregnant and being incapacitated because of pregnancy within the FMLA's meaning of a "serious health condition."[29] The court held that because the plaintiff failed to provide information that her daughter was incapacitated due to complications from her pregnancy, the plaintiff did not provide sufficient notice that her leave potentially implicated the FMLA.[30]

The decision in *Cruz* makes it clear that in order to place an employer on notice that an employee is requesting FMLA leave, employees must provide facts or information that somehow convey to the employer that an event has occurred triggering FMLA applicability.[31] Unlike a pregnancy with complications or actual childbirth, a normal pregnancy does not implicate the FMLA. Thus, mere mention of a pregnancy, whether it be the employee's pregnancy or the pregnancy of an immediate family member, is not enough to put the employer on notice that a request for FMLA leave has been made.

B. Return to Work Requirements Under the FMLA

Two district courts in the Eleventh Circuit addressed the return to work requirements for employees after FMLA leave in 2005, and both cases ended with the courts granting summary judgment for the employers. In *Barnes v. Ethan Allen, Inc.*,[32] the United States District Court for the Southern District of Florida held that the defendant did not interfere with the plaintiff's FMLA rights when it terminated her for failing to submit a valid certification after her FMLA leave expired.[33] On December 5, 2003, the plaintiff in *Barnes* notified the defendant that

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28. *Id.* at 1384.

29. *Id.* at 1383.

30. *Id.* at 1386. *See also* Martinez v. Mercedes Home Realty, Inc., No. 6:04CV1467ORL31JGG, 2005 WL 2647884, at *6 (M.D. Fla. Oct 17, 2005) (holding that the employee did not assert a valid FMLA claim because telling her employer that she was pregnant was not sufficient notice to the employer that she was taking FMLA leave).

31. Events triggering the applicability of the FMLA are (1) an employee's serious health condition that makes him or her unable to perform the essential functions of his or her job; (2) an employee's need to care for a spouse, child, or parent with a serious health condition; (3) the birth of the employee's child; or (4) the employee's adoption of a child or acceptance of a foster child. *See* 29 U.S.C. § 2612(a)(1) (2005), *invalidated by* Touvell v. Ohio Dep't of Mental Retardation & Developmental Disabilities, 422 F.3d 392 (2005).

32. 356 F. Supp. 2d 1306 (S.D. Fla. 2005).

33. *Id.* at 1313.

she was diagnosed with kidney stones. The plaintiff's leave expired on January 26, 2004. The defendant required the plaintiff to submit a "fitness-for-duty certificate" before she could be re-instated in her former position. The plaintiff was notified in writing that she could be terminated if she failed to submit the certification.[34] The plaintiff alleged that she submitted a note from her physician on January 14, 2004, stating she was under his care until "4-6 weeks from today 01/14/04."[35]

By March 18, 2004, the plaintiff still had not returned to work. The defendant sent the plaintiff a letter informing her that her FMLA leave expired on January 26, 2004 and that she needed to submit documentation of her absence from work to the defendant's corporate office. In response, the plaintiff submitted a doctor's note dated March 23, 2004, explaining the length of her illness and that she could return to work in a limited capacity. The plaintiff, however, did not return to work. Finally, in July 2004, the defendant terminated the plaintiff for her six-month unexplained absence. The plaintiff filed a complaint against the defendant, alleging the defendant violated the FMLA. The defendant moved for summary judgment.[36]

The court granted the defendant's summary judgment motion, finding that the plaintiff failed to submit a fitness-for-duty certification to the defendant in a timely manner.[37] Under the FMLA, an employer can require that an employee submit a recertification when her FMLA leave expires.[38] The court found, however, that the physician's note the plaintiff submitted on January 14, 2004 was not a valid certification because it did not state specifically when the plaintiff could return to work.[39] In addition, the plaintiff's March 23, 2004 certification letter, though containing the necessary information, was invalid because it was submitted after the plaintiff's FMLA leave expired.[40] Accordingly, summary judgment for the defendant was proper because the plaintiff

34. *Id.* at 1308.

35. *Id.*

36. *Id.* at 1309-10.

37. *Id.* at 1313.

38. *Id.* at 1311. Pursuant to 29 C.F.R. § 825.310(a) (2005), an employer is allowed to require its employees to submit fitness-for-duty certifications before they return to work if (1) the employer uniformly applies the policy and (2) the employees are notified of the certification requirement. *Id.* The employees can be terminated if they fail to submit the certification before their FMLA leave expires. *Id.*

39. *Barnes*, 356 F. Supp. 2d at 1312.

40. *Id.* at 1312, 1313.

did not file a valid fitness-for-duty certification as required by the defendant.[41]

Similarly, in *Burkett v. Beaulieu Group, LLC*,[42] the United States District Court for the Northern District of Georgia held that the plaintiff's return to work recertification was invalid because it did not contain a contemporaneous statement that the plaintiff could return to work, along with a specific date on which the plaintiff could return to work.[43] In June 2003, the plaintiff filed for FMLA leave after being hospitalized for depression. To be reinstated after taking FMLA leave, the defendant required its employees to submit a fitness-for-duty certificate (a "recertification"), which was nothing more than a statement from the employee's physician noting that the employee could return to work and the date on which the employee could return.[44]

The plaintiff was discharged from his treatment center on July 1, 2003. The plaintiff's physician submitted a recertification to the defendant on August 18, 2003, but the note neither contained a specific end date for the plaintiff's treatment nor indicated whether the plaintiff could return to work. The plaintiff's physician modified the recertification on August 19, 2003, adding information on the length of the plaintiff's condition and the date on which the plaintiff would be released from the doctor's care. The modified recertification still did not contain the date that the plaintiff could return to work. On October 6, 2003, the plaintiff submitted another recertification containing all of the necessary information. The plaintiff's physician backdated recertification to September 5, 2003, the date the plaintiff's FMLA leave expired. By that time, however, the plaintiff's position had been filled, and his employment was terminated. The plaintiff sued for retaliatory discharge under the FMLA.[45]

Granting the defendant's motion for summary judgment, the court held that the defendant was not liable for terminating the plaintiff when his FMLA leave expired because the plaintiff failed to submit a valid recertification statement within the required time.[46] The court found that the plaintiff's August 19, 2003 recertification was not valid because it did not state that the plaintiff could return to work at the time the

41. *Id.* at 1313.

42. 382 F. Supp. 2d 1376 (N.D. Ga. 2005). This is the latest decision on recertification requirements, but it is currently on appeal to the Eleventh Circuit.

43. *Id.* at 1380-81.

44. *Id.* at 1378.

45. *Id.* at 1378-80.

46. *Id.* at 1381.

recertification was made.[47] The court also held that the plaintiff's October 6th recertification was invalid because it was obtained after the plaintiff's FMLA leave had expired and was backdated.[48] Applying a very strict standard to the plaintiff's fitness-for-duty certifications, the court held that "it is axiomatic that the [fitness-for-duty certification] be made contemporaneously with the employee's ability to return to work."[49]

The lesson of both *Barnes* and *Burkett* is that courts in the Eleventh Circuit will strictly enforce an employer's return-to-work requirements following FMLA leave. As a result, an employee's failure to follow carefully her employer's FMLA policy may prove to be a fatal flaw in an otherwise sustainable FMLA retaliatory discharge claim.

III. THE NATIONAL LABOR RELATIONS ACT

A. *Mandatory Subjects of Bargaining*

The Eleventh Circuit Court of Appeals sided with organized labor in *Georgia Power Co. v. NLRB*,[50] when it held that Georgia Power Company ("Georgia Power") violated the National Labor Relations Act ("NLRA")[51] by failing to bargain with the union over a Workplace Ethics Program ("WEP").[52]

Georgia Power had a long-term labor agreement with the International Brotherhood of Electrical Workers Local Union No. 84 (the "IBEW") that governed grievance procedures for complaints brought by IBEW members. In addition to these grievance procedures for IBEW members, Georgia Power provided an Equal Employment Opportunity ("EEO") program for resolving discrimination complaints and a Corporate Concerns program that handled general employee concerns regarding discipline, discharge, or unfairness.[53]

After learning that the IBEW employees wanted improvement in the Corporate Concerns program because of poor employee representation, Georgia Power combined its EEO and Corporate Concerns programs to create the WEP. The WEP was a peer review process comprised of a panel of IBEW and non-IBEW employees who reviewed management decisions dealing with employee issues like discharges, discipline, or

47. *Id.*
48. *Id.*
49. *Id.*
50. 427 F.3d 1354 (11th Cir. 2005).
51. 29 U.S.C. §§ 151-197 (2000).
52. *Georgia Power*, 427 F.3d at 1358-59.
53. *Id.* at 1356.

demotion. The IBEW was not involved in the creation of the WEP and was not pleased with the new program because there was no mechanism for notifying the IBEW when one of its members filed a concern with the WEP.[54] The IBEW felt that this lack of notification interfered with its right to represent its members in complaints involving the terms and conditions of their employment.[55]

An administrative law judge ("ALJ") determined, among other things, that Georgia Power had violated the NLRA by refusing to bargain with IBEW over the formation of the WEP. The National Labor Relations Board (the "NLRB") affirmed the ALJ's ruling on this issue.[56]

On appeal, the Eleventh Circuit affirmed the NLRB's decision that Georgia Power had violated the NLRA by unilaterally creating the WEP.[57] The court noted that "the unilateral implementation of a program subject to mandatory bargaining generally will be considered an unlawful refusal to bargain."[58] According to the court, Georgia Power's creation of the WEP appeared to be an attempt to sidestep the grievance procedures negotiated by Georgia Power and the IBEW.[59] Accordingly, the court concluded that the NLRB could reasonably infer that Georgia Power created the WEP to weaken the IBEW's presence and participation with its members in matters that concerned the terms and conditions of their employment, in violation of the NLRA.[60]

As *Georgia Power* demonstrates, even though an employer has a contractual grievance procedure with its union employees, it must still negotiate with the union when creating other employee complaint procedures that are open to union members. The court did not create any new law in *Georgia Power*, but this case serves as a timely reminder to unionized employers that may be implementing or revising corporate

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54. *Id.* at 1356-57.

55. *See id.* at 1357.

56. *Id.* at 1356. The Eleventh Circuit noted that, pursuant to Supreme Court precedent, the court had a limited role in reviewing the Board's decision and it could review only whether "the Board's decision [was] rational, consistent with the NLRA, and supported by substantial evidence." *Id.* at 1358.

57. *Id.* at 1358-59. The NLRA "prohibits an employer from interfering with its employees' exercise of their NLRA rights and from refusing to bargain collectively with its employees' representatives." *Id.* at 1358 (citing 29 U.S.C. § 158(a)(1), (5)). Accordingly, an employer violates the NLRA when it "bargains directly with covered employees over terms and conditions of employment, . . . because such direct dealing interferes with the employees' rights to bargain collectively through their designated representative." *Id.* (citations omitted).

58. *Id.* at 1358.

59. *Id.* at 1358-59.

60. *Id.*

ethics programs in response to the whistleblower provisions of the Sarbanes-Oxley Act of 2002.[61]

B. Secondary Boycotts

The Eleventh Circuit addressed the NLRA's rule on secondary boycotts[62] in *Kentov v. Sheet Metal Workers' International Ass'n, Local 15*,[63] holding that a union could not rely on First Amendment[64] protections when picketing a secondary employer to coerce them to discontinue their business relationship with the primary employer, with whom the union had a dispute.[65] In *Kentov*, the Sheet Metal Workers' International Association Local 15 (the "Union") was in a labor dispute with Massey Metals, Inc. ("Massey") and Workers Temporary Staffing ("WTS") because of Massey's use of nonunion labor for a construction project at Brandon Regional Medical Center (the "Hospital"). To protest Massey's use of nonunion labor, the Union staged a two-hour mock funeral procession in front of the Hospital, complete with a coffin, pallbearers, and a man in a grim reaper costume carrying a large sickle. The Union also broadcasted funeral music in concert with the procession.[66]

During the procession, Union representatives distributed handbills titled "Going to Brandon Regional Hospital Should Not be a Grave Decision," which detailed four patient deaths at the Hospital. The Hospital filed an unfair labor practice complaint with the NLRB the day after the mock procession, alleging that the Union violated the NLRA's secondary boycott provision because the mock procession was aimed at forcing the Hospital to cease doing business with Massey and WTS, the primary employers in this case. The NLRB filed for an interim injunction in a Florida district court while it continued its proceedings

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61. Pub. L. No. 107-204, 116 Stat. 745 (codified in scattered sections of 11, 15, 18, 28, and 29 U.S.C.).

62. Under the NLRA, it is "an unfair labor practice for a labor organization . . . to threaten, coerce, or restrain any person engaged in commerce . . . where . . . an object thereof is . . . forcing or requiring any person to . . . cease doing business with any other person . . . ." 29 U.S.C. § 158(b)(4)(ii)(B) (2005). The secondary boycott rule "prohibit[s] a union that has a labor dispute with one employer (the primary employer) from exerting pressure on another neutral employer (the secondary employer), where the union's conduct is calculated to force the secondary employer to cease doing business with the primary employer." Kentov v. Sheet Metal Workers' Int'l Ass'n Local 15, 418 F.3d 1259, 1263 (11th Cir. 2005).

63. 418 F.3d 1259 (11th Cir. 2005).

64. U.S. CONST. amend. I.

65. *Kentov*, 418 F.3d at 1267.

66. *Id.* at 1261.

against the Union. The district court granted the injunction, finding that there was a reasonable belief that the Union violated the NLRA's secondary boycott provision. The Union appealed the grant of the temporary injunction.[67]

The Eleventh Circuit held there was reasonable cause to believe that the Union violated the NLRA's secondary boycott provisions.[68] A violation of the secondary boycott rule occurs when: "(1) a union engages in conduct that threatens, coerces, or restrains an employer or other person engaged in commerce; and (2) an object of the union's conduct is to force or require an employer or person not to handle the products of, or to do business with, another person."[69] The Union argued that it could not be found in violation of the NLRA because its mock funeral procession was protected by the First Amendment. In support of its position, the Union cited the Supreme Court's decision in *Edward J. DeBartolo Corp. v. Florida Gulf Coast Building & Construction Trades Council*[70] as binding precedent.[71]

The Supreme Court in *DeBartolo* recognized that handbilling against a secondary employer would raise First Amendment concerns because it was a peaceful, and likely truthful, means of protest.[72] But as the court of appeals noted, the Supreme Court "distinguished peaceful expressive handbilling from picketing and patrolling, which it reasoned [were] 'qualitatively different from other modes of communication' and more likely to be found coercive under the NLRA."[73] The Eleventh Circuit determined that the Union's mock funeral procession fit into the category of picketing and patrolling, which is a "'mixture of conduct and communication' intended to 'provide the most persuasive deterrent to third persons about to enter' the hospital."[74] Because the Supreme Court held in *DeBartolo* that picketing and patrolling did not implicate

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67. *Id.* at 1261-62.

68. *Id.* at 1267.

69. *Id.* at 1263 (citing 29 U.S.C. § 158(b)(4)(ii)(B)). The Union conceded the second factor, admitting that one of the objectives of the procession was to pressure the Hospital to cease doing business with WTS and Massey. *Id.*

70. 485 U.S. 568 (1988).

71. *Kentov*, 418 F.3d at 1264. In *DeBartolo*, a union was in a dispute with a construction company that used nonunion labor while working at a shopping mall. The union distributed handbills to customers at the shopping mall, urging the shoppers to boycott the mall stores if the mall did not promise to use contractors who hired union laborers. Determining that Congress did not intend the secondary boycott rule to prevent the distribution of flyers, the Court determined that handbilling was not coercive conduct as required by the secondary boycott rules. *DeBartolo*, 485 U.S. at 570, 580.

72. 485 U.S. at 580.

73. *Kentov*, 418 F.3d at 1264 (quoting *DeBartolo*, 485 U.S. at 580).

74. *Id.* at 1265 (citations omitted).

the First Amendment, the court of appeals held that the Union's conduct was not shielded by freedom of expression.[75] Therefore, injunctive relief was proper.[76]

The court in *Kentov* did not articulate a bright-line test for determining whether conduct involved in a union protest outside of a secondary employer was peaceful handbilling, or patrolling and picketing. If the conduct was peaceful handbilling, as opposed to patrolling and picketing, then the conduct may be protected under the First Amendment. But the court did indicate that a mixture of conduct and communication that is deemed coercive—reasonably expected to discourage people from approaching the boycotted business—falls outside the pale of protected speech.[77]

IV. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACTS

The Uniformed Services Employment and Reemployment Rights Act ("USERRA")[78] was enacted to prohibit employment discrimination on the basis of military service.[79] With many of our nation's military reservists returning from active duty in Iraq, and many more to follow, USERRA is poised to become a hotbed of employment litigation.

In *Coffman v. Chugach Support Services, Inc.*,[80] the Eleventh Circuit Court of Appeals was asked to consider, for the first time, the meaning of a "successor in interest" or "successor employer" under USERRA.[81] The court observed that a multi-factored business continuity test was the appropriate analysis for determining a successor in interest under USERRA, but held that such an analysis was only proper when there had been a merger or transfer of assets between the two subject companies.[82]

In *Coffman*, Del-Jen, Inc. ("Del-Jen") contracted with Tyndall Air Force Base (the "Base") in Panama City, Florida to provide base support services. The plaintiff, Charles Coffman, worked for Del-Jen as the Hazardous Materials Program Manager at the Base. The plaintiff was

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75. *Id.* at 1265-66.

76. *Id.* at 1266. In the court's decision to uphold the injunction, the court also cited the Union's history of using secondary boycotts against the Hospital, and the Union counsel's message that the Union would conduct similar activity. *Id.*

77. *See id.* at 1265-66.

78. Pub. L. No. 103-353, 108 Stat. 3149 (1994).

79. 38 U.S.C. § 4301 (2002).

80. 411 F.3d 1231 (11th Cir. 2005).

81. *Id.* at 1234.

82. *Id.* at 1237.

also a Non-Commissioned Officer in the Air Force Reserve. In November 2001, the Air Force called the plaintiff to active duty. While the plaintiff was away, the Air Force awarded its base support services contract to a new company, Chugach Support Services, Inc. ("Chugach"). In taking over the support services contract from Del-Jen, Chugach hired ninety-seven of the one hundred Del-Jen employees working at Tyndall. The plaintiff was one of the three Del-Jen employees not hired by Chugach. When the plaintiff was discharged from active service, he sent a letter to Chugach's president asking to be reinstated in his former position. When Chugach refused, the plaintiff sued alleging that Chugach had violated his right to reemployment under USERRA. Chugach denied liability, arguing that it could not be liable for failing to hire the plaintiff because Chugach was not a successor in interest to Del-Jen. The district court granted Chugach's motion for summary judgment, and the plaintiff appealed.[83]

In determining whether Chugach was a successor in interest to Del-Jen, the court adopted a multi-factored business continuity test similar to the one used in *Leib v. Georgia-Pacific Corp.*,[84] (the "*Leib* Test") and endorsed by Congress in USERRA's legislative history.[85] Using the *Leib* Test, courts consider "'whether there is (1) substantial continuity of the same business operations, (2) use of the same plant, (3) continuity of work force, (4) similarity of jobs and working conditions, (5) similarity of supervisory personnel, (6) similarity in machinery, equipment, and production methods, and (7) similarity of products or services.'"[86] The court, however, refused to apply the *Leib* Test, holding that use of the test was only appropriate in cases where there was a predecessor-successor relationship, such as a merger or a transfer of assets between the plaintiff's former employer and the alleged successor in interest.[87] Because no such predecessor-successor relationship existed between Chugach and Del-Jen, the court held that no duty arose on the part of Chugach to employ the plaintiff when he returned from active duty.[88] Accordingly, the court affirmed the summary judgment in favor of Chugach.[89]

In *Coffman* the court chose to follow precedent from previous successor liability cases rather than forge a new standard for USERRA cases.

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83. *Id.* at 1232-34.
84. 925 F.2d 240, 247 (8th Cir. 1991).
85. *See* H.R. REP. No. 103-65, (1994), *as reprinted in* 1994 U.S.C.C.A.N. 2449, 2454.
86. *Coffman*, 411 F.3d at 1237 (quoting *Leib*, 925 F.2d at 247).
87. *Id.*
88. *Id.* at 1238.
89. *Id.*

Thus, the court appears to be following a conservative path in handling USERRA cases. As the number of USERRA cases increases in the coming years, it will be interesting to see if the court stays on that path.

V. OTHER CASES AFFECTING LABOR AND EMPLOYMENT LAW IN THE ELEVENTH CIRCUIT

A. *Undocumented Laborers*

Under the Immigration Reform and Control Act of 1986 ("IRCA"),[90] it is illegal for an employer "to hire, or to recruit or refer for a fee" an illegal worker.[91] In *Williams v. Mohawk Industries, Inc.*,[92] the Eleventh Circuit Court of Appeals joined the Second, Sixth, and Ninth Circuits in holding that current or former employees have standing to sue an employer under federal and state Racketeer Influenced and Corrupt Organization ("RICO") statues for "knowingly hir[ing]" illegal workers.[93]

The plaintiffs in *Williams*, four former hourly employees of Mohawk Industries, Inc. ("Mohawk"), filed a class action against Mohawk. They alleged that Mohawk violated the federal and state RICO[94] statutes by knowingly hiring and harboring illegal workers as part of a conspiracy to repress overall wages and lessen worker's compensation claims. The plaintiffs claimed that the alleged hiring of illegal workers permitted Mohawk to reduce the number of legal workers it must hire and to suppress the wages paid to legal hourly workers. The plaintiffs further claimed that Mohawk had been unjustly enriched under Georgia law. Mohawk filed a motion to dismiss for failure to state a claim. The United States District Court for the Northern District of Georgia granted the motion to dismiss as to the plaintiffs' claim that Mohawk was unjustly enriched, but denied the motion as to all other claims.[95]

On appeal, the Eleventh Circuit first noted that in order to state a claim for RICO violations, the plaintiffs had to sufficiently allege "(1) conduct (2) of an enterprise (3) through a pattern (4) of racketeering activity."[96] The court concluded that the plaintiffs easily met the third

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90. Pub. L. No. 99-603, 100 Stat. 3359.

91. *Id.* at 3360.

92. 411 F.3d 1252 (11th Cir. 2005).

93. *Id.* at 1257, 1259.

94. The pertinent Federal RICO statutes are codified at 18 U.S.C. §§ 1962(c), 1964(c) (2000). The pertinent state RICO statutes are codified at O.C.G.A. §§ 16-2-22(a)(1), -14-4(a) (2003).

95. *Williams*, 411 F.3d at 1255-56.

96. *Id.* at 1256 (citing 18 U.S.C. § 1962(c)).

and fourth prongs of this analysis and, therefore, focused on the first two prongs.[97] The court noted that the plaintiffs had to establish not only that there was an enterprise, but also that the enterprise had a "common purpose."[98]

After reviewing the facts of the case, the Eleventh Circuit held that the plaintiffs sufficiently alleged an "enterprise" as required by RICO by asserting that Mohawk was associated with outside recruiters for purposes of bringing illegal workers into the United States for its own benefit.[99] The court further held that the plaintiffs sufficiently alleged a "common purpose" by alleging that both Mohawk and the outside recruiters benefitted financially from the enterprise.[100]

In addition to the above-mentioned elements, private parties to a civil RICO claim must demonstrate that the alleged injury was to "business or property" and was caused by the RICO violation.[101] The Eleventh Circuit determined that the plaintiffs had sufficiently alleged proximate cause by asserting that the so-called conspiracy purposefully and directly depressed their wages.[102]

Upon deciding *Williams*, the Eleventh Circuit became the fourth federal appeals court to conclude that private parties who had filed suits alleging RICO violations on account of illegal immigration practices had sufficiently alleged such violations to survive a motion to dismiss.[103] Similar decisions have emerged in the Sixth and Ninth Circuits, and the Second Circuit recently recognized a RICO claim against a cleaning company brought by a competitor business, alleging that it had lost a bid contract on account of the defendant's use of illegal workers.[104] This trend toward allowing private individuals to assume the role of enforcement in areas that previously were viewed as the government's responsibility could dramatically affect the landscape of labor and employment law by giving employees a new weapon in their arsenal against their employers. Because an employer who violates RICO statues may be liable for treble damages, this new weapon may well be a weapon of mass destruction for employers who are either directly hiring illegal workers or temporarily employing illegal workers through staffing agencies.

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97. *Id.* at 1256-64.
98. *Id.* at 1257.
99. *Id.* at 1258.
100. *Id.* at 1258-60.
101. *Id.* at 1260-61.
102. *Id.* at 1261-62.
103. *Id.* at 1259, 1264.
104. *Id.* at 1259.

B. Restrictive Covenants

In *Palmer & Cay, Inc. v. Marsh & McLennan Co.*,[105] the Eleventh Circuit examined the scope of a district court's power to declare restrictive covenants unenforceable.[106] The plaintiff in *Palmer & Cay* filed an action seeking to enjoin his former employer from enforcing restrictive covenants in two employment contracts he entered into before resigning his employment to work for a competitor. The district court found that the restrictive covenants in the two employment agreements were unenforceable under Georgia law.[107] Following the precedent set in *Keener v. Convergys Corp.*,[108] the district court issued an injunction prohibiting the enforcement of the covenants in Georgia only. The district court also issued a "limited" declaratory judgment, declaring the restrictive covenants "unenforceable 'within the state of Georgia.'"[109] The plaintiff's former employer appealed, and the plaintiff cross-appealed, arguing that the district court had erred by limiting the scope of its injunction and declaratory judgment to Georgia only.[110]

On the plaintiff's cross-appeal, the Eleventh Circuit affirmed the district court's geographically limited injunction, holding that the district court had correctly followed *Keener*.[111] The court held, however, that the district court erred by geographically limiting its declaratory judgment.[112] The court observed that when determining the scope of a judgment rendered by a federal court sitting in diversity, the court should look to the law of the state where the rendering court sits, unless that state's laws conflict with federal interests.[113] Examining Georgia law, the court concluded that "Georgia does not attempt to limit its declaratory judgments in cases involving non-competition agreements

105. 404 F.3d 1297 (11th Cir. 2005).

106. *Id.* at 1299. The court of appeals first addressed this issue in Keener v. Convergys Corp., 312 F.3d 1236 (11th Cir. 2002). Subsequently, the court of appeals held that a district court abused its discretion by issuing an injunction prohibiting "worldwide" the enforcement of a restrictive covenant found unenforceable under Georgia law. Keener v. Convergys Corp., 342 F.3d 1264, 1269 (11th Cir. 2003). For a discussion of *Keener*, see Jerry C. Newsome & K. Alex Khoury, *Labor and Employment*, 55 MERCER L. REV. 1353, 1371-72 (2004).

107. *Palmer & Cay*, 404 F.3d at 1299-1302.

108. 312 F.3d 1236 (11th Cir. 2002).

109. *Palmer & Cay*, 404 F.3d at 1299.

110. *Id.* at 1302.

111. *Id.* at 1309.

112. *Id.* at 1310.

113. *Id.*

. . . . [Therefore a] federal district court sitting in Georgia and applying Georgia law should not do so either."[114]

After *Keener* and *Palmer & Cay*, a federal court sitting in Georgia and applying Georgia law can only enjoin the enforcement of a restrictive covenant within Georgia's boundaries.[115] But, the same court can render a geographically unlimited declaratory judgment declaring the restrictive covenant unenforceable.[116] Taken together, these two cases allow employees seeking to avoid restrictive covenants to continue to seek shelter under Georgia's public policy against such covenants, but they can no longer use the Eleventh Circuit's injunctive powers to export Georgia's policy to other states that might otherwise enforce the covenants. A practical effect of *Keener* and *Palmer & Cay* may be to encourage employees seeking injunctive relief to avoid the federal courts and file their actions in Georgia's state courts, which do not recognize a geographical limitation on their injunctive powers.[117]

114. *Id.* In so concluding, the court looked to Hostetler v. Answerthink, 267 Ga. App. 325, 599 S.E.2d 271 (2004), in which the Georgia Court of Appeals reversed a lower court for following *Keener* and limiting an injunction against the enforcement of a restrictive covenant to the state of Georgia. *Id.* at 330, 599 S.E.2d at 276.

115. *Palmer & Cay*, 404 F.3d at 1309 (citing *Keener*, F.3d at 1269).

116. *Id.* at 1310.

117. *See Hostetler*, 267 Ga. App. at 330, 599 S.E.2d at 276.

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