

Labor and Employment

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This Article surveys notable developments in labor and employment law in the Eleventh Circuit from January 1 to December 31, 2003. During the survey period, the United States Supreme Court handed down two notable decisions, one involving the Fair Labor Standards Act (“FLSA”)¹ and the other involving the Family and Medical Leave Act (“FMLA”).² The United States Court of Appeals for the Eleventh Circuit rendered several notable decisions involving the FLSA, the FMLA, the National Labor Relations Act (“NLRA”),³ and the Railway Labor Act (“RLA”)⁴ during the survey period. The Eleventh Circuit also issued a significant opinion affecting restrictive covenants under Georgia law.⁵

I. THE FAIR LABOR STANDARDS ACT

The FLSA continues to be an active area in federal employment litigation. During this survey period, the Supreme Court granted certiorari to a case from the Eleventh Circuit⁶ on the issue of removability of FLSA actions.⁷ The Eleventh Circuit focused primarily on collective actions under § 216(b),⁸ but it also considered the joint

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1. 29 U.S.C. §§ 201-219 (2000).

2. 29 U.S.C. §§ 2601-2654 (2000).

3. 29 U.S.C. §§ 151-169 (2000).

4. 45 U.S.C. §§ 151-164 (2000).

5. *See Keener v. Convergys Corp.*, 342 F.3d 1264 (11th Cir. 2003).

6. *See Breuer v. Jim’s Concrete of Brevard, Inc.*, 292 F.3d 1308 (11th Cir. 2002).

7. *Breuer v. Jim’s Concrete of Brevard, Inc.*, 538 U.S. 691 (2003).

8. 29 U.S.C. § 216(b) (2000).

employment of migrant workers and the applicability of the agriculture exemption to nonagricultural enterprises.

A. Removal

In *Breuer v. Jim's Concrete of Brevard, Inc.*,⁹ the Supreme Court resolved a long-standing split among the circuits over whether FLSA actions brought in state court are removable on "federal question" grounds.¹⁰ The controversy arose from the seemingly innocuous wording of 29 U.S.C. § 216(b), which provides that "[a]n action to recover [for a violation of the Act] . . . may be maintained against any employer . . . in any Federal or State court of competent jurisdiction."¹¹ The issue was whether the words "may be maintained . . . in . . . State court" constituted Congress's express prohibition on removal.¹² Finding that the wording of § 216(b) falls short of an express prohibition on removal, the Supreme Court unanimously held that FLSA claims are removable.¹³

B. Collective Actions

The hottest employment topic in the Eleventh Circuit during this survey period was the "collective action" procedure under § 216(b). The court of appeals issued four opinions concerning collective actions under the FLSA, and many more collective action cases found their way into the district courts during this survey period.¹⁴

9. 538 U.S. 691 (2003).

10. *Id.* at 694. Compare, e.g., *Johnson v. Butler Bros.*, 162 F.2d 87, 89 (8th Cir. 1947) (holding that § 216(b) precludes removal of FLSA actions properly brought in state court) with *Cosme Nieves v. Deshler*, 786 F.2d 445, 451 (1st Cir. 1986) (holding that "nothing in the FLSA . . . expressly prohibits the removal of FLSA actions").

11. 29 U.S.C. § 216(b) (2000).

12. 538 U.S. at 693.

13. *Id.* at 694, 700.

14. See, e.g., *Barron v. Henry County Sch. Sys.*, 242 F. Supp. 2d 1096 (M.D. Ala. 2003) (granting conditional class certification); *Marsh v. Butler County Sch. Sys.*, 242 F. Supp. 2d 1086 (M.D. Ala. 2003) (denying class certification absent similarly situated class members or a commonality of employment actions giving rise to the class's claims); *Reed v. Mobile County Sch. Sys.*, 246 F. Supp. 1227 (S.D. Ala. 2003) (same); *Mackenzie v. Kindred Hosps. E., L.L.C.*, 276 F. Supp. 2d 1211 (M.D. Fla. 2003) (dismissing plaintiff's claims as moot because plaintiff was offered full relief and other employees' right to file suit against the employer would not be compromised by resolution of the plaintiff's claims); *Chapman v. Lehman Bros.*, 279 F. Supp. 2d 1286 (S.D. Fla. 2003) (holding that FLSA collective actions are distinct from FED. R. CIV. P. 23 class actions and therefore are not exempt from mandatory arbitration under the Federal Arbitration Act, 9 U.S.C. §§ 1 to 307 (2000)); *Horne v. United Servs. Auto. Ass'n*, 279 F. Supp. 2d 1231 (M.D. Ala. 2003) (denying class certification because plaintiff failed to present evidence of similarly situated

In *Prickett v. Dekalb County*,¹⁵ the Eleventh Circuit Court of Appeals held that plaintiffs who opted into a collective action were opting into the entire action, including subsequently added claims.¹⁶ The named plaintiffs in *Prickett* originally filed two FLSA claims against their employer for overtime pay. Several hundred other employees opted into the action by filing consent forms with the district court. Subsequently, the named plaintiffs amended their complaint to add a third FLSA claim against the employer. The district court granted the employer's motion for summary judgment against the opt-in plaintiffs on the later-added FLSA claim, concluding that the opt-in plaintiffs were not parties to the new claim because they had not filed a separate consent form for that claim.¹⁷

The court of appeals examined the following statutory language of § 216(b): "No employee shall be a party plaintiff to any such action unless he gives his consent in writing to become such a party"¹⁸ According to the court, the "plain language [of § 216(b)] indicates that plaintiffs do not opt in or consent to join an action as to specific claims, but as to the action as a whole."¹⁹ The court of appeals then vacated the district court's opinion and remanded the case for further proceedings.²⁰

In *Cameron-Grant v. Maxim Healthcare Services, Inc.*,²¹ a three-judge panel of the court of appeals stated that it was considering an issue of first impression in the Eleventh Circuit: "whether the mootness principles in the Rule 23^[22] class action context apply to collective actions brought under § 216(b) of the FLSA."²³ Although the opinion in *Cameron-Grant* may have been the first to discuss *in detail* the applicability of Rule 23 mootness principles in FLSA collective actions, another three-judge panel had already considered the issue twice during

employees who wished to opt in); *Smith v. Tradesmen Int'l, Inc.*, 289 F. Supp. 2d 1369 (S.D. Fla. 2003) (denying plaintiff's motion to permit notification of the collective action to other employees because three identical affidavits from employees with different job titles, different responsibilities, and who worked in different locations was insufficient evidence for the court to determine whether similarly situated employees existed).

15. 349 F.3d 1294 (11th Cir. 2003).

16. *Id.* at 1297-98.

17. *Id.* at 1296.

18. *Id.* (quoting 29 U.S.C. § 216(b) (2000)).

19. *Id.* at 1297.

20. *Id.* at 1298.

21. 347 F.3d 1240 (11th Cir. 2003).

22. FED. R. CIV. P. 23.

23. 347 F.3d at 1245.

this survey period.²⁴ The question of which panel was first is relevant because the court in *Cameron-Grant* held that Rule 23 mootness principles do not apply to FLSA collective actions,²⁵ but the earlier panel applied the Rule 23 principles to vacate a district court's dismissal of two FLSA collective actions for mootness.²⁶

The named plaintiffs in *Cameron-Grant* were four nurses who sued their employer for failure to pay overtime, failure to pay minimum wage, and retaliation. After finding that plaintiffs had produced no evidence that other similarly situated employees wanted to opt in to the action, the district court denied plaintiffs' motion to allow notification to potential opt-in plaintiffs. By the time the district court's denial of that motion was appealed to the Eleventh Circuit, however, all four plaintiffs had dismissed with prejudice all of their claims against defendant.²⁷

On appeal the court noted that settlement of a plaintiff's claims generally moots a cause of action.²⁸ However, when a Rule 23 class action is involved, a plaintiff may retain a "personal stake" in class certification even after the plaintiff's substantive claims have become moot.²⁹ But, as the court observed, a Rule 23 class action is a "fundamentally different creature" than a § 216(b) collective action.³⁰ In a Rule 23 class action, the named plaintiff can establish a class regardless of whether the class members participate in the action, and any judgment rendered in the case is binding on every member of the class who does not "opt out."³¹ On the other hand, under § 216(b), class members must opt in to the action before they can benefit from, or be

24. See *Martinez-Mendoza v. Champion Int'l Corp.*, 340 F.3d 1200, 1203 & n.1, 1215-16 (11th Cir. 2003) (decided on Aug. 5, 2003); *Gonzalez-Sanchez v. Int'l Paper Co.*, 346 F.3d 1017, 1019 & n.1, 1023 (11th Cir. 2003) (decided on Sept. 25, 2003). *Cameron-Grant* was decided on October 20, 2003.

25. 347 F.3d at 1249.

26. See *Martinez-Mendoza*, 340 F.3d at 1215-16; *Gonzalez-Sanchez*, 346 F.3d at 1023. Which case was decided first matters because the Eleventh Circuit follows the "earliest case" rule, which provides that when there is a conflict in circuit authority, the earliest case controls because a prior panel decision is binding on subsequent panels and cannot be overturned except by the court sitting *en banc*. See *Walker v. Mortham*, 158 F.3d 1177, 1188 (11th Cir. 1998).

27. 347 F.3d at 1242-44.

28. *Id.* at 1244.

29. *Id.* at 1245-47. In its discussion of Rule 23 class actions, the court cited *Martinez-Mendoza* to support the proposition that mootness does not terminate a plaintiff's right to represent a class. *Id.* at 1247 n.4. Unlike the other cases the court cited to support that proposition, however, *Martinez-Mendoza* was not a Rule 23 class action but a § 216(b) collective action. See *Martinez-Mendoza*, 340 F.3d at 1203 & n.1.

30. 347 F.3d at 1249.

31. *Id.* at 1248-49.

bound by, its outcome.³² Based upon this distinction, the court held that a § 216(b) plaintiff does not have an independent right to represent the class.³³ Thus, a named plaintiff's interest in the action is limited to the plaintiff's individual claims on the merits.³⁴

The court's holding in *Cameron-Grant* calls into question its holdings in *Martinez-Mendoza v. Champion International Corp.*³⁵ and *Gonzalez-Sanchez v. International Paper Co.*,³⁶ decided earlier in the survey period. In *Martinez-Mendoza* and *Gonzalez-Sanchez*, migrant workers moved for class certification under § 216(b) of the FLSA.³⁷ In both cases, the United States District Court for the Northern District of Florida declared the issue of class certification moot after granting summary judgment against the named plaintiffs.³⁸ The Eleventh Circuit vacated both district court opinions, citing Rule 23 class action precedent for the proposition that "a plaintiff's capacity to act as representative of the class is not ipso facto terminated when he loses his case on the merits."³⁹

Despite a thorough analysis of the issue in *Cameron-Grant*, and the absence of any analysis in *Martinez-Mendoza* and *Gonzalez-Sanchez*, the apparently conflicting holdings of these cases have left the issue of mootness and class representation in FLSA collective actions unsettled in the Eleventh Circuit.

C. Joint Employment

Martinez-Mendoza and *Gonzalez-Sanchez* addressed not only collective-action procedure, but also the issue of joint employment.⁴⁰ In these two cases, concerning nearly identical facts and conclusions of law, migrant employees of farm labor contractors ("FLCs") were contracted to plant tree seedlings for Champion International Corporation ("Champion") and International Paper Company ("International Paper"), respectively. The FLCs recruited the plaintiffs from Mexico, trained them, transported them to the work site, and paid their wages. When the work season was over, the FLCs transported plaintiffs back to Mexico. In addition to planting seedlings for Champion and International Paper, plaintiffs

32. *Id.*

33. *Id.* at 1249.

34. *Id.*

35. 340 F.3d 1200 (11th Cir. 2003).

36. 346 F.3d 1017 (11th Cir. 2003).

37. *Martinez-Mendoza*, 340 F.3d at 1203; *Gonzalez-Sanchez*, 346 F.3d at 1019.

38. 340 F.3d at 1215; 346 F.3d at 1023.

39. 340 F.3d at 1215-16; *see* 346 F.3d at 1023.

40. 340 F.3d at 1203-07; 346 F.3d at 1019-20.

planted trees for other entities that had contracted with the FLCs for those services. Plaintiffs sued the FLCs and the paper manufacturers for minimum wage and overtime violations under the theory of joint employment. The United States District Court for the Northern District of Florida granted summary judgment in favor of the paper manufacturers in both cases.⁴¹

The court of appeals in *Martinez-Mendoza* identified seven factors for determining “as a matter of economic reality” whether a joint employment relationship exists.⁴² Those factors are:

(1) whether the agricultural employer has the power, either alone or through the FLC, to direct, control, or supervise the worker or the work performed (such control may be either direct or indirect, taking into account the nature of the work performed and a reasonable degree of contract performance oversight and coordination with third parties); (2) whether the agricultural employer has the power, either alone or in addition to another employer, directly or indirectly, to hire or fire, modify the employment conditions, or determine the pay rates or the methods of wage payment for the worker; (3) the degree of permanency and duration of the relationship of the parties, in the context of the agricultural activity at issue; (4) the extent to which the services rendered by the worker are repetitive, rote tasks requiring skills which are acquired with relatively little training; (5) whether the activities performed by the worker are an integral part of the overall business operation of the agricultural employer; (6) whether the work is performed on the agricultural employer’s premises, rather than on premises owned or controlled by another business entity; and (7) whether the agricultural employer undertakes responsibilities in relation to the worker which are commonly performed by employers, such as preparing and/or making payroll records, preparing and/or issuing pay checks, paying FICA taxes, providing workers’ compensation insurance, providing field sanitation facilities, housing or transportation, or providing tools and equipment or materials required for the job (taking into account the amount of the investment).⁴³

The court held that the employee bears the burden of proving that the above factors weigh in favor of finding joint employment by a preponderance of the evidence and that no one factor is dispositive.⁴⁴

The court in *Martinez-Mendoza* determined that the first factor weighed against a finding of joint employment because the workers were

41. *Id.*

42. 340 F.3d at 1208-09.

43. *Id.* (citing 29 C.F.R. § 500.20(h)(5)(iv)(A)-(G); *Charles v. Burton*, 169 F.3d 1322,1328-29 (11th Cir. 1999)).

44. *Id.* at 1209.

supervised by the FLC foremen and planted the trees according to the FLC's specifications, which met or exceeded the specifications provided by Champion.⁴⁵ The court weighed the second factor against joint employment because the FLC foremen determined when the workers started work each day, when they took breaks, and when they finished.⁴⁶ The court also stated that the FLC could alter the type of work performed by each worker, punish the workers, and alter their pay.⁴⁷ The third factor, degree of permanency of the relationship, also weighed against joint employment because plaintiffs' work for Champion was "scattered," and the workers "generally never even knew that Champion was the recipient of their efforts."⁴⁸ The court weighed the fourth element in favor of plaintiffs because tree planting, though requiring some skill, could be learned with very little training.⁴⁹ The fifth factor, whether the work was an integral part of Champion's overall business, weighed against plaintiffs because Champion bought most of its lumber on the open market and the trees could have been planted by machine rather than by hand.⁵⁰ The sixth factor weighed in favor of plaintiffs because the work they performed was done on Champion's land.⁵¹ However, the fact that the workers seldom knew whose land they were on while planting the trees reduced the weight of this factor because it weakened plaintiffs' claim that they were economically dependent on Champion.⁵² The final factor weighed heavily against a finding of joint employment because the FLC undertook all of the bureaucratic responsibilities that employers usually perform for their employees, whereas Champion provided none of those services.⁵³ Determining that the five factors favoring Champion outweighed the two factors favoring plaintiffs, the court held that Champion was not plaintiffs' joint employer under the FLSA and affirmed the judgment of the district court.⁵⁴

45. *Id.* at 1210-11.

46. *Id.* at 1211.

47. *Id.* at 1212.

48. *Id.*

49. *Id.* at 1212-13.

50. *Id.*

51. *Id.* at 1214.

52. *Id.*

53. *Id.*

54. *Id.* at 1215. The facts and conclusions of law in *Gonzalez-Sanchez* are sufficiently similar to the facts and conclusions in *Martinez-Mendoza* that a separate discussion of the court's decision in that case would be redundant. See *Gonzalez-Sanchez*, 346 F.3d at 1020.

D. Exemptions

In *Ares v. Manuel Diaz Farms, Inc.*,⁵⁵ the Eleventh Circuit considered another issue of first impression: whether the FLSA's agricultural exemption⁵⁶ applies to employers that do not actually engage in agriculture but exist solely to serve an agricultural enterprise.⁵⁷ Plaintiff in *Ares* sued his employer, Diaz Landscaping and Nursery, Inc. (the "Nursery"), for failure to pay overtime wages. The Nursery was owned by Manuel Diaz ("Diaz"), who also owned Diaz Farms, Inc. (the "Farm"). The Nursery was the employer of record for all of the Farm's workers. The sole function of the Nursery was to lease employees and land to the Farm. The Farm used the Nursery's employees and land to cultivate trees and ornamental plants. The district court granted summary judgment in favor of the Nursery, holding that the Nursery and the Farm "were so intertwined as to constitute a single agricultural enterprise which is exempt from the requirement to pay overtime wages."⁵⁸

The court of appeals affirmed the district court's ruling.⁵⁹ According to the Eleventh Circuit panel, "the availability of the agricultural exemption should not 'turn upon the technicalities of corporate organization.'"⁶⁰ Courts may decline to apply the agricultural exemption to employers who serve agricultural enterprises but "perform separate, self-contained services and operate independently from the agricultural enterprises they serve."⁶¹ But when the evidence shows that two companies are actually part of a "single farm enterprise," § 213(b)(12)⁶² exempts the employees of both companies from FLSA requirements.⁶³

II. THE FAMILY AND MEDICAL LEAVE ACT

While not as heavily litigated as the FLSA during this survey period, FMLA litigation still managed to yield some significant opinions. In *Nevada Department of Human Resources v. Hibbs*,⁶⁴ the Supreme Court

55. 318 F.3d 1054 (11th Cir. 2003).

56. 29 U.S.C. § 213(b)(12) (2000).

57. 318 F.3d at 1056.

58. *Id.*

59. *Id.* at 1058.

60. *Id.* (quoting *Wirtz v. Jackson & Perkins Co.*, 312 F.2d 48, 50 (2d Cir. 1963)).

61. *Id.* at 1057.

62. 29 U.S.C. § 213(b)(12) (2000).

63. 318 F.3d at 1057.

64. 538 U.S. 721 (2003).

held that the FMLA abrogates Eleventh Amendment immunity.⁶⁵ The decision had an immediate impact on the Eleventh Circuit, prompting the court of appeals to reverse in part the holding in *Bylsma v. Baily*,⁶⁶ which was decided by the United States District Court for the Middle District of Alabama. In *Morrison v. Amway Corp.*,⁶⁷ the Eleventh Circuit chose sides in a circuit split over the proper standard of review to apply to a motion to dismiss due to the employee's ineligibility to bring an FMLA action.⁶⁸ And finally, in *Russell v. North Broward Hospital*,⁶⁹ the Eleventh Circuit explored the definition of a "serious health condition" under the FMLA.⁷⁰

A. Abrogation of Eleventh Amendment Immunity

In *Nevada Department of Human Resources v. Hibbs*,⁷¹ the Supreme Court ruled 6-3 that state employees can sue a state employer in federal court for violation of the FMLA's family-care provision.⁷² William Hibbs, an employee of the Nevada Department of Human Resources Welfare Division (the "Department"), was fired for overstaying his authorized-leave time to care for his wife, who had been injured in a car accident. Hibbs sued the Department in federal court for violation of § 2612(a)(1)(C).⁷³ The district court held that the suit was barred by the state's Eleventh Amendment immunity and granted summary judgment in favor of the Department, but the United States Court of Appeals for the Ninth Circuit reversed the district court's ruling.⁷⁴

The Supreme Court held that "Congress may . . . abrogate [Eleventh Amendment] immunity in federal court if it makes its intention to abrogate unmistakably clear in the language of the statute and acts pursuant to a valid exercise of its power under § 5 of the Fourteenth Amendment."⁷⁵ Examining the language of the FMLA, the Court held that it clearly revealed congressional intent to abrogate state immunity because it "enables employees to seek damages 'against any employer (including a public agency) in any Federal or State court of competent

65. *Id.* at 726.

66. 127 F. Supp. 2d 1211 (M.D. Ala. 2001), *rev'd in part*, 346 F.3d 1324 (11th Cir. 2003).

67. 323 F.3d 920 (11th Cir. 2003).

68. *Id.* at 927.

69. 346 F.3d 1335 (11th Cir. 2003).

70. *Id.* at 1337.

71. 538 U.S. 721 (2003).

72. *Id.* at 725. The FMLA's family care provision is codified at 29 U.S.C. § 2612(a)-(1)(C) (2000).

73. 29 U.S.C. § 2612(a)(1)(C) (2000).

74. 538 U.S. at 725.

75. *Id.* at 726.

jurisdiction.”⁷⁶ The only remaining issue in determining whether Hibbs could maintain his lawsuit was whether Congress abrogated state immunity in the FMLA pursuant to its powers under section 5 of the Fourteenth Amendment.⁷⁷

Section 5 of the Fourteenth Amendment authorizes Congress to enforce equal protection of the laws through appropriate legislation.⁷⁸ The Supreme Court has interpreted § 5 as giving Congress the power to enact “prophylactic legislation that proscribes facially constitutional conduct, in order to prevent and deter unconstitutional conduct.”⁷⁹ The unconstitutional conduct sought to be proscribed by the FMLA, according to the Court, is “gender-based discrimination in the workplace.”⁸⁰ Examining the FMLA’s legislative history, the Court concluded that Congress enacted the FMLA’s family leave provision to remedy the widening gender gap in the allocation of family leave, which was caused by, and perpetuated, stereotypical “beliefs about the allocation of family duties.”⁸¹ The Court held that Congress validly exercised its authority under the Fourteenth Amendment when it abrogated the states’ Eleventh Amendment immunity in the FMLA because “setting a minimum standard of family leave for *all* eligible employees, irrespective of gender, . . . attacks the formerly state-sanctioned stereotype that only women are responsible for family caregiving, thereby reducing employers’ incentives to engage in discrimination by basing hiring and promotion decisions on stereotypes.”⁸²

The impact of *Hibbs* in the Eleventh Circuit was immediate. In *Bylsma v. Freeman*,⁸³ the court of appeals reversed the Middle District of Alabama’s holding that Congress had not validly abrogated Eleventh Amendment immunity under the family care provision of the FMLA.⁸⁴ But *Hibbs* may not have opened the floodgates to state employees for all types of FMLA claims.⁸⁵ In *Garrett v. University of Alabama Board of Trustees*,⁸⁶ the Eleventh Circuit held that Congress did not have the authority to abrogate state sovereign immunity for FMLA claims

76. *Id.* (quoting 29 U.S.C. § 2617(a)(2) (2000)).

77. *Id.*

78. *Id.* at 727.

79. *Id.* at 727-28.

80. *Id.* at 728.

81. *Id.* at 730 (citing S. REP. NO. 103-3, at 14-15 (1993)).

82. *Id.* at 737.

83. 346 F.3d 1324 (11th Cir. 2003).

84. *Id.* at 1324. See *Bylsma v. Bailey*, 127 F. Supp. 2d 1211, 1234 (M.D. Ala. 2001).

85. See *Bylsma*, 127 F. Supp. 2d at 1233.

86. 193 F.3d 1214 (11th Cir. 1999).

concerning an employee's leave to attend to personal medical needs.⁸⁷ *Garrett* is probably still good law because the Supreme Court in *Hibbs* justified abrogation in family care leave cases as a means of combatting the stereotype of women as caregivers in the home.⁸⁸ That concern is not implicated when the individual requiring care is the employee.

B. *The Motion to Dismiss Standard*

In *Morrison v. Amway Corp.*,⁸⁹ the Eleventh Circuit considered whether a district court should use the Rule 12(b)(1)⁹⁰ or Rule 56⁹¹ standard of review "when reviewing a defendant's motion to dismiss an FMLA action" on grounds of employee eligibility.⁹² As the court in *Morrison* noted, not only are the circuits split on the issue,⁹³ but a split of opinion also existed within the Eleventh Circuit.⁹⁴

Plaintiff in *Morrison* sued his employer, Amway Corporation ("Amway"), for retaliation under the FMLA.⁹⁵ Amway moved to dismiss the action for lack of subject matter jurisdiction pursuant to Rule 12(b)(1) because, it argued, plaintiff had failed to establish that he was an "eligible employee" under the FMLA.⁹⁶ The district court agreed and dismissed the action.⁹⁷

The court of appeals began its analysis by reviewing the circumstances under which the Rule 56 and Rule 12(b)(1) standards of review apply.⁹⁸ The Rule 12(b)(1) standard applies to jurisdictional challenges that "can be decided without reference to the merits of the underlying claim."⁹⁹

87. *Id.* at 1219-20. The FMLA leave provision involving personal medical needs is codified at 29 U.S.C. § 2612(a)(1)(D) (2000).

88. 538 U.S. at 730.

89. 323 F.3d 920 (11th Cir. 2003).

90. FED. R. CIV. P. 12(b)(1).

91. FED. R. CIV. P. 56.

92. 323 F.3d at 921-22.

93. *See id.* at 928 n.11.

94. *See id.* at 928-29.

95. The FMLA's retaliation provision is codified at 29 U.S.C. § 2615 (2000).

96. An "eligible employee" under the FMLA is one who was employed for at least twelve months with the employer and must have worked at least 1250 hours with the employer in the previous twelve months. 29 U.S.C. § 2611(2)(A) (2000). Section 2611(2)(B), however, excludes employees who worked at a site where the employer employed less than fifty people, if the total number of employees working for that employer within seventy-five miles of that worksite is less than fifty. Amway argued that it employed less than fifty people within seventy-five miles of plaintiff's worksite, and therefore, plaintiff was not an eligible employee pursuant to § 2611(2)(B). 323 F.3d at 923.

97. 323 F.3d at 922.

98. *Id.* at 924-25.

99. *Id.*

If the motion to dismiss requires the court to make a determination on the merits of the case, the Rule 56 standard should be used.¹⁰⁰ The court observed that in an FMLA action, jurisdiction is “intertwined” with the merits of the action because “eligible-employee status . . . is a threshold jurisdictional question . . . that also appears to be a prima facie element for recovery.”¹⁰¹

The court observed that under the Rule 56 standard, plaintiffs are entitled to a presumption of truthfulness regarding facts relevant to the merits of the action, whereas no such presumption exists when a court considers a plaintiff’s jurisdictional allegations.¹⁰² Because an eligibility challenge is an attack on both jurisdiction and the merits in an FMLA action, the court held that resolution of factual disputes on the issue is reserved for the jury.¹⁰³ Accordingly, the court reversed the district court for not reviewing Amway’s motion to dismiss under the standard for Rule 56.¹⁰⁴

C. *Serious Health Conditions*

In *Russell v. North Broward Hospital*,¹⁰⁵ the Eleventh Circuit held that a “serious health condition” under the FMLA is a condition requiring more than three consecutive full days of incapacity.¹⁰⁶ The court’s holding may prove particularly helpful in clarifying the rights of employers and employees under the FMLA’s intermittent leave provision.¹⁰⁷

The case arose when plaintiff slipped and fell while working for North Broward Hospital (the “Hospital”), breaking her wrist and elbow. Over the next ten days, plaintiff worked intermittently due to doctors appointments and episodes of severe pain. Ultimately, the Hospital terminated plaintiff’s employment due to “her excessive absenteeism.”¹⁰⁸ Plaintiff sued under the FMLA, claiming that her absences fell within the twelve weeks of leave she was entitled to under the Act because her injuries constituted a serious health condition.¹⁰⁹ At trial the judge instructed the jury that a serious health condition was an

100. *Id.* at 925.

101. *Id.* at 927 (citations omitted).

102. *Id.* at 925.

103. *Id.* at 928.

104. *Id.* at 930.

105. 346 F.3d at 1335 (2003).

106. *Id.* at 1346.

107. *See* 29 U.S.C. § 2612(b) (2000).

108. 346 F.3d at 1339.

109. *Id.* Plaintiff had a history of attendance problems prior to her accident. *See id.* at 1338.

injury requiring more than three consecutive calendar days of incapacity.¹¹⁰ When the jury asked whether three consecutive partial days of incapacity would satisfy the requirement, the judge responded that “three consecutive calendar days, [seventy-two] hours or more,” was required.¹¹¹ The jury returned a verdict in favor of the Hospital, and plaintiff appealed.¹¹²

The court of appeals began by noting that the FMLA allows an employee twelve workweeks of leave per year “because of a *serious health condition* that makes the employee unable to perform the functions of the position of such employee.”¹¹³ The FMLA defines a “serious health condition” as “an illness, injury, impairment, or physical or mental condition that involves . . . continuing treatment by a health care provider.”¹¹⁴ “Continuing treatment,” however, is not defined in the FMLA.¹¹⁵ For this definition, the court turned to a Department of Labor regulation that defines “continuing treatment” as “[a] period of incapacity (i.e., inability to work, attend school or perform other regular daily activities due to the serious health condition, treatment therefor, or recovery therefrom) of *more than three consecutive calendar days*.”¹¹⁶ Plaintiff argued that her seven consecutive partial days of incapacity were sufficient to satisfy the regulation.¹¹⁷ The court rejected her argument, holding that the regulation requires three consecutive full days of incapacity.¹¹⁸ The court held that “[p]artial days do not count, except at the beginning or end of the ‘period of incapacity’ in order to make up the ‘more than’ element.”¹¹⁹

III. THE NATIONAL LABOR RELATIONS ACT

The only decision from the Eleventh Circuit Court of Appeals concerning the NLRA during this survey period was *Marine Engineers Beneficial Ass’n v. GFC Crane Consultants, Inc.* (“*Marine*”).¹²⁰ In *Marine* the court of appeals held that a notice of termination was not

110. *Id.* at 1340.

111. *Id.*

112. *Id.*

113. *Id.* at 1342 (quoting 29 U.S.C. § 2612(a)(1)(D) (2000)).

114. *Id.* (quoting 29 U.S.C. § 2611(11) (2000)).

115. *Id.*

116. *Id.* (quoting 29 C.F.R. § 825.114(a)(2)(i)).

117. *Id.* at 1343.

118. *Id.* at 1344.

119. *Id.*

120. 331 F.3d 1287 (11th Cir. 2003).

equivalent to a notice of modification for the purpose of triggering a continuation clause in the collective bargaining agreement.¹²¹

In 1995 the Marine Engineers Beneficial Association ("MEBA") entered into a collective bargaining agreement (the "CBA" or "Agreement") with G.F.C. Crane Consultants, Inc. ("GFC"). The CBA contained a continuation clause that allowed for the terms of the CBA to remain in effect during negotiations to modify the Agreement or until the parties reached an impasse in such negotiations. At the end of the initial five-year term, the Agreement would automatically renew on a year-to-year basis unless either MEBA or GFC notified the other that it wanted to modify the Agreement. Such notice of modification triggered the continuation clause.¹²²

Near the end of the five-year term, MEBA notified GFC that it wished to modify the Agreement. GFC responded by notifying MEBA that it was going to terminate the Agreement at the end of the five-year term. GFC told MEBA that it was willing to negotiate a new agreement, and the parties agreed to extend the terms of the old agreement for thirty days while the parties worked out a new collective bargaining agreement. After the thirty-day extension expired, but before a new agreement had been reached, MEBA lodged several complaints with GFC involving various employee issues. GFC denied those complaints and refused to arbitrate because it believed that the CBA's arbitration provisions had expired at the end of the thirty-day extension. MEBA sought to compel GFC to arbitrate by filing suit in federal district court. The district court ordered GFC to arbitrate under the terms of the 1995 CBA, holding that GFC's notice of termination was the "functional equivalent" of a notice to modify, and therefore, the terms of the CBA were still in effect pursuant to the continuation clause.¹²³

121. *Id.* at 1291.

122. *Id.* at 1288-89. Specifically, the continuation clause provided as follows:

The provisions of this Agreement shall become effective from August 14, 1995, and shall remain in full force and effect until August 14, 2000. It shall automatically be renewed from year to year thereafter unless either party shall notify the other, in writing, at least sixty (60) days prior but no sooner than ninety (90) days prior to the expiration or anniversary date, that it desires to modify this Agreement. In the event that such notice is given, negotiations shall begin not later than thirty (30) days prior to the expiration or anniversary date. The terms of the Agreement at the time of notice to modify was given shall continue in effect until mutual agreement on the proposed modifications or an impasse has been reached.

Id. at 1289 n.1.

123. *Id.* at 1289-90.

The court of appeals reversed the district court, holding that GFC's notice of termination did not trigger the continuation clause.¹²⁴ According to the appellate court, "[n]otices to modify and notices to terminate are not equivalent except in the face of contractual language that equates those types of notice."¹²⁵ The court also rejected MEBA's alternative argument that the arbitration provisions of the CBA were still in effect because MEBA triggered the continuation clause when it notified GFC of its desire to modify the agreement.¹²⁶ The court held that the purpose of the continuation clause "was to continue the terms of the agreement until the parties reached an agreement on the modification proposals or impasse was reached on those modification proposals. By *statutorily terminating*, GFC made those contract-based modification negotiations, and, by extension, the contract continuation clause, moot."¹²⁷

IV. THE RAILWAY LABOR ACT ("RLA")

A. Preemption

In *Geddes v. American Airlines, Inc.*,¹²⁸ the court of appeals considered an issue of first impression in the Eleventh Circuit: whether the RLA "has the . . . preemptive force necessary to create federal removal jurisdiction."¹²⁹ Geddes sued American Airlines, Inc. ("American") in Florida state court for defamation, negligence, and negligent supervision arising from its handling of a complaint against him. American removed the case to federal court. According to American, federal question jurisdiction existed because it conducted the investigation of the complaint against Geddes in accordance with a collective bargaining agreement made under, and governed by, the RLA. The district court denied Geddes's motion to remand because it concluded that the RLA completely preempted Geddes's state tort claims.¹³⁰ The district court based its finding that the RLA completely preempted state law claims on the similarities between the RLA and the Labor Management

124. *See id.* at 1291.

125. *Id.* at 1290.

126. *Id.* at 1293.

127. *Id.*

128. 321 F.3d 1349 (11th Cir. 2003).

129. *Id.* at 1353.

130. *Id.* at 1351-52.

Relations Act ("LMRA"),¹³¹ which has been held to support removal due to complete preemption.¹³²

The court of appeals began its analysis by distinguishing ordinary preemption from complete preemption.¹³³ The court noted that "a federal law may substantively displace state law under ordinary preemption but lack the extraordinary force to create federal removal jurisdiction under the doctrine of complete preemption."¹³⁴ Such "extraordinary" preemptive force must be manifest in the clearly expressed intent of Congress.¹³⁵ Looking at the language and legislative history of the RLA, the court found no indication that Congress intended the RLA to create a federal cause of action for dispute resolution under the Act.¹³⁶ Accordingly, the court held that the RLA does not completely preempt state law claims, and it reversed the district court ruling.¹³⁷

B. Notice

In *Steward v. Mann*,¹³⁸ the Eleventh Circuit Court of Appeals considered two issues arising from the RLA's due-notice requirement:¹³⁹ (1) whether the due-notice requirement applies to proceedings before an airline board of adjustment,¹⁴⁰ and (2) what kind of notice is required under the due-notice provision.¹⁴¹

The dispute in this case arose between two groups of pilots, referred to herein as "the Steward pilots" and "the Mann pilots," over their seniority standing at AirTran Airways, Inc. The Mann pilots successfully petitioned to have an arbitrator revise AirTran's seniority rankings in such a way that the Mann pilots moved ahead of the Steward pilots. The arbitrator did not send notice of the arbitration to the Steward pilots despite the fact that their seniority could have been, and was,

131. 29 U.S.C. § 185 (2000).

132. 321 F.3d at 1354-55.

133. *Id.* at 1352-53. Although ordinary preemption can be pleaded as an affirmative defense to state law claims in state or federal court, "a case may *not* be removed to federal court on the basis of a federal defense, including that of federal preemption." *Id.* Complete preemption, on the other hand, exists only when the federal statute's preemptive force is so extraordinary that it creates a federal cause of action. *Id.* at 1353.

134. *Id.* at 1353.

135. *Id.*

136. *Id.* at 1354.

137. *Id.* at 1357. In so holding, the court declined to follow precedent to the contrary from the Second, Eighth, and Ninth Circuits. *See id.* at 1356 & n.5.

138. 351 F.3d 1338 (11th Cir. 2003).

139. 45 U.S.C. § 153 First (j) (2000).

140. 351 F.3d at 1344. This issue was one of first impression.

141. *Id.* at 1345.

adversely affected by the arbitrator's ruling. At least three of the Steward pilots (out of seven) found out about the arbitration and attended. The Steward pilots then filed suit in federal court and succeeded in getting the arbitrator's award set aside for violation of the RLA's due-notice provision.¹⁴² The court of appeals affirmed.¹⁴³

The court of appeals first considered whether the RLA's due-notice requirement applied to proceedings before an airline adjustment board.¹⁴⁴ The court acknowledged that Congress expressly stated that section 153 of the RLA, the section that contains the due-notice provision, does not apply to proceedings before airline adjustment boards.¹⁴⁵ Nevertheless, relying on a Supreme Court opinion instructing it to look at the entirety of the RLA rather than to those provisions that expressly apply to the airline industry, the court held that the RLA's due-notice requirement applied to proceedings before the airline adjustment board.¹⁴⁶ The court justified its holding by emphasizing that Congress's intent when extending applicability of the RLA to the airline industry was to "extend the same benefits and obligations to air carriers and their employees that already applied to the railroad industry."¹⁴⁷

The court then considered the type of notice required by the RLA's due-notice provision.¹⁴⁸ The Mann pilots argued that the Steward pilots had constructive notice of the arbitration and that such notice satisfied the due-notice requirement.¹⁴⁹ The court of appeals rejected this argument, holding instead that the airline adjustment board was required to personally notify any involved employees who were not represented at the adjustment board hearing.¹⁵⁰ The court held that the notice could be "informal and delivered by mail," but it must be adequate, i.e., it must include the time, date, and location of the hearing.¹⁵¹

142. *Id.* at 1338-44.

143. *Id.* at 1348.

144. *Id.* at 1344.

145. *Id.* (citing 45 U.S.C. § 182 (2000)).

146. *Id.* (citing *Int'l Ass'n of Machinists v. Central Airlines*, 372 U.S. 682, 685-89 (1963)).

147. *Id.* at 1345 (quoting *Air Line Pilots Ass'n Int'l v. Tex. Int'l Airlines, Inc.*, 567 F. Supp. 66, 76 (S.D. Tex. 1983)). *Texas International* was the only published opinion that considered the issue of the due notice provision's applicability to airlines prior to *Steward*. *Id.*

148. *Id.*

149. *Id.* at 1343.

150. *Id.* at 1346.

151. *Id.* (citations omitted).

C. Damages

*CSX Transportation, Inc. v. Brotherhood of Maintenance of Way Employees*¹⁵² stands out from the other labor and employment cases during this survey year. This case is significant not for what it holds, but because the majority used the opinion to urge the court of appeals to reconsider, en banc, Eleventh Circuit precedent holding that an employer cannot recover damages under the RLA for the wrongful acts of a union.¹⁵³

This case evolved from a dispute between CSX Transportation, Inc. ("CSX") and the Brotherhood of Maintenance of Way Employees (the "BMWE") over CSX's practice of allowing supervisors to make small repairs while they inspected the company's railroad tracks and CSX's refusal to award a BMWE member a track-repairman position. After fruitless discussions between the parties to resolve the issues, the BMWE called an eleven-state strike against CSX without giving the company any formal or informal notice. CSX sued the BMWE in the Middle District of Florida, seeking a temporary restraining order ("TRO") and a preliminary injunction to stop the strike and damages. The district court granted the TRO and the preliminary injunction but dismissed CSX's claim for damages, which the court held were unavailable under the RLA.¹⁵⁴

The court of appeals held that by striking over a minor dispute and striking without giving notice, the BMWE had purposely violated the RLA.¹⁵⁵ Turning to the issue of damages, the court stated that were it "writing on a clean slate, [it] would hold that . . . this case is the quintessential 'appropriate' case for an action for damages under the RLA."¹⁵⁶ But the court was not writing on a clean slate. In 1958 the United States Court of Appeals for the Fifth Circuit held, in *Louisville & Nashville Railroad v. Brown*,¹⁵⁷ that Congress did not create a "statutory right of action for damages" under the RLA.¹⁵⁸ Reluctantly acknowledging that it was bound by the decision in *Brown*, the court held that CSX could not recover damages against the BMWE.¹⁵⁹

152. 327 F.3d 1309 (11th Cir. 2003).

153. *Id.* at 1330.

154. *Id.* at 1311-14.

155. *Id.* at 1324. The court held that the BMWE had violated sections 152, Second and 153, First by striking over a minor dispute. *Id.* at 1323-24. The court also held that the BMWE violated section 152, First by striking without giving notice. *Id.*

156. *Id.* at 1327.

157. 252 F.2d 149 (5th Cir. 1958).

158. *Id.* at 155.

159. 327 F.3d at 1327.

Despite following *Brown*, the court built a strong argument for overturning, or at least limiting, *Brown*'s holding. The court looked at the BMW's history of using secret strikes¹⁶⁰ and noted that the unavailability of remedial damages for such behavior allowed the BMW to "impose[] economic harm on carriers . . . with impunity."¹⁶¹ The court observed that the purpose of the RLA, to allow employers and employees to settle disputes while avoiding strikes and the disruption of commerce, was frustrated by the current law prohibiting damages because it deprives employers of any recourse when bad faith actors like the BMW strike without notice.¹⁶² The court reasoned that damages should be available under the RLA on a case-by-case basis under the general rule, announced after the Fifth Circuit's holding in *Brown*, that "absent clear direction to the contrary by Congress, the federal courts have the power to award any appropriate relief in a cognizable cause of action brought pursuant to a federal statute."¹⁶³

V. RESTRICTIVE COVENANTS

The Eleventh Circuit's opinion in *Keener v. Convergys Corp.*¹⁶⁴ limited the scope of injunctive relief available in noncompete cases by preventing the district court from enjoining enforcement of a noncompete clause outside of the state whose law it applied to invalidate the clause.¹⁶⁵

Factually, *Keener* is not atypical of multi-state restrictive covenant cases. Plaintiff in *Keener* entered into a noncompete agreement with Convergys Corporation ("Convergys") that included an Ohio choice of law provision. Plaintiff later accepted employment in Savannah, Georgia, with one of Convergys's competitors. Seeking to forestall an attempt by Convergys to enforce his noncompete agreement, plaintiff told Convergys he was leaving the company to take a job in the banking industry. Plaintiff then filed an action with the United States District Court for the Southern District of Georgia, seeking a declaration that his noncompete agreement with Convergys was unenforceable and an

160. The court noted that the BMW had planned secret strikes at least four times in the previous year. *Id.* at 1324 (citing *Burlington N. & Santa Fe Ry. v. Bhd. of Maint. of Way Employees*, 143 F. Supp. 2d 672, 678-85 (N.D. Tex. 2001)).

161. *Id.* at 1325.

162. *See id.* at 1328-29. As the court noted, injunctive relief, the preferred remedy in RLA actions, is rendered useless to employers when employees launch a secret strike. *Id.* at 1328

163. *Id.* at 1325 (quoting *Franklin v. Gwinnett County Pub. Sch.*, 503 U.S. 60, 65-66 (1992)).

164. 342 F.3d 1264 (11th Cir. 2003).

165. *Id.* at 1266.

injunction to prevent Convergys from trying to enforce the clause.¹⁶⁶ The district court disregarded the choice of law provision in plaintiff's employment contract¹⁶⁷ and applied Georgia law because the noncompete agreement violated Georgia's public policy.¹⁶⁸ The district court held that under Georgia law, the noncompete agreement was unenforceable and enjoined Convergys from seeking to enforce the noncompete agreement "in any court worldwide."¹⁶⁹

A. Choice of Law

Uncertain about Georgia's conflict-of-laws rules concerning contractual choice of law provisions, the court of appeals certified the following question to the Supreme Court of Georgia:

Whether a court applying Georgia conflict of law rules follows the language of Restatement (Second) Conflict of Laws § 187(2) and, therefore, first must ascertain whether Georgia has a "materially greater interest" in applying Georgia law, rather than the contractually selected forum's law, before it elects to apply Georgia law to invalidate a non-compete agreement as contrary to Georgia public policy.¹⁷⁰

The Georgia Supreme Court held that in Georgia, a contractual choice of law clause would not be honored if applying the chosen forum's law produced a result that contravened Georgia public policy.¹⁷¹ In light of the Georgia Supreme Court's answer to its certified question and because plaintiff's noncompete agreement with Convergys contravened Georgia's public policy, the Eleventh Circuit affirmed the district court's declaratory judgment in favor of plaintiff.¹⁷²

166. *Keener v. Convergys Corp.*, 312 F.3d 1236, 1238-39 (11th Cir. 2002).

167. The parties had agreed that Ohio law would apply to any contract disputes. 342 F.3d at 1268 n.2. Ohio law allows courts to "blue pencil" unreasonable restrictive covenants; Georgia law does not. *Id.* at 1268 & n.2.

168. Georgia's public policy disfavors unreasonable or overbroad restrictive covenants in employment contracts. *See, e.g., Keener v. Convergys Corp.*, 205 F. Supp. 2d 1374, 1379-80 (S.D. Ga. 2002), *rev'd in part*, 342 F.3d at 1271. The district court held that the noncompete agreement in *Keener* was unreasonable and violated Georgia's public policy, *inter alia*, because the scope of the restriction was indeterminable at the time it was entered into and could have potentially prevented plaintiff from competing with Convergys worldwide. *Id.* at 1381-82.

169. 342 F.3d at 1269.

170. 312 F.3d at 1241.

171. *See Convergys Corp. v. Keener*, 276 Ga. 808, 810-12, 582 S.E.2d 84, 85-87 (2003).

172. 342 F.3d at 1268-69.

B. *Scope of Injunctive Relief*

The court of appeals next reviewed the district court's injunction prohibiting the enforcement of the clause in any court worldwide.¹⁷³ The court of appeals held that the district court abused its discretion by granting a "worldwide" injunction because granting such an expansive injunction impermissibly "[imputed Georgia's] public policy decisions nationwide."¹⁷⁴ Accordingly, the court ordered that the injunction "be modified to preclude Convergys from enforcing the [noncompete clause] in Georgia only."¹⁷⁵

The court of appeals appears to have limited its holding on the nationwide-injunction issue to cases in which the public policy of the forum state supersedes a contractual choice of law provision.¹⁷⁶ Presumably, after *Keener*, a district court in a diversity action can still issue a nationwide injunction preventing the enforcement of a noncompete agreement if the district court applies the law of the forum chosen by the parties. Under such circumstances, the losing party cannot complain of losing the benefit of his bargain.¹⁷⁷

Other factors seemed to influence the court's decision to reverse the district court's injunction in *Keener*, though the weight given to these factors is unclear. The court noted that plaintiff had misled Convergys about his job with a competitor in order to prevent Convergys from enforcing the noncompete agreement.¹⁷⁸ While the misrepresentation alone was not egregious, the court stated that plaintiff's misrepresentation, coupled with the fact that he was seeking a declaratory judgment to preempt the enforcement of his noncompete agreement, "depriv[ed] Convergys of the opportunity of enforcing the [noncompete agreement] in Ohio, under Ohio law, as provided by the [noncompete agreement]."¹⁷⁹

Georgia's strict scrutiny of restrictive covenants has made it a friendly forum for out-of-state employees seeking to escape contractual agree-

173. *Id.* at 1269.

174. *Id.*

175. *Id.* at 1270.

176. *See id.* ("The district court extended the injunction beyond a reasonable scope by permitting the public policy interests of Georgia to declare a[] [noncompete agreement] unenforceable nationwide, *when its law was not intended by the parties to apply in the first place.*") (emphasis added).

177. *See id.* at 1269 ("To permit a nationwide injunction would in effect interfere both with parties' ability to contract and their ability to enforce appropriately derived expectations.")

178. *Id.* at 1270.

179. *Id.*

ments not to compete with a former employer.¹⁸⁰ *Keener* is not likely to stop the flow of employees seeking refuge in Georgia's favorable restrictive covenant laws, but it severely limits their ability to use the federal courts to export the benefit of those laws to other states at the expense of their former employers.

180. This "forum shopping" by out-of-state employees was described by the district court in *Keener* as one of "[t]he aches and pains of federalism." 205 F. Supp. 2d at 1379, *rev'd in part*, 342 F.2d at 1271.