

Tax Law—Retired Tenured Professors’ Early Retirement Plan Compensation Subject to Federal Insurance Contributions Act Taxation—*University of Pittsburgh v. United States*, 507 F.3d 165 (3d Cir. 2007)

The Federal Insurance Contributions Act (FICA) funds a national system of old age, survivors, disability, and hospital insurance, commonly known as social security and Medicare.¹ To achieve its purpose, FICA imposes a tax on both employers and employees at a level corresponding to a percentage of the employee’s wages.² In *University of Pittsburgh v. United States*,³ the United States Court of Appeals for the Third Circuit considered whether the payments of the University of Pittsburgh (University) pursuant to an early retirement plan (ERP) for its tenured professors constitute taxable “wages” under FICA.⁴ The Third Circuit held that FICA taxation applies to ERPs because such benefits are compensation for services and thus constitute wages.⁵

From 1989 and 1999, the University implemented early retirement plans for the benefit of tenured professors and members of the administration.⁶ The ERPs enabled the University to offer competitive compensation packages to

1. See Social Security Act Amendment of 1939, Pub. L. No. 76-379, § 1432, 53 Stat. 1360, 1387 (codified as amended at 26 U.S.C. §§ 3101-3128 (2002)) (launching program funding federal insurance for disabled and elderly persons); 26 U.S.C. § 3101(a) (establishing tax to fund national old-age, survivors, and disability insurance); 26 U.S.C. § 3101(b) (imposing tax to finance hospital insurance of FICA); see also Jeffrey C. Honaker, Note, *United States v. Cleveland Indians: FICA and FUTA Taxes v. The Social Security Act – Why Have Different Definitions for Identical Language?*, 17 AKRON TAX J. 99, 102 n.22 (2002) (explaining how public commonly refers to FICA). FICA resembles the concept of insurance premiums because it provides future benefits in exchange for present payments. See *Temple Univ. v. United States*, 769 F.2d 126, 130 (3d Cir. 1985) (explaining FICA secures current funds to replace income of retired or disabled individuals); Nancy J. Altman, *Social Security and the Low-Income Worker*, 56 AM. U. L. REV. 1139, 1152 (2007) (characterizing social security as insurance policy).

2. See 26 U.S.C. § 3101(a)-(b) (listing taxation rate for each component of FICA); 5 SOCIAL SECURITY LAW AND PRACTICE § 69:2 (2007) (listing FICA rates from 1974 onward). The current taxation rate for old-age, survivors, and disability insurance is 6.2 percent of wages, and hospital insurance is 1.45 percent. 26 U.S.C. § 3101(a)-(b). FICA requires employers to match the tax contributions of the employee. 26 U.S.C. § 3111(a), (b); 13 EMPLOYMENT COORDINATOR PERSONNEL MANUAL § 9:27 (2008) (detailing employer’s obligations under FICA’s withholding procedures). FICA requires the employer to collect the tax from its employees. 26 U.S.C. § 3102(a).

3. 507 F.3d 165 (3d Cir. 2007).

4. *Id.* at 166 (addressing whether FICA taxation applies to premature retirement plan benefits).

5. *Id.* at 171 (providing court’s holding).

6. *Id.* at 166 (describing programs granting certain employees right to retire before mandatory age). From 1982 to 1999, the University offered five plans that enabled selected members to retire prematurely. *Id.* The first four plans applied to eligible employees between the ages of sixty-two and sixty-eight who had served the institution for at least ten years. *Id.* The fifth plan offered a similar retirement opportunity to those eligible members that were at least sixty years old and had served at least twelve years, or to those participants whose age and service totaled a minimum of eighty-five years. *Id.*

new faculty and provide flexible retirement options to its existing faculty.⁷ Under these plans, the University would compensate participants who chose early retirement with an amount correlating to the participant's salary at retirement and length of service to the institution.⁸ As a condition of receiving this compensation, the University required all faculty participants to relinquish their tenure rights.⁹ Tenure immunized faculty from termination without cause.¹⁰

From 1996 to 2001, the University paid more than \$2 million in taxes on ERP payments to its tenured faculty.¹¹ In 2001, the University requested a full refund; the Internal Revenue Service (IRS) denied the request.¹² In October 2004, the University responded by filing suit against the IRS in the United States District Court for the Western District of Pennsylvania.¹³ The district court granted the University's motion for summary judgment, concluding that the payments it made pursuant to the ERPs did not constitute wages and therefore were not subject to FICA taxation.¹⁴ The district court ordered the IRS to refund \$2,088,358 to the University.¹⁵ On appeal by the government, the Third Circuit reversed, holding ERP payments that require relinquishment

7. 507 F.3d at 172 (explaining University's motivation in creating early retirement opportunities). The University also viewed these plans as part of a compensation package that equaled those of competing institutions. *See id.*

8. *Id.* at 166 (providing details of ERPs). Each plan participant would "execute an irrevocable" Contract for Participation before enrolling in the program. *Id.*

9. *Id.* (summarizing plan's conditions). The University regards tenure as a "status accorded to members of the University faculty who have demonstrated high ability and achievement in their dedication to growth of human knowledge." *Id.* at 166 (emphasis omitted). At all pertinent times, the University had a seven-year tenure track for its faculty. *Id.* When this seven-year period expired, the faculty member either earned academic tenure or the University terminated his employment. *Id.* The power to grant or deny tenure rested with the University's Chancellor and Chief Executive. *Id.*

10. *Id.* at 166 (outlining tenured faculty privileges). Absent cause, the University could terminate a tenured professor if fiscal exigency demanded it. *Id.*

11. 507 F.3d at 166 (describing total amount University paid in FICA taxes from 1996 to 2001).

12. *Id.* (tracing origins of dispute from which litigation ensued). The University sought a refund of \$2,196,942, which included portions of taxes employees had paid individually because they allowed the University to act on their behalf. *Id.* at 167. The University believed early retirement benefits paid out to tenured faculty did not constitute "wages" for FICA purposes. *Id.* at 166-67. Rather, the University claimed these payments reflected a "buy-out." *Id.* at 166.

13. *Id.* at 166 (discussing procedural history). The district courts exercise original jurisdiction over suits for tax refund. *See* 28 U.S.C. § 1346(a)(1) (2002) (establishing district court jurisdiction in civil tax lawsuits); *see also* 26 U.S.C. § 6532(a)(1) (2002) (instituting timing requirements in civil actions for tax refund). Initially, the University filed two separate complaints with the district court. 507 F.3d at 166 n.2. The first complaint sought a refund for the years 1996 to 2000, and the second complaint sought a refund for the year 2001. *Id.* The district court consolidated the cases. *Id.*

14. 507 F.3d at 167 (stating lower court's decision on parties' cross-motions for summary judgment). The district court referred the motions to a magistrate judge who recommended that the court not view ERP payments to tenured faculty as wages. *Id.* Conversely, the magistrate judge suggested that ERP payments to non-tenured librarians constitute wages and are thus taxable under FICA. *Id.* The district court judge adopted the magistrate's report in its entirety, and granted and denied in part the parties' cross-motions. *Id.*

15. *Id.* at 167 (noting district court's judgment). The court also awarded statutory interest to the University. *Id.*

of tenure status constitute wages under FICA.¹⁶

Congress intended that FICA taxation apply to a wide range of payments arising from the employment relationship.¹⁷ The financial backbone of FICA is wages, which Congress defined as “all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash.”¹⁸ The Supreme Court has construed the word “employment” to encompass the “entire employer-employee relationship for which compensation is paid to the employee by the employer.”¹⁹ Although the term “wages” comprises all compensation earned while at the service of another, wages do not necessarily include all income that one secures from his employment.²⁰ In assessing whether certain payments constitute FICA wages, courts consider the employer’s method for calculating payments, the employer’s motivation in awarding the benefits, the employee’s eligibility for earning the compensation, and the nature of the employment relationship giving rise to the remunerations.²¹ Applying these factors, courts have interpreted wages to include back pay, early-out payments, reduction-in-force compensation, supplemental unemployment benefits, and ERISA settlement payments.²²

16. *Id.* at 166 (vacating lower court’s decision and remanding for order favoring government).

17. *See, e.g.,* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 365-66 (1946) (suggesting FICA relies on broad taxable base); Appoloni v. United States, 450 F.3d 185, 190 (6th Cir. 2006) (inferring broad applicability necessary for FICA’s remedial aspects to function); Assoc. Elec. Coop., Inc. v. United States, 226 F.3d 1322, 1326 (Fed. Cir. 2000) (stating FICA constitutes broad taxation law).

18. 26 U.S.C. § 3121(a) (2002) (implementing broad definition of “wages”); *see also* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 361 (1946) (explaining wages fund FICA); Treas. Reg. §§ 31.3121(a)-1(c) (2002) (explaining forms of remuneration to which FICA does and does not apply). Further, FICA defines “employment” as “any service, of whatever nature, performed by an employee for the person employing him. 26 U.S.C. § 3121(b). Generally, an “employee” is a person who “performs services for remuneration for any person.” 26 U.S.C. § 3121; *see generally* 37 A.L.R. FED. 95, § 1[c] (2007) (summarizing definition of key FICA terms).

19. Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 365-66 (1946) (elaborating on meaning of “employment”).

20. Rowan Co. v. United States, 452 U.S. 247, 249 n.4 (1981) (assembling pertinent statutory provision to deduce narrow definition of “wages”); Cent. Ill. Pub. Serv. Co. v. United States, 435 U.S. 21, 31 (1978) (refusing to equate “wages” and “income” for withholding purposes). “Wages” is a more restricted concept than “income.” Rowan Co. v. United States, 452 U.S. 247, 254 (1981). Not all income is subject to FICA taxation as wages. *See* Cent. Ill. Pub. Serv. Co. v. United States, 435 U.S. 21, 31 (1978); Gerbec v. United States, 164 F.3d 1015, 1026 n.14 (6th Cir. 1999).

21. *See* Rowan Co. v. United States, 452 U.S. 247, 248, 263 (1981) (concluding meal benefits do not constitute wages because employer motivated to cut costs, not provide service); Appoloni v. United States, 450 F.3d 185, 191 (6th Cir. 2006) (reasoning plan’s eligibility requirements established payments pursuant thereto taxable as wages under FICA); N.D. State Univ. v. United States, 255 F.3d 599, 606 (8th Cir. 2001) (distinguishing tenured and at-will employment in deciding whether early retirement payments constitute wages); Assoc. Elec. Coop., Inc. v. United States, 226 F.3d 1322, 1328 (Fed. Cir. 2000) (calling calculation method pertinent to determining whether payments constitute wages).

22. *See* Soc. Sec. Bd. v. Nierotko, 327 U.S. 358, 364 (1946) (holding back pay as part of award from wrongful termination constitutes wages); Assoc. Elec. Coop., Inc. v. United States, 226 F.3d 1322, 1328 (Fed. Cir. 2000) (holding severance payments pursuant to voluntary “early-out” plans taxable as wages); Hemelt v. United States, 122 F.3d 204, 210 (4th Cir. 1997) (concluding settlement payments arising out of ERISA claims fall within FICA’s definition of wages); Sheet Metal Workers Loc. 141 Supplemental Unemployment Benefit Trust Fund v. United States, 64 F.3d 245, 251 (6th Cir. 1995) (deciding supplemental unemployment benefits

In addition to judicial guidance, the IRS, through its revenue rulings, sheds light on the definition of wages as it pertains to FICA taxation.²³ In Revenue Ruling 58-301, the IRS advised that an employer's payment to an employee to secure a mutual nullification of a multi-year employment contract does not constitute wages for FICA purposes.²⁴ On the other hand, in subsequent Revenue Ruling 75-44, the IRS determined that employer payments are taxable as wages when offered to induce an employee to waive seniority rights earned under a general, but indefinite, employment contract.²⁵ The IRS distinguished Revenue Ruling 75-44 from Revenue Ruling 58-301 in that the former concerned payment for relinquishment of rights, whereas the latter involved compensation for canceling an original agreement.²⁶ Recently, in Revenue Ruling 2004-110, the IRS has expressly indicated that it would not follow Revenue Ruling 58-301 after January 2005 and would consider as wages those payments that an employer offers to induce an employee to relinquish his contractual rights.²⁷

In recent years, a circuit split has developed on whether FICA taxation applies to payments inducing tenured college professors to retire prematurely.²⁸

constitute wages because receipt of such payment depended on past services); *CSX Corp. v. United States*, 52 Fed. Cl. 208, 220-21 (2002) (holding payments employees received upon enrolling voluntarily in reduction-in-force program subject to FICA taxation). Additionally, fees, bonuses, and commissions may constitute wages if the employer includes them in employees' compensation. *See* Treas. Reg. § 31.3121(a)-(c). Conversely, courts have ruled that meal and lodging perquisites, reimbursement for travel expenses, and interest on settlement payouts are not subject to FICA taxation. *See* *Rowan Co. v. United States*, 452 U.S. 247, 263 (1981) (holding room-and-board benefits outside scope of FICA wages); *Cent. Ill. Pub. Serv. Co. v. United States*, 435 U.S. 21, 33 (1978) (holding reimbursement for lunches employees consumed during work travel does not constitute wages); *Hemelt v. United States*, 122 F.3d 204, 210 (4th Cir. 1997) (interpreting "wages" to possibly exclude interest paid on settlement award).

23. *See infra* notes 24-27 (outlining revenue rulings on applicability of FICA taxation); *see also* *United States v. Mead Corp.*, 533 U.S. 218, 234-35 (2001) (holding courts may defer to agency rulings). A revenue ruling's persuasiveness depends on whether the IRS considered the issue thoroughly, used rational reasoning in support of its decision, and applied principles from previous rulings consistently. *Id.* at 228. Courts, however, may disregard revenue rulings if they contradict the statute or arrive at an unreasonable result. *See* *Geisinger Health Plan v. Comm'r*, 985 F.2d 1210, 1216 (3d Cir. 1993).

24. Rev. Rul. 58-301, 1958-1 C.B. 23 (issuing administrative opinion on applicability of FICA to payments pursuant to contract cancellation). Employer and employee agreed to terminate the remaining three years of a five-year employment contract in exchange for a lump-sum payment to the employee. *Id.* The IRS noted that such payment is income, but failed to categorize it as wages. *Id.*

25. Rev. Rul. 75-44, 1975-1 C.B. 15 (considering FICA applicability to payments for relinquishment of seniority). This ruling involved a general contract of employment entitling a railroad employee to seniority rights and other benefits. *Id.* Upon proposal of the employer, the employee agreed to change job positions and surrender the seniority rights he had attained previously. *Id.* The employer paid a lump-sum amount in return. *Id.*

26. Rev. Rul. 75-44, 1975-1 C.B. 15 (limiting applicability of Revenue Ruling 58-301). The IRS noted that in Revenue Ruling 58-301, both employer and employee owed obligations to one another. *Id.* Conversely, in Revenue Ruling 75-44, the employment relationship was of an indefinite nature that each party could terminate. *Id.*

27. *See* Rev. Rul. 2004-110, 2004-2 C.B. 960 (refusing to apply Revenue Ruling 58-301 to similar scenarios occurring after 2005).

28. *Compare* *N.D. State Univ. v. United States*, 255 F.3d 599, 607 (8th Cir. 2001) (holding compensation

The two circuits that have addressed the issue rely extensively on Revenue Ruling 58-301 and 75-44, and their opposing positions center on whether tenure redemption payments represent property-right sales, placing them outside FICA's reach, or whether they constitute taxable wages.²⁹ In *North Dakota State University v. United States*,³⁰ the Eighth Circuit held that, like in Revenue Ruling 58-301, payments to achieve tenure redemption are not wages because they further the sale of a property interest.³¹ The court resisted likening the case to Revenue Ruling 75-44 because tenure is more than an award for past services; it is primarily a new employment relationship that commences upon its granting.³² Alternatively, the Sixth Circuit in *Appoloni v. United States*³³ held payments for the relinquishment of tenure privileges constitute wages because tenure is a benefit employees earn through past service, similar to the seniority rights in Revenue Ruling 75-44.³⁴ The court

intended to convert tenure rights exempt from wages definition), *with Appoloni v. United States*, 450 F.3d 185, 187 (6th Cir. 2006) (ruling compensation for relinquishment of statutorily earned tenure constitutes wages for FICA purposes). A federal district court also addressed this issue, concluding that severance payments to tenured professors are not wages. *See Slotta v. Tex. A&M Univ. Sys.*, No. G-93-92, 1994 U.S. Dist. LEXIS 21205, at *4-*5 (S.D. Tex. Aug. 9, 1994). In *Slotta*, the court held that payments to purchase a college professor's tenure rights were not subject to FICA because they enticed future employment and could not be considered as benefits incurred for past service. *Id.* at *2-*6. Tenure rights are interests in property protected by the Fourteenth Amendment's requirement of due process. *See Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 576-77 (1972); *McDaniel v. Flick*, 59 F.3d 446, 454 (3d Cir. 1995). Officials from institutions of higher education characterize tenure as guaranteed employment until retirement age. Ralph S. Brown & Jordan E. Kurkland, *Academic Tenure and Academic Freedom*, 53 LAW & CONTEMP. PROBS. 325, 325 (1990) (citing university executive). Tenure ensures professional freedom. *See id.* at 326. This academic freedom, however, comes at a very high cost for institutions. *See id.* at 331. Additionally, tenure leads to inactivity and academic forbearance on some faculty members. *See id.* at 331-32.

29. *See* Jon J. Jensen, *Reducing the Employment Tax Burden on Tenure Buyouts*, 80 N.D. L. REV. 11, 11 (2004) (articulating disagreement over whether tenure redemption payments represent wages or property right purchases); *supra* note 23 and accompanying text (reviewing conditions upon which courts may use revenue rulings to support their decisions). *Compare* *N.D. State Univ. v. United States*, 255 F.3d 599, 607 (8th Cir. 2001) (holding tenure conversion payment differs from wages because it represents property right purchase, not remuneration), *with Appoloni v. United States*, 450 F.3d 185, 192-93 (6th Cir. 2006) (determining wages include tenure redemption payments because employer used them as severance package).

30. 255 F.3d 599 (8th Cir. 2001).

31. *N.D. State Univ. v. United States*, 255 F.3d 599, 607 (8th Cir. 2001) (providing case's holding). The court analogized the case to Revenue Ruling 58-301 because the professors gave up a benefit in contract, that of continued employment absent cause. *Id.*; *see also* Jensen, *supra* note 29, at 20-40 (reviewing *North Dakota State University* decision and arguing Eighth Circuit's holding correct in light of other authority). The plan further conditioned that the participants would relinquish their statutory tenure. *N.D. State Univ. v. United States*, 255 F.3d 599, 607 (8th Cir. 2001).

32. *N.D. State Univ. v. United States*, 255 F.3d 599, 605-06 (8th Cir. 2001) (dismissing government's argument institution awards tenure to reward longevity). *But see* Heather L. Turner, Note, *Disparate Treatment of University Administrators' and Tenured Faculty Members' Early Retirement Payments for FICA Taxation: North Dakota State University v. United States*, 54 TAX LAW. 233, 238-39 (2000) (criticizing district court's failure, which Circuit Court adopted, to apply Revenue Ruling 75-44).

33. 450 F.3d 185 (6th Cir. 2006).

34. *See Appoloni v. United States*, 450 F.3d 185, 187, 194 (6th Cir. 2006) (holding compensation for tenure buy-out constitutes wages not unlike other severance payments). *But see id.* at 200-02 (Griffin, J., dissenting) (arguing payments constituted distinct and separate consideration for tenure redemption, not

determined that the school's motivation in approving the compensation package was to induce retirement, not to buy out tenure; hence, tenure conversion was incidental to the plan, not its principal purpose, and therefore constituted wages subject to FICA.³⁵

In *University of Pittsburgh v. United States*, the Third Circuit determined that the University's ERP payments, for which faculty participants relinquished their tenure privileges, were wages subject to FICA taxation.³⁶ After reviewing the current circuit split and the applicable revenue rulings, the court accepted the Sixth Circuit's view as the more reasonable interpretation.³⁷ First, the court reasoned that eligibility for participation in the ERPs depended heavily on the employees' years of prior service, not tenure relinquishment.³⁸ The court buttressed its position that the ERP payments were wages by highlighting portions of the plans wherein the University treated the payments as compensation.³⁹ The court also determined that the University's partial motivation in redeeming tenure rights did not outweigh the plan's principal purpose of providing early retirement opportunities.⁴⁰ Lastly, the court

remuneration). *Appoloni* involved the buy-out of statutorily granted tenure of public-school teachers. *See id.* at 187-88 (majority opinion). In Michigan, public-school teachers automatically earned tenure upon completion of a probationary period, and the state board of education considered nothing else when granting tenure. *See id.* The court stated that "[t]enure rights were previously paid in kind—job security—and now are being paid in cash." *Id.*

35. *See Appoloni v. United States*, 450 F.3d 185, 187, 193 (6th Cir. 2006) (reasoning tenure redemption only tangential part of buy-out). The court added that severance packages typically involve some loss for the employee. *Id.* at 193. The court refused to differentiate relinquishment of tenure rights from those other benefits employees gain through prior service. *Id.* Finally, the court distinguished *North Dakota State University* because that case involved tenure that employees did not earn automatically. *Id.* at 195 n.5.

36. 507 F.3d at 174 (stating holding and disposition of case). The court concluded that tenure is a benefit in recognition of past service to the University. *Id.* Similarly, the payments offered to redeem these benefits are substitutes of the compensation that the University made to its tenured staff for their past contributions. *Id.* This decision was not unanimous. *See id.* at 175-78 (Scirica, J., dissenting).

37. *Id.* at 170-71 (majority opinion) (observing differing approaches of circuits that ruled on issue at bar). The Third Circuit agreed with the Sixth Circuit's reasoning in that it could not distinguish tenure relinquishment payments from other severance packages requiring waiver of rights. *Id.* at 172-73.

38. *See id.* at 171-72 (linking eligibility to past service, not tenure). In support, the court pointed out that both tenured and non-tenured employees were eligible for ERP benefits. *Id.* The court further distinguished this case from *North Dakota State University* because in that case eligibility for participation in ERPs was based on factors other than past service and age. *Id.* at 172 n.9. Conversely, the University only relied on past service even though it could have applied other eligibility factors. *Id.* *But see id.* at 176 (Scirica, J., dissenting) (asserting University relied primarily on tenure relinquishment, not on rewarding past service).

39. *See id.* at 172 (evaluating ERP language). The court noted that all ERPs contained language demonstrating that the University created these rewards to boost marketability of its compensation packages. *Id.*

40. 507 F.3d at 172 (suggesting ERPs mainly furthered goal of bestowing retirement benefits). The court equated the ERP payments with other severance packages that constitute FICA "wages" that employers offer as part of termination. *Id.* The court agreed with *Appoloni* in refusing to distinguish these payments from typical severance packages simply because the former involved tenure rights. *Id.* Both forms of compensation replace value employees earned through past service. *Id.* at 173. The court placed no significance on the distinction between severance-package cases involving at-will employment and tenure cases involving employment where termination was subject to due process. *Id.* Hence, the court determined Revenue Ruling 75-44 to be most

disagreed that Revenue Ruling 58-301 applied to this situation because, in its opinion, tenure does not mark the beginning of an entirely new employment relationship.⁴¹

The Third Circuit correctly held that ERP payments professors receive in exchange for tenure constitute wages to which FICA taxation applies.⁴² In so concluding, the court appropriately applied the factors that courts often use in determining whether a payment for services constitutes wages.⁴³ First, the contested ERP payments qualified as wages because eligibility hinged on the participant's continuous employment with the University, not on the employee's ability to provide something of value to the University.⁴⁴ Second, the court rightfully reasoned that the University offered the ERPs to strengthen its recruitment by providing attractive compensation, rather than by purchasing the existing faculty's property interest in its tenure.⁴⁵ Third, the court justly pointed out that the University calculated ERP payments, which were also available to non-tenured staff, based on a combination of years of service and the participant's age.⁴⁶ Lastly, the court reviewed the nature of the employment

applicable to the case at bar. *Id.*

41. *Id.* at 173 (refusing to extend applicability of Revenue Ruling 58-301 to present facts). The court stated that tenure is "more like a promotion than an entirely new contract" of the kind present in Revenue Ruling 58-301. *Id.* The fact remains, noted the court, that past performance to the University is pivotal in deciding whether to grant tenure. *Id.* at 174.

42. *See id.* at 174 (deciding ERP payments in exchange for surrender of tenure subject to FICA taxation); *infra* notes 43-50 and accompanying text (detailing support for court's decision).

43. *See* 507 F.3d at 171-74 (outlining court's reasoning); *infra* notes 43-46 and accompanying text (asserting court's analysis of ERP eligibility, motivation, and calculation method show payments as FICA wages); *see also supra* note 21 and accompanying text (describing factors courts use in determining whether payments to employees constitute wages).

44. *See* 507 F.3d at 166 (describing ERP eligibility required minimum number of years of employment with the University); *Sheet Metal Workers Loc. 141 Supplemental Unemployment Trust Fund v. United States*, 64 F.3d 245, 251 (6th Cir. 1995) (considering supplemental unemployment payment wages because eligibility mandated continued employment).

45. *See* 507 F.3d at 174-75 (concluding University primarily concerned with recognizing past service); *see also Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 364-65 (1946) (holding "back-pay" constitutes wage because employer made payment as compensation for employee's wage loss); *Appoloni v. United States*, 450 F.3d 185, 192 (6th Cir. 2006) (deciding early retirement benefits constitute wages because employer paid benefit to recognize past service); *cf. Rowan Co. v. United States*, 452 U.S. 247, 263 (1981) (concluding meal benefits do not constitute wages because employer provided them for its own convenience). The University's own brochures indicated that the ERPs provided competitive compensation packages and flexibility in retirement plans. 507 F.3d at 172. This demonstrates that the University offered the plans before a professor's tenure dream ripened into reality. *See id.* The University therefore could not have implemented them with the motive of purchasing a property right—as the dissent and *North Dakota State University* claim—because that interest had not yet vested. *See id.* Thus, the ERP payments are wages because they do not constitute consideration in the purchase of a property right. *See Appoloni v. United States*, 450 F.3d 185, 187, 194 (6th Cir. 2006) (holding property-right loss due to tenure conversion only incidental to motive for establishing ERPs).

46. *See* 507 F.3d at 166 (reviewing ERP eligibility to conclude participants must have served University previously). The University calculated plan benefits according to the participant's prior service to the University. *See id.* For instance, the ERP participant's benefits depended upon whether he or she had been in the University's employ for a minimum of ten or twelve years. *See id.* This therefore demonstrates that the payments are wages because prior service is inherent in the method of calculation. *See Assoc. Elec. Coop., Inc.*

relationship and properly dismissed the argument that tenure marks a new job association.⁴⁷

The court's classification of ERP payments as FICA wages is consistent with the prevailing weight of authority.⁴⁸ First, the court's characterization of ERP payments as wages adheres to the notion that FICA taxation applies to a wide range of service remunerations.⁴⁹ Second, the court accurately highlighted that courts generally define wages broadly.⁵⁰ Additionally, the court correctly explained the IRS rulings favor its decision to find ERP payments as wages by likening them to lost seniority status in similar scenarios.⁵¹ More importantly, the court appropriately treated tenure as identical to any other rights that employees forego when entering into retirement or severance agreements.⁵²

Notwithstanding this case's correct outcome, other circuits that address this issue in the future may arrive at a different result.⁵³ First, neither the Third Circuit nor the *Appoloni* court rebutted satisfactorily the argument that tenure is costly to universities, and perhaps the only motivation for offering ERPs is cost relief, not recognition for past service.⁵⁴ These courts apparently side-stepped the argument that the term "wage" is not as encompassing as "income."⁵⁵

v. United States, 226 F.3d 1322, 1328-29 (Fed. Cir. 2000) (holding lay-off payments calculated by service as represented by salary earned constitute wages); *supra* notes 18-19 and accompanying text (providing FICA provisions that define wages as compensation earned while at service of another).

47. See 507 F.3d at 173 (concluding tenure constitutes continuation of previous employment, albeit it at better terms); see also *Appoloni v. United States*, 450 F.3d 185, 187, 192-93 (6th Cir. 2006) (refusing to distinguish tenure from other rights earned through continuous employment).

48. See *infra* notes 49-51 and accompanying text (arguing FICA purpose, case law, and IRS rulings favor treating ERP payments as wages).

49. See *supra* notes 1-2 and accompanying text (emphasizing FICA's importance); *supra* notes 17-18 and accompanying text (demonstrating Congress's expectation that FICA applies to broad range of compensation); see also *supra* note 21 and accompanying text (listing wide variety of payment items that courts construed as FICA wages).

50. See 507 F.3d at 168 (acknowledging Court's broad interpretation of employment, and in turn, wages); see also *Soc. Sec. Bd. v. Nierotko*, 327 U.S. 358, 365-66 (1946) (inferring wages over-inclusive because remuneration for service receives broad coverage under FICA); *Assoc. Elec. Coop., Inc. v. United States*, 226 F.3d 1322, 1327 (Fed. Cir. 2000) (determining courts must construe wages broadly); *supra* note 24 and accompanying text (listing wide variety of payment items courts have construed as FICA wages).

51. See 507 F.3d at 173 (finding close comparison to Revenue Ruling 75-44, holding severance payments constitute wages); see also *Appoloni v. United States*, 450 F.3d 185, 187, 194 (6th Cir. 2006) (likening tenure relinquishment to any loss inherent in severance agreements); *Turner*, *supra* note 32, at 238-39 (arguing tenure waiver incidental to agreement and analogous to other privileges lost in employment contracts).

52. See *supra* note 50 and accompanying text (regarding tenure loss as seniority loss in severance package).

53. See *infra* notes 54-56 and accompanying text (discussing arguments opposing present decision and pointing out shortcomings of Third Circuit's reasoning).

54. See *supra* note 28 (explaining high costs schools incur from granting tenure). In the present case, the Third Circuit could easily dispose of this argument because University policy clearly stated that the ERPs were recruiting tools. See 507 F.3d at 172.

55. See 507 F.3d at 166-74 (failing to address whether distinction between income and wage plays role in defining latter term); *Appoloni v. United States*, 450 F.3d 185, 185-95 (6th Cir. 2006) (overlooking income-wage distinction in analyzing definition of wages); see also *supra* note 20 and accompanying text (describing

Other courts, however, may face a scenario where an institution implements an ERP simply to cut its losses, thus necessitating a different result because the payments would not be in contemplation of services.⁵⁶ Another reason why other circuits may rule differently is the fervor with which this issue was debated in the prior opinions, seemingly drawing an even split.⁵⁷ Finally, other courts may defer less to revenue rulings—which were instrumental to the Third Circuit’s conclusion—because they are only persuasive authority.⁵⁸

In *University of Pittsburgh v. United States*, the Third Circuit held that FICA taxation applies to payments that professors receive pursuant to an ERP requiring them to relinquish their tenure rights. This ruling adopts the reasoning of the Sixth Circuit in *Appoloni* and recent revenue rulings and rejects the Eighth Circuit’s approach in *North Dakota State University*. In refusing to limit FICA’s reach, the court’s decision helps sustain the funding that is necessary to the proper functioning of this national system of insurance that has been so crucial to its beneficiaries.

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courts’ understanding that wages constitute narrower concept than income). Future courts may rely on this distinction to conclude that “wages” is a narrow term that should exclude tenure redemption payments. *See supra* note 20 and accompanying text. Clearly, the ERP payments would include income, but that alone does not make them wages. *Id.*

56. *Cf. Rowan Co. v. United States*, 452 U.S. 247, 263 (1981) (holding lunch and lodging benefits not wages because employer provided them to reduce operational costs).

57. *See supra* notes 24-27 (describing pertinent revenue rulings and their contradictory outcomes); *supra* notes 32-35 (noting analysis of *North Dakota State University* and *Slotta* contrary to *Appoloni*); *supra* note 35 (outlining dissenting opinion of Third Circuit judge in present case).

58. *See United States v. Mead Corp.*, 533 U.S. 218, 227-28 (2001) (stating courts may consider revenue rulings if sufficiently persuasive).