Lynch also is not entitled to summary judgment on this claim on the basis of qualified immunity. Genuine issues of material fact exist as to whether Lynch had probable cause to arrest Curry for any reason prior to the struggle between Lynch and Curry when Curry resisted arrest. Lynch, the moving party, has not established that no genuine issue of material fact exists as to whether he reasonably believed that he had probable cause to arrest Curry for a crime. Accordingly, summary judgment on this claim should be denied.

CONCLUSION

We affirm the district court's award of summary judgment to Syracuse on all claims. We conclude that genuine issues of material fact exist as to whether Lynch used excessive force in effecting the arrest of Curry, and as to whether Lynch had probable cause to arrest Curry for possession of a controlled substance and/or resisting arrest. We further conclude that Lynch has not established that he is entitled to summary judgment on the basis of qualified immunity on any of Curry's claims. Therefore, we vacate the district court's grant of summary judgment as to the plaintiff's 42 U.S.C. § 1983 claims against Lynch and remand this case for further proceedings. We also vacate the district court's dismissal of Curry's pendent state law claims and direct the district court to reinstate those claims for further proceedings.

The parties shall bear their own costs.

force exerted by the police in effecting an arrest is excessive." *Stevenson,* 31 N.Y.2d at 112, 286 N.E.2d at 448, 335 N.Y.S.2d at 56. *See also People v. Branch,* 223 A.D.2d 882, 637 N.Y.S.2d 220 (N.Y.App.Div.1996) (holding that a person cannot be convicted of resisting arrest where the officer was attempting to "secure" the person, pursuant to police department policy, but did not have probable cause at that time to actually arrest the person). Accordingly, even if we were to accord collateral estoppel effect to the ALJ's finding that Curry struck Lynch, Curry's striking Lynch during his struggle with Lynch (and after he was struck in the back of the leg by Lynch's flashlight) would be insufficient to support a finding of probable cause to arrest Curry.

**Rochelle SAKS, Plaintiff–Appellant,**

**v.**

**FRANKLIN COVEY CO. and Franklin Covey Client Sales, Inc., Defendants–Appellees.**

**Docket No. 00–9598.**

United States Court of Appeals, Second Circuit.

Argued Jan. 10, 2002.

Decided Jan. 15, 2003.

Infertile female employee brought action against employer under Americans with Disabilities Act (ADA), Title VII, Pregnancy Discrimination Act, and state law following denial of her claim for benefits under employer's self-insured employee health benefits plan for expenses related to surgical impregnation procedures. On cross-motions for summary judgment, the United States District Court for the Southern District of New York, Colleen McMahon, J., 117 F.Supp.2d 318, granted summary judgment in favor of employer, and employee appealed. The Court of Ap-

and childbearing capacity, rather than fertility alone").

Because the Plan's exclusion of coverage for surgical impregnation procedures limits the infertility procedures covered for male and female employees equally, that exclusion does not violate Title VII.[8]

II. ERISA Preemption

Finally, Saks contends that the district court erred in finding that Franklin Covey had not waived the defense that ERISA preempts Saks's state contract claims where that defense was raised for the first time in Franklin Covey's motion for summary judgment. She also argues that it would be an abuse of discretion for the district court to allow defendants to amend their answer to include the ERISA preemption defense after she filed a motion for summary judgment. In the alternative, for the first time on appeal, she requests leave to amend her complaint to add ERISA claims.

A. Waivability of ERISA Preemption

Four circuits, as well as numerous state courts, have concluded that the defense of ERISA preemption in a benefits-due action may be waived if not timely raised. *See, e.g., Wolf v. Reliance Standard Life Ins. Co.,* 71 F.3d 444, 448–49 (1st Cir.1995) (citing state and federal cases); *Dueringer v. Gen. Am. Life Ins. Co.,* 842 F.2d 127, 129–30 (5th Cir.1988); *Gilchrist v. Jim Slemons Imps., Inc.,* 803 F.2d 1488, 1497 (9th Cir.1986); *Rehab. Rehabilitation Inst. of Pittsburgh v. Equitable Life Assurance Soc'y of the United States,* 131 F.R.D. 99, 101 (W.D.Pa.1990), *aff'd without op.,* 937 F.2d 598 (3d Cir.1991). In *International Longshoremen's Association v. Davis,* the Supreme Court made clear that preemption issues that dictate the choice of forum are jurisdictional and therefore may not be waived, but expressly stated that this rule does not extend to preemption issues that affect the parties' choice of law. *See Davis,* 476 U.S. 380, 390 & n. 9, 398–99, 106 S.Ct. 1904, 90 L.Ed.2d 389 (1986); *see also Wolf,* 71 F.3d at 448; *Gilchrist,* 803 F.2d at 1496–97. The circuits that have addressed the waiver issue have agreed that the converse of the *Davis* rule also holds: Where federal preemption affects only the choice of law, the defense may be waived if not timely raised. *See Wolf,* 71 F.3d at 448; *Piekarski v. Home Owners Sav. Bank, F.S.B.,* 956 F.2d 1484, 1489 (8th Cir.1992); *HECI Exploration Co. v. Holloway (In re: HECI Exploration Co.),* 862 F.2d 513, 521 & n. 13 (5th Cir.1988); *Dueringer,* 842 F.2d at 130; *Gilchrist,* 803 F.2d at 1497; *see also Mauldin v. WorldCom, Inc.,* 263 F.3d 1205, 1211 (10th Cir.2001) (declining to decide whether ERISA or state contract law governs dispute because neither party briefed issue); *Butero v. Royal Maccabees Life Ins. Co.,* 174 F.3d 1207, 1212 (11th Cir.1999) (stating that ERISA preemption can constitute an affirmative defense to certain state law claims). We join our sister circuits in reaching the same conclusion.

**[12]** ERISA's jurisdictional provision governing benefits-due actions provides concurrent jurisdiction in state and federal district courts, *see* 29 U.S.C. § 1132(a)(1)(B), (e)(1), and thus ERISA prescribes the choice of law, not jurisdiction. As a result, we find that ERISA preemption in a benefits-due action is a waivable defense. *See Wolf,* 71 F.3d at 448–49; *Dueringer,* 842 F.2d at 130; *Gilchrist,* 803 F.2d at 1497; *Rehab. Inst.,* 131 F.R.D. at 101. We note that other types of actions under ERISA are subject to the

8. Appellant also appeals the district court's decision on her New York Human Rights Law claim. Because, as she acknowledges, this claim is co-extensive with her Title VII and PDA claims, it must likewise fail.