

Labor and Employment

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The Eleventh Circuit's trial and appellate courts handed down several significant opinions affecting labor and employment law during this survey period (January 1, 2006 to December 31, 2006). For example, the Eleventh Circuit rendered notable decisions involving the Fair Labor Standards Act ("FLSA"),¹ the Family and Medical Leave Act ("FMLA"),² the Employee Retirement Income Security Act ("ERISA"),³ and federal and state Racketeer Influenced and Corrupt Organization ("RICO") statutes,⁴ and a district court decided a noteworthy decision under the Uniformed Services Employment and Reemployment Rights Act ("USERRA").⁵

I. THE FAIR LABOR STANDARDS ACT—COMPENSABLE TIME

In a series of related cases, the Eleventh Circuit and the United States District Court for the Middle District of Florida ruled that employees who begin their workday by picking up an employer vehicle and driving it to their first job assignment must be compensated for the time driving

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1. 29 U.S.C. §§ 201-262 (2000).
2. 29 U.S.C. §§ 2601-2654 (2000 & Supp. III 2003).
3. 29 U.S.C. §§ 1001-1461 (2000 & Supp. III 2003).
4. 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), 16-14-4(a)(2003).
5. 38 U.S.C. § 4301 (2000).

between their employer's parking site and their first assignment under the Fair Labor Standards Act ("FLSA").⁶

In *Burton v. Hillsborough County*⁷ and *Silas v. Hillsborough County*,⁸ the plaintiffs, who worked for Hillsborough County's Public Works Department, filed complaints against Hillsborough County (the "County") for allegedly failing to compensate them for the time they spent driving county vehicles from a county parking site to their first assignment for the day or from their last work-site back to the county parking site at the end of the day. The County required the plaintiffs to drive their personal cars to a county parking site where they picked up county vehicles, which the plaintiffs then drove to a work-site. The plaintiffs used the county vehicles to travel between work-sites during the day, and at the end of each day, the plaintiffs returned the vehicles to the county parking site and retrieved their personal vehicles. The county vehicles contained tools and equipment that the plaintiffs used for their jobs and also served as satellite offices from which the plaintiffs could perform their duties while at a work-site. The County required the plaintiffs to leave their tools in the county vehicles at the parking sites at the end of each day. In addition, the County assumed all costs for vehicle maintenance and fuel.⁹

The parties filed cross-motions for summary judgment. The district court granted the plaintiffs' motion for summary judgment after concluding that the plaintiffs should be compensated for the travel time.¹⁰ In support of its decision, the district court reasoned that retrieving and returning the county's vehicles, which contained tools and equipment necessary for them to perform their jobs, was a principal activity under the Portal-to-Portal Act.¹¹ The district court further reasoned that the travel time was compensable because it played an integral part in the plaintiffs' ability to perform their jobs and because the storage of the vehicles at a county facility primarily benefited the County. The County appealed this decision.¹²

6. 29 U.S.C. §§ 201-262 (2000); see *Burton v. Hillsborough County*, 181 F. App'x 829, 838 (11th Cir. 2006); *Silas v. Hillsborough County*, No. 8:04-CV-1616-T-27TBM, 2006 U.S. Dist. LEXIS 79503, at *8 (M.D. Fla. Oct. 31, 2006).

7. 181 F. App'x 829 (11th Cir. 2006).

8. No. 8:04-CV-1616-T-27TBM, 2006 U.S. Dist. LEXIS 79503 (M.D. Fla. Oct. 31, 2006).

9. *Burton*, 181 F. App'x at 831-32; *Silas*, 2006 U.S. Dist. LEXIS 79503, at *2-3.

10. *Burton*, 181 F. App'x at 832; *Silas*, 2006 U.S. Dist. LEXIS 79503, at *1.

11. 29 U.S.C. §§ 251-262 (2000); *Burton*, 181 F. App'x at 832. The Portal-to-Portal Act amended the FLSA and identifies employee activities that are not compensable under the FLSA. 29 U.S.C. § 254(a).

12. *Burton*, 181 F. App'x at 832.

Under the Portal-to-Portal Act, an employer is not liable under the FLSA for failing to pay overtime compensation for: (1) traveling to and from the employee's work site where the employee performs his "principal activity or activities" or (2) activities that are "preliminary to or postliminary to [the employees'] principal activity or activities," which occur before the employee begins his workday or after the employee finishes his workday.¹³ Moreover, the Portal-to-Portal Act provides that incidental use of an employer's vehicle for commuting is not considered part of the employee's principal activities if the employee uses the vehicle within the "normal commuting area for the employer's business or establishment" and if there is an agreement between the employer and the employee regarding the usage of the employer's vehicle.¹⁴ However, under the Portal-to-Portal Act, preliminary and postliminary activities are compensable if they are "an integral and indispensable part of the [employee's] principal activities."¹⁵

On appeal, the County argued that under the Portal-to-Portal Act, it was not required to compensate the plaintiffs for their travel time because the county vehicles were used within the plaintiffs' normal commute area, and there was an understanding between the County and the plaintiffs regarding the use of the county vehicles.¹⁶ The Eleventh Circuit determined that resolution of whether the plaintiffs were entitled to overtime compensation for time spent traveling between the county parking site and their work-site in a county vehicle rested on the definition of "travel" in the Portal-to-Portal Act.¹⁷ After reviewing the statute and its regulations, the court determined that under the FLSA regulations, traveling was defined to include incidental travel, such as commuting from home-to-work or work-to-home, which is generally not compensable.¹⁸ However, the court concluded that "travel from an employer-designated location to the workplace is compensable under the FLSA as that travel constitutes a part of the employee's principal activity."¹⁹ Consequently, the court determined that employer-required travel that occurs when an "employer's mandate or job requirement

13. 29 U.S.C. § 254(a). See *IBP, Inc. v. Alvarez*, 546 U.S. 21 (2005), as discussed in a previous survey, for an extensive discussion of postliminary and preliminary time. Jerry C. Newsome & K. Alex Khoury, *Labor and Employment*, 57 MERCER L. REV. 1159, 1160 (2006).

14. 29 U.S.C. § 254(a)(2).

15. *Burton*, 181 F. App'x at 833 (quoting *Steiner v. Mitchell*, 350 U.S. 247, 256 (1956)).

16. *Id.* at 832.

17. *Id.* at 833-34.

18. *Id.* at 834.

19. *Id.*

interrupts an employee's home-to-work and work-to-home path"²⁰ fell outside the Portal-to-Portal Act exemption and, therefore, was compensable under the FLSA.²¹ The court explained that the focus should not rest on whether the employee used an employer-owned vehicle for the travel, but instead on whether the employee was "required to return to the employer's premises after a day's work prior to returning home."²² Because the plaintiffs in this case were required to travel between the county parking site and their work-site, the court determined that this travel time was compensable.²³

Another key issue that the court focused on in its determination of whether the plaintiffs' travel time was compensable was the FLSA's definition of "principal activity or activities."²⁴ Based on the Eleventh Circuit's precedent in *Dunlop v. City Electric, Inc.*,²⁵ the court determined that activities that are "an integral and indispensable part of the principal activities for which [the employees] are employed" do not fall under the Portal-to-Portal Act exemption and, thus, are compensable under the FLSA.²⁶ In this case, the County required the plaintiffs to drive their personal vehicles to the county work-site closest to their assigned work location and pick up a county vehicle to drive to the work-site. At the end of each workday, the plaintiffs were required to drive the county vehicle to the county parking site because the County wanted its vehicles stored in a secure location, and the County wanted to prevent unauthorized or personal use of the vehicles.²⁷ In addition, the plaintiffs needed the county vehicles because that was where they stored their equipment and the tools necessary to perform their duties.²⁸

Based on these facts, the court determined that the plaintiffs had to begin and end their workday at the County's parking site to use the

20. *Id.*

21. *Id.* at 834-35.

22. *Id.* at 835.

23. *Id.* at 838.

24. *Id.* at 836-37.

25. 527 F.2d 394 (5th Cir. 1976). In *Dunlop* the former Fifth Circuit determined that the term "principal activity or activities" includes "any work of consequence" and that the Portal-to-Portal Act must be read together with the rest of the FLSA provisions. *Id.* at 398 (quoting 29 C.F.R. § 790.8(a)). Accordingly, the court in *Dunlop* concluded that the Portal-to-Portal Act did not intend for an employer to have to compensate an employee for "activities 'predominantly spent in [the employee's] own interests.'" *Id.* (quoting *Jackson v. Air Reduction Co.*, 402 F.2d 283, 287 (6th Cir. 1968)). It is important to note that the Eleventh Circuit adopted as binding precedent all Fifth Circuit decisions before October 1, 1981. See *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

26. *Burton*, 181 F. App'x at 837 (quoting *Dunlop*, 527 F.3d at 399).

27. *Id.*

28. *Id.* at 838.

county vehicles, and therefore, use of the county vehicles was “integral and indispensable to the plaintiffs’ principal activities.”²⁹ Furthermore, the court concluded that, although the employees may have gained a small benefit from not using their personal cars for part of their commute, the County significantly benefited because the county vehicles were stored in a secure facility, and the vehicles were not used for personal or unauthorized purposes by the employees.³⁰ For these reasons and others, the court affirmed the district court’s decision and held that the plaintiffs should have been compensated for the travel time.³¹ Later in 2006, the Middle District of Florida followed *Burton* in *Silas*, finding that because the defendant and the allegations were identical to those in *Burton*, the employees in *Silas* were also entitled to overtime compensation.³²

The decisions in *Burton* and *Silas* provide that an employer must compensate an employee for employer-required travel time between two employer locations when the employer derives a significant benefit from that travel. Moreover, the United States Supreme Court has already denied the County’s petition for certiorari,³³ leaving the Eleventh Circuit’s decision intact. Accordingly, employers should review their payroll policies to ensure that their employees are being compensated for employer mandated travel time. Failing to do so could subject employers to serious liability.

II. THE FAMILY AND MEDICAL LEAVE ACT

In *Hurlbert v. St. Mary’s Health Care System, Inc.*,³⁴ the Eleventh Circuit held that an individual can be incapacitated from one job and continue to work at another position with a different employer and still be entitled to FMLA leave.³⁵ Thomas Hurlbert was a long-time employee of St. Mary’s Health Care System, Inc., (“St. Mary’s”) working as a paramedic in 1989. Hurlbert also worked full-time with the Rockdale County Fire Department (“Rockdale”) as a firefighter and dealt with hazardous materials and occasional paramedic duties. Hurlbert was promoted to a supervisory position at St. Mary’s shortly after his employment began, which involved maintaining St. Mary’s emergency medical services (“EMS”) vehicles. Five years later, Hurlbert’s duties

29. *Id.* at 837.

30. *Id.*

31. *Id.* at 840.

32. *Silas*, 2006 U.S. Dist. LEXIS 79503, at *8.

33. *Hillsborough County v. Burton*, 127 S. Ct. 556 (2006).

34. 439 F.3d 1286 (11th Cir. 2006).

35. *Id.* at 1296.

changed when he became responsible for supervising three Emergency Medical Technician shifts. Hurlbert's duties included ensuring that EMS units were properly staffed, visiting and checking the various duty stations, and transporting linens.³⁶

In October 1999 Hurlbert had a heart attack but returned to work after surgery on November 9, 1999 at St. Mary's and November 16, 1999 at Rockdale. Hurlbert, however, was diagnosed with depression, anxiety, and sinusitis and was on medication for these conditions.³⁷

In February 2002 St. Mary's went through an internal reorganization, which resulted in Hurlbert undergoing a competency evaluation. The reviewer, Dr. Jerome Howell, deemed Hurlbert's performance unsatisfactory. Based on some family concerns and Hurlbert's inability to perform under stress, Dr. Howell recommended that Hurlbert take some time off. Dr. Howell discussed the results of Hurlbert's competency evaluation with Mike McElhannon, St. Mary's educational director, and Jeff Sosby, a manager at St. Mary's. Dr. Howell informed them that Hurlbert was under stress and recommended placing Hurlbert in a position with more manageable duties. Dr. Howell also discussed Hurlbert's performance with Bonnie Butler, the executive director at St. Mary's, and inquired whether Hurlbert could be placed in a different position. After this discussion, Hurlbert spoke with Sosby about taking FMLA leave to deal with his stress. Sosby informed Hurlbert that he would inquire into his leave request and obtain a leave form.³⁸

Butler then met with Jeff English, St. Mary's vice president of human resources and support services, and they discussed several options for Hurlbert's employment, including: (1) helping Hurlbert find a different position at St. Mary's; (2) allowing Hurlbert to resign with thirty days of severance pay; or (3) terminating Hurlbert.³⁹

On September 6, 2002, Hurlbert met with Sosby to fill out his FMLA leave paperwork, but after initially agreeing to do so, Sosby informed Hurlbert that the plans had changed and that Hurlbert could either resign and receive severance pay or be fired. Hurlbert refused to resign and informed Sosby that he was clocking out and going home. However, when Hurlbert went home, he received a phone call from Butler asking him to come back to work. Hurlbert did so, and during the meeting with Butler, Hurlbert inquired about his leave. When Butler informed Hurlbert that he was not going to receive any leave, Hurlbert said the meeting was over and that St. Mary's denial of leave was illegal. It was

36. *Id.* at 1288-89.

37. *Id.* at 1289.

38. *Id.* at 1289-91.

39. *Id.* at 1291.

at this time that Sosby informed Butler that Hurlbert had requested FMLA leave.⁴⁰

On September 10, 2002, Sosby received a letter from Hurlbert, which purported to be a follow-up to his request for FMLA leave that was recommended by Dr. Howell. The letter stated that Hurlbert was under the care of his family physician, who agreed that Hurlbert needed a thirty-day leave of absence for stress. Hurlbert also inquired as to whether he needed to complete any paperwork for his leave. Hurlbert attached a note from his physician, dated September 9, 2002, which indicated that Hurlbert was under his care and that he could return to work on October 9, 2002. Sosby and Butler discussed Hurlbert's letter, and Butler informed Sosby that Hurlbert could not be granted FMLA leave because St. Mary's had terminated his employment on September 6, 2002. However, it was not until September 18, 2002 that St. Mary's issued a separation notice which stated that Hurlbert was terminated for failing to meet his competency requirements.⁴¹

Hurlbert filed a complaint against St. Mary's, alleging that St. Mary's interfered with his FMLA rights when it terminated him following his request for leave and retaliated against him in violation of the FMLA. The district court granted St. Mary's motion for summary judgment, holding that both Hurlbert's FMLA interference and retaliation claims failed. The court determined that, among other things, Hurlbert could not establish that he was entitled to leave because his stress was not a serious health condition as he was not incapacitated. The court also determined that Hurlbert's retaliation claim failed because he had no rights under the FMLA.⁴² During the district court proceedings, Hurlbert argued that he suffered from a serious health condition because he was diagnosed with anxiety after his 1999 heart attack, which was evidence that he met the FMLA's definition of a serious health condition—a mental condition involving “continuing treatment by a health care provider.”⁴³ Hurlbert further argued that he had a serious health condition under FMLA because (1) his heart attack resulted in a period of incapacity over three days, (2) his subsequent treatment for anxiety included a regimen of continuing treatment (his prescription for anxiety), and (3) his anxiety resulted in his being incapacitated for thirty days. The district court rejected this argument.⁴⁴

40. *Id.* at 1291-92.

41. *Id.* at 1292.

42. *Id.* at 1292-93.

43. *Id.* at 1294.

44. *Id.* at 1293, 1294-95.

The district court relied on the Americans with Disabilities Act (“ADA”)⁴⁵ definition of “incapacitated” when it determined that Hurlbert could not have been incapacitated from his anxiety because he was able to work his job at Rockdale during the thirty-day period, during which he allegedly suffered a serious health condition and could not work at St. Mary’s.⁴⁶ The district court determined that, under the ADA definition, an individual must establish that he or she is unable to perform either a class of jobs or a broad range of jobs. The district court further reasoned that although Hurlbert was unable to perform his paramedic duties at St. Mary’s, Hurlbert was able to perform his duties at Rockdale. Because Hurlbert’s duties at Rockdale were substantially similar to his St. Mary’s position, the district court determined that Hurlbert was not incapacitated during this period.⁴⁷

The Eleventh Circuit reversed the district court’s opinion, holding that the district court erred when it concluded that Hurlbert did not have a serious health condition.⁴⁸ The court of appeals determined that the district court erred in using the ADA’s definition of incapacitated for an FMLA determination of whether an individual suffered a serious health condition.⁴⁹ The Eleventh Circuit conceded that there were some similarities between the ADA and FMLA regulations, but it relied on the Eighth Circuit’s decision in *Stekloff v. St. John’s Mercy Health Systems*,⁵⁰ in which the court held that the ADA concept of disability and the FMLA concept of serious health condition were “different concepts and must be analyzed separately.”⁵¹

The court in *Stekloff* determined that to meet the standard of a serious health condition under the FMLA, it was sufficient for an individual to demonstrate that he or she was unable to perform his or her current position because of a serious health condition, even though the individual could still perform another job.⁵² Based on the Eighth Circuit’s decision in *Stekloff*, the court in *Hurlbert* determined that Hurlbert was indeed incapacitated because he could not perform his duties at St. Mary’s, for which he requested FMLA leave.⁵³ The court rejected St. Mary’s argument to the contrary and decided that the fact that Hurlbert could perform his duties at Rockdale was irrelevant to a determination

45. 42 U.S.C. §§ 12101-12113 (2000).

46. *Hurlbert*, 439 F.3d at 1295.

47. *Id.*

48. *Id.*

49. *Id.*

50. 218 F.3d 858 (8th Cir. 2000).

51. *Hurlbert*, 439 F.3d at 1295 (quoting *Stekloff*, 218 F.3d at 861).

52. *Stekloff*, 218 F.3d at 861.

53. *Hurlbert*, 439 F.3d at 1295-96.

of whether he had a serious health condition under the FMLA.⁵⁴ As such, the court determined that Hurlbert could have suffered a serious health condition, even though he was able to work at Rockdale during the thirty-day period he was unable to work at St. Mary's, and reversed the district court's grant of summary judgment to St. Mary's.⁵⁵

The decision in *Hurlbert* makes it clear that employers cannot rely on an employee's ability to perform another position to defeat an incapacity determination under the FMLA's serious health condition standard. Unlike the ADA's definition of incapacity, the FMLA's definition applies only to the employee's current position and not a broad class of jobs. Thus, employers should only focus on the employee's ability to perform his or her current job to defeat a FMLA claim.

III. EMPLOYEE BENEFITS

In *Billings v. UNUM Life Insurance Co. of America*,⁵⁶ the Eleventh Circuit decided an issue of first impression in a claim brought under ERISA⁵⁷ regarding whether an individual was wrongfully denied disability benefits due to obsessive-compulsive disorder ("OCD").⁵⁸ The issue the Eleventh Circuit faced was whether a "'mental illness' limitation of an ERISA-governed contract, which fail[ed] to provide whether an illness [was] categorized as mental based on its symptoms or etiology, is ambiguous."⁵⁹

David M. Billings ("Billings") was employed as a pediatrician at Pediatric Professional Associates, P.A., which had a long-term disability ("LTD") policy issued by UNUM Life Insurance Company ("UNUM"). Billings was diagnosed with OCD and major depression in November 1996 and was advised by his treating physician that he could not continue his pediatrics practice. Billings stopped working and practicing medicine on January 21, 1997. Around June 3, 1997, Billings filed a claim for disability benefits with UNUM under the LTD policy due to his OCD and major depression. UNUM approved his claim and started paying Billings's disability benefits effective July 21, 1997. The policy, however, contained a mental illness limitation, which provided that benefits for mental illness disabilities were limited to twenty-four

54. *Id.*

55. *Id.*

56. 459 F.3d 1088 (11th Cir. 2006).

57. 29 U.S.C. §§ 1001-1461 (2000).

58. *Billings*, 459 F.3d at 1090.

59. *Id.*

months of payments.⁶⁰ The policy defined mental illness as “mental, nervous or emotional diseases or disorders of any type.”⁶¹

In February 1999 UNUM informed Billings that because of the mental illness limitation, his benefits for his OCD and major depression would expire on July 20, 1999. Billings filed for continuation of his disability benefits, claiming that he was disabled because of Meniere’s Disease, a condition of the inner ear that results in vertigo, hearing loss, and ear-ringing or whistling. After investigating, however, UNUM determined that Billings’s Meniere’s Disease was not severe enough to render him incapable of performing his job. Consequently, UNUM terminated Billings’s benefits on August 13, 2001. Billings sued UNUM under ERISA, alleging that it wrongfully denied him benefits for OCD and Meniere’s Disease. The parties filed cross-motions for summary judgment.⁶²

The United States District Court for the Southern District of Florida granted summary judgment in favor of Billings, holding that UNUM’s mental illness limitation was ambiguous and, therefore, must be construed in favor of Billings. The court reasoned that a mental illness could either be categorized by its origins or its symptoms. The court found that because the UNUM policy did not identify which classification applied, the policy was ambiguous.⁶³ In addition, the court found that the policy’s limitation did not apply to an illness with an “organic or physical cause,” such as OCD, which was a physiological condition with mental symptoms, and accordingly, the policy’s limitation did not apply to Billings.⁶⁴ Therefore, the district court interpreted the mental illness limitation against UNUM and held that illnesses with an organic origin did not fall within the limitation. UNUM appealed, among other things, the court’s decision that the mental illness limitation was ambiguous.⁶⁵

On appeal, UNUM argued that the definition of mental illness in the policy’s mental illness limitation was not ambiguous because there was only one reasonable interpretation.⁶⁶ In addition, UNUM argued that the district court’s interpretation was unreasonable because it excluded a mental disorder, OCD, from being considered a mental illness.⁶⁷

60. *Id.* at 1090-91.

61. *Id.* at 1091.

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.* at 1091, 1094.

66. *Id.* at 1093.

67. *Id.*

UNUM asserted that the district court should have followed the basic tenet of contract interpretation under ERISA and precedent from the Fifth and Eighth Circuits⁶⁸ that words are given their plain meaning.⁶⁹ UNUM argued that the plain meaning of mental illness was any illness that manifested itself through mental symptoms regardless of the cause.⁷⁰ Billings, however, argued that UNUM's policy was ambiguous because it did not indicate whether an illness was considered mental based on its origin or its symptoms.⁷¹ Therefore, Billings claimed that the policy should have been construed in his favor and his interpretation—that OCD did not fall within the mental illness definition because it was a physically based condition—should apply.⁷²

The court turned to its prior decision in *Dahl-Eimers v. Mutual of Omaha Life Insurance Co.*,⁷³ in which it held that “[a]n insurance contract is ambiguous if it is susceptible to two or more reasonable interpretations that can fairly be made. When one of these interpretations results in coverage and another results in exclusion, ambiguity exists in the insurance policy.”⁷⁴ In this case, the court weighed the different results from the Fifth, Seventh, Eighth, and Ninth Circuits, and ultimately, it agreed with decisions from the Seventh and Ninth Circuits.⁷⁵ Those courts concluded that mental illness limitations were ambiguous when they did not define how a mental illness was classified.⁷⁶

Consequently, the court held that UNUM's mental illness limitation was ambiguous as it applied to Billings because the “policy contain[ed] no definition or explanation of the term ‘mental [disorder],’ and offer[ed] no illustration of the conditions that are included or excluded,” and fail[ed] to ‘contain any language suggesting whether the cause or the manifestation determines whether an illness’ falls within the limitation.”⁷⁷ To resolve the ambiguity, the court applied the doctrine of

68. See *Lynd v. Reliance Standard Life Ins. Co.*, 94 F.3d 979, 983-84 (5th Cir. 1996); *Delk v. Durham Life Ins. Co.*, 959 F.2d 104, 105 (8th Cir. 1992); *Brewer v. Lincoln Nat'l Life Ins. Co.*, 921 F.2d 150, 153-54 (8th Cir. 1990).

69. *Billings*, 459 F.3d at 1093.

70. *Id.*

71. *Id.*

72. *Id.* Billings supported his argument with decisions from the Seventh and Ninth Circuits. See *Phillips v. Lincoln Nat'l Life Ins. Co.*, 978 F.2d 302 (7th Cir. 1992); *Patterson v. Hughes Aircraft Co.*, 11 F.3d 948 (9th Cir. 1993).

73. 986 F.2d 1379 (11th Cir. 1993).

74. *Id.* at 1381 (internal citations omitted).

75. *Billings*, 456 F.3d at 1094.

76. *Id.*; see *Patterson*, 11 F.3d at 950; *Phillips*, 978 F.2d at 308, 311.

77. *Billings*, 459 F.3d at 1094-95 (quoting *Kunin v. Benefit Trust Life Ins. Co.*, 910 F.2d 534, 541 (9th Cir. 1990)).

contra proferentem, which meant that the court would interpret any ambiguities against UNUM.⁷⁸ Thus, the court concluded that “Billings’s organically based OCD does not fall within the policy’s mental illness limitation” and affirmed the district court’s ruling.⁷⁹

The decision in *Billings* should serve as a reminder to insurance companies and administrators of benefit plans that they should properly define how a mental illness is classified. This will help avoid any ambiguity in interpreting any mental illness policies, which the Eleventh Circuit decided would be construed against the insurance company. Of course, based on the circuit split regarding the ambiguity of mental illness limitations, it is possible the Supreme Court may step in and overrule the Eleventh Circuit’s decision. However, until that happens, insurance companies and benefit plan administrators should draft their mental illness limitations carefully.

IV. THE UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

In *Breletic v. CACI Inc.-Federal*,⁸⁰ the United States District Court for the Northern District of Georgia was asked to consider whether a plaintiff’s claims under the Uniformed Services Employment and Reemployment Rights Act (“USERRA”)⁸¹ could be the subject of mandatory binding arbitration.⁸² The plaintiff, John C. Breletic, Jr. was hired by CACI Inc.-Federal (“CACI”) in 2002 as an operations research analyst. CACI provided IT systems integration and managed network solutions to businesses and contractors, including the United States Army. CACI occasionally hired current and former members of the U.S. Army, such as Breletic. When Breletic was hired, CACI required him to sign an employment agreement that was governed by Virginia law and that contained a mandatory arbitration provision.⁸³ The arbitration provision provided that

[a]ny controversy or claim arising out of, or relating to this Agreement, or its breach, or otherwise arising out of or relating to my CACI employment or the termination of such employment (including without limitation to any claim of discrimination whether based on race, color, religion, national origin, gender, age, sexual preference, disability . . . or any other legally protected status, and whether based on federal or

78. *Id.* at 1095.

79. *Id.*

80. 413 F. Supp. 2d 1329 (N.D. Ga. 2006).

81. 38 U.S.C. § 4301 (2000).

82. *Breletic*, 413 F. Supp. 2d at 1335.

83. *Id.* at 1331.

State law, or otherwise) shall be settled first by resort to mediation . . . and then, if mediation fails to resolve the matter, by arbitration.⁸⁴

Breletic's primary duties at CACI included providing "organizational analysis, organizational integration, and force integration projects for classified and unclassified projects as directed by the Deputy Chief of Staff for Operations at the U.S. Army Forces Command ("FORSCOM") located at Fort McPherson, Georgia."⁸⁵ Between February 2000 and October 2, 2001, Breletic worked on a variety of projects under the supervision of Joseph Fleck, a CACI senior director.⁸⁶ Breletic's duties later shifted when he became involved in "activation efforts associated with the development, staffing, and coordination of a new military organization, the Air Traffic Services Command ("ATSCOM"), which was to provide command and control of United States Army air traffic services worldwide."⁸⁷

In September 2001 Breletic provided his supervisor with verbal and email notification that he would likely be called to active duty in the Army, which was formally ordered on October 3, 2001. While Breletic was on active duty, the ATSCOM project was formally activated at Fort Rucker, Alabama. There were eleven CACI employees on the project before it moved to Fort Rucker; however, only one chose to relocate to Fort Rucker to remain on the project. Two employees left CACI, and the remaining employees were reassigned to other CACI projects that supported the Deputy Chief of Staff for Operations at FORSCOM in Fort McPherson. On September 4, 2003, while Breletic was still on active duty, an Atlanta director of CACI informed him that he no longer had a job with CACI unless he was willing to relocate to Fort Rucker.⁸⁸

Breletic was released from active duty on October 2, 2003, and on November 5, 2003, he submitted a formal re-employment application to CACI with his former supervisor, Fleck, and CACI's Human Resources Manager, Richard Hart. Fleck informed Breletic on November 19, 2003, that his job was abolished and, therefore, re-employment was not possible. Breletic, however, believed that CACI was advertising for a research analyst position connected to the ATSCOM project in Fort McPherson, which was nearly identical to his previous position. Nonetheless, CACI refused to re-employ Breletic and forced him to interview for the advertised position like other applicants. At this time, Breletic contacted the National Committee for Employer Support of the

84. *Id.*

85. *Id.*

86. *Id.* at 1332.

87. *Id.*

88. *Id.*

Guard and Reserve, an advocacy group that assists reservists, which led to CACI reinstating him. However, on December 19, 2003, Fleck notified Breletic that his employment was terminated effective that day.⁸⁹

Breletic filed a complaint against CACI on November 3, 2004, asserting that CACI violated his rights under USERRA when it failed to properly reinstate him when his active military duty service expired and that it retaliated against him because of his military service and his attempt to exercise his rights under USERRA. CACI ultimately offered Breletic a new position in December 2004 and presented him with a new employment agreement ("2004 Agreement"), which contained an arbitration provision that was subject to Virginia law and provided that an arbitrator would decide all questions of arbitrability. The 2004 Agreement superseded Breletic's 2000 agreement.⁹⁰ In addition to the agreement, Breletic obtained a written promise from Fleck that the terms of his employment as expressed in the 2004 Agreement "would be subject to 'any and all rights [Breletic] may have under [USERRA].'"⁹¹ Despite Breletic's re-employment with CACI, he continued pursuing his complaint in court and refused to arbitrate his claims. CACI argued that all of Breletic's claims were subject to binding mandatory arbitration under the 2004 Agreement and requested that the court dismiss the complaint and compel arbitration pursuant to the Federal Arbitration Act ("FAA").⁹²

In determining whether Breletic's USERRA claims could be the subject of binding, mandatory arbitration, the court first decided whether any external legal constraints would prevent arbitration on Breletic's USERRA claims.⁹³ Breletic argued that the 2004 Agreement was preempted by USERRA, which, he argued, prohibits mandatory, binding arbitration agreements for USERRA claims.⁹⁴ The court turned to the United States Supreme Court's decision in *Gilmer v. Interstate/Johnson Lane Corp.*⁹⁵ for guidance. In *Gilmer* the Court held that arbitration agreements encompassing statutory claims are enforceable unless "Congress itself has evinced an intention to preclude a waiver of judicial remedies for the statutory rights at issue."⁹⁶ The Court in *Gilmer* also determined that support for preclusion of arbitration agreements could

89. *Id.*

90. *Id.* at 1332-33.

91. *Id.*

92. *Id.* at 1333-34; 9 U.S.C. §§ 1-307 (2000).

93. *Breletic*, 413 F. Supp. 2d at 1334.

94. *Id.*

95. 500 U.S. 20 (1991).

96. *Id.* at 26.

be found in the legislative history of a statute or in an “inherent conflict’ between arbitration and the [statute’s] underlying purposes.”⁹⁷ Accordingly, the court in *Breletic* examined the text of the USERRA statute.⁹⁸

The court focused on 38 U.S.C. § 4302, a provision in the USERRA statute providing that USERRA supersedes any contract that “reduces, limits, or eliminates *in any manner* any right or benefit provided by [the USERRA], including the establishment of additional prerequisites to the exercise of any such right.”⁹⁹ Based on this language, the court held that “USERRA supersede[d] any arbitration agreements that abrogate[d] in any manner the rights provided by the USERRA.”¹⁰⁰

The court noted that generally an individual entering into an arbitration agreement for statutory claims does not abandon his substantive rights under the statute.¹⁰¹ Rather, the individual transfers the authority for determination of those rights from a court to an arbitrator.¹⁰² *Breletic*, however, argued that the USERRA statute guaranteed a service member’s right to bring an action in any federal court in any state where the employer has a place of business.¹⁰³ Because the 2000 Agreement provided that *Breletic* must pursue his claims in Virginia instead of Georgia, where he lived, *Breletic* reasoned that the 2000 Agreement ran afoul of USERRA.¹⁰⁴

Breletic’s argument was further bolstered by the fact that the 2004 Agreement provided that *Breletic* relinquished his right to bring an action in federal court.¹⁰⁵ Accordingly, based on these limitations, the court determined that the 2004 Agreement did infringe on *Breletic*’s rights under USERRA, albeit minimally.¹⁰⁶

The court then turned to the legislative history of USERRA for guidance and reviewed a House Report stating that arbitration of USERRA claims was not required and that any arbitration decision for a USERRA claim was not binding.¹⁰⁷ The House Report further

97. *Id.*

98. *Breletic*, 413 F. Supp. 2d at 1335.

99. *Id.* at 1336 (quoting 38 U.S.C. § 4302(b) (2000)).

100. *Id.*

101. *Id.*; see *Gilmer*, 500 U.S. at 26.

102. *Breletic*, 413 F. Supp. 2d at 1336; see *Gilmer*, 500 U.S. at 26.

103. *Breletic*, 413 F. Supp. 2d at 1336.

104. *Id.*

105. *Id.*

106. *Id.* The court determined that arbitration agreements are contracts and are held on even footing with contracts by the FAA. *Id.* (quoting *Anders v. Hometown Mortgage Serv., Inc.*, 346 F.3d 1024, 1032 (11th Cir. 2003)).

107. *Id.* at 1336-37.

provided that any waivers to an individual's rights under USERRA must be explicit and unequivocal.¹⁰⁸ In addition, the House Report noted that "[a]n express waiver of future statutory rights, such as one that an employer might wish to require as a condition of employment, would be contrary to the public policy embodied in the Committee bill and would be void."¹⁰⁹ Accordingly, based on the language in the House Report, the court concluded that Congress intended USERRA to preempt employment agreements that would limit an employee's rights under USERRA or place conditions on those rights.¹¹⁰ Moreover, the court concluded that arbitration decisions on USERRA claims would not be binding.¹¹¹

In this case, the court concluded that the 2004 Agreement was an express waiver of Breletic's right to bring a USERRA claim in court.¹¹² Because such a waiver was in conflict with the public policy behind USERRA, the court held that the arbitration agreement in the 2004 Agreement was preempted by USERRA.¹¹³ Furthermore, based on the text of USERRA and its legislative history, the court held that USERRA preempts arbitration agreements covering USERRA claims and that USERRA claimants have a right to pursue their claims in court.¹¹⁴

Moreover, the court rejected CACT's argument that under the 2004 Agreement, an arbitrator should have decided the issue of whether Breletic's USERRA claims were arbitrable.¹¹⁵ The court reasoned that the issue of whether USERRA preempted an arbitration agreement preceded any discussion on whether Breletic's claims were arbitrable.¹¹⁶ The court further reasoned that if Breletic's claims were preempted from arbitration, there would be no issue regarding arbitrability because there would be no agreement to arbitrate.¹¹⁷ As a consequence of its determination that the 2004 Agreement was preempted by USERRA, the court ruled there was no issue regarding arbitrability.¹¹⁸

Additionally, the court rejected CACT's claim that Breletic waived his rights under USERRA and agreed to arbitration when he signed the

108. *Id.* (quoting H.R. REP. NO. 103-65 (1994), reprinted in 1994 U.S.C.C.A.N. 2453).

109. *Id.* at 1337 (quoting H.R. REP. NO. 103-65).

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

115. *Id.*

116. *Id.*

117. *Id.*

118. *Id.*

2004 Agreement.¹¹⁹ According to the court, by signing the 2004 Agreement after commencing his suit against CACI, Breletic was not clearly and unequivocally waiving his rights under USERRA.¹²⁰ Furthermore, the court relied on CACI's offer letter to Breletic, which provided that the 2004 Agreement was subject to any rights Breletic had under USERRA, as support that Breletic retained his right to bring USERRA claims in court.¹²¹ Therefore, the court held that Breletic did not waive his rights under USERRA and thus denied CACI's motion to dismiss and compel arbitration.¹²²

The court in *Breletic* forged new ground when it held that USERRA claims generally are not subject to mandatory binding arbitration agreements. Employers should review their employment agreements that contain arbitration provisions and remove USERRA claims from the list of statutory claims subject to arbitration. Based on the court's decision in *Breletic*, employees can no longer prospectively waive USERRA claims.

V. UNDOCUMENTED LABORERS

In 2005 the Eleventh Circuit in *Williams v. Mohawk Industries, Inc.*¹²³ determined that current or former employees have standing to sue an employer under federal and state RICO statutes for "knowingly hir[ing]" illegal workers.¹²⁴ In 2006, however, Mohawk Industries ("Mohawk") filed an application for writ of certiorari to the United States Supreme Court on two questions:

- (1) Whether a defendant corporation and its agents can constitute an "enterprise" under [RICO] in light of the settled rule that a RICO defendant must "conduct" or "participate in" the affairs of some larger enterprise and not just its own affairs [and]
- (2) Whether plaintiffs state proximately caused injuries to business or property by alleging that the hourly wages they voluntarily accepted were too low.¹²⁵

The Supreme Court granted Mohawk's writ for certiorari on its first question only,¹²⁶ but after oral argument, the Court dismissed the writ,

119. *Id.* at 1337-38.

120. *Id.* at 1338.

121. *Id.*

122. *Id.*

123. *Williams v. Mohawk Indus., Inc.*, (*Williams I*), 411 F.3d 1252 (11th Cir. 2005).

124. *Id.* at 1257, 1259-60. See Newsome & Khoury, *supra* note 13, at 1172, for a detailed analysis of this decision.

125. *Williams v. Mohawk Indus., Inc.*, (*Williams IV*), 465 F.3d 1277, 1281 (11th Cir. 2006).

126. *Williams v. Mohawk Indus., Inc.*, (*Williams II*), 126 S. Ct. 830 (2005).

vacated the Eleventh Circuit's 2005 decision, and remanded the case to the Eleventh Circuit for further consideration in light of the Court's decision in *Anza v. Ideal Steel Supply Corp.*¹²⁷ On remand, the Eleventh Circuit ordered briefing on both the Supreme Court's decision in *Anza* and the Georgia Supreme Court's decision in *Williams General Corp. v. Stone*.¹²⁸

The plaintiffs in *Williams*, four former Mohawk hourly employees, filed a class action against Mohawk, the second largest carpet manufacturer in the United States.¹²⁹ In their complaint, the plaintiffs alleged that Mohawk violated the federal and state RICO¹³⁰ statutes by knowingly hiring and harboring illegal workers as part of a conspiracy to repress overall wages and lessen workers' compensation claims. The plaintiffs alleged that Mohawk employees recruited illegal aliens from the Texas border and transported them to North Georgia to work for Mohawk. In addition, the plaintiffs alleged that Mohawk made incentive payments to employees and recruiters to locate illegal aliens for the company and that the recruiters and employees housed the illegal aliens and helped them find employment with Mohawk. The plaintiffs further alleged that Mohawk concealed its hiring and harboring of illegal alien workers when it destroyed documents and assisted them in evading detection by local law enforcement during searches and inspections at Mohawk's facilities. In addition, the plaintiffs claimed that Mohawk's extensive hiring and harboring of illegal aliens reduced labor costs and increased the labor pool of illegal aliens hired by Mohawk, which in turn depressed the wages paid to Mohawk's legal hourly workers. The plaintiffs maintained that Mohawk was unjustly enriched under Georgia law because Mohawk saved money by paying lower wages to illegal aliens and because illegal aliens were less likely to file workers' compensation claims.¹³¹

In response to the plaintiffs' complaint, Mohawk filed a motion to dismiss for failure to state a claim. The United States District Court for the Northern District of Georgia determined that the plaintiffs stated a valid claim under state and federal RICO statutes, in addition to a valid claim for unjust enrichment under state law, for the alleged purpose of

127. 126 S. Ct. 1991 (2006); *Williams v. Mohawk Indus., Inc. (Williams III)*, 126 S. Ct. 2016 (2006).

128. 280 Ga. 631, 632 S.E.2d 376 (2006).

129. *Williams IV*, 465 F.3d at 1281.

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

131. *Williams IV*, 465 F.3d at 1280-82.

suppressing wages. However, the court dismissed the plaintiffs' unjust enrichment claim based on the decreased workers' compensation claims.¹³²

After reviewing the case for the second time, the Eleventh Circuit once again determined that the plaintiffs sufficiently stated a claim under both federal and state RICO statutes because, among other things, the plaintiffs' complaint alleged that Mohawk engaged in a common enterprise with its recruiters.¹³³ In making its decision, the court relied on the plaintiffs' allegations that Mohawk directed recruiters to recruit illegal aliens and also worked with the recruiters to provide illegal aliens jobs at Mohawk.¹³⁴ Accordingly, the court deemed the allegations sufficient to establish that Mohawk and the recruiters had the common purpose to procure and hire illegal aliens at Mohawk so that "Mohawk could reduce its labor costs and the recruiters could get paid."¹³⁵

In addition, the Eleventh Circuit reviewed the Supreme Court's decision in *Anza*, in which the Court established that the plaintiffs must adequately plead that the injury they claim occurred was proximately caused by the defendants' RICO violations.¹³⁶ The Court in *Anza* ruled that "when a court evaluates a RICO claim for proximate causation, the central question it must ask is whether the alleged violation led directly to the plaintiff's injuries."¹³⁷ In addition, the Court in *Anza* instructed that courts should consider the "motivating principle[s]" behind the directness component of the proximate cause standard in RICO cases.¹³⁸ The Court in *Anza* identified a number of motivating princi-

132. *Id.* at 1282.

133. *Id.* at 1286. The court, however, determined that both of the plaintiffs' unjust enrichment claims failed. *Id.* at 1294. The plaintiffs' first unjust enrichment claim failed because, under Georgia law, an unjust enrichment claim applies only when there is no legal contract. *Id.* at 1294-95. In this case, the court concluded that the plaintiffs could state a contract action for failing to receive their full pay and, therefore, there could be no unjust enrichment claim. *Id.* at 1295. Furthermore, the plaintiffs' unjust enrichment claim based on decreased workers' compensation claims was dismissed because the plaintiffs failed to allege how the decrease in workers' compensation claims impacted the plaintiffs' wages. *Id.*

134. *Id.* at 1286.

135. *Id.*

136. *Anza*, 126 S. Ct. at 1997.

137. *Id.* at 1998.

138. *Id.* at 1997. In *Williams IV*, the court determined that to establish proximate cause in RICO cases "it is enough for the plaintiff to plead and prove that the defendant's tortious or injurious conduct was a 'substantial factor in the sequence of the responsible causation.'" *Williams IV*, 465 F.3d at 1288.

ples that courts should consider, including the difficulty in ascertaining damages and the risk of duplicative recoveries.¹³⁹

Based on the Court's directives in *Anza*, the court in *Williams* determined that the plaintiffs sufficiently pleaded a RICO claim because they established proximate cause.¹⁴⁰ The court relied on the plaintiffs' allegations that Mohawk knowingly hired and harbored a large number of illegal aliens to minimize labor costs, which in turn depressed the wages for Mohawk's legal, hourly employees.¹⁴¹ In addition, the court determined there was no merit to Mohawk's argument that the United States—and not the plaintiffs—was the most direct victim of Mohawk's alleged RICO violations.¹⁴² The court reasoned that under RICO's provisions, Congress intended to criminalize the employment of illegal workers to protect legal workers.¹⁴³ Therefore, the court concluded that allowing legal workers who are directly affected by their employer's hiring of illegal workers to privately enforce perceived RICO violations was consistent with RICO's provisions.¹⁴⁴ Based on all these factors, the court determined that the plaintiffs' complaint contained sufficient allegations to establish a direct relationship between their alleged injury—decreased wages—and Mohawk's RICO violation and, therefore, the plaintiffs sufficiently pleaded a RICO claim.¹⁴⁵

The Supreme Court's decision to remand *Williams* to the Eleventh Circuit leaves the question of whether private parties can file RICO violations against employers based on illegal immigration practices in a murky state. There is a split between the circuits, with the Second, Sixth, and Ninth Circuits concluding that such claims are cognizable, while the Seventh Circuit, in a decision for which the Supreme Court denied certiorari, concluded otherwise. However, the Eleventh Circuit's second decision in *Williams* undoubtedly has established the law in this circuit and opens numerous employers to potential liability for lawsuits by private individuals to enforce immigration statutes.

139. *Anza*, 126 S. Ct. at 1997-98. The court in *Williams IV* determined that the damages in this case were not speculative because the plaintiffs were seeking recovery of the diminution in their wages. *Williams IV*, 465 F.3d at 1290.

140. *Williams IV*, 465 F.3d at 1288.

141. *Id.* at 1288-89.

142. *Id.* at 1290.

143. *Id.*

144. *Id.*

145. *Id.*