

ELEVENTH CIRCUIT KEEPS BIRMINGHAM RESIDENTS
MINIMUM WAGE SUIT ALIVE

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In 2015, the Birmingham City Council passed a city ordinance increasing minimum wage throughout the city to \$8.50 beginning in July 2016 and raising to \$10.10 in 2017.¹ This ordinance came in response to the City Council's repeated attempts and eventual resolution to get the Alabama state legislature to increase the minimum wage to \$10 per hour across the state of Alabama.² The legislature refused the city's request, leading the Birmingham City Council to increase the minimum wage throughout the city on their own with the purpose of "tak[ing] legislative steps to help lift working families out of poverty, decrease income inequality, and boost [Birmingham's] economy."³ Birmingham, the largest city in the State of Alabama, has thirty percent (30%) of its residents living below the poverty line while also being home to the largest African American population (72%) in Alabama.⁴

About a week after the ordinance's approval, the Alabama legislature introduced a bill seeking to establish a uniform minimum wage throughout the state at the federal minimum (\$7.25), effectively quashing the City Council's ordinance at the same time.⁵ A state representative from a neighboring community in Birmingham, where only 1.5% of its residents are African American and just 3% live below the poverty line, introduced the bill.⁶ This initial bill stalled at the end of the 2015 legislative cycle, but the same representative introduced a new bill at the very beginning of the 2016 legislative cycle. This time, the bill garnered support from many state representatives—all of whom were white.⁷ The bill moved rapidly through the house while not receiving a single vote from any African American representatives.⁸

While the bill awaited senate voting, the Birmingham City Council attempted to accelerate its Minimum Wage Ordinance by increasing the minimum wage to \$10.10 as designed, to take effect in 2017.⁹ For two days, employees within the city of Birmingham enjoyed a pay raise—because “in

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¹ *Lewis v. Governor of Alabama (Lewis II)*, 896 F.3d 1282, 1287 (11th Cir. 2018). Birmingham City Council's ordinance was the first time a municipality in the State of Alabama increased the minimum wage above the federal floor of \$7.25. *Id.*

² *Id.*

³ *Id.*

⁴ *Id.* at 1287–88.

⁵ *Id.* at 1288.

⁶ *Lewis II*, 896 F.3d at 1288.

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

an uncharacteristic fashion, and contrary to its normal practices”¹⁰—the bill passed through the senate and was signed into law¹¹ by Governor Bentley in only two days.¹² Just like the house of representatives, not a single African American senator voted in favor of the bill.¹³

Several weeks after the passage of the bill into law, now known as the Alabama Minimum Wage and Right-To-Work Act (“Act”),¹⁴ two Birmingham African American residents and employees who made less than \$10.10 an hour and benefitted from the Birmingham City Ordinance filed suit along with several public interest groups against the state attorney general, the Governor of Alabama, the Mayor of Birmingham, and the City of Birmingham.¹⁵ The plaintiffs’ lawsuit claimed that the Act violated the Equal Protection Clause of the Fourteenth Amendment.¹⁶ Specifically, the plaintiffs alleged that the Act violated the Fourteenth Amendment’s Equal Protection Clause because it “disproportionately impacts African Americans who live and work in the City of Birmingham”¹⁷ by denying them equal economic opportunities strictly on the basis of race.¹⁸

The district court dismissed the plaintiff’s complaint finding that they lacked Article III standing to bring the suit, and the plaintiffs failed to state a plausible claim.¹⁹ The plaintiffs appealed.

The Eleventh Circuit began its analysis by addressing the jurisdictional disputes and started with the standing issue which the district

¹⁰ Complaint for Declaratory and Injunctive Relief at ¶ 5, *Lewis v. Bentley*, No. 2:16-cv-00690-SGC (N.D. Ala. April 28, 2016).

¹¹ *See* ALA. CODE §§ 25-7-40 et. seq. The legislative purpose of the new law is to “establish within the Legislature complete control over regulation and policy pertaining to . . . wages, leave, or other employment benefits provided by and employer to an employee . . . in order to ensure that such regulation and policy is applied uniformly throughout the state.” § 25-7-45(a). The legislature also achieved its goal of quashing the Birmingham ordinance because the new law explicitly states, “[a]ny existing policies, ordinances, rules, or other mandates promulgated or enforced contrary to the terms of this section are null and void, and any future policy, ordinance, rule, or other mandate shall comply with this section.” § 25-7-45(c).

¹² *Lewis II*, 896 F.3d at 1288.

¹³ *Id.*

¹⁴ §§ 25-7-40.

¹⁵ Complaint, *supra* note 10, at ¶¶ 8–11.

¹⁶ *Id.* at ¶¶ 48–60. The plaintiffs also brought several other claims. For instance, the plaintiffs brought several voting rights claims under the Fifteenth Amendment and Section 2 of the Voting Rights Act. *Lewis II*, 896 F.3d at 1288. These claims, however, were dismissed by the Eleventh Circuit and are outside the scope of this article. *Id.* at 1299.

¹⁷ *Id.* at ¶ 53.

¹⁸ *Lewis II*, 896 F.3d at 1294. It should be noted that the plaintiffs also brought an Equal Protection claim under the political-process doctrine. Complaint, *supra* note 10, at ¶¶ 61–64. The Eleventh Circuit, however, also dismissed this claim and it is outside the scope of this article. *Lewis II*, 896 F.3d at 1298.

¹⁹ *Lewis v. Bentley (Lewis I)*, No. 2:16-CV-690-RDP, 2017 WL 432464, at *3, *11. (N.D. Ala. Feb. 1, 2017). The court also found that the defendants are immune from suit under the Eleventh Amendment. *Id.* at *9.

court used as its main basis to dismiss the plaintiff's claims.²⁰ The court noted the three requirements every plaintiff must have in order to have Article III standing: (1) the plaintiff suffered an injury-in-fact; (2) a causal connection or traceability between the injury to the named defendant; and (3) the injury can be redressed with the court's decision.²¹

The court quickly acknowledged that the plaintiffs have suffered a cognizable injury-in-fact due to the passage of the Act.²² As a result of the passage of the Birmingham City Ordinance, the plaintiffs had an opportunity to increase their wages to \$10.10 per hour.²³ The Act, however, effectively quashed this ordinance and thereby "depriv[ed] [the plaintiffs] of a significant increase to their hourly wage."²⁴ The plaintiffs, therefore, met the Article III injury requirement because they suffered an economic injury every hour they worked making less than \$10.10.²⁵

Next, the court found that those injuries could be attributed to the state attorney general, thus satisfying the traceability requirement.²⁶ In its reasoning, the court noted that the attorney general has the "*sweeping authority* to interpret, enforce, and defend the laws and interest of the state . . ."²⁷ More importantly, the attorney general has the sole authority to "institute and prosecute, in the name of the state, all civil actions . . . necessary to protect the rights and interests of the state."²⁸ The court acknowledged that if the Birmingham City Council refused to recognize the Act and continued to mandate that all employees working within the city are required to be paid \$10.10 per hour, the attorney general could file suit and "compel compliance."²⁹ In fact, the defendants conceded this point.³⁰ Therefore, the attorney general's authority to implement and enforce the Act creates a causal connection to the plaintiffs injury allowing him/her to be a named defendant.³¹

Finally, an injunction against the attorney general—a named defendant—would redress the plaintiff's injury and grant them necessary relief.³² If the attorney general is unable to enforce the Act, the Birmingham

²⁰ *Lewis II*, 896 F.3d at 1289.

²¹ *Id.*

²² *Id.* at 1290.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Lewis II*, 896 F.3d at 1290.

²⁷ *Id.* (emphasis added).

²⁸ *Id.* (quoting ALA. CODE § 36-15-12).

²⁹ *Id.* at 1290.

³⁰ *Id.*

³¹ *Id.*

³² *Lewis II*, 896 F.3d at 1291.

City's Ordinance would be reinstated and the plaintiffs would benefit from earning a higher rate per hour.³³ Thus, their injury would be redressed.³⁴

Therefore, the court ruled that the plaintiffs in fact have standing to bring their Fourteenth Amendment claims against the attorney general.³⁵

After ruling that the plaintiffs have standing to bring suit, the court addressed the main issue on appeal—whether the plaintiffs Equal Protection claim against the attorney general can survive a Rule 12(b)(6) motion.³⁶ The court began its analysis by noting that the Act is facially neutral and that in order for the plaintiffs to prevail they must prove the facts contained within the complaint plausibly imply a discriminatory impact and a discriminatory intent behind the enactment of the law.³⁷

When looking at the Act's racial impact, the court addressed the disparity between African American and white laborers in the Birmingham area.³⁸ The Act "denied 37% of Birmingham's black wage workers a higher hourly wage, compared to only 27% of white wage workers."³⁹ Moreover, on average, an African American laborer in Birmingham makes \$1.41 less per hour than white laborers, and \$2.12 less per hour compared to white

³³ *Id.*

³⁴ *Id.*

³⁵ *Id.* The plaintiffs also brought Equal Protection claims against the City of Birmingham and the Mayor. *Id.* They argued that the City of Birmingham also violated their Equal Protection rights by not enforcing the Ordinance. *Id.* The court rejected this argument noting that the attorney general could implement the Act by bringing suit against the city. *Id.* Bringing suit against the City of Birmingham and the Mayor would "only kick the (wrong) can down the road and leave the plaintiffs subject to the same allegedly discriminatory statute from which they seek relief." *Id.* Therefore, because the plaintiffs' injuries could not be attributed to the City and the Mayor and court action would not redress their injuries, the plaintiffs lacked Article III standing. *Lewis II*, 896 F.3d at 1291. The City and the Mayor were dismissed from the suit. *Id.*

³⁶ *Id.* at 1294. Again, there were other claims the court addressed after deciding the jurisdiction disputes. The plaintiffs also brought a political-process claim under the Equal Protection Clause arguing that the Act "transfer[ed] control from the majority-black Birmingham City Council to the majority-white Alabama Legislature," disallowing them from participating in politics within the Birmingham community. *Id.* at 1297. The court rejected this argument noting that prior Supreme Court precedent regarding the political-process doctrine recently was called into question and that it should only be applied to situation in which "the state action in question . . . had the serious risk, if not purpose, of causing specific injuries on account of race." *Id.* (quoting *Schuette v. Coalition to Defend Affirmative Action*, 572 U.S. 291, 305 (2014)). Because the Act affects both African Americans and white workers the same and does not affect serious racial harms as the theory intends, the court dismissed the plaintiffs political-process claims. *Lewis II*, 896 F.3d at 1298.

The court also dismissed the plaintiffs Fifteenth Amendment and Voting Rights Claims. *Id.* at 1299. Simply put, the court held the plaintiff's claims could not survive a 12(b)(6) motion because their allegations "have nothing to do with voting." *Id.* at 1298.

³⁷ *Id.* at 1294.

³⁸ *Id.*

³⁹ *Id.*

laborers statewide.⁴⁰ Not to mention that it affected nearly 40,000 laborers, mostly comprised of African Americans.⁴¹ The defense, however, argued that these numbers were just “cherry picked” and there is no discriminatory impact of the Act because it applies statewide to all laborers of all races.⁴² The court flat out rejected this argument noting that this completely ignores the plaintiffs allegations and statistics that make the basis of the suit.⁴³ That the legislature promulgated the Act in direct response to the Birmingham Ordinance seeking to increase the minimum wage above the federal floor for its laborers within the city.⁴⁴ The plaintiffs, therefore, sufficiently pled a plausible allegation in their complaint that the Act had a discriminatory impact.⁴⁵

The plaintiffs also sufficiently pled plausible claims that the Act had a discriminatory intent.⁴⁶ Factors the court will consider when determining whether a facially neutral law has a discriminatory intent are: the “historical background of the decision; the specific sequence of events leading up to the challenged law; departures from substantive and procedural norms; and legislative or administrative history.”⁴⁷

The court found that the plaintiffs put forth sufficient evidence, detailing Alabama’s history of “imped[ing] the efforts of its black citizens to achieve social and economic equality.”⁴⁸ The plaintiffs not only discussed Alabama’s longstanding civil rights history of power stripping African American, but also discussed events in recent memory that had racial implications, events such as the 2015 reconstruction of the Birmingham Water Works Board, the 2010 and 2012 political redistricting plan, and the 2011 immigration law.⁴⁹ All these events sufficiently show the historical implications behind the Act.⁵⁰

Moreover, the specific sequence of events, the departure from substantive and procedural norms, and the administrative history are all sufficiently pled to plausibly show a discriminatory intent and defeat a 12(b)(6) motion.⁵¹ This is shown by the legislature’s actions of responding to the Birmingham City Ordinance by introducing the Act within a week after “fail[ing] to take any action to establish a statewide minimum wage law and

⁴⁰ *Lewis II*, 896 F.3d at 1294.

⁴¹ *Id.* at 1295.

⁴² *Id.*

⁴³ *Id.*

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Lewis II*, 896 F.3d at 1297.

⁴⁷ *Id.* at 1294 (quoting *Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977)) (internal quotes omitted).

⁴⁸ *Lewis II*, 896 F.3d at 1295.

⁴⁹ *Id.*

⁵⁰ *Lewis II*, 896 F.3d at 1296.

⁵¹ *Id.* at 1295.

had [] been indifferent to efforts to establish such a law” in the past.⁵² Additionally, the representative who introduced the Act hails from Alabama’s least diverse area, all white representatives and senators voted in favor of the bill while none of their African American counterparts did, and the Act flew through the legislative process in just sixteen days.⁵³

The court concluded by reversing the district court, allowing the plaintiffs suit on their Equal Protection claims to go forward against the attorney general.⁵⁴ Although the plaintiffs might not prevail in their suit, this ruling grants them their constitutional right to try.⁵⁵ As Christine Owens from the National Employment Law Project states, “[t]he court’s decision should put state legislatures around the country on notice.”⁵⁶

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.* at 1297.

⁵⁵ Ivana Hrynkiw, *Dismissal of Lawsuit Over Birmingham’s Minimum Wage Reversed by Appeals Court*, AL.COM (July 25, 2018), https://www.al.com/news/birmingham/index.ssf/2018/07/appeals_court_sends_lawsuit_on.html.

⁵⁶ *Id.*