Gunn v. United of Omaha Life Ins. Co.

United States District Court for the Middle District of Florida, Orlando Division
April 16, 2014, Decided; April 16, 2014, Filed
Case No: 6:13-cv-1731-Orl-36TBS

Reporter: 2014 U.S. Dist. LEXIS 70520

DAVID GUNN, Plaintiff, v. UNITED OF OMAHA LIFE INSURANCE COMPANY, Defendant.

Subsequent History: Adopted by, Motion granted by, Remanded by *Gunn v. United of Omaha Life Ins. Co., 2014 U.S. Dist. LEXIS 70521 (M.D. Fla., May 22, 2014)*

Core Terms

staffing, political subdivision, entity, alley, exempt, employee benefit plan, pension plan, district court, preempt, subject matter jurisdiction, federal question, state law claim, disability, recommend, island, employee welfare benefit plan, federal court, state court, not-for-profit

Case Summary

Overview

HOLDINGS: [1]-An employee who worked for a not-for-profit corporation that was established by a hospital to provide employee staffing and management services to the hospital met his burden of showing that a case he filed in a Florida court against an insurance company that sold a long-term disability benefits policy to the corporation was improperly removed to federal district court because the policy the insurance company sold to the corporation was not governed by the Employee Retirement Income Security Act of 1974 (″ERISA″), *29 U.S.C.S. §§ 1001-1461*; [2]-The hospital was a political subdivision of the State of Florida for purposes of the ERISA, and the not-for-profit corporation it created was an agency or instrumentality of the hospital that was allowed to purchase employee benefits plans under the governmental plan exemption to the ERISA.

Outcome

The magistrate judge recommended that the district court grant the employee's motion to remand the case to state court.

LexisNexis® Headnotes

Civil Procedure > ... > Jurisdiction > Diversity Jurisdiction > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > General Overview

Civil Procedure > ... > Subject Matter Jurisdiction > Jurisdiction Over Actions > General Overview

Civil Procedure > ... > Removal > Specific Cases Removed > General Overview

Constitutional Law > The Judiciary > Jurisdiction > General Overview

HN1 It is by now axiomatic that the inferior federal courts are courts of limited jurisdiction that are empowered to hear only those cases within the judicial power of the United States , as defined by Article III of the United States Constitution, which have been entrusted to them by a jurisdictional grant authorized by Congress . In a given case, a federal district court must have at least one of three types of subject matter jurisdiction: (1) jurisdiction under a specific statutory grant; (2) federal question jurisdiction pursuant to *28 U.S.C.S. § 1331*; or (3) diversity jurisdiction pursuant to *28 U.S.C.S. § 1332(a)*. These subject matter jurisdiction requirements are applicable to all cases brought in federal court. *28 U.S.C.S. § 1441(a)* (only authorizing removal of actions of which the district courts of the United States have original jurisdiction). A party who removes a case to federal district court bears the burden of demonstrating that federal jurisdiction exists.

Civil Procedure > ... > Subject Matter Jurisdiction > Federal Questions > Well Pleaded Complaint Rule

Civil Procedure > ... > Removal > Specific Cases Removed > Federal Questions

Constitutional Law > Supremacy Clause > Federal Preemption

Pensions & Benefits Law > ERISA > Federal Preemption > General Overview

HN2 Where Congress preempts an area of law so completely that any complaint raising claims in that area is necessarily federal in character, super preemption applies, and federal jurisdiction exists, even if the face of the complaint does not plead federal claims. The Employee Retirement Income Security Act of 1974 (″ERISA″), *29 U.S.C.S. §§ 1001-1461*, broadly preempts state laws relating to any employee benefit plan, and a defendant may remove on the basis of federal question jurisdiction any ERISA claims which are pled as state law claims. *29*

U.S.C.S. § 1144(a). Thus, ERISA presents an exception to the ″well-pleaded complaint rule,″ which holds that, for federal question jurisdiction to exist, the issue must necessarily appear in a plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose.

Constitutional Law > Supremacy Clause > Federal Preemption

Pensions & Benefits Law > ERISA > Federal Preemption > State Laws

HN3 Under § 514(a) of the Employee Retirement Income Security Act of 1974 (″ERISA″), 29 U.S.C.S. § 1144(a), a state law claim is expressly preempted by ERISA if it relates to any employee benefit plan. A law ″relates to″ an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan. To determine whether a plaintiff's state law claims are preempted, courts in the Eleventh Circuit typically apply a four-factor test: (1) there must be a relevant ERISA plan; (2) the plaintiff must have standing to sue under the plan; (3) the defendant must be an ERISA entity; and (4) the complaint must seek compensatory relief akin to that available under 29 U.S.C.S. § 1132(a), which provides in part that a participant or beneficiary of a plan may bring a civil action to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan.

Pensions & Benefits Law > ERISA > Federal Preemption > Deemer Clause

Pensions & Benefits Law > ERISA > Federal Preemption > Savings Clause

HN4 The preemption provision in § 514(a) of the Employee Retirement Income Security Act of 1974 (″ERISA″), 29 U.S.C.S. § 1144(a), is limited by the ″savings clause″ at § 514(b)(2)(A), 29 U.S.C.S. § 1144(b)(2)(A), which provides that § 514(a) shall not be construed to exempt or relieve any person from any law of any state which regulates insurance, banking, or securities. The ″savings clause″ is modified by the ″deemer clause,″ which prohibits a state from deeming an employee benefit plan to be an insurance company, bank, or investment company for purpose of state regulation. 29 U.S.C.S. § 1144(b)(2)(B).

Pensions & Benefits Law > ERISA > General Overview

HN5 Except for plans that are exempted from its coverage, the Employee Retirement Income Security Act of 1974 (″ERISA″), 29 U.S.C.S. §§ 1001-1461, applies to any employee benefit plan if it is established or maintained by any employer engaged in commerce or in any industry or activity affecting commerce. 29 U.S.C.S. § 1003(a)(1). An ″employee benefit plan″ is defined as ″an employee welfare benefit plan.″ 29 U.S.C.S. § 1002(3). The term ″'employee welfare benefit plan″ means any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer to the extent that such plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, benefits in the event of sickness, accident, or disability. 29 U.S.C.S. § 1002(1). A welfare plan requires (1) a plan, fund, or program (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing disability benefits (5) to participants or their beneficiaries.

Pensions & Benefits Law > ERISA > Exempt Plans > Government Plans

HN6 The Employee Retirement Income Security Act of 1974 (″ERISA″), 29 U.S.C.S. §§ 1001-1461, exempts five categories of employee benefit plans, including a ″governmental plan″ exemption. 29 U.S.C.S. § 1003(b)(1). Despite ERISA's regulatory and remedial sweep, Congress did not include public or governmental benefit plans within its reach believing, in part, that state and local governments' ability to tax would enable them to operate employee benefit systems that would avoid the pitfalls of underfunding. The term ″governmental plan″ means a plan established or maintained for its employees by the Government of the United States , by the government of any state or political subdivision thereof, or by any agency or instrumentality of the foregoing. 29 U.S.C.S. § 1002(32).

Governments > Local Governments > General Overview

Governments > State & Territorial Governments > General Overview

Pensions & Benefits Law > ERISA > Exempt Plans > Government Plans

HN7 Florida statutes define ″political subdivision″ to include counties, cities, towns, villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in Florida . Fla. Stat. § 1.01(8). However, because the Employee Retirement Income Security Act of 1974 (″ERISA″), 29 U.S.C.S. §§ 1001-1461, is a federal statute, the term ″political subdivision″ must be interpreted by reference to federal law, in the absence of clear legislative intent to the contrary. ERISA does not define the term ″political subdivision.″

Governments > Local Governments > General Overview

Governments > State & Territorial Governments > General Overview

HN8 To determine whether an entity is a ″political subdivision″ under federal law, courts have routinely applied the test found in the United States Supreme Court 's decision in NLRB v. Natural Gas Utility District of

Hawkins County, Tennessee . The NLRB test provides that a political subdivision is an entity that is either (1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.

Governments > Local Governments > General Overview

Governments > State & Territorial Governments > General Overview

Pensions & Benefits Law > ERISA > Exempt Plans > Government Plans

HN9 As with ″political subdivision,″ the Employee Retirement Income Security Act of 1974 (″ERISA″), *29 U.S.C.S. §§ 1001-1461*, does not define the terms ″agency″ or ″instrumentality.″ In Rose v. Long Island R.R. Pension Plan, the United States Court of Appeals for the Second Circuit gave deference to the Internal Revenue Service's (″IRS's″) interpretation of the terms ″agency″ and ″instrumentality″ because the IRS is charged with administering the ERISA. The Rose court recognized that the IRS uses the following six factors in *Rev. Rul. 57-128, 1957-1 C.B. 311*, to determine whether an entity qualifies as an agency or instrumentality: (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interest of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the source of its operating expenses.

Governments > Local Governments > General Overview

Governments > State & Territorial Governments > General Overview

Pensions & Benefits Law > ERISA > Exempt Plans > Government Plans

HN10 The United States courts of appeals are split on the issue of whether the test the United States Court of Appeals for the Second Circuit adopted in Rose v. Long Island R.R. Pension Plan or the test the United States Court of Appeals for the District of Columbia Circuit adopted in Alley v. Resolution Trust Corp. is the proper test to use in determining whether an entity is a ″political subdivision″ of a state for purposes of the Employee Retirement Income Security Act of 1974 (″ERISA″), *29 U.S.C.S. §§ 1001-1461*. The United States Court of Appeals for the Tenth Circuit adopted the Alley test, but did not mention the Rose test, and the United States Court of Appeals for the Third Circuit rejected the Alley test as inappropriate for cases involving state entities. In Hightower v. Texas Hospital Association, the United States Court of Appeals for the Fifth Circuit found that once a governmental entity relinquishes responsibility for providing a retirement plan to a private entity, that private entity operates or maintains the existing pension plan, or any newly created pension plan, subject to the provisions of the ERISA.

Governments > Local Governments > General Overview

Governments > State & Territorial Governments > General Overview

Pensions & Benefits Law > ERISA > Exempt Plans > Government Plans

HN11 In Smith v. Reg'l. Transit Auth., the United States District Court for the Eastern District of Louisiana concluded that the United States Court of Appeals for the District of Columbia Circuit did not intend for its reasoning in Alley v. Resolution Trust Corp. to be applied to state court cases and used the test the United States Court of Appeals for the Second Circuit adopted in Rose v. Long Island R.R. Pension Plan to determine whether an entity was a ″political subdivision″ of a state for purposes of the Employee Retirement Income Security Act of 1974, *29 U.S.C.S. §§ 1001-1461*. The United States District Court for the Middle District of Florida, Orlando Division , agrees with the District Court for the Eastern District of Louisiana 's conclusion in Smith.

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For United of Omaha Life Insurance Company, Defendant: Wendy L. Furman, LEAD ATTORNEY, Pett Furman, PL, Boca Raton, FL.

Judges: THOMAS B. SMITH, United States Magistrate Judge.

Opinion by: THOMAS B. SMITH

Opinion

REPORT AND RECOMMENDATION

This case comes before the Court on Plaintiff's Amended Motion to Remand. (Doc. 19). Defendant has filed a response in opposition to the motion and the issue is ripe for decision. (Doc. 23). Upon due consideration, I respectfully recommend the Court grant Plaintiff David Gunn's (″Gunn″) motion.

I. Background

The beginning point of this case is Halifax Hospital Medical Center (″Halifax Hospital″), which owns and operates hospitals in Volusia County and surrounding

counties. (Doc. 1 at 2). It is a ″legislatively-chartered taxing healthcare organization governed by a Board of Commissioners appointed by the Governor of Florida.″ www.halifaxhealth.org/history-facts. Halifax Hospital was created in 1979 by special act of the state of Florida as a special taxing district with all the powers of a body corporate. (1979) Fla. Laws, Ch. 79-577 (the ″Special Act″). It has the authority **[*2]** to establish, construct, operate and maintain hospitals, medical facilities, and other health care facilities and services which are necessary for the preservation of the public health, and it has the authority to establish corporations under control of the District [1] and to enter into capital or operating leases. Fla. Laws Chs. 84-539, 89-409, 91-532.

In 1993, Halifax Hospital requested an opinion from the Florida Attorney General as to whether: (1) it could establish a not-for-profit corporation to provide employee staffing and management services; (2) whether it was required to take competitive bids to staff and manage its hospital; and (3) whether the employees of a not-for-profit, management and staffing corporation would be required to participate in the Florida Retirement System. (Doc. 23-3 at 1). The Florida Attorney General opined that Halifax Hospital had the authority to establish such a corporation, that it was not required to bid management and staffing contracts competitively, and that the employees of such a not-for-profit corporation **[*3]** ″would not appear to be covered by the Florida Retirement System.″ (Id.).

After receiving the Attorney General's opinion, Halifax Hospital created Halifax Staffing, Inc. (″Staffing″). (Doc. 23 at 4; see also Doc. 19-1). Staffing is a non-stock, not-for-profit corporation whose sole member is Halifax Hospital. (Doc. 19-1 at 1-2). Its articles of incorporation provide that it was organized exclusively for ″charitable, educational and scientific purposes.″ (Doc. 19-1 at 2). It is supposed ″to assist the [Halifax Hospital], in carrying out its duties and responsibilities pursuant to the Special Act.″ (Id.). In this manner, Staffing is intended ″to promote the general health of the citizens of the District.″ (Id.). In truth, the sole purpose of Staffing is to allow Halifax Hospital to move its employees from the Florida Retirement System into a self-funded retirement program. (Doc. 19-2 at p. 33). To this end, Gunn and everyone else who works for Halifax Hospital is employed by Staffing. (Id.).

Halifax Hospital refers to Staffing as an ″instrumentality″ and the employees treat Halifax Hospital and Staffing ″as one and the same.″ (Doc. 19-2 at p. 33). Halifax Hospital and Staffing share a **[*4]** registered office and agent; Staffing receives 100% of its funding from Halifax Hospital; and Staffing's Board of Directors must be comprised of Commissioners of Halifax Hospital. (Doc. 19 ¶¶ 10-13).

In 1995, Staffing asked the Internal Revenue Service for rulings on a number of issues, including whether it is an ″affiliate of a governmental unit,″ within the meaning of section 4 of *Rev. Proc. 95-48, 1995-47 I.R.B. 13*. (Doc. 19-5). The IRS responded that Staffing is ″'an affiliate of a governmental unit' as that term is used in section 4 of *Rev. Proc. 95-48, C.B. 1995-2 418*, and is relieved from filing a Form 990 pursuant to section 3 of *Rev. Proc. 95-48*.″ (Id. at 10).

Staffing obtained from Defendant United of Omaha Life Insurance Company (″United″), Group Long Term Policy No. GUPR-AC4Q (the ″Policy″), effective January 1, 2009. (Doc. 2, ¶ 7). The Policy provides long term disability benefits to eligible employees. (Doc. 1-1; Doc. 2, ¶ 7). Gunn alleges that he is covered by the Policy. (Doc. 2, ¶ 7). In May, 2012, he made a claim for Policy benefits that was denied by United. (Id., ¶ 8). Gunn then filed this lawsuit in state court for breach of the Policy and a declaratory judgment **[*5]** that coverage exists. (Doc. 2).

United contends that the Policy is part of an employee welfare benefit plan governed by the Employee Retirement Income Security Act of 1974, as amended, *29 U.S.C. §§ 1001-1461* (″ERISA″). (Doc. 1, ¶ 2). It argues that due to ERISA's preemptive power all claims that relate to an employee welfare benefit plan are automatically re-characterized as federal in nature and are consequently removable to federal court. (Id. at 5). United removed the lawsuit to this Court, which it argues has original concurrent subject matter jurisdiction under *28 U.S.C. § 1331* and *29 U.S.C. § 1132(e)(1)*. (Id.). Gunn counters that Staffing is an agency or instrumentality of Halifax Hospital, which is a political subdivision of the state of Florida. (Doc. 19 ¶ 6). Therefore, he argues, because the Policy was established and maintained by Staffing, it is a governmental plan that is exempt from ERISA pursuant to *29 U.S.C. § 1003(b)(1)*. (Id., ¶ 5). Following this line of reasoning, Gunn concludes that the Court does not have jurisdiction to hear this case. (Doc. 19).

II. ERISA and Preemption

HN1 It is ″by now axiomatic that the inferior federal courts are courts of limited jurisdiction ... **[*6]** 'empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution,' and which have been entrusted to

[1] The ″District″ means Halifax Hospital, a special tax district, public body corporate and politic of Florida, created by the Special Act. (Id.).

them by a jurisdictional grant authorized by Congress." Id. at 409 (quoting *Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994)*). "In a given case, a federal district court must have at least one of three types of subject matter jurisdiction: (1) jurisdiction under a specific statutory grant; (2) federal question jurisdiction pursuant to *28 U.S.C. § 1331*; or (3) diversity jurisdiction pursuant to *28 U.S.C. § 1332(a)*." *Baltin v. Alaron Trading Corp., 128 F.3d 1466, 1469 (11th Circ. 1997)*. These subject matter jurisdiction requirements are applicable to all cases brought in federal court. See*28 U.S.C. § 1441(a)* (only authorizing removal of actions "of which the district courts of the United States have original jurisdiction"). *Whitt v. Sherman Intern. Corp., 147 F.3d 1325, 1329 (11th Cir. 1998)*. The removing party bears the burden of demonstrating that federal jurisdiction exists. *Kirkland v. Midland Mortgage Co., 243 F.3d 1277, 1281 n.5 (11th Cir. 2001)*; *Pretka v. Kolter City Plaza II, 608 F3d 744, 752 (11th Cir. 2010)*.

United **[*7]** alleges jurisdiction based on the doctrine of preemption. ***HN2*** "Where Congress preempts an area of law so completely that any complaint raising claims in that area is necessarily federal in character, super preemption applies, and federal jurisdiction exists, even if the face of the complaint does not plead federal claims." *Whitt v. Sherman Int'l Corp., 147 F.3d 1325, 1329 (11th Cir. 1998)*. ERISA broadly preempts state laws relating to any employee benefit plan, and a defendant may remove on the basis of federal question jurisdiction any ERISA claims which are plead as state law claims. *29 U.S.C. § 1144(a)*; *Holloman v. Mail-Well Corp., 443 F.3d 832, 835 n.1 (11th Cir. 2006)*. Thus, ERISA presents an exception to the "well-pleaded complaint rule," which holds that, for federal question jurisdiction to exist, the issue must "necessarily appear[ ] in the plaintiff's statement of his own claim in the bill or declaration, unaided by anything alleged in anticipation of avoidance of defenses which it is thought the defendant may interpose." *Stern v. IBM, 326 F.3d 1367, 1370 (11th Cir. 2003)* (quoting *Oklahoma Tax Comm'n v. Graham, 489 U.S. 838, 841, 109 S. Ct. 1519, 103 L. Ed. 2d 924 (1989)*).

HN3 Under *section 514(a)*, **[*8]** a state law claim is expressly preempted by ERISA if it "relate[s] to any employee benefit plan . . . ." *29 U.S.C. § 1144(a)*; *Ass'n of New Jersey Chiropractors v. Aetna, Inc., Civil Action No. 09-3761 (JAP), 2012 U.S. Dist. LEXIS 64413, 2012 WL 1638166, at *8 (D.N.J. May 8, 2012)*.[2] "A law 'relates to' an employee benefit plan, in the normal sense of the phrase, if it has a connection with or reference to such a plan." *Shaw v. Delta Airlines, 463 U.S. 85, 96-97, 103 S. Ct. 2890, 77 L. Ed. 2d 490 (1983)*; *Chiropractors, 2012 U.S. Dist. LEXIS 64413, 2012 WL 1638166, at *8*. To determine whether a plaintiff's state law claims are preempted, courts in the Eleventh Circuit typically apply a four-factor test: (1) there must be a relevant ERISA plan; (2) the plaintiff must have standing to sue under the plan; (3) the defendant must be an ERISA entity; and (4) the complaint must seek compensatory relief akin to that available under *29 U.S.C. § 1132(a)*, which provides in part that a participant or beneficiary of a plan may bring a civil action "to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan . . . ." *Butero v. Royal Maccabees Life Ins. Co., 174 F.3d 1207, 1212 (11th Cir. 1999)*; *Dickerson v. Alexander Hamilton Life Ins. Co. of Am., 130 F. Supp. 2d 1271, 1273 (N.D. Ala. 2001)*; **[*9]** *29 U.S.C. § 1132(a)(1)(B)*.

III. Employee Benefit Plan

HN5 Except for plans that are exempted from its coverage, ERISA applies "to any employee benefit plan if it is established or maintained ... by any employer engaged in commerce or in any industry or activity affecting commerce. *29 U.S.C. § 1003(a)(1)*. An "employee benefit plan" is defined as "an employee welfare benefit plan ..." *29 U.S.C. § 1002(3)*.

The term "'employee welfare benefit plan' mean[s] any plan, fund, or program which was heretofore or is hereafter established or maintained by an employer . . . to the extent that such **[*10]** plan, fund, or program was established or is maintained for the purpose of providing for its participants or their beneficiaries, through the purchase of insurance or otherwise, . . . benefits in the event of sickness, accident, disability . . . ." *29 U.S.C. § 1002(1)*.

"[A] welfare plan requires (1) a 'plan, fund, or program' (2) established or maintained (3) by an employer or by an employee organization, or by both, (4) for the purpose of providing ... disability ... benefits (5) to participants or their beneficiaries." *Donovan v. Dillingham, 688 F.2d 1367, 1371 (11th Cir. 1982)*. The Policy satisfies all five criteria. It is a plan or program, established by Staffing, the entity that employs everyone who works for Halifax Hospital. And, the Policy exists for the benefit of Staffing's employees, by providing disability benefits to the participants. Accordingly, I find that the Policy is an "employee welfare benefit plan," as defined by ERISA.

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[2] ***HN4*** The section 514(a) preemption provision is limited by the "savings clause" at section 514(b)(2)(A), which provides that section 514(a) "shall not be construed to exempt or relieve any person from any law of any State which regulates insurance, banking, or securities." 29 U.S.C. § 1144(b)(2)(A). The "savings clause" is modified by the "deemer clause," which prohibits a state from deeming an employee benefit plan to be an insurance company, bank, or investment company for purpose of state regulation. Section 514(b)(2)(B), 29 U.S.C. § 1144(b)(2)(B). None of these secondary preemption provisions apply in this case.

IV. The ″Governmental Plan″ Exemption

HN6 ERISA exempts five categories of employee benefit plans; relevant to this case is the ″governmental plan″ exemption. *29 U.S.C. § 1003(b)(1)*. ″Despite ERISA's regulatory and remedial sweep, Congress did not include **[*11]** public or governmental benefit plans within its reach believing, in part, state and local governments' ability to tax, would enable them to operate employee benefit systems that would 'avoid the pitfalls of underfunding.'″ *McGraw v. Prudential Ins. Co. of Am., 137 F.3d 1253, 1257 (10th Cir. 1998)* (citing *Hightower v. Texas Hosp. Ass'n, 65 F.3d 443, 449 (5th Cir. 1995)*). ″The term 'governmental plan' means a plan established or maintained for its employees by the Government of the United States, by the government of any State or political subdivision thereof, or by any agency or instrumentality of the foregoing.″ *29 U.S.C. § 1002(32)*.

Because the Policy was established by Staffing, the governmental exemption only applies if Halifax Hospital is a political subdivision of the state of Florida, and Staffing is its agency or instrumentality; or alternatively, if Halifax Hospital is an agency or instrumentality of the state of Florida and Staffing is so intertwined with Halifax Hospital that it, too, is an agency or instrumentality of the state.

Whether Halifax Hospital is a Political Subdivision of the State

HN7 Florida Statues define ″political subdivision″ to include ″counties, cities, towns, **[*12]** villages, special tax school districts, special road and bridge districts, bridge districts, and all other districts in this state.″ *Fla. Stat. 1.01(8)*. As a ″special tax district″ created by Florida law, Halifax Hospital comes within the state's definition of a political subdivision. See (1979) Fla. Laws Ch. 79-577. However, ″[b]ecause ERISA is a federal statute, the term ″political subdivision″ must be interpreted by reference to federal law, in the absence of clear legislative intent to the contrary.″ *Rose v. Long Island R.R. Pension Plan, 828 F.2d 910, 916) (2d Cir. 1987)*(citing *NLRB v. Natural Gas Util. Dist. Of Hawkins Cnty., Tenn., 402 U.S. 600, 602-03, 91 S. Ct. 1746, 29 L. Ed. 2d 206 (1971)*. ERISA has not defined the term ″political subdivision.″

HN8 To determine whether an entity is a political subdivision under federal law, courts have routinely applied the test found in NLRB v. Natural Gas Utility District of Hawkins County, Tennessee. See *Hawkins Cnty, 402 U.S. at 604-05*; *Rose, 828 F.2d at 916*; *Culpepper v. Protective Life Ins. Co., 938 F. Supp 794, 797 (M.D. Ala. 1997)*; *Smith v. Reg'l. Transit Auth., 944 F. Supp. 2d 515, 526 (E.D. La. 2013)*. The NLRB test provides that a political subdivision is an entity **[*13]** that is either ″(1) created directly by the state, so as to constitute departments or administrative arms of the government, or (2) administered by individuals who are responsible to public officials or to the general electorate.″ *Hawkins Cnty., 402 U.S. at 604-05*.

Halifax Hospital satisfies the first prong of the NLRB test because it was created by the Florida Legislature for the public purpose of preserving the public health. (1979) Fla. Laws Ch. 79-577. See *Rose, 828 F.2d at 916* (finding the Metropolitan Transit Authority satisfied the first criteria of the NLRB test because it was created by state law and for the benefit of the people of New York); *Smith, 944 F. Supp. 2d at 526* (finding the Regional Transit Authority met the first criteria of the NLRB test because it was created by Louisiana law for the benefit of the people of Jefferson, Orleans, St. Bernard, and St. Tammany parishes).

Halifax Hospital also satisfies the second prong of the NLRB test in that its governing body consists of a seven-member board of commissioners all of whom are appointed by the Governor, and all of whom are subject to the Governor's authority. (1979) Fla. Laws Ch. 79-577 § 2; see *Smith, 944 F. Supp. 2d at 526* **[*14]** (finding the RTA satisfied the second criteria of the NLRB test because its board consisted of three members from each parish who were appointed by the CEO of the parish). Thus, Halifax Hospital is ″administered by individuals who are responsible to public officials or the general electorate.″

Although not a part of the NLRB test, it is worth noting that Halifax Hospital has been granted the power of eminent domain. (1979) Fla. Laws Ch. 79-577§ 6. This is a factor the Supreme Court in Hawkins County found to be persuasive when determining whether the entity in that case was a political subdivision and a factor which the Third Circuit more recently noted when applying the NLRB test to an ERISA preemption claim. (1979) Fla. Laws Ch. 79-577 § 6; see also *Hawkins Cnty., 406 U.S. at 604*; *Koval v. Washington Cnty. Redevelopment Auth., 574 F.3d 238, 243 (3d Cir. 2009)*. For these reasons, I find that Halifax Hospital is a political subdivision of the state of Florida for purposes of ERISA.[3]

Whether Staffing is an Agency or Instrumentality of Halifax Hospital

[3] See also Bolt v. Halifax Hospital Medical Center, 891 F.2d 810, 823-24 (11th Cir. 1993), *cert. denied*, *495 U.S. 924, 110 S.Ct. 1960, 109 L.Ed.2d 322 (1990)*, holding in an antitrust case that although Halifax **[*15]** Hospital was not a state agency acting as a sovereign, the powers granted to it by the Florida Legislature are virtually identical to the powers possessed by a municipality and therefore, Halifax Hospital should be treated as a municipality.

While United admits that a plan distributed by Halifax Hospital would likely be precluded from ERISA as a ″governmental plan,″ it argues that Staffing is not an agency or instrumentality of Halifax Hospital or the state of Florida. ***HN9*** As with ″political subdivision″, ERISA does not define the terms ″agency″ or ″instrumentality.″ Gunn argues that the Court should use *Revenue Ruling 57-128* as its guide, as found in *Rose v. Long Island R.R. Pension Plan, 828 F.2d 910 (2d Cir. 1987)*. United argues the Court should use the test found in *Alley v. Resolution Trust Corp., 984 F.2d 1201, 299 U.S. App. D.C. 363 (D.C. Cir. 1993)*. **[*16]** Neither test has been adopted by the Eleventh Circuit.

In Rose, after finding that the MTA was a political subdivision of the state of New York, the Second Circuit turned to the issue of whether the Long Island Railroad Pension Plan is an agency or instrumentality of the MTA or New York. *828 F.2d at 917*. Because the Internal Revenue Service is charged with administering ERISA, the Second Circuit gave deference to its interpretation of the terms ″agency″ and ″instrumentality.″ *Id. at 918* (citing *Hawkins Cnty., 402 U.S. at 605*). The Rose court recognized that the IRS uses the following six factors in *Revenue Ruling 57-128* (the ″*Rose* test″) to determine whether an entity qualifies as an agency or instrumentality:

> (1) whether it is used for a governmental purpose and performs a governmental function; (2) whether performance of its function is on behalf of one or more states or political subdivisions; (3) whether there are any private interests involved, or whether the states or political subdivisions involved have the powers and interest of an owner; (4) whether control and supervision of the organization is vested in public authority or authorities; (5) if express or implied statutory or **[*17]** other authority is necessary for the creation and/or use of such an instrumentality, and whether such authority exists; and (6) the degree of financial autonomy and the source of its operating expenses.

Id.; *Rev. Rul. 57-128, 1957-1 C.B. 311*.

At least two courts in this circuit, *Dickerson v. Alexander Hamilton Life Ins. Co. of Am., 130 F. Supp. 2d 1271, 1274 (N.D. Ala. 2001)*; and *Culpepper v. Protective Life Ins. Co., 938 F. Supp. 794, 798 (M.D. Ala. 1997)*, have applied the Rose test. However, the Dickerson the court found that for its purposes the Rose test was ″not particularly helpful″ in deciding whether the entity it was analyzing was an agency or instrumentality of the state. *130 F. Supp. 2d at 1275*. So, after applying the Rose test, the Dickerson court based its decision in part on the reasoning of the Secretary of the United States Department of Labor's interpretation of the governmental plan exemption, in which the Secretary wrote:

> an employee benefit plan of an independent, nonprofit corporation for its employees is not considered a ″governmental plan″ when the sponsoring employer's only claim to ″governmental status″ consists in qualifying to receive virtually all its funding **[*18]** from government sources, primarily through the process of conforming its organization and operation, and in agreeing by contract to perform activities in accordance with strict regulatory standards provided in the statute.

Id. at 1276 (quoting Allen v. Nimrod Reynolds, et. al., Civil Action No. CV-96AR-1423-E).

An alternative test appears in *Alley v. Resolution Trust Corp., 984 F.2d 1201, 299 U.S. App. D.C. 363 (D.C. Cir. 1993)*. In Alley, the D.C. Circuit chose to focus ″on what should be the core concern for ERISA purposes—the nature of an entity's relationship to and governance of its employees.″ Id. The Alley court found ″no indication that Congress meant the governmental plan exemption to reach an entity that relates to its employees as would a private business—an entity whose employees are not subject to laws governing public employees generally.″ At least one district court has reduced the Alley test to the following set of factors: (1) if the employee is excluded from the state civil service system; (2) if the employee is subject to governmental personnel rules and salary restrictions; and (3) if the employee is allowed to participate in civil servant pension and welfare plans. *Smith, 944 F. Supp. 2d at 527 n.24* **[*19]** (citing *Alley, 984 F.2d at 1206-07*).

But, the application of Alley to state court entities is in doubt. At multiple points in the opinion, the Alley court emphasized that the entity involved was affiliated with the federal government, which did not implicate the same federalism concerns present when considering entities affiliated with state governments. *Alley, 984 F.2d at 1206 n.11, 1207, 1207 n.14*. Indeed, the Alley court noted that ″[c]oncern about protecting state authority over relations

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See also, USA ex. rel. Elin Baklid-Kunz v. Halifax Hospital Medical Center and Halifax Staffing, Inc., No. 6:09-cv-1002-Orl-31TBS, 2012 U.S. Dist. LEXIS 36304 (M.D. Fla. March 19, 2012), holding that while Halifax Hospital is a ″state agency or instrumentality,″ it is not entitled to *Eleventh Amendment* immunity.

with state employees was one reason for the governmental plan exemptions," and so "a Rose-style test focusing broadly on the extent of governmental contacts may be more appropriate where state-affiliated entities are concerned." *Alley, 984 F.2d at 1205-06 n.11*.

HN10 Other circuits are split on the issue. The Tenth Circuit adopted the Alley test, but did not mention the Rose test. *McGraw v. Prudential Ins. Co. of Am., 137 F.3d 1253, 1257-58 (10th Cir. 1995)* (applying Alley test and finding employee of private corporation operated by a public trust could not claim governmental exemption because trust did not establish the plan or directly employ employee). More recently, the Third Circuit rejected the Alley **[*20]** test as inappropriate for cases involving state entities. *Koval v. Washington Cnty. Redevelopment Auth., 574 F.3d 238, 241-42 (3d Cir. 2009)*. The Fifth Circuit, in *Hightower v. Texas Hospital Association, 65 F.3d 443, (5th Cir. 1995)*, reviewed a case where a county leased the county hospital to a private foundation, which became the employer of all hospital employees. The court did not apply the Alley or Rose tests, but found that "once a governmental entity relinquishes responsibility for providing a retirement plan to a private entity, that private entity operates or maintains the existing pension plan, or any newly created pension plan, subject to the provisions of ERISA." *Id. at 448*.

HN11 In the past year, a district judge in Louisiana considered this exact issue; the plaintiffs urged the court to follow the test found in Alley, while the defendants urged the court to apply the six factor Rose test. *Smith, 944 F. Supp. 2d at 526*. The district judge concluded that the *Alley* court never intended for its reasoning to be applied to state court cases and used the *Rose* test. See *Smith, 944 F. Supp. 2d at 527*; *Caranci v. Blue Cross & Blue Shield of R.I., 194 F.R.D. 27, 35 (D.R.I. 2000)*. After **[*21]** weighing the alternatives, I agree.

When applying the Rose test, the first factor to consider is whether Staffing is used for a governmental purpose and performs a governmental function. Staffing does not provide any service that Halifax Hospital is not capable of providing. Its sole purpose and function is to move the people who would otherwise be employed by Halifax Hospital out of the Florida Retirement System and into a self-funded retirement plan. Nothing in the record suggests that the public benefits in any way from this arrangement, or that it has anything to do with Halifax Hospital's contribution to the public good. Accordingly, I find no governmental purpose or function in this arrangement.

The second and third factors weigh in favor of finding the Policy exempt. The performance of Staffing's function is exclusively on behalf of Halifax Hospital, a political subdivision of the state of Florida. And, there is no private interest involved in Staffing. It is wholly owned and controlled by Halifax Hospital which enjoys all of the powers and interests that come with ownership the corporation.

The fourth factor considers whether control and supervision of Staffing is vested in public **[*22]** authority or authorities. I find that it is. Staffing's affairs are conducted by a Board of Directors comprised of the District Commissioners. The Commissioners are appointed by, responsible to, and serve at the pleasure of the Governor.

Fifth, express or implied statutory authority was necessary for Halifax Hospital to create Staffing. According to the Florida Attorney General, that statutory authority exists pursuant to Florida laws Ch.79-577, amended in 1984 to grant Halifax Hospital the authority to establish corporations, and amended again in 1991 to provide that Halifax Hospital may form a not-for-profit corporation which may engage in non-healthcare-related activities. (Doc. 23-3).

Finally, the Court must determine the degree of Staffing's financial autonomy and the source of its operating expenses. Staffing has no separate, independent financial autonomy. It is totally dependent upon Halifax Hospital to supply the money it requires to operate. (Doc. 19 ¶ 13).

In sum, all but the first of the Rose factors support a finding that Staffing is an agency or instrumentality of Halifax Hospital. Thus, the overwhelming weight of the factors supports, and I find, that Staffing comes within **[*23]** the governmental plan exemption to ERISA. Consequently, this Court lacks subject matter jurisdiction over this case.

V. Recommendation

For these reasons, I **RESPECTFULLY RECOMMEND** that the Court:

(1) Grant Plaintiff's Amended Motion to Remand (Doc. 19);

(2) Remand this case to the state court; and

(3) Direct the Clerk of Court to close the file.

Specific written objections may be filed in accordance with *28 U.S.C. § 636*, and *M.D. Fla. R. 6.02*, within fourteen (14) days after service of this report and recommendation. Failure to file timely objections shall bar the party from a de novo determination by a district judge and from attacking factual findings on appeal.

RESPECTFULLY RECOMMENDED in Orlando, Florida on April 16, 2014.

KATHERINE LANGE

/s/ Thomas B. Smith
United States Magistrate Judge

THOMAS B. SMITH