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, 2004. During the survey period, the Eleventh Circuit Court of Appeals rendered notable decisions regarding the Family and Medical Leave Act ("FMLA")[1] and the Labor Management Relations Act ("LMRA").[2] Several district courts also weighed in during this survey period with significant rulings on the FMLA and the Equal Pay Act ("EPA").[3]

I. THE FAMILY AND MEDICAL LEAVE ACT

Most of the notable employment law decisions rendered by the Eleventh Circuit this year concerned the Family and Medical Leave Act ("FMLA").[4] In *Walker v. Elmore County Board of Education*[5] the court of appeals addressed the issue of retaliation for pre-eligibility leave requests under the FMLA.[6] Also, in *Morrison v. Magic Carpet Aviation*,[7] the court of appeals limited the definition of an "integrated employer" under the FMLA.[8] Additionally, the United States District Court for the Middle District of Alabama handed down an interesting

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1. 29 U.S.C. §§ 2601-2654 (2000).
2. 29 U.S.C. § 141-197 (2000).
3. 29 U.S.C. § 206(d) (2000).
4. 29 U.S.C. §§ 2601-2654 (2000).
5. 379 F.3d 1249 (11th Cir. 2004).
6. *Id.* at 1250.
7. 383 F.3d 1253 (11th Cir. 2004).
8. *Id.* at 1257.

FMLA decision in *Baldwin-Love v. Electronic Data Systems Corp.*[9] when it strictly construed the medical certification requirements of the FMLA.[10]

In *Walker* the Eleventh Circuit Court of Appeals considered the narrow issue of whether a pre-eligibility request for FMLA leave is protected under the FMLA's anti-retaliation provision when the leave would begin while the employee was still ineligible for FMLA leave but would continue after the employee became eligible.[11] Plaintiff in *Walker* was a teacher in the Elmore County school system. In 1999 plaintiff accepted a one-year employment contract, which commenced on August 9, 1999. In December of that year, plaintiff informed the principal of her school that she was pregnant and due to deliver in August of 2000. When plaintiff notified the principal that she was pregnant, she also inquired into what she needed to do to obtain maternity leave following the birth of her child. The principal told her she needed to submit a written request for leave to the school board. The principal recommended, however, that she hold off on requesting the leave until she knew whether the school board was going to renew her contract for the next school year. Plaintiff followed the principal's recommendation. On May 15, 2000, the school board informed plaintiff that her employment contract was not going to be renewed.[12]

Plaintiff brought suit against the board of education alleging both that she had been improperly denied maternity leave and that her contract was not renewed in retaliation for her FMLA leave request. The district court held that the board of education's denial of plaintiff's maternity leave was proper because plaintiff was not an eligible employee entitled to leave under the FMLA. Plaintiff had not worked for the school board for a twelve month period at the time she made her request for maternity leave, nor had she worked for at least 1250 hours during the twelve months prior to requesting her leave.[13] Nevertheless, with respect to her retaliation claim, the district court held that "the FMLA protected [plaintiff] from retaliation for her maternity leave request" because "'almost all of her leave would have taken place during her FMLA-eligibility period.'"[14]

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9. 307 F. Supp. 2d 1222 (M.D. Ala. 2004).
10. *Id.* at 1235.
11. *Walker*, 379 F.3d at 1250.
12. *Id.* at 1250-51.
13. *Id.* at 1251.
14. *Id.* at 1252 (quoting Walker v. Elmore County Bd. of Educ., 223 F. Supp. 2d 1255, 1261 (M.D. Ala. 2002)).

The Eleventh Circuit affirmed the district court's holding regarding the denial of maternity leave due to plaintiff's ineligibility.[15] The court held that "[t]here can be no doubt that the request—made by an ineligible employee for leave that would begin when she would still have been ineligible—is not protected by the FMLA."[16] Regarding plaintiff's retaliation claim, the court acknowledged that the "FMLA makes it unlawful for an employer to interfere with the attempt 'to exercise[] any [FMLA] right . . . .'"[17] The court, however, held that under 29 U.S.C. § 2612,[18] "the right to leave is provided only to eligible employees."[19] Consequently, the court reversed the district court and granted defendants' motion for summary judgment on plaintiff's retaliation claim, holding that because plaintiff's "request . . . did not constitute a protected attempt to obtain an FMLA benefit," her retaliation claim was without merit.[20] Notably, the court left for "another day" the question of whether a pre-eligibility request for post-eligibility FMLA leave that falls entirely within the post-eligibility period would be protected under the FMLA's retaliation provision.[21]

In *Morrison* the court of appeals examined what it means to be an employer, an integrated employer, and a joint employer under the FMLA for purposes of meeting the FMLA's threshold jurisdictional requirement.[22] Plaintiff in *Morrison* was a pilot for Magic Carpet Aviation, Inc. ("Magic Carpet"), which is wholly owned by Amway Corp. ("Amway"). Magic Carpet contracted with Orlando Magic Ltd., which is owned by RDV Sports, Inc. ("RDV"), to fly the Orlando Magic basketball team to games and other events around the country.[23]

Morrison requested four weeks off from work to deal with clinical depression. His supervisor, however, only approved two weeks of leave. When Morrison later requested additional time off, he was terminated. Morrison sued Magic Carpet, Amway, and RDV for retaliation under the FMLA. The district court granted a motion for summary judgment in favor of Magic Carpet and Amway because it held that Morrison was ineligible for FMLA leave because Magic Carpet and Amway did not

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15. *Id.* at 1253.
16. *Id.*
17. *Id.*
18. 29 U.S.C. § 2612 (2000).
19. *Walker*, 379 F.3d at 1253.
20. *Id.* at 1252-53.
21. *Id.* at 1253.
22. *Morrison*, 383 F.3d at 1255-57. *See* 29 U.S.C. § 2611(2)(B)(ii) (limiting FMLA applicability to employers with at least 50 employees within a 75 mile radius of the worksite).
23. *Morrison*, 383 F.3d at 1254.

employ at least fifty people within seventy-five miles of Morrison's worksite.[24] The court also granted a motion for summary judgment in favor of RDV, holding that RDV "was not Morrison's employer, integrated employer or joint employer" under the FMLA.[25] Morrison appealed the district court's ruling regarding RDV.[26] The court of appeals examined de novo the issue of whether RDV was Morrison's employer, integrated employer, or joint employer under the FMLA.[27]

The court held that the test articulated in *Welch v. Laney*[28] was applicable to determine RDV's status as Morrison's employer.[29] The *Welch* test provides that when a court is considering whether an entity is an employer of a particular individual, the court must consider: "(1) whether or not the employment took place on the premises of the alleged employer; (2) how much control the alleged employer exerted on the employees; and (3) whether or not the alleged employer had the power to fire, hire, or modify the employment condition of the employees."[30] With regard to the first element of the *Welch* test, the court held that RDV was the owner of the worksite because RDV leased the airplane Morrison piloted from Magic Carpet when he was transporting Orlando Magic personnel.[31] The lease agreement between RDV and Magic Carpet, however, gave RDV no rights "except to have its players sit back and be flown around."[32] Because the court concluded the lease "did not give RDV any meaningful direct control over or in the worksite itself," the court held that the first prong of the *Welch* test did not comport to a determination that RDV was Morrison's employer.[33]

The second prong of the *Welch* test, how much control the alleged employer has over the employee, was also insufficient to support a conclusion that RDV was Morrison's employer.[34] Morrison was required to wear an RDV identification badge, Orlando Magic ties, and an Orlando Magic parka, and he was required to attend an employee orientation at RDV. Morrison was also listed in RDV's staff directory as an employee.[35] The contract between Orlando Magic, Ltd. and Magic

24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1254-55.
28. 57 F.3d 1004 (11th Cir. 1995).
29. *Morrison*, 383 F.3d at 1255.
30. *Id.* (citing Welch v. Laney, 57 F.3d 1004, 1011 (11th Cir. 1995)).
31. *Id.*
32. *Id.*
33. *Id.* at 1255-56.
34. *Id.* at 1257.
35. *Id.* at 1256.

Carpet, however, specifically provided that "'all crew members,' the 'assignment of crew members to particular flights,' and 'directions to crew members to conduct flights,' would be under the 'exclusive control' of Magic Carpet."[36] In light of the clear contractual language giving Magic Carpet exclusive control over Morrison during his employment, the court determined RDV's control over Morrison was the indirect control of a customer over a service provider's employees rather than the direct control required to create an employer/employee relationship between RDV and Morrison.[37]

The final prong of the *Welch* test, whether the alleged employer has the power to fire, hire, or modify the employment conditions of the employee, clearly did not support a holding that RDV was Morrison's employer.[38] Although RDV could exert significant influence over Magic Carpet, it had no authority to hire, fire, or modify the conditions of Morrison's employment.[39]

Having concluded that RDV was not Morrison's employer, the court next considered whether RDV was an "integrated employer" of Morrison for purposes of satisfying the jurisdictional requirements of the FMLA.[40] To be an integrated employer, a company must be one of several companies that have "(i) Common management; (ii) Interrelation between operations; (iii) Centralized control of labor relations; and (iv) [A] [d]egree of common ownership/financial control."[41] Although Morrison failed to present any evidence sufficient to satisfy the first three elements of the integrated employer test, the fourth element of the test clearly supported a conclusion that RDV was integrated with Magic Carpet because Amway and RDV shared a common owner, the DeVos family.[42] Nevertheless, the court of appeals held that "[a]s a matter of law, we do not believe that common ownership of two corporations is enough for a jury to conclude that they were integrated into one operation for FMLA purposes."[43] Accordingly, the court held that RDV was not Morrison's integrated employer.[44]

Finally, the court considered whether RDV and Magic Carpet were Morrison's joint employers under the FMLA pursuant to 29 C.F.R.

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36. *Id.* at 1257.
37. *Id.* at 1256-57.
38. *Id.* at 1255.
39. *Id.*
40. *Id.* at 1257.
41. *Id.* (quoting 29 C.F.R. § 825.104(c)(2) (2004)).
42. *Id.*
43. *Id.*
44. *Id.*

§ 825.106(a).[45] For FMLA jurisdictional purposes, multiple employers can be an employee's joint employer:

> (1) [w]here there is an arrangement between employers to share an employee's services or to interchange employees; (2) [w]here one employer acts directly or indirectly in the interests of the other employer in relation to the employee; or, (3) [w]here the employers . . . may be deemed to share control of the employee, directly or indirectly, because one employer controls, is controlled by, or is under common control with the other employer.[46]

With very little additional discussion, the court held that Magic Carpet and RDV did not share Morrison's services and that RDV had no direct control over either Morrison or Magic Carpet.[47] Accordingly, the court held that the joint employer test was inapplicable and affirmed the district court's grant of summary judgment to defendants.[48]

In *Baldwin-Love* the United States District Court for the Middle District of Alabama strictly enforced the medical certification requirements of 29 U.S.C. § 2613[49] and granted a motion for summary judgment to an employer when an employee failed to meet the employer's deadline for turning in medical certification of her illness.[50] Plaintiff in *Baldwin-Love* was a call center representative who was diagnosed with Bell's Palsy in February 2002. Shortly after her diagnosis, plaintiff informed her employer that she could no longer answer customer calls because "facial pain prevented her from speaking on the phone."[51] Plaintiff also informed her supervisor that typing made her left arm stiff. As a call center representative, plaintiff was expected to spend at least ninety-five percent of her time engaged in these two activities. Nevertheless, plaintiff's supervisor accommodated plaintiff's condition by assigning her work that did not require her to talk on the phone. Plaintiff requested numerous leaves of absence in the

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45. *Id.* at 1257-58; 29 C.F.R. § 825.106(a) (2004).
46. *Morrison*, 383 F.3d at 1257-58 (quoting 29 C.F.R. § 825.106(a)).
47. *Id.* at 1258.
48. *Id.*
49. 29 U.S.C. § 2613 (2000). Section 2613 provides that
> [a]n employer may require that a request for leave under subparagraph (C) or (D) of section 2612(a)(1) of this title be supported by a certification issued by the health care provider of the eligible employee or of the son, daughter, spouse, or parent of the employee, as appropriate. The employee shall provide, in a timely manner, a copy of such certification to the employer.

Id.
50. *Baldwin-Love*, 307 F. Supp. 2d at 1225, 1235.
51. *Id.* at 1225.

spring of 2002.[52] On March 27, 2002, plaintiff was placed on medical leave of absence pending medical certification after plaintiff's doctor requested the employer "limit the amount of incoming phone calls, [plaintiff received] . . . because [plaintiff's] conditions tend[ed] to flair up due to excessive movement of the facial muscles."[53]

After being placed on medical leave, plaintiff received an FMLA packet that explained her FMLA rights and responsibilities. Plaintiff was notified that she was required to obtain medical certification from her healthcare provider regarding her illness and absences. Plaintiff returned to work around the middle of April but took another leave of absence from April 22 through April 29. Plaintiff then worked intermittently until May 29, when she took a leave of absence from which she never returned.[54]

Although plaintiff was repeatedly warned to provide a completed Healthcare Provider Certification Form to her employer for her absences from March and April, she had not done so by June 28, 2002.[55] On July 3, 2002, plaintiff received a letter notifying her that she had to provide documentation from her "healthcare provider that substantiate[d] [her] absences since March 27, 2002 . . . by no later than 12 noon on July 11, 2002."[56] Plaintiff was informed that failure to do so would result in her termination for "unexcused absences."[57] Plaintiff did not meet the noon deadline; however, her doctor did fax some of the necessary paperwork to her employer six hours after the deadline had passed.[58] Nevertheless, plaintiff was terminated for unexcused absences from work.[59]

Plaintiff brought suit in the Middle District of Alabama alleging she was improperly denied a leave of absence under the FMLA and was discharged in retaliation for asserting her FMLA rights under the FMLA. More specifically, plaintiff argued that she should not have been terminated due to her doctor's failure to comply with her employer's

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52. *Id.*
53. *Id.*
54. *Id.* at 1225-26.
55. *Id.* at 1226-27.
56. *Id.* at 1227.
57. *Id.*
58. *Id.* at 1228. Plaintiff argued that a medical certification she submitted on June 12, 2002, was intended to cover all of her absences from work, including her absences from March 27 through April 22. *Id.* at 1230. However, even viewing the facts in the light most favorable to plaintiff, the court held that the medical certification plaintiff submitted on June 12 applied to her May absences, not her March and April absences for which she was fired. *Id.* at 1232.
59. *Id.* at 1228.

"arbitrary" deadline.[60] Plaintiff further argued that under Department of Labor regulation 825.305(d),[61] "an employer is required to 'advise an employee whenever the employer finds a certification incomplete, and provide the employee a reasonable opportunity to cure any such deficiency.'"[62]

The court rejected both of plaintiff's arguments.[63] While acknowledging "[t]he FMLA is designed 'to balance the demands of the workplace with the needs of families,'" the court noted that it does so "'in a manner that accommodates the legitimate interests of employers.'"[64] The court observed that Congress made the employee's right to FMLA leave subject to the certification requirements of 29 U.S.C. § 2613[65] as part of this balancing of interests.[66] The court held that while employees have a right to a fifteen-day window to correct or complete insufficient health certifications, the fifteen-day window does not extend "to second, third, and fourth opportunities given to an employee to submit a certification."[67]

Further, the court noted that 29 C.F.R. § 825.305,[68] which requires an employer "to notify an employee when it finds a certification incomplete and requires the employer to allow the employee a reasonable time to cure any deficiency," is not applicable in cases such as this one where the employee fails to submit any certification.[69] The court further held that under 29 C.F.R. § 825.311(b),[70] leave does not constitute FMLA leave unless an employee produces medical certification.[71] Accordingly, the court granted defendant's motion for summary judgment on the plaintiff's FMLA and retaliation claims.[72]

II. THE EQUAL PAY ACT

The most notable Equal Pay Act[73] ("EPA") decision handed down during this survey period came from the United States District Court for

60. *Id.* at 1224, 1232.
61. 29 C.F.R. § 825.305(d) (2004).
62. 307 F. Supp 2d at 1234 (quoting 29 C.F.R. § 825.305(d) (2003)).
63. *Id.* at 1233-35.
64. *Id.* at 1233 (citing 29 U.S.C. § 2601(b)(3)).
65. 29 U.S.C. § 2613 (2000).
66. *Baldwin-Love*, 307 F. Supp. 2d at 1233.
67. *Id.*
68. 29 C.F.R. § 825.305.
69. *Baldwin-Love*, 307 F. Supp. 2d at 1234.
70. 29 C.F.R. § 825.311(b) (2004).
71. *Baldwin-Love*, 307 F. Supp. 2d at 1234-35.
72. *Id.* at 1235.
73. 29 U.S.C. § 206(d) (2000).

the Middle District of Alabama, which considered the issue of whether a plaintiff seeking equitable relief is entitled to a jury trial under the EPA.[74]

In *Alexander v. Chattahoochee Valley Community College*,[75] plaintiff, the Director of Admissions at Chattahoochee Valley Community College, filed a complaint under the EPA, Title VII of the Civil Rights Act of 1964,[76] 42 U.S.C. § 1981,[77] and numerous other federal and state laws seeking declaratory judgment and equitable relief.[78] Specifically, Alexander sought to require defendants to raise her pay and provide her "with all back pay, allowances, seniority, and retirement benefits to which she would have been entitled had [she] been properly compensated."[79]

In her original complaint, Alexander made a demand for a jury trial under Federal Rule of Civil Procedure 38(b).[80] Subsequently, Alexander filed a proposed amended complaint and sought to withdraw her jury trial demand. Defendants opposed Alexander's motion to withdraw her jury demand pursuant to Federal Rule of Civil Procedure 38(d).[81]

Federal Rule of Civil Procedure 38(d) provides that a demand for a jury trial under Rule 38 cannot be withdrawn without the consent of the parties.[82] Rule 39(a)(2), however, provides that a court may order that a trial not be by jury if the court finds that "a right of trial by jury of some or all of those issues does not exist under the constitution or statues of the United States."[83] Thus, if Alexander had a constitutional or statutory right to a jury trial, she would not be able to withdraw her jury trial demand over defendants' objection.[84] If Alexander did not

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74. Alexander v. Chattahoochee Valley Cmty. Coll., 303 F. Supp. 2d 1289 (M.D. Ala. 2004).

75. 303 F. Supp. 2d 1289 (M.D. Ala. 2004).

76. 42 U.S.C. § 2000e-e17 (2000).

77. 42 U.S.C. § 1981 (2000).

78. *Alexander*, 303 F. Supp. 2d at 1291. Plaintiff filed claims against defendants "under the Equal Pay Act (EPA), 29 U.S.C.[] § 206(d); Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C.[] §§ 1981a and 2000e through 2000e-e17; the Civil Rights Act of 1866, as amended by 42 U.S.C.[] § 1981; the [E]qual [P]rotection [C]lause of the [F]ourteenth [A]mendment to the United States Constitution, as enforced through 42 U.S.C.[] § 1983; 1975 Alabama Code §§ 16-22-13.2(4) and 16-22-11(3); and Alabama contract law."

Id.

79. *Id.*

80. FED. R. CIV. P. 38(b).

81. *Alexander*, 303 F. Supp. 2d at 1290-91; FED. R. CIV. P. 38(d).

82. FED. R. CIV. P. 38(d).

83. FED. R. CIV. P. 39(a)(2).

84. *Alexander*, 303 F. Supp. 2d at 1291.

have a constitutional or statutory right to a jury trial, then the court could grant her motion to withdraw her request for a jury.[85]

Alexander argued that because the relief she sought was equitable, she had no right to a jury trial, and the court could grant her motion despite defendants' opposition.[86] The court acknowledged that back pay is generally considered equitable relief, and thus, does not create a right to a jury trial.[87] The court, however, observed that Congress made the EPA enforceable under the Fair Labor Standards Act ("FLSA"),[88] which gives private plaintiffs a right to a jury trial against defendants other than the federal government.[89] Accordingly, the court held that Alexander had a right to a jury trial under the EPA for back pay, and thus, could not withdraw her jury demand without the consent of defendants.[90]

III. THE LABOR MANAGEMENT RELATIONS ACT

In 2004 the Eleventh Circuit Court of Appeals in *Bartholomew v. AGL Resources, Inc.*[91] considered the issue of preemption under the Labor Management Relations Act ("LMRA").[92] At issue was whether the LMRA's six-month statute of limitations applied to a claim arising under state tort law when the elements of the tort claim were intertwined with the interpretation of a collective bargaining agreement.[93]

In *Bartholomew*, plaintiffs, five former employees of AGL Resources, Inc. ("AGL"), were laid off from their field service representative jobs during AGL's statewide reduction in force on March 10, 2000. Three of the plaintiffs, Bartholomew, Childers, and Higgins, were offered the possibility to transfer to another job with AGL by "bumping" an employee with less seniority but they refused.[94] The remaining two plaintiffs, Moss and Johnson, were junior field service representatives who lacked the seniority to bump anyone from their job, and they were simply laid off. Pursuant to the collective bargaining agreement between AGL and its union, Bartholomew, Childers, and Higgins submitted written grievances to the union. The union made a formal

85. *Id.*
86. *Id.*
87. *Id.*
88. 29 U.S.C. §§ 201-209 (2000).
89. *Alexander*, 303 F. Supp. 2d at 1291-92.
90. *Id.* at 1292.
91. 361 F.3d 1333 (11th Cir. 2004).
92. *Id.* at 1337; 29 U.S.C. § 185 (2000).
93. *Bartholomew*, 361 F.3d at 1337.
94. These three plaintiffs were bumped from their positions by more senior personnel. *Id.* at 1336.