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For the Civil Practitioner: Review of Fourth Circuit Opinions in Civil Cases Decided November 1, 1991 Through December 31, 1992: II. Arbitration, Labor Relations and Employment Discrimination

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F.2d at 512 (citations omitted). FERC's determination that its certification of the incinerator was not a "major Federal action" was deemed reasonable for several reasons. First, the "ministerial" nature of agency certification deprived the agency of discretion in the matter and precluded the agency from considering environmental factors. *Id.* at 513. Second, FERC had insufficient control over the project to "federalize" it because the operator of the incinerator could have constructed the facility without FERC certification if it chose to give up the PURPA benefits, and because the agency provided no federal funding "or other substantial federal assistance" to the project. *Id.* at 513-14. Further, because "[t]he standard for triggering NHPA requirements is similar to that for the triggering of NEPA requirements," *id.* at 515, the NHPA arguments failed as well.

II. Arbitration, Labor Relations and Employment Discrimination

Written by Professor Mark H. Grunewald

A. Federal Agencies—Duty to Bargain

In *Social Security Administration v. Federal Labor Relations Authority*, 956 F.2d 1280 (4th Cir. 1992), the Fourth Circuit held that the Federal Service Labor-Management Relations Statute (FSLMRS), 5 U.S.C. sections 7101-7135, does not impose upon federal agencies a duty to bargain over union proposals made during the term of a collective bargaining agreement. The case arose, when during the term of its collective bargaining agreement with the Social Security Administration (SSA), the American Federation of Government Employees (AFGE) proposed the payment of relocation expenses for employees who relocated as the result of promotion from within the SSA, a subject on which the agreement was silent. The SSA refused to bargain, and the AFGE filed an administrative complaint with the Federal Labor Relations Authority (FLRA). The FLRA concluded that the SSA's refusal to bargain constituted an unfair labor practice. On review, the court ruled that while an FLRA decision was generally entitled to "considerable deference," 956 F.2d at 1283, its examination of the language and design of the statute as a whole made clear that the FLRA interpretation was incorrect. The court acknowledged that the language of the statute did not deal with the issue of mid-term union proposals, but found the statutory language requiring the agency to bargain for the purpose of "arriving at *a collective bargaining agreement*" suggested that post agreement bargaining was not required. *Id.* at 1284 (citing 5 U.S.C. § 7114(a)(4) (1988)). The court found confirmation for this view in the language of the statute that explicitly required the Agency to bargain over the "impact and implementation" of changes in employment it made mid-term. *Id.* The court also found support for its conclusion in the legislative history of the statute and rejected a contrary conclusion of the District of Columbia Circuit on the ground that it had relied too heavily on private sector labor law precedent which requires such bargaining. Finally, the court expressed the view that to conclude that the FSLMRS duty to bargain extended to union-initiated mid-term proposals

would jeopardize the overriding goal of the statute to protect the "'paramount right of the public to as effective and efficient a Government as possible.'" *Id.* at 1288 (quoting H.R. CONF. REP. No. 1717, 95th Cong., 2d Sess. 154 (1978), *reprinted in* LEGISLATIVE HISTORY OF THE FEDERAL SERVICE LABOR-MANAGEMENT RELATIONS STATUTE, TITLE VII OF THE CIVIL SERVICE REFORM ACT OF 1978 793, 822 (Comm. Print 1979)).

B. Preemption

In *Richardson v. Kruchko & Fries*, 966 F.2d 153 (4th Cir. 1992), the Fourth Circuit held that the National Labor Relations Act (NLRA), 29 U.S.C. sections 151-187, preempts a tort action by a former employee against the legal counsel of her former employer for intentional infliction of emotional distress or intentional interference with business relations. The plaintiff alleged that the law firm advised her employer to discharge her for union activity. The court viewed the former employee's claims an "artfully pleaded," 966 F.2d 158, attempt to avoid the general preemption standard of the NLRA which precludes state regulation of conduct "'actually or arguably' protected . . . or 'prohibited'" by federal statute. *Id.* at 156 (citations omitted). The Fourth Circuit reasoned that to address either of the former employee's tort claims, a court would have to determine whether her discharge was an "unfair labor practice" under the NLRA—a question reserved by the preemption doctrine to the National Labor Relations Board to avoid the risk of undermining national policy through inconsistent state-law judgments. *Id.* at 158. The court recognized that under its ruling the plaintiff would be limited to the process and remedies of the NLRA as against her former employer and would not be able to attack the allegedly tortious conduct of the law firm. The court nevertheless concluded that to depart from the preemption doctrine when a plaintiff sought to use state law against a defendant who could not be reached under the NLRA would create an intolerably large exception that could disrupt important relationships such as, in this case, the attorney-client relationship. Accordingly, the Fourth Circuit affirmed the district court's dismissal of the plaintiff's complaint.

C. Fair Labor Standards Act—Overtime

In *Wilson v. City of Charlotte*, 964 F.2d 1391 (4th Cir. 1992) (en banc), the Fourth Circuit held by a vote of 7-6 that in a state that prohibits collective bargaining by governmental units with their employees, a union of public employees is not the "representative" of the employees for the purposes of section 7(o) of the Fair Labor Standards Act of 1938 (FLSA), 29 U.S.C. section 207(o). Section 7(o) requires cash payment rather than compensatory time off for overtime hours unless an agreement to the contrary is reached between the public employer and the "representative" of its employees. Under the court's view, the city fire fighters had no "representative" and thus section 7(o), as interpreted in Department of Labor regulations, 29 C.F.R. section 553.23(a)(1), permitted the public employer to continue unilaterally a practice of compensatory time off in lieu of cash

payment. While the majority viewed its construction of 7(o) as necessary to avoid conflict with state law with respect to public employee collective bargaining, the dissent saw the role of the representative under 7(o) as simply the employee representative for arriving at an "agreement," 964 F.2d at 1401, but not a "collective bargaining agreement," *Id.* at 1402, with the employer as to which of two regulatory standards—time off or cash payment—would apply. The choice offered by the statute was part of a legislative compromise after the FLSA was applied again to state and local governmental employers when the Supreme Court in *Garcia v. San Antonio Metropolitan Transit Authority*, 469 U.S. 528 (1985), overruled its 1972 decision in *National League of Cities v. Usery*, 426 U.S. 833 (1976), which had found application of the FLSA to state and local governments unconstitutional. The Fourth Circuit's decision has the effect of limiting employee participation in the choice between the two forms of compensation under the federal wage-hour law in states which restrict public employee collective bargaining—a subject not directly related to the purposes of the FLSA.

D. Age Discrimination in Employment—EEOC Investigative Authority

In *Equal Employment Opportunity Commission v. American & Efird Mills, Inc.*, 964 F.2d 300 (4th Cir. 1992) (per curiam), the Fourth Circuit held that the Equal Employment Opportunity Commission (EEOC) has statutory authority to investigate possible discrimination under Age Discrimination in Employment Act of 1967 (ADEA) section 7(a), 29 U.S.C. section 626(a), even where the individual charge triggering the investigation is time barred. A former employee of American & Efird filed a charge with the EEOC, claiming that the company had discharged him nineteen months earlier because of his age. Under the ADEA, an individual charge of discrimination must be filed with the EEOC within six months of the alleged discriminatory act. The EEOC notified the company of the charge and requested information about the company's general employment practices and policies and about the circumstances of the former employee's discharge. The company refused to provide any of the information on the ground that the individual charge was time barred. After further efforts to obtain the information failed, the EEOC issued an administrative subpoena against the company and ultimately brought an action in federal district court to have its subpoena enforced.

Relying on *EEOC v. Ocean City Police Department*, 820 F.2d 1378 (4th Cir. 1987) (en banc), *vacated on other grounds*, 486 U.S. 1019 (1988), which dealt with investigation under Title VII of the Civil Rights Act of 1964, the district court refused to enforce the EEOC subpoena, reasoning that the EEOC had no authority to investigate a time barred age discrimination charge. 964 F.2d at 304. The Fourth Circuit vacated the district court decision and remanded the case, ruling that the general investigatory authority granted to the EEOC in section 7(a) of the ADEA, 29 U.S.C. section 626(a), includes the power to investigate age discrimination in employment independent of individual charges. The court distinguished this authority from the investi-

gatory authority of the EEOC in the cases of race and sex discrimination under Title VII where the power to investigate is ordinarily dependent upon the filing of a timely individual charge.

III. BANKRUPTCY

Written by
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A. Classification of Claims and "Cramdown"

In *In re Bryson Properties, XVIII*, 961 F.2d 496 (4th Cir.), *cert. denied*, 113 S. Ct. 191 (1992), the Fourth Circuit dealt with a Chapter 11 debtor's plan of reorganization that provided, among other things, for the separate classification of a nonrecourse mortgagee's deficiency claim from other unsecured creditors. *See* 11 U.S.C. § 1111(b) (1988) (dealing with Chapter 11's allowance of nonrecourse mortgagee's deficiency claims). In addition, the plan also allowed the debtor's limited partners to retain their interests in the partnership in exchange for cash contributions to the debtor. The bankruptcy court and the district court approved the plan. In reversing, the Fourth Circuit held that the separate classification of the nonrecourse mortgagee's deficiency claim in a case where all unsecured claims would receive the same distribution treatment under the plan was for the purpose of manipulating the voting on the plan and, therefore, impermissible.

The Fourth Circuit then addressed the issue of the absolute priority rule and the "new capital exception." 961 F.2d at 503. While not deciding whether the new value exception survived under the Bankruptcy Code, the Fourth Circuit concluded that it would not apply in this case. The debtor's limited partners' exclusive right to contribute new capital, which in effect allowed them to purchase the property without the risk of outside potential buyers, constitutes "property" under 11 U.S.C. section 1129(b)(2)(B)(ii) that was received or retained on account of a prior interest. 961 F.2d at 504-05. The proposed reorganization plan, which in this case provided the debtor's limited partners with the exclusive right to contribute and recover new capital prior to the first mortgagee's recovery of its unsecured claim, was not "fair and equitable" where the first mortgagee was the only truly impaired creditor. *Id.* at 505.

B. Fraudulent Conveyances and Preferences

In *In re Jeffrey Bigelow Design Group, Inc.*, 956 F.2d 479 (4th Cir. 1992), a third party purchased fifty percent of the stock in the debtor in exchange for a cash payment and the arrangement with a bank for a line of credit for the benefit of the debtor. Although the third party was the maker of the line of credit, only the debtor received the draws and all payments were made directly by the debtor to the bank. After the debtor filed its bankruptcy petition, the Chapter 7 trustee filed a complaint to recover payments from the debtor to the bank as fraudulent conveyances