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# Labor and Employment Law

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# LABOR AND EMPLOYMENT LAW

## OVERVIEW

In considering a variety of important labor law topics, the Tenth Circuit Court of Appeals issued a number of unanimous opinions. This article will examine the major issues in four of these decisions. In *Harberson v. NLRB*,[1] the court considered the appropriateness of the National Labor Relations Board's (the "Board") deferral to an arbitrator's decision on an unfair labor practice issue. *Derr v. Gulf Oil Corp.*[2] marked a reassessment of the Tenth Circuit's position on the standard for determining when an employee has been constructively discharged. In addressing the issue of hybrid versus non-hybrid actions, the court in *Garcia v. Eidal International Corp.*[3] made an important exception to the *DelCostello v. International Brotherhood of Teamsters*[4] rule in selecting the proper statute of limitations period. Finally, in *Crenshaw v. Quarles Drilling Corp.*,[5] the Tenth Circuit construed the Fair Labor Standards Act focusing on the requirements necessary for a Belo contract, and the questions regarding liquidated damages and statute of limitations.

## I. THE STANDARD FOR BOARD DEFERRAL TO ARBITRATION

### A. *Background*

It is not uncommon in labor law for an employee to assert that one's "rights," under both section 7 of the National Labor Relations Act[6] (the "Act") and a collective bargaining agreement, have been violated by the employer. An employee's statutory rights under section 7 of the Act include the right to form, join or assist labor unions, bargain collectively, and engage in other concerted activities.[7] Section 10 of the Act empowers the Board to protect such rights by making findings, issuing orders, and petitioning for the enforcement of such orders in a court of law.[8]

In addition to the rights under the Act, employees can obtain rights under a collective bargaining agreement, such as the right to refuse to cross an approved picket line and the right of arbitration. In this situation, the enforcement of such rights is contractual, with both management and labor agreeing to submit to an impartial arbitrator any contractual dispute.

An employer's single act can, in many situations, be a violation of an

1. 810 F.2d 977 (10th Cir. 1987).
2. 796 F.2d 340 (10th Cir. 1986).
3. 808 F.2d 717 (10th Cir. 1986).
4. 462 U.S. 151 (1983).
5. 798 F.2d 1345 (10th Cir. 1986).
6. 29 U.S.C. § 157 (1982).
7. *Id.*
8. 29 U.S.C. § 160(a)-(i) (1982).

employee's statutory, as well as contractual, rights. The question that then arises is: what happens when a union, after submitting a losing dispute to arbitration, files an unfair labor practice action? Can or should the Board defer to the arbitrator and assume that the unfair labor practice issue was also resolved? The Board has determined that in some situations it will defer to an arbitrator's decision on an unfair labor practice. The standard used to determine when this deferral is appropriate has, however, been a volatile one.

In *Spielberg Manufacturing Co.*,[9] the Board determined that if the arbitration proceedings appeared to be fair and regular, if the arbitrator's decision was not "clearly repugnant to the purposes and policies of the Act" and if all parties agreed to be bound, Board deference was proper.[10] Eight years later, in *Raytheon Co.*,[11] the Board added a fourth requirement that an unfair labor practice issue had to be "fully and fairly litigated" before the Board would give effect to an arbitrator's decision.[12] In *Yourga Trucking*,[13] the Board insisted that the party urging deferral bear the burden of proving that the statutory issue was advanced in the arbitration. However, in 1974, the Board, in *Electronic Reproduction Service Corp.*,[14] changed its course radically by holding that if an unfair labor practice issue was not raised in arbitration but could have been, the Board must defer unless there were "unusual circumstances."[15] However, a few years later, in *Suburban Motor Freight, Inc.*,[16] the Board disavowed the *Electronic Reproduction* decision by holding that it would not defer to an arbitration decision which bore "no indication that the arbitrator ruled on the statutory issue."[17] Finally, in 1984, the Board reaffirmed a modified *Spielberg* standard in *Olin Corp.*[18] and reversed *Suburban Motor Freight* by shifting the burden of proof onto the party opposing deferral.[19]

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9. 112 N.L.R.B. 1080 (1955).

10. *Id.* at 1082.

11. 140 N.L.R.B. 883 (1963).

12. *Id.* at 887.

13. 197 N.L.R.B. 928 (1972).

14. 213 N.L.R.B. 758 (1974).

15. *Id.* at 764.

16. 247 N.L.R.B. 146 (1980).

17. *Id.* at 147.

18. 268 N.L.R.B. 573 (1984). The Board held that:

> [A]n arbitrator has adequately considered the unfair labor practice if (1) the contractual issue is factually parallel to the unfair labor practice issue, and (2) the arbitrator was presented generally with the facts relevant to resolving the unfair labor practice. In this respect, differences, if any, between the contractual and statutory standards of review should be weighed by the Board as part of its determination under the *Spielberg* standards of whether an award is 'clearly repugnant' to the Act. And, with regard to the inquiry into the 'clearly repugnant' standard, we would not require an arbitrator's award to be totally consistent with Board precedent. Unless the award is 'palpably wrong,' i.e., unless the arbitrator's decision is not susceptible to an interpretation consistent with the Act, we will defer.

*Id.* at 574.

19. *Id.* at 574.

B. *Interpreting the* Olin *Standard*

1. Case in Context

*Harberson v. NLRB*[20] reviewed the *Olin* standard as applied by the Board in this case. The Tenth Circuit's interpretation was that the *Olin* standard could be interpreted in different ways, depending on the particular factual setting to which it is applied. Because the Board had not adequately explained why it had rejected the administrative law judge's (the "ALJ") interpretation and application of the *Olin* standard, the court remanded the case to the Board. The Tenth Circuit held that merely stating the *Olin* decision, without discussing it in light of the applicable factual circumstances, was not acceptable.

2. Statement of the Case

Two sympathy strikers, Harberson and Talley, refused to cross a lawful picket line organized by one of the three unions representing the Hilton Hotel employees. When the strike was settled, the two strikers returned to work and were told that they had been permanently replaced and put on a preferential hiring list.[21]

As a result of the employer's actions, two issues arose. First, because the collective bargaining agreement stated that employees would not be disciplined or discharged for refusing to cross a legally approved picket line,[22] there was a potential breach of contract. Secondly, there was a potential unfair labor practice under section 8(a)(3) of the Act.[23]

It was determined in arbitration that there was not a violation of the contract when the two employees were permanently replaced. Thereafter, the union filed an unfair labor practice action. The employer urged that the ALJ defer to the arbitrator's decision; however, the ALJ found that deferral was not appropriate because the contractual claims were not relevant in deciding the statutory claims.[24] The Board reversed the ALJ's findings and concluded that, pursuant to *Olin*, deferral was appropriate.[25]

3. Analysis

The ALJ took the position that the contractual issue was not factually parallel to the unfair labor practice issue because the arbitrators did not consider the factual question of whether the employees hired to replace the plaintiffs undertook the same job assignments. Because this issue was essential to the unfair labor practice question,[26] the ALJ held

20. 810 F.2d 977 (10th Cir. 1987).
21. *Id.* at 979-80.
22. *Id.* at 980.
23. 29 U.S.C. § 158(a)(3) (1982) provides in part that an employer cannot discriminate for the purpose of discouraging an employee's right to engage in concerted activities.
24. Denver Hilton Hotel, 272 N.L.R.B. 488, 491 (1984).
25. *Id.* at 488.
26. *Id.* at 491. This issue is important under the Act because economic strikers' right for reinstatement hinges upon whether permanent replacements have actually been ob-

that the *Olin* standard had not been met and, consequently, that the unfair labor practice issue had not been presented in arbitration.

The Tenth Circuit found this interpretation to be reasonable and refused to sanction the Board's rejection of the same.[27] In what can be considered the heart and soul of the *Harberson* opinion, the Tenth Circuit noted that "[w]hen applied to a particular factual situation, the standard for deferral set out in *Olin* may be interpreted in various ways."[28] The ALJ's finding that the facts relating to the unfair labor practice were not adequately presented to the arbitrator were, according to the court, strongly supported in the record. Whereas, the court could not find such support in the Board's decision.[29] Thus, the Board's mere assertion that the ALJ was wrong was rejected because the court had no idea how the Board was interpreting *Olin* in light of the specific factual situation. Consequently, rather than manufacturing an interpretation of the *Olin* standard for the Board, the court remanded the case in hopes that the Board would provide one.

4. Implications of Holding

Absent from the Tenth Circuit's opinion is an analysis of the *Olin* standard. While the court was certainly aware of the debate over the standard,[30] the judges apparently did not wish to state their position until they could review the Board's interpretation of the various elements of the *Olin* standard. Presumably, the court will eventually have to resolve the issue of whether the *Olin* standard, as implemented by the Board, is allowable under the Act. Thus, it will be useful to explore some of the major areas of controversy surrounding *Olin*.

Several problems are raised by those who disagree with the Board's decision in *Olin*. One scholar noted that even though there are two "safety devices" in the *Olin* standard — the contractual issue must be "factually parallel" to the unfair labor practice issue and the arbitrator must be presented with the facts necessary to resolve the unfair labor practice,[31] — they are rendered completely ineffectual by the Board's insistence that the party resisting deferral bear the burden of proof.[32] Professor Ray also noted that the records of many arbitration decisions are far from complete, sometimes stating an award in only a few sentences.[33] Consequently, the Board, without the arbitrator's reason-

tained. If the replacements are not permanent and the employer refuses to reinstate the economic strikers after they have made an unconditional offer to return, there is a potential unfair labor practice under sections 8(a)(1) and 8(a)(3) of the Act. *See* NLRB v. Int'l Van Lines, 409 U.S. 48 (1972), and NLRB v. McKay Radio & Telegraph Co., 304 U.S. 333 (1938).

27. *Harberson*, 810 F.2d at 983.

28. *Id.* at 984.

29. *Id.*

30. *Id.* at 982-83.

31. *Olin Corp.*, 268 N.L.R.B. 573, 574 (1984).

32. Ray, *Individual Rights and NLRB Deferral to the Arbitration Process: A Proposal*, 28 B.C.L. REV. 1, 13 (1986).

33. *Id.*

ing and factual basis before it, is not able to make determinations under the established standards.[34] Furthermore, the *Olin* standard provides that the General Counsel, who is never present at an arbitration, bear the burden of proving that relevant facts and evidence were not presented.[35] Given these circumstances, it seems unlikely that the Board will be able to protect the individual rights mandated in section 10(a) of the Act.

Similarly, the Eleventh Circuit has explicitly denounced *Olin* in *Taylor v. NLRB*.[36] Taking note of several factors addressed by the Fifth Circuit,[37] the court communicated its conviction that employees need to have a forum, independent of the arbitration arena, to advance their statutory rights.[38] The factors that the court considered especially important were that many arbitrators are principally educated in the "law of the shop," and thus may lack the sophistication to decide intricate statutory issues, and that fact finding in arbitration is usually not analogous to judicial fact finding.[39] The Eleventh Circuit further condemned the Board's position that deferral is appropriate unless it is affirmatively shown that an unusual situation exists, thus necessitating an independent exploration by the ALJ into the employee's statutory claims.[40] The court stated that this position neglects those situations where contractual and statutory issues factually correspond but entail different levels of proof and issues of factual relevance.[41]

The final problem is raised by the forceful dissent in *Olin*. Board member Zimmerman recognized that the deferral policy adopted by the Board could actually deter arbitration rather than encourage it. Zimmerman suggested that unions might begin demanding that all arbitrations be performed in a very formal, on-the-record manner. Thus, many advantages of arbitration — less expensive, quicker, and less formal — could quickly evaporate.[42]

## II. THE STANDARD FOR ASSESSING CONSTRUCTIVE DISCHARGE

### A. *Background*

The utilization of constructive discharge in Title VII[43] cases has its

34. *Id.* at 13.
35. *Id.*
36. 786 F.2d 1516 (11th Cir. 1986).
37. McNair v. United States Postal Service, 768 F.2d 730 (5th Cir. 1985).
38. *Taylor*, 786 F.2d at 1521.
39. *Id.*
40. *Id.* at 1522.
41. *Id.*
42. Henkel and Kelly, *Deferral to Arbitration After Olin and United Technologies: Has the NLRB Gone Too Far?*, 43 WASH. & LEE L. REV. 37 (Wntr. 1986).
43. Civil Rights Act of 1964 § 703, 42 U.S.C. § 2000(e) (1982) provides that:
(a) It shall be an unlawful employment practice for an employer -
(1) To fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such an individual's race, color, religion, sex or national origin; or
(2) To limit, segregate, or classify his employees or applicants for employment

roots in the National Labor Relations Act's (the "Act") prohibition on employer discrimination "in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization."[44] To establish an unfair labor practice under section 8(a)(3) of the Act, it must be shown that an employee was terminated because of his union activity.[45] The Board has, however, recognized that employers could subject union employees to harsh working conditions, thereby avoiding the literal prohibition of anti-union discrimination.[46]

Applying Title VII of the Civil Rights Act of 1964, it was found that employers could use the same methods to circumvent the prohibition on discrimination under the Civil Rights Act as they had used to avoid the Act's prohibition of anti-union discrimination. As a result, the circuit courts also adopted the doctrine of constructive discharge.[47] The utilization of this doctrine, however, resulted in a controversy among the circuit courts as to what an employee must prove to establish a constructive discharge. The "objective standard" — adopted by the First,[48] Second,[49] Third,[50] Fifth,[51] Sixth,[52] Ninth,[53] Eleventh,[54] and District of Columbia[55] Circuit Courts of Appeals — is met upon an employee's showing that the working conditions "have been so difficult or unpleasant that a reasonable person in the employee's shoes would have felt compelled to resign."[56] Under the "subjective standard" — adopted by the Fourth,[57] Eighth[58] and, until recently, the Tenth[59] Circuit Courts of Appeals — a constructive discharge "exists when an employer deliberately renders the employee's working conditions intolerable and thus forces him to quit his job."[60] Thus, this two-prong subjective standard requires one to not only consider the unpleasantness of the working conditions, but to consider the employer's subjective mental state or intent.

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in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

44. 29 U.S.C. § 158(a)(3) (1982).

45. 1 THE DEVELOPING LABOR LAW 187 (C. Morris 2d ed. 1983).

46. O'Toole, *Choosing a Standard for Constructive Discharge in Title VII Litigation*, 71 CORNELL L. REV. 587 (1986) [hereinafter "O'Toole"].

47. *Id.* at 591.

48. Rosado v. Santiago, 562 F.2d 114 (1st Cir. 1977).

49. Pena v. Brattleboro Retreat, 702 F.2d 322 (2d Cir. 1983).

50. Goss v. Exxon Office Sys. Co., 747 F.2d 885 (3d Cir. 1984).

51. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61 (5th Cir. 1980).

52. Held v. Gulf Oil Co., 684 F.2d 427 (6th Cir. 1982).

53. Heagney v. University of Wash., 652 F.2d 1157 (9th Cir. 1981).

54. Henson v. City of Dundee, 682 F.2d 897 (11th Cir. 1982).

55. Clark v. Marsh, 665 F.2d 1168 (D.C. Cir. 1981).

56. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 65 (5th Cir. 1980) (quoting Rosado v. Santiago, 562 F.2d 114, 119 (1st Cir. 1977)).

57. EEOC v. Federal Reserve Bank, 698 F.2d 633 (4th Cir. 1983).

58. Johnson v. Bunny Bread Co., 646 F.2d 1250 (8th Cir. 1981).

59. Muller v. United States Steel Corp., 509 F.2d 923 (10th Cir. 1975), *cert. denied*, 423 U.S. 825 (1975).

60. *Muller*, 509 F.2d at 929.

B. *The Employment of the Objective Standard:* Derr v. Gulf Oil Corp.

1. Case in Context

The holding in *Derr v. Gulf Oil Corp.*[61] is important in that the Tenth Circuit explicitly changed the requirements for proving a constructive discharge. The decision marks the rejection of the subjective standard established by the Tenth Circuit in *Muller v. U.S. Steel Corp.*[62] and the adoption of the objective standard as developed by the Fifth Circuit in *Bourque v. Powell Electric Manufacturing Co.*[63]

2. Statement of Case

After Gail Derr was demoted, she resigned and filed an action alleging that the demotion was the result of sex discrimination in violation of Title VII of the Civil Rights Act of 1964. The trial court agreed with Ms. Derr's contentions that Gulf had discriminated against her when it transferred her to the lower position and that she had been constructively discharged, and thus ordered that she be reinstated and awarded back pay.[64]

3. Analysis

The Tenth Circuit's "unqualified adoption"[65] of the less stringent objective standard seems to reflect a frustration with the troublesome task of analyzing an employer's state of mind. Indeed, ascertaining what a particular person "intended" is one of the most difficult and elusive problems in the law. Thus, in rejecting the two-prong subjective test, the court simply presumed that an employer "intended those consequences it could reasonably have foreseen,"[66] thereby making an employer's state of mind irrelevant notwithstanding an employer's denial of the existence of any wrongful intent. Consequently, the objective standard simplifies the fact finder's task by redirecting the focus away from the employer's nebulous mental state onto a more manageable "reasonable person" standard.

4. Implications of Holding

The acceptance of the objective standard will be advantageous to workers and their unions. Employees may prevail where they would not have otherwise had the subjective standard been applied. For example, consider the situation where an employer is satisfied with an employee's performance in a particular job classification but refuses to promote the worker because of the employee's sex. Under the subjective standard, a constructive discharge would not be found because the employer did

61. 796 F.2d 340 (10th Cir. 1986).
62. 509 F.2d 923 (10th Cir. 1975).
63. 617 F.2d 61 (5th Cir. 1980).
64. *Derr*, 796 F.2d at 341-42.
65. *Id.* at 344.
66. *Id.* (quoting Clark v. Marsh, 665 F.2d 1168, 1175 n. 8 (D.C. Cir. 1981)).

not have the requisite intent to make working conditions so intolerable that the employee would resign. The employer wants the employee to stay in the position without having to promote. Whereas, under the objective standard, an employee would prevail upon the trier of fact's finding that the employer, by his illegal discrimination, had "made working conditions so difficult that a reasonable person in the employee's position would feel compelled to resign."[67] Thus, the employee would be fully compensated regardless of the employer's intent.[68]

It would be a mistake, however, to assume that the utilization of the less burdensome objective standard will necessarily manifest a major increase in the number of employee resignations. The leading circuit in this area, the Fifth Circuit, has stated that "the policies underlying Title VII will best be served if, whenever possible, unlawful discrimination is attacked within the context of existing employment relationships."[69] The objective standard does not allow an employee to resign solely because the employer's discrimination takes the form of unequal pay. An employee has a duty to mitigate damages by remaining on the job and trying to rectify the problems either through internal grievance procedures or by filing a complaint with the Equal Employment Opportunity Commission. Only when there is no reasonable possibility of rescuing the employment relationship — measured by the court's objective standard — will an employee who resigns be considered constructively discharged.

## III. Statute of Limitations in Hybrid Actions

### A. *Background*

Because Congress remained mute on the issue, a question arose in *Garcia v. Eidal International Corp.*[70] as to what statute of limitations period should apply to suits brought under section 301 of the Labor Management Relations Act of 1947 (the "LMRA").[71] For over one hundred years, the established precedent has been that, when Congress does not supply a statute of limitations for a federal cause of action, the states' statutes of limitations apply.[72] However, in *DelCostello v. International Brotherhood of Teamsters*,[73] the United States Supreme Court made an exception to this general rule. The Court held that when an employee files a "hybrid action" — a suit against the employer for a breach of a collective bargaining agreement and the union for a breach of its duty of fair representation — the six-month statute of limitations period provided for by section 10(b) of the Act[74] controls the claim against both the em-

67. *Id.* at 344.
68. *See* O'Toole, *supra* note 46, at 615.
69. Bourque v. Powell Elec. Mfg. Co., 617 F.2d 61, 66 (5th Cir. 1980).
70. 808 F.2d 717 (10th Cir. 1986).
71. 29 U.S.C. § 185 (1982).
72. UAW v. Hoosier Cardinal Corp., 383 U.S. 696 (1966); *see also* M'Cluny v. Silliman, 27 U.S. (3 Pet.) 270 (1830).
73. 462 U.S. 151 (1983).
74. NLRA, 29 U.S.C. § 160(b) (1982).

ployer and the union under section 301 actions.[75]

B. *An Exception to* DelCostello: Garcia v. Eidal International Corp.

1. Case in Context

*Garcia v. Eidal International Corp.*[76] involved a review of the district court's interpretation and application of the *DelCostello* hybrid standard. The Tenth Circuit disagreed with the district court's decision to impose the six month federal statute of limitations, and held that the *DelCostello* standard is not to be applied when an employer has renounced all of its responsibilities under a collective bargaining agreement.[77] Consequently, the court indicated that a worker's section 301 claim under the LMRA should be "analogized to an action on a contract, and the appropriate state limitations period should be applied."[78]

2. Statement of the Case

Eidal International Corporation ("Eidal") terminated all of its bargaining unit employees after it allegedly sold its business to Jencor International Corporation ("Jencor"). Because Eidal did not transfer their collective bargaining agreement with the sale, Jencor's employees — only a few of whom were former Eidal employees — were subject to less favorable working terms.[79]

Eighteen months after being notified of the sale, Eidal's former employees filed an action under section 301 of the LMRA[80] against the union, Eidal, and Jencor.[81] The employees asserted that Jencor was simply Eidal's alter ego and that the actions taken by Eidal were pursued for the sole purpose of avoiding its obligations under the collective bargaining agreement. The employees further contended that, because the union had not informed them of the sale and had signed a pre-hire agreement with the buyer, it had violated its duty of fair representation.[82]

3. Analysis

In hybrid actions, employees assert not only that their employers treated them unfairly, but also that the union treated them unfairly because it represented them in a discriminatory, arbitrary, and perfunctory manner in the arbitration process. Consequently, in order to prevail in this type of action, the employees must prove that the union breached its duty of fair representation. Otherwise, if the union has met its duty of

75. *DelCostello*, 462 U.S. at 166, 172.
76. 808 F.2d 717 (10th Cir. 1986).
77. *Id.* at 719.
78. *Id.* at 721.
79. *Id.* at 719.
80. 29 U.S.C. § 185 (1982).
81. *Garcia*, 808 F.2d at 719.
82. *Id.*

fair representation, the arbitrator's decision will be final and binding.[83]

The question facing the Tenth Circuit in *Garcia* was whether the particular factual situation was a hybrid action as defined in *DelCostello*.[84] Rejecting the lower court's position that it was a hybrid action, the Tenth Circuit carved an exception to the *DelCostello* rule because of factual differences and policy considerations.[85]

On the surface, *Garcia* appears to fit into the *DelCostello* mold in that an employee sued both his employer for breach of contract and his union for breach of the duty of fair representation. The court, however, found a subtle factual difference which took *Garcia* out of the scope of *DelCostello*.

Unlike the *DelCostello* situation,[86] the employees in *Garcia* claimed that the employer unilaterally sold out to its alter ego, Jencor, in order to repudiate the collective bargaining agreement and escape arbitration. Therefore, in order for the employees to prevail against the employer under these circumstances, the employees do not have to prove that the union failed in its duty of fair representation. Instead, if the employees prove their assertion against their employer, the employer will be liable and such liability will be separate from the union's liability.[87] The Tenth Circuit, therefore, refused to allow the employer to label the claim as a hybrid action simply because the union had consented to the breach. Since the claim against the employer is contractual, the court found that the appropriate state statute of limitations must be applied.[88]

Judge Seymour's opinion also noted that the policy considerations which had contributed to the outcome in *DelCostello* are absent in *Garcia*. The Court in *DelCostello* implemented the shorter six month statute of limitations primarily because it recognized that if decisions interpreting a collective bargaining agreement could be challenged years later, the relationship between labor and management could be severely disrupted.[89] Speed and finality are paramount when the issue under consideration is intertwined with the open and ongoing working relationships between management and labor.[90]

In *Garcia*, there was no open and ongoing relationship. Assuming the truth of the employees' allegations, the employer had repudiated the entire contract, thereby leaving those employees covered under the contract "outside and looking in." With all contractual relationships shattered by the company's bad faith and unilateral actions, the employees'

83. United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 62-63 (1981).

84. *See supra* note 75 and accompanying text.

85. *Garcia*, 808 F.2d at 721.

86. In *DelCostello*, a single employee charged that his employer had discharged him in violation of the collective bargaining agreement and that his union had not properly represented him in the grievance procedure. *DelCostello*, 462 U.S. at 155.

87. *Garcia*, 808 F.2d at 721.

88. *Id.* at 723.

89. *DelCostello*, 462 U.S. at 169 (quoting from United Parcel Service, Inc. v. Mitchell, 451 U.S. 56, 63-64 (1981)).

90. Adams v. Gould, Inc., 739 F.2d 858, 867 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1122 (1985).

allegation that the dispute was not subject to arbitration was legitimate.[91] Hence, because there was no longer any resemblance of a day-to-day working relationship, the rationale for swift and uniform resolutions of labor disputes vanished.

4. Implications of Holding

The significance of this opinion is the Tenth Circuit's creation of a limited exception to the *DelCostello* rule — a bad faith dissolution of the day-to-day employment relationship. Therefore, in determining what statute of limitations will be applied in a particular section 301 action, labor attorneys are well advised to carefully scrutinize all cases which at first glance appear to be a hybrid-*DelCostello* variety.

## IV. Assessing the Fair Labor Standards Act

### A. *Background*

1. The Belo Contract

Section 207(a)(1) of the Fair Labor Standards Act (the "FLSA") specifies that an employer cannot force his employees to work more than forty hours a week unless he pays them time-and-a-half for the time worked over forty hours.[92] This overtime provision was instituted to reduce unemployment by prodding employers to hire more workers who would work fewer hours, and to offset, at least partially, the marginal costs incurred by employees who work additional hours.[93]

An exception to this standard, however, was recognized by the United States Supreme Court in *Walling, DOL v. A.H. Belo Corp.*[94] The so-called "Belo contract" was subsequently codified by the United States Congress.[95] This exception was created in response to the problems which arose when particular job classifications required employees to work hours fluctuating above and below forty hours per week.[96] Rather than subjecting employees to the uncertainty of fluctuating weekly paychecks, the Belo contract permits employers and employ-

91. *Garcia*, 808 F.2d at 722.
92. 29 U.S.C. § 207(a)(1) (1982).
93. Donovan v. Brown Equip. and Service Tools, Inc., 666 F.2d 148 (5th Cir. 1982).
94. 316 U.S. 624 (1942).
95. 29 U.S.C. § 207(f) states that:
No employer shall be deemed to have violated subsection (a) of this section by employing any employee for a workweek in excess of the maximum workweek applicable to such employee under subsection (a) of this section if such employee is employed pursuant to a bona fide individual contract, or pursuant to an agreement made as a result of collective bargaining by representatives of employees, if the duties of such employees necessitate irregular hours of work, and the contract or agreement (1) specifies a regular rate of pay of not less than the minimum hourly rate provided in subsection (a) or (b) of section 206 of this title (whichever may be applicable) and compensation at not less than one and one-half times such rate for all hours worked in excess of such maximum workweek, and (2) provides a weekly guaranty of pay for not more than sixty hours based on the rates so specified.
96. *Donovan*, 666 F.2d at 153.

ees working "irregular hours"[97] to agree upon a fixed weekly salary.[98]

B. *Employer Limitations Under the FLSA:* Crenshaw v. Quarles Drilling Corp.

1. Case in Context

*Crenshaw v. Quarles Drilling Corp.*[99] provides a useful discussion of several of the important concepts found in the FLSA. After characterizing the elements of the section 207(f) exception,[100] the Tenth Circuit held that the exception did not apply in this case because the "irregular hours" requirement had not been satisfied.[101] After much discussion, the court further found that the three-year — not the two-year — statute of limitations was appropriate because the employer had committed a "willful violation" of the Act.[102] Finally, after analyzing section 216(b) of the FLSA,[103] which provides for liquidated damages equal to the amount of the unpaid overtime, and concluding that the employer did not show that its actions were taken in good faith, Judge Tacha upheld the district court's decision to award plaintiff liquidated damages.[104]

2. Statement of the Case

Crenshaw, a drilling equipment mechanic for Quarles Drilling Corporation ("Quarles"), performed routine maintenance and responded to emergency situations at drilling sites. Crenshaw and Quarles entered into a contract whereby Crenshaw was to be paid a set biweekly wage based on a sixty-hour work week. After working for Quarles for approximately three years, Crenshaw filed this suit alleging that Quarles had violated the overtime requirements of the FLSA. The district court agreed with Crenshaw's assertions, and Quarles appealed.

3. Analysis

a. *The Belo Contract*

Two of the three requisite elements of a Belo contract were disputed in *Crenshaw*. The first element at issue was whether the contract designated a "regular rate" of pay[105] as required by section 207(f).[106]

97. *See infra* notes 110-12 and accompanying text.
98. *Donovan*, 666 F.2d at 153.
99. 798 F.2d 1345 (10th Cir. 1986).
100. *Id.* at 1347. (The elements of the section 207(f) exception are, as described in Donovan v. Brown Equip. and Service Tools, Inc., 666 F.2d 148, 153 (5th Cir. 1982), as follows: "First, the duties of the employee must 'necessitate irregular hours of work.' 29 U.S.C. § 207(f) (1982). Second, the employee must be employed pursuant to a bona fide individual contract or collective bargaining agreement. *Id.* Third, that contract must 'specif[y] a regular rate of pay' for hours up to forty and one and one-half times that rate for hours over forty. Id. at § 207(f)(1). Finally, the contract must provide a weekly pay guarantee for not more than sixty hours, based on the specified rates.").
101. *Id.* at 1349.
102. 29 U.S.C. § 255(a) (1982).
103. 29 U.S.C. § 216(b) (1982).
104. *Crenshaw*, 798 F.2d at 1351.
105. The "regular rate" of pay has been defined as "the hourly rate actually paid for

After the Tenth Circuit concluded that the district court's reliance on an employee's testimony[107] was justified, the court emphasized that it would not tolerate after-the-fact calculations by unscrupulous employers.[108]

The second element disputed was whether Crenshaw worked "irregular hours."[109] The court, acknowledging that fluctuating hours are not necessarily equivalent to "irregular hours,"[110] concurred with a Fifth Circuit decision which held that "[f]or hours to be considered irregular within the meaning of section 7(f), they must, in a significant number of weeks, fluctuate both below forty hours per week as well as above."[111] Therefore, working fifty hours one week and ninety hours the next constitutes fluctuating hours but does not constitute "irregular hours" as contemplated under section 207(f) of the Act. Instead, there must be a "significant" number of weeks worked under forty hours before a court will conclude that an employee has worked "irregular hours."[112]

b. *The Statute of Limitations under the FLSA*

The Tenth Circuit was also faced with determining the applicable statute of limitations period. Section 255(a) establishes a two-year statute of limitations for any cause of action concerning "unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938."[113] However, if there is a "willful violation" of the Act, a three-year statute of limitations is applicable.[114]

In contemplating whether an employer's behavior is "willful," the court adopted the Fifth Circuit's former approach.[115] In *Coleman v. Jiffy June Farms, Inc.*,[116] the Fifth Circuit held that an "employer's decision to change his employees' rate of pay in violation of the FLSA is 'willful' when . . . there is substantial evidence in the record to support a finding that the employer knew or suspected that his actions might violate the FLSA."[117]

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the normal, non-overtime work-week." Walling v. Helmerich & Payne, Inc., 323 U.S. 37, 40 (1944).

106. 29 U.S.C. § 207(f)(1) (1982).

107. Quarles' testimony that the parties had designated a "regular rate" of pay contradicted Crenshaw's testimony. *Crenshaw*, 798 F.2d at 1348.

108. *Id.* (quoting Triple "AAA" Co. v. Wirtz, 378 F.2d 884 (10th Cir. 1967)).

109. 29 U.S.C. § 207(f) (1982).

110. *Crenshaw*, 798 F.2d at 1348.

111. *Id.* (quoting Donovan v. Brown Equip. and Service Tools, Inc., 666 F.2d 148, 154 (5th Cir. 1982)); *see also* Donovan v. Tierra Vista Inc., 796 F.2d 1259, 1260 (10th Cir. 1986).

112. *Crenshaw*, 798 F.2d at 1348.

113. 29 U.S.C. § 255(a) (1982).

114. *Id.*

115. Donovan v. McKissick Products Co., 719 F.2d 350 (10th Cir. 1983).

116. 458 F.2d 1139 (5th Cir. 1972), *cert. denied*, 409 U.S. 948 (1972).

117. *Id.* at 1142. The Supreme Court in Trans World Airlines v. Thurston, 469 U.S. 111, 127-28 (1985), held that this broad standard is inappropriate for determining liquidated damages, but the Court did not rule on what is the appropriate standard for the statute of limitations. The Fifth Circuit, in Halfertz v. Pulse Drug Co., 826 F.2d 2 (5th Cir.

In *Crenshaw*, the company's tax manager testified that he believed that Crenshaw should have been paid overtime for hours exceeding sixty.[118] This, coupled with Crenshaw's time sheets demonstrating that he continually worked more than sixty hours a week, was substantial evidence for the district and the Tenth Circuit courts to conclude that Quarles should have known that the FLSA was applicable. Accordingly, the court found Quarles' violation to be "willful" and, thus, applied the three-year statute of limitations.[119]

c. *Liquidated Damages*

The Tenth Circuit also reviewed the district court's liquidated damages award to Crenshaw. The FLSA permits the awarding of liquidated damages in an amount equal to the unpaid overtime unless the employer proves that its failure to pay overtime compensation was in good faith and that it reasonably presumed that such action/inaction would not constitute a FLSA violation.[120]The court rejected Quarles' contention that its misbelief that Crenshaw's employment contract fell under the section 207(f) exception constituted "reasonable grounds" since the statute's mandate could be easily evaded by an employer simply claiming that it misunderstood the FLSA's requirements.[121] Consequently, the court held that the district court did not err in awarding liquidated damages.[122]

4. Implication of Holding

a. *The Belo Contract*

There are several important issues which the court addressed in its interpretation of the FLSA provisions enumerated in *Crenshaw*. One of the most significant comes from the discussion on the so-called "Belo" contract. In reaffirming the notion that fluctuating hours are not necessarily equivalent to "irregular hours," the Tenth Circuit clearly stated that an employer cannot work a salaried employee as much as it wants without compensating for overtime. To fall within the Belo exception, a "significant"[123] number of the work weeks must fall below forty hours. However, the court did not define "significant." The only conclusion that can be drawn with any certainty is that if an employee works fewer than forty hours per week, 6.9%[124] of the time, then the Tenth Circuit will deem the same to be insignificant.

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1987), and Peters v. City of Shreveport, 818 F.2d 1148, 1168 (5th Cir. 1987), subsequently rejected its *Jiffy June* standard as being too broad in light of *Trans World*. The Tenth Circuit, in *Crenshaw*, rejected this interpretation of *Trans World*. *See infra* note 118 and accompanying text.

118. *Crenshaw*, 798 F.2d at 1350.
119. *Id.*
120. 29 U.S.C. § 260 (1982).
121. *Crenshaw*, 798 F.2d at 1351.
122. *Id.*
123. *Id.* at 1349.
124. *Id.*

b. *The Statute of Limitations and Liquidated Damages*

The court's findings regarding the statute of limitations and liquidated damages place an employer on notice that it must analyze not only the FLSA provisions but also the particular factual setting at issue. The Tenth Circuit has made it clear that it will not condone tenuous justifications by the employer such as "I did not know" or "I did not understand the law."

In the case of liquidated damages, for example, an employer is required to show "reasonable" grounds for believing that it had not violated FLSA. Several circuits, including the Tenth Circuit, have held that an employer's claim of ignorance of the Act's requirements is not a reasonable ground.[125]

Similarly, if a statute of limitations issue arises, it is evident that the court will not tolerate an employer ignoring the particular factual situation when claiming it did not willfully violate FLSA. If an employer should have known that its employees might have been covered by the Act, it will be held that the employer's violation of FLSA was "willful."[126]

## CONCLUSION

In a series of well written opinions, several important themes and positions emerged during the 1986-87 survey period. First, the Tenth Circuit insisted upon the need for a careful factual analysis. This was evident in the *Harberson* opinion when the court refused to uphold a Board decision because of the Board's failure to adequately discuss the factual aspects of the case. In the *Garcia* case, the Tenth Circuit again showed its preoccupation with factual detail and careful analysis by distinguishing this case from the closely related *DelCostello* standard in analyzing the statute of limitations in a hybrid action.

Finally, the court in this survey period showed a willingness to provide workers with some protection against unscrupulous employers. In *Crenshaw*, the Tenth Circuit clearly stated that it will not tolerate employers who work employees long hours without paying overtime compensation. The court also noted that an employer will not be able to avoid the FLSA by simply asserting that it did not understand the FLSA. Instead, the court adopted a "should have known" standard which provides working people with a greater degree of protection and carries out the legislative intent of the FLSA. Similarly, in dealing with the issue of constructive discharge, the court in *Derr* rejected the subjective standard and replaced it with the more manageable objective standard. This,

125. Sinclair v. Auto. Club of Okla., Inc., 733 F.2d 726, 730 (10th Cir. 1984); *see also* Marshall v. Brunner, 668 F.2d 748, 753 (3d Cir. 1982) and Barcellona v. Tiffany English Pub, Inc., 597 F.2d 464, 468-69 (5th Cir. 1979).

126. *Crenshaw*, 798 F.2d at 1349-50.

also, should give employees more protection against those employers with a predisposition towards illegal conduct.

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