Labor and Employment

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The trial and appellate courts within the Eleventh Circuit handed down a number of important opinions affecting labor and employment law during the survey period of January 1, 2009 to December 31, 2009.[1] These included a ruling on a question of first impression in the Eleventh Circuit regarding whether harassment claims are cognizable under the Uniformed Services Employment and Reemployment Rights Act of 1994 (USERRA)[2] and notable decisions involving the Employee Retirement Income Security Act of 1974 (ERISA)[3] and the Fair Labor Standards Act (FLSA).[4]

I. UNIFORMED SERVICES EMPLOYMENT AND REEMPLOYMENT RIGHTS ACT

A. *Dees v. Hyundai Motor Manufacturing Alabama, LLC*

In *Dees v. Hyundai Motor Manufacturing Alabama, LLC*,[5] the United States District Court for the Middle District of Alabama, on a motion for

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1. For analysis of Eleventh Circuit labor and employment law during the prior survey period, see W. Christopher Arbery, Valerie N. Njiiri & Leslie Eanes, *Labor and Employment, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1281 (2009).

2. 38 U.S.C. §§ 4301–4334 (2006).

3. 29 U.S.C. §§ 1001–1461 (2006).

4. 29 U.S.C. §§ 201–219 (2006).

5. 605 F. Supp. 2d 1220 (M.D. Ala. 2009), *aff'd*, No. 09-12107, 2010 WL 675714 (11th Cir. Feb. 26, 2010).

reconsideration, held that the defendants, Hyundai Motor Manufacturing Alabama, LLC (HMMA) and Hyundai Motor America, Inc. (HMA), were entitled to summary judgment on the plaintiff's claims under USERRA[6] because the plaintiff lacked standing to assert a claim for harassment and did not have sufficient evidence to support his claim for termination.[7] Most significantly, however, the court addressed a question of first impression in the Eleventh Circuit when it ruled that claims for harassment are valid under USERRA.[8]

The plaintiff, Jerry Leon Dees Jr., began working for HMMA in November 2005 as a maintenance technician in the Stamping Maintenance Department. Dees was a staff sergeant and combat MP in the Alabama National Guard during this time and previously served two tours in Iraq. Dees alleged that his supervisors, Greg Prater and Kevin Hughes, started harassing him when they learned of his military service.[9]

Prater allegedly required Dees to provide military orders for his monthly Guard weekend training, forbade Dees from missing work to attend Guard training, made derogatory comments about the Guard in the presence of Dees and others, and attempted to convince Dees's coworkers to make false statements that Dees violated company policies and procedures. Dees also alleged that Prater and Hughes assigned him more frequently to difficult and dangerous work compared to other employees. Dees had the sergeant of his Guard unit submit a letter to HMMA's Human Resources Department explaining that military orders were not required for the Guard's monthly weekend training procedures in the hopes that this would quell the harassment by Prater and Hughes. The sergeant also offered to confirm Dees's presence at his Guard unit's weekend training. Dees asserted that the sergeant's letter did not quell the harassment and that, instead, the harassment escalated.[10]

In February 2007 a production stamping manager for HMMA allegedly accused Dees of sleeping on the job. Based on this incident, an HMMA committee decided to terminate Dees's employment. Dees filed a lawsuit against the defendants for allegedly terminating his employment because of his Guard membership, for creating an environment of harassment in violation of USERRA, and for claims of outrage and conversion under state law. In May 2008 the district court granted the defendants' motion

6. 38 U.S.C. §§ 4301–4334 (2006).
7. *Dees*, 605 F. Supp. 2d at 1225–26, 1229.
8. *Id.* at 1227.
9. *Id.* at 1223.
10. *Id.*

for summary judgment on Dees's USERRA termination claim, outrage claim, and all claims against HMA, but not on Dees's USERRA harassment and conversion claims against HMMA. Dees and HMMA filed motions for reconsideration.[11]

USERRA prohibits employers from discriminating against an employee who serves in a "uniformed service" in the terms and conditions of employment because of the employee's service.[12] The district court determined that before it could reach the merits of Dees's USERRA claims, it first had to examine whether HMMA and HMA were employers under USERRA or whether only HMMA was Dees's employer.[13] USERRA defines an *employer* as "any person, institution, organization, or other entity that pays salary or wages for work performed or that has control over employment opportunities, including . . . a person, institution, organization, or other entity to whom the employer has delegated the performance of employment-related responsibilities."[14] The district court believed that USERRA's focus is on the individual or entity that carries out "employment-related responsibilities" and not on the entity or individual that controls the overall enterprise.[15]

The district court noted that HMMA was the manufacturer of Hyundai vehicles in the United States, and HMA was the distributor, marketer, and seller of these vehicles in the United States. Hyundai Motor Company (HMC) was the parent company for both HMA and HMMA.[16] The court found that HMMA was the only entity that carried out employment-related responsibilities because there were no HMA employees working in Alabama, any Korean expatriate individuals on loan from HMC to HMMA were employed by HMC, and the committee members that made the decision regarding Dees's separation were all HMMA employees.[17] Moreover, all the personnel decisions regarding Dees's employment—his hiring, training, and separation—were undertaken by HMMA's Human Resources Department without any involvement by HMA.[18] While the court believed HMA and HMMA definitely were linked companies, the court determined this was insufficient to consider HMA an employer under USERRA because it did

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11. *Id.* at 1222–23.
12. 38 U.S.C. § 4311(a).
13. *Dees*, 605 F. Supp. 2d at 1223.
14. 38 U.S.C. § 4303(4)(A).
15. *Dees*, 605 F. Supp. 2d at 1224.
16. *Id.*
17. *Id.*
18. *Id.*

not handle any employment-related duties.[19] Accordingly, the district court found that HMA was entitled to summary judgment on all of Dees's USERRA claims because it was not his employer.[20]

As for Dees's USERRA claims against HMMA, the district court noted that an employer discriminates against an employee in violation of USERRA "if the employee's membership in the armed services 'is a motivating factor in the employer's action, unless the employer can prove that the action would have been taken in the absence of such membership.'"[21] The court found that discriminatory animus could be inferred from Prater's actions and remarks; however, this discrimination could not be imputed to HMMA because Prater had no role in Dees's termination.[22] The court opined that "[d]iscriminatory remark[s] by [a] non-decisionmaker [are] insufficient to satisfy a plaintiff's burden under USERRA to show [an] employer's discriminatory motive."[23]

While Dees alleged that a supervisor who harassed him because of his Guard membership also recommended his termination and attended the termination committee meeting, the court determined that Dees failed to provide any evidence that his protected status actually played a part in the termination decision.[24] The court found that HMMA considered intentional sleeping on the job a terminable offense.[25] The supervisor that discovered Dees sleeping on the job believed it was intentional because Dees was found sleeping in an isolated area that appeared set up to avoid detection.[26] The supervisor reported Dees's misconduct; however, a committee ultimately made the decision to terminate Dees's employment based solely on the supervisor's allegations.[27] The court found that Dees did not present any evidence that either the supervisor or the committee harbored any bias towards those who served in the military.[28] In addition, even assuming that there was any truth to Dees's contentions that the supervisor fabricated the allegations against him, the court determined that Dees did not present any evidence that the committee was not acting in good faith.[29] Moreover, on the slim chance that Dees could show that his military status was a motivating

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19. *Id.*
20. *Id.*
21. *Id.* at 1224–25 (quoting 38 U.S.C. § 4311(c)(1)).
22. *Id.* at 1225.
23. *Id.*
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.*
28. *Id.*
29. *Id.*

factor in the committee's decision to terminate his employment, the district court held that the committee would have made the same decision without regard to Dees's military service because it considered intentionally sleeping on the job a terminable offense.[30] Accordingly, the court concluded that the defendants were entitled to summary judgment on the plaintiff's USERRA termination claim.[31]

The district court observed that courts have not yet resolved whether a harassment claim is valid under USERRA, nor had the United States Court of Appeals for the Eleventh Circuit addressed this question.[32] However, in reliance on a decision from a federal agency,[33] the district court determined that a claim for harassment because of an individual's military service is a valid claim under USERRA.[34] The court opined that other federal anti-discrimination statutes recognize harassment claims.[35] In addition, because the legislature intended USERRA to be construed broadly for the benefit of returning veterans, it would be consistent with that mandate to extend USERRA's protections to claims for harassment.[36] The court believed that one purpose of USERRA was to encourage military service by assuring individuals that their jobs would not be at risk if they chose to join the military.[37] The court determined that "[a]n assurance that employees cannot be fired on account of their military service is meaningless without assurance that the work environment will not be so intolerable that they will feel forced to quit."[38] The court believed this protection was especially necessary in the current environment because almost half of the individuals in the active military are non-career service members of the National Guard and Reserves.[39] Accordingly, the court held that Dees's USERRA harassment claim was valid.[40]

The court next examined Dees's harassment claim using the severe and pervasive standard established by the United States Supreme Court to analyze Title VII[41] harassment claims.[42] The district court found

30. *Id.* at 1225–26.
31. *Id.* at 1226.
32. *Id.*
33. *See* Petersen v. Dep't of Interior, 71 M.S.P.R. 227 (1996).
34. *Dees*, 605 F. Supp. 2d at 1227.
35. *Id.*
36. *Id.*
37. *Id.*
38. *Id.* at 1227–28.
39. *Id.* at 1228.
40. *Id.* at 1227.
41. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

that the following conduct Dees alleged met the standard for severe or pervasive: Prater's frequent derogatory comments about his Guard service, Prater's insistence that Dees produce military orders for every Guard training weekend, Prater's insistence that Dees put his job with HMMA above his military service, and Prater's frequently assigning Dees to work that was more dangerous.[43] While the court believed this evidence could preclude summary judgment for the defendants, it nevertheless granted the defendants' motion for summary judgment based on Dees's lack of standing on his USERRA harassment claim.[44]

The court noted that it could only provide three kinds of relief for USERRA violations: (1) it could require an employer to comply with USERRA (including injunctive relief); (2) it could compensate an individual for loss of wages or benefits suffered because the employer failed to comply with USERRA; and (3) if it believed the employer engaged in a willful violation of USERRA, it could award liquidated damages in the amount of the lost wages or benefits the individual suffered.[45] USERRA does not provide any recovery for mental anguish, pain and suffering, or punitive damages.[46] The court noted that Dees did not suffer any loss of wages or benefits due to the alleged harassment by Prater, and thus, he would not be entitled to any recovery for lost wages or benefits or any liquidated damages were he to prevail on his harassment claim.[47] In addition, because Dees no longer worked for HMMA or HMA, injunctive relief requiring HMMA and HMA to comply with USERRA would provide him with no benefit.[48] The court concluded that there was no relief it could give Dees for the harassment he allegedly endured.[49]

Based on this conclusion, the court found that Dees did not have any standing to assert his USERRA harassment claim.[50] The requirements for standing are:

> (1) the plaintiff must have suffered . . . an invasion of a legally protected interest resulting in a concrete and particularized injury, (2) the injury must have been caused by the defendant's complained-of

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42. *Dees*, 605 F. Supp. 2d at 1228 (citing Meritor Sav. Bank v. Vinson, 477 U.S. 57, 67 (1986)).
43. *Id.*
44. *Id.* at 1228–29.
45. *Id.* at 1229.
46. *Id.*
47. *Id.*
48. *Id.*
49. *Id.*
50. *Id.*

> actions, and (3) the plaintiff's injury or threat of injury must likely be redressible by a favorable court decision.[51]

The court determined that Dees could not meet the third factor because he could not obtain any relief from a decision in his favor.[52] Accordingly, the court had no choice but to award the defendants summary judgment on Dees's USERRA harassment claim.[53]

The court in *Dees* ruled on an issue of first impression in the Eleventh Circuit. In addition to the claims of discrimination and retaliation under USERRA, employers now will have to contend with claims for harassment under USERRA. It will be interesting to see whether the Eleventh Circuit and other courts will follow the Middle District of Alabama's decision, especially in what likely will be a climate of increased claims under USERRA due to the large population of non-career active military service members.[54]

B. *Atteberry v. Avantair, Inc.*

In *Atteberry v. Avantair, Inc.*,[55] the United States District Court for the Middle District of Florida denied an employer's motion for summary judgment after finding that the employer failed to meet its burden of showing that it had legitimate, nondiscriminatory reasons for retracting an offer of employment to an individual with military obligations.[56]

The plaintiff, Alex Atteberry, worked as a Flight Dispatcher for the defendant, Avantair, Inc., from November 2005 through October 2006. On or about November 25, 2007, Atteberry contacted Phil Torsello, Avantair's director of operation's control center, to inquire about potential reemployment. Atteberry alleged that Avantair made him a job offer in the middle of December to begin reemployment on December 27, 2007. In addition, Atteberry alleged that Torsello sent him an e-mail stating he was "okay with it." Atteberry alleged that Avantair inquired into his military obligations after he received the job offer. On December 20, 2007, Avantair retracted the job offer and informed Atteberry that there were no job openings, that company policy prohibited hiring former employees, and that he had a poor exit interview in 2006. The United States Department of Labor investigated Avantair's employment decision

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51. *Id.* (alteration in original) (internal quotation marks omitted) (quoting Fla. State Conference of NAACP v. Browning, 522 F.3d 1153, 1159 (11th Cir. 2008)).

52. *Id.*

53. *Id.*

54. On appeal, the Eleventh Circuit affirmed the district court's decision but did not address the validity of a harassment claim under USERRA. *See Dees*, 2010 WL 675714.

55. No. 8:08-cv-01034-T-17EAJ, 2009 WL 1615519 (M.D. Fla. June 9, 2009).

56. *Id.* at *1.

and determined that the explanations it provided for not hiring Atteberry were false and pretextual.[57]

Atteberry filed his lawsuit in the Middle District of Florida on May 28, 2008, alleging that Avantair's actions violated USERRA. Avantair filed a motion for summary judgment asserting that it had legitimate reasons for refusing to rehire Atteberry and that there was no evidence its decision was motivated by his military service.[58] In reviewing Avantair's motion for summary judgment, the district court noted that the Eleventh Circuit does not use the traditional *McDonnell Douglas* burden-shifting standard for deciding USERRA discrimination claims; instead, the Eleventh Circuit uses a "but for" test.[59]

Under the "but for" test, the plaintiff has the initial burden of establishing a prima facie case, which involves showing by a preponderance of the evidence that his or her military status was a motivating or substantial factor in the defendant's decision.[60] If the plaintiff meets this burden, the defendant can avoid liability by showing by a preponderance of the evidence that there was a legitimate reason for which it would have taken the same action despite the plaintiff's military involvement.[61] Essentially, the district court explained, the defendant of a USERRA claim discharges its burden of proof by showing that but for its articulated legitimate reasons, the plaintiff would have suffered no adverse action.[62]

The court found that Atteberry provided strong circumstantial evidence that could convince a jury that Avantair did not rehire him because of his military involvement.[63] Specifically, in October or November 2007, Atteberry received information on possible job openings at Avantair. After conversations with Atteberry, Avantair expressed that it was interested in rehiring him and even agreed on December 27, 2007, as a start date. In addition, there was e-mail correspondence

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57. *Id.*

58. *Id.*

59. *Id.* at *2 (citing Coffman v. Chugach Support Servs., Inc., 411 F.3d 1231, 1238 (11th Cir. 2005)).

60. *Id.* at *3; *see also Coffman*, 411 F.3d at 1238.

61. *Atteberry*, 2009 WL 1615519, at *3.

62. *Id.* The Eleventh Circuit in *Coffman* expressed the test differently:

> When the employee has met this burden [of showing by a preponderance of the evidence that his protected status was a motivating factor in the decision], the burden shifts to the employer to prove the affirmative defense that legitimate reasons, standing alone, would have induced the employer to take the same adverse action.

411 F.3d at 1238–39 (internal quotation marks omitted) (quoting Sheehan v. Dep't of Navy, 240 F.3d 1009, 1014 (Fed. Cir. 2001)).

63. *Atteberry*, 2009 WL 1615519, at *3.

showing that an Avantair representative approved rehiring Atteberry. While there normally would have been a delay in Atteberry's hiring process because of the need to conduct a background check, Avantair admitted that Atteberry's military involvement made this a non-issue. Moreover, a representative of Avantair testified that because of the holiday season, there was an immediate need for flight dispatchers—the position for which Atteberry received a job offer. Furthermore, Avantair's management stated that Atteberry was a good candidate for hire because he had knowledge of and experience with its systems and processes, and he knew its aircraft and pilots.[64]

Additionally, the court found the timing of Avantair's retraction suspicious, which was enough by itself to suggest that Atteberry's military obligations were at least a motivating factor that affected Avantair's hiring decision.[65] Specifically, after it already had discussed Atteberry's likelihood for rehire, Avantair inquired into Atteberry's military obligations, including asking how much longer his military obligations would last and what his obligations were. Avantair did not inform Atteberry of its retraction until after Atteberry informed its management that he had two more years of service and that his military obligations would cause him to miss work.[66] The court found that this evidence, in addition to testimony from Avantair's management that the position for which Atteberry was hired remained unfilled for a period of time and was filled by a person less qualified than Atteberry, established a prima facie case of discrimination.[67]

The court examined Avantair's articulated reasons for retracting the job offer and determined that Avantair failed to establish legitimate nondiscriminatory reasons for its actions.[68] To meet its burden on summary judgment, the court explained, Avantair was required to provide evidence that showed "but for legitimate reasons, standing alone, [Atteberry] would have gained reemployment."[69] Instead, the court found that Avantair provided conflicting reasons for its actions, and these reasons were inconsistent with testimony from Avantair's representatives.[70]

Specifically, the court determined that Avantair's statement that it did not rehire Atteberry because there were no available positions was

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64. *Id.*
65. *Id.* at *4.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.* at *4–5.

refuted by its testimony that there was an urgent need to fill employment positions.[71] Moreover, Avantair's stated reason that it could not rehire Atteberry due to company policy that prohibited rehiring former employees was refuted by testimony from Avantair that no such policy existed.[72] Similarly, Avantair's articulated reason that it did not rehire Atteberry because of his poor exit interview was not supported by the evidence because Avantair management testified that it did not review Atteberry's exit interview until after it had retracted its job offer.[73] Based on the inconsistent testimony, the court ruled that Avantair failed to meet its burden of showing a legitimate, nondiscriminatory reason for its employment decision, and its articulated reasons were a pretext for discrimination.[74] Accordingly, the court denied Avantair's motion for summary judgment.[75]

This case illustrates the importance of thoroughly reviewing adverse employment actions before they are carried out to verify that the employer's reasons are supported by the facts. This is especially important when the adverse employment actions affect employees in protected categories. While the fact that an employee is in a protected category does not mean that the employer cannot take any adverse action against the employee, it does mean that the employer should take a closer look at such adverse actions to ensure that it has reviewed the potential risks and has taken measures to minimize these risks.

II. EMPLOYEE RETIREMENT INCOME SECURITY ACT

In *Zipp v. World Mortgage Co.*,[76] the United States District Court for the Middle District of Florida addressed the viability of a failure to pay overtime claim under ERISA.[77] The court determined that although a failure to pay overtime claim may have an impact on an ERISA plan, it does not necessarily create an ERISA claim.[78]

The plaintiffs, former and current employees of the defendants, filed a complaint in the district court against five entities—World Mortgage Company; World Savings Bank, F.S.B.; Golden West Financial Corporation; Wachovia Mortgage Corporation; and Wachovia Corporation. One of the plaintiffs, William J. Walker Jr., alleged that he was a participant

71. *Id.* at *4.
72. *Id.*
73. *Id.*
74. *Id.* at *5.
75. *Id.*
76. 632 F. Supp. 2d 1117 (M.D. Fla. 2009).
77. 29 U.S.C. §§ 1001–1461 (2006); *Zipp*, 632 F. Supp. at 1119.
78. *Zipp*, 632 F. Supp. 2d at 1124.

in the defendants' pension and savings plans during his employment as an appraiser with World Mortgage or World Savings from June 2003 through January 2006. Walker claimed that he was improperly classified as an exempt employee under the FLSA,[79] and therefore, he did not receive overtime pay when he worked more than forty hours in a workweek.[80]

In Count I of the complaint, Walker alleged that the defendants failed to pay the plaintiffs overtime pay as required by the FLSA when they worked more than forty hours in a workweek. In Count II, he asserted that the defendants violated ERISA by failing to maintain records that would provide sufficient information when calculating the participants' benefit accrual rights under the pension plan. In addition, in Count III of the complaint, Walker alleged that the defendants breached their fiduciary duties by failing to credit the plaintiffs for overtime pay when calculating their benefits under the savings and pension plans. Walker sought injunctive relief requiring the defendants to credit all members of the purported class with compensation under the pension plan for past and future overtime they worked, among other things.[81]

The defendants filed a motion to dismiss the complaint, in which they noted that Walker's employer was Golden West and that Golden West did not maintain a "Pension and Savings Plan" but instead maintained a World Increased Savings for Employees plan (WISE plan). The defendants assumed that the WISE plan was the plan at issue, to which the court agreed because there was no objection from the plaintiff. Under the WISE plan, employees could elect to defer two percent to twenty percent of their compensation and have this amount credited to their WISE plan account.[82] The WISE plan defined *compensation* as "wages, salaries, fees for professional service and other amounts paid by an Employer to an Employee . . . for personal services actually rendered by the Employee."[83]

The defendants argued that Walker sought an ERISA remedy for alleged FLSA violations and that the ERISA claims were duplicative of or dependent on FLSA claims. Specifically, the defendants asserted that Walker could not use ERISA's catchall provision to enforce the alleged recordkeeping violations in Count II of the complaint. Moreover, the defendants argued, ERISA does not require that plan fiduciaries monitor whether an employer is compliant with the FLSA's overtime provisions

79. 29 U.S.C. §§ 201–219 (2006).

80. *Zipp*, 632 F. Supp. 2d at 1118–19.

81. *Id.*

82. *Id.* at 1119 & n.2.

83. *Id.* at 1119 (alteration in original) (internal quotation marks omitted).

or recordkeeping requirements. In addition, the defendants argued that Walker incorrectly was using a claim for equitable relief to seek legal relief. Lastly, the defendants argued that Walker's ERISA claims were barred because he failed to exhaust his administrative remedies.[84]

The district court acknowledged that FLSA overtime and recordkeeping violation claims couched as ERISA "catchall" claims had survived motions to dismiss in other courts.[85] However, the defendants cited a number of decisions in which courts held that (1) ERISA did not provide a private cause of action for recordkeeping violations due to misclassifying an employee as exempt, and (2) such a claim was for benefits—that is, damages— and not a claim for equitable relief.[86]

After reviewing the caselaw provided by both parties, the court concluded that the decisions presented by the defendants provided a better-reasoned approach.[87] Specifically, the court cited favorably a decision from the United States District Court for the District of Minnesota in which the court determined that an inquiry into the validity of FLSA overtime claims couched as ERISA claims should first examine whether such a claim was cognizable under ERISA.[88] In that case, the court determined that ERISA did not govern a defendant's business decision on how to classify its employees as exempt or nonexempt under the FLSA.[89] In addition, the Minnesota court found that "[a]n employer's discretion in determining salaries is a business judgment which does not involve the administration of an ERISA plan or the investment of an ERISA plan's assets. Such a decision may ultimately affect a plan indirectly but it does not implicate fiduciary concerns regarding plan administration or assets."[90]

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84. *Id.* at 1120.

85. *Id.*; *see also* Rosenburg v. Int'l Bus. Machs. Corp., No. C 06-0430 PJH, 2006 WL 1627108, at *9 (N.D. Cal. June 12, 2006) (holding that the plaintiff's ERISA claims were not unripe simply because they were dependent on the plaintiff's FLSA claims); *In re* Farmers Ins. Exch. Claims Representatives' Overtime Pay Litig., MDL No. 33-1439(B), 2005 WL 1972565, at *3–4 (D. Or. Aug. 15, 2005) (holding that the plaintiffs were not precluded from filing an ERISA claim under the catchall provision to enjoin the defendant's alleged recordkeeping violations).

86. *Zipp*, 632 F. Supp. 2d at 1121–24; *see* Premick v. Dick's Sporting Goods, Inc., No. 02:06cv0530, 2007 WL 141913, at *6 (W.D. Pa. Jan. 18, 2007); *see also* Maranda v. Group Health Plan, Inc., Civ. No. 07-4655 DSD/SRN, 2008 WL 2139584 (D. Minn. May 20, 2008).

87. *Zipp*, 632 F. Supp. 2d at 1124.

88. *Id.* (citing LePage v. Blue Cross & Blue Shield of Minn., Civ. No. 08-584, 2008 WL 2570815, at *5 (D. Minn. June 25, 2008)).

89. *LePage*, 2008 WL 2570815, at *5.

90. *Id.* (internal quotation marks omitted) (quoting Eckelkamp v. Beste, 201 F. Supp. 2d 1012, 1023 (E.D. Mo. 2002)).

The district court in *Zipp* agreed with the district court in Minnesota that the plaintiff's FLSA claims presented as ERISA claims were not legally cognizable.[91] The court believed that a company's business decision to classify employees as exempt or nonexempt under the FLSA for overtime purposes may impact an ERISA plan, but this "does not render the claims based on that classification decision ERISA claims."[92] Consequently, the court found that the plaintiff's recordkeeping claim related to an employment decision that may have affected an ERISA plan, but this was not enough to state an ERISA claim.[93] The plaintiff did not allege that the defendants failed to keep records as required by ERISA, but instead that they kept incorrect records based on their misclassification of employees as exempt under the FLSA.[94] The court also found that the defendants acted in accordance with the plan when they followed the WISE plan's definition of *compensation* and credited the plan based on the amount the employees were paid and not the amount they allegedly earned.[95] Accordingly, the court dismissed with prejudice Counts II and III of the plaintiff's complaint because they did not properly assert ERISA claims.[96]

The decision in *Zipp* provides a good example of a court's reluctance to expand ERISA claims. ERISA provides employees with certain rights with respect to welfare benefit plans, but legal claims that can be brought under ERISA are quite narrow. Courts seek to ensure that such claims are actually tied to an ERISA plan and do not simply impact an ERISA plan. Obviously this does not mean that the decision in *Zipp* provides a defense to a FLSA exemption claim. The decision in *Zipp* is narrowly framed and only applies to a plaintiff's attempt to assert a FLSA exemption claim as an ERISA claim.

III. THE FAIR LABOR STANDARDS ACT

In *Gregory v. First Title of America, Inc.*,[97] the Eleventh Circuit determined that a marketing executive who obtained orders for title insurance services was an exempt employee under the FLSA[98] outside sales exemption.[99] The plaintiff, Nelda L. Gregory, worked as a

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91. *Zipp*, 632 F. Supp. 2d at 1124.
92. *Id.*
93. *Id.* at 1124–25.
94. *Id.*
95. *Id.* at 1125.
96. *Id.*
97. 555 F.3d 1300 (11th Cir. 2009).
98. 29 U.S.C. §§ 201–219 (2006).
99. *Gregory*, 555 F.3d at 1301.

marketing executive for the defendants, First Title of America, Inc. and Bruce Napolitano, from July 2004 through January 2005. Napolitano owned First Title.[100] Gregory entered into an employment agreement with First Title, which provided that she would be paid $1000 per week and that her position was to "provide the services for referring and closing title insurance companies."[101] Gregory later suggested that she be paid on a commission basis at which point she received fifty percent commission for all title insurance orders from her clients that closed with First Title. Gregory alleged that she was a nonexempt employee and was entitled to overtime pay when she worked more than forty hours in a workweek, but she was never paid any overtime.[102]

First Title responded that it did not pay Gregory overtime because it considered her exempt from overtime under the FLSA based on the outside sales exemption. Specifically, First Title asserted that Gregory was exempt because her main responsibility was to bring in or obtain orders for First Title, and her compensation was tied directly to orders for title services that actually closed.[103] Gregory claimed that this exemption was not applicable to her because she did not sell title insurance or title insurance services directly, nor was she licensed to do so. Instead, she asserted that her duties only involved inducing realtors, brokers, and lenders to refer their customers to First Title for title insurance services. Gregory claimed that her work merely was promotional and not selling.[104]

The Middle District of Florida granted the defendants' motion for summary judgment after finding that Gregory met the requirements of the FLSA's outside sales exemption. Gregory appealed this decision to the Eleventh Circuit.[105]

On appeal, the Eleventh Circuit analyzed the regulations implemented by the Department of Labor.[106] An individual is considered an exempt employee under the FLSA's outside sales exemption if (1) his or her primary duty is "(i) making sales . . . or (ii) obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer"; and (2) the individual "is customarily and regularly engaged away from the employer's place or places of

100. *Id.*
101. *Id.* (internal quotation marks omitted).
102. *See id.*
103. *Id.* at 1305.
104. *Id.* at 1303–04.
105. *Id.* at 1301.
106. *See id.* at 1302–03.

business in performing such primary duty."[107] A "primary duty" is the "principal, main, major or most important duty that the employee performs."[108] Factors that should be considered in determining a primary duty include:

> the relative importance of the exempt duties as compared with other types of duties; the amount of time spent performing exempt work; the employee's relative freedom from direct supervision; and the relationship between the employee's salary and the wages paid to other employees for the kind of nonexempt work performed by the employee.[109]

As the Eleventh Circuit observed, the FLSA regulations provide that "'[p]romotional work that is actually performed incidental to and in conjunction with an employee's own outside sales or solicitations is exempt work' whereas 'promotional work that is incidental to sales made, or to be made, by someone else is not exempt outside sales work.'"[110] In addition, the regulations provide that

> [e]xempt outside sales work includes not only the sales of commodities, but also "obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer." Obtaining orders for "the use of facilities" includes the selling of time on radio or television, the solicitation of advertising for newspapers and other periodicals, and the solicitation of freight for railroads and other transportation agencies.[111]

The court determined that Gregory was an exempt employee because her primary duty was obtaining orders—that is, bringing in orders—for First Title's title insurance service.[112] The court concluded that Gregory was obtaining orders for services because Gregory testified that the goal of her promotional work for First Title was to obtain orders for title services.[113] Moreover, the court concluded that Gregory did make sales "in some sense" because she obtained a commitment for the purchase of First Title's title insurance service, and First Title credited her with this "sale."[114] Indeed, Gregory's income was tied directly to

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107. *Id.* at 1302 (internal quotation marks omitted) (quoting 29 C.F.R. § 541.500(a) (2009)).
108. *Id.* (internal quotation marks omitted) (quoting 29 C.F.R. § 541.700 (2009)).
109. *Id.* (internal quotation marks omitted) (quoting 29 C.F.R. § 541.700).
110. *Id.* (quoting 29 C.F.R. § 541.503(a) (2009)).
111. C.F.R. § 541.501(c) (2009).
112. *Gregory*, 555 F.3d at 1308.
113. *Id.*
114. *Id.* at 1308–09.

the number of orders she brought into First Title, which was based on orders placed by her clients that closed.[115] The court concluded that Gregory's efforts were tied directly toward the consummation of her own sales and only generally to stimulating sales for First Title.[116] Gregory was not paving the way for another person to consummate the sale; she received direct credit for any orders that were made by her clients.[117] Based on all these facts, the court determined that the district court correctly found that Gregory was an exempt employee under the FLSA's outside sales exemption and affirmed its grant of summary judgment to the defendants.[118]

This decision highlights the importance of properly analyzing employees' duties in accordance with applicable regulations in classifying their positions as exempt or nonexempt. This case is especially consistent because it helps employers establish that "making sales" and "obtaining orders" can be interpreted broadly to include duties that otherwise might be considered "promotional" and nonexempt. Any organization that employs individuals to visit with customers and discuss the purchase of goods or services should consider the *Gregory* decision and its possible value in support of the outside sales exemption.

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115. *Id.* at 1309.
116. *Id.*
117. *Id.* at 1310.
118. *Id.*