Employment Discrimination

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The 2005 survey period saw a continuation of the diminished number of *published* decisions by the Eleventh Circuit Court of Appeals in the area of employment discrimination.[1] However, it is interesting to note that the Eleventh Circuit also handed down at least 141 *unpublished* opinions in employment discrimination cases. Accordingly, while this trend may mean that the topic of employment discrimination is still very much alive and well within the Eleventh Circuit, it may also indicate that there are fewer unsettled questions of law in this area. However, this does not mean that the 2005 survey period was insignificant.

In *Smith v. City of Jackson*,[2] the United States Supreme Court resolved once and for all that the disparate-impact theory of relief is available in age discrimination claims pursuant to the Age Discrimination in Employment Act.[3] In addition, the Eleventh Circuit decided several issues of first impression, including whether the Americans with

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1. This Article covers significant cases in the area of employment discrimination law decided by the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit during 2005. Cases arising under the following federal statutes are included: Title VII of the Civil Rights Act of 1964 ("Title VII") (codified as amended at 42 U.S.C. §§ 2000e to 2000e-17 (2000)); the Age Discrimination in Employment Act of 1967 ("ADEA") (codified as amended at 29 U.S.C. §§ 621-634 (2000)); the Americans with Disabilities Act of 1990 ("ADA") (codified as amended at 42 U.S.C. §§ 12101-12113 (2000)); and the Civil Rights Acts of 1866 and 1871 (codified as amended at 42 U.S.C. § 1981 (1994) and 42 U.S.C. § 1983 (2000)).

2. 544 U.S. 228 (2005).

3. *Id.* at 232; 29 U.S.C. §§ 621-634 (2000).

Disabilities Act[4] requires employers to accommodate employees who are merely "regarded as" disabled.[5] The Eleventh Circuit also established under what circumstances a losing plaintiff, as a condition for appealing a judgment, may be required to post a bond on appeal that covers the defendant's anticipated attorney fees.[6]

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Theories of Liability and Burdens of Proof

1. Disparate Treatment

The familiar circumstantial evidence model of proof in Title VII[7] cases was established over twenty years ago by the Supreme Court in *McDonnell Douglas Corp. v. Green.*[8] Under *McDonnell Douglas* and its progeny, the plaintiff bears the initial burden of establishing a prima facie case of discrimination.[9] To rebut this initial showing, the defendant need only articulate a legitimate, non-discriminatory reason for the employer's action.[10] At this stage, the plaintiff then bears the burden of proving that the employer's proffered reason was merely a pretext for discrimination.[11]

a. Prima Facie Case. In *Underwood v. Perry County Commission*,[12] the plaintiff could not even meet the initial *McDonnell Douglas* hurdle.[13] At issue was whether a plaintiff could establish a prima facie case of discrimination in a complaint alleging failure to hire on the basis of gender when the plaintiff failed to establish that a male was hired for the position in question.[14] The plaintiff applied twice for a truck driving position for the Perry County Highway Department in Alabama. Ultimately, the plaintiff was not hired for the position. The evidence revealed that following the plaintiff's applications the County hired three

4. 42 U.S.C. §§ 12101-12113 (2000).
5. D'Angelo v. ConAgra Foods, Inc., 422 F.3d 1220, 1235 (11th Cir. 2005).
6. Young v. New Process Steel, LP, 419 F.3d 1201, 1202 (11th Cir. 2005).
7. 42 U.S.C. §§ 2000e to 2000e-17 (2000).
8. 411 U.S. 792 (1973).
9. *Id*. at 802.
10. Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248, 252 (1981).
11. *McDonnell Douglas*, 411 U.S. at 804; Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 143 (2000).
12. 431 F.3d 788 (11th Cir. 2005).
13. *Id.* at 795.
14. *Id.* at 789.

male truck drivers, but also hired two female truck drivers.[15] The district court granted summary judgment for the County, finding that the plaintiff failed to establish a prima facie case.[16]

On appeal, the Eleventh Circuit affirmed, but for different reasons than those found by the district court. The court of appeals focused on the prima facie element that the plaintiff must prove that "equally or less qualified individuals outside of her protected class were considered or hired for the position."[17] The court concluded that although it was "not necessary that [the plaintiff] name the individual hired by the [defendant,] . . . it [was] necessary that [the plaintiff] present evidence that the favored applicant was male."[18] The only evidence the plaintiff submitted "about gender and the hiring of [the] truck driver" was that "both men and women were hired." The court concluded that this failure was "fatal to [the plaintiff's] complaint of discrimination."[19]

Similarly, in *Morris v. Emory Clinic, Inc.*,[20] the initial prima facie hurdle, although not high, was insurmountable to the plaintiff. The plaintiff was a male obstetrician and gynecologist employed by the Emory University School of Medicine.[21] The plaintiff was ultimately terminated by Emory following a sequence of patient complaints concerning the plaintiff's "forceful physical examinations and off-color remarks he made on the ability of older patients to have children."[22] For instance, one patient complained that the plaintiff told her (after she was examined by him and after she consulted him about pregnancy) "the realities are that you have 42-year-old eggs, which means that it will be difficult for you to get pregnant."[23] Furthermore, the patient complained that the plaintiff seemed to have "an underlying resentment of women who chose to postpone motherhood in favor of pursuing a career."[24] Another patient complained, after the plaintiff entered the examination room and discovered that the patient was still wearing a bra, that the plaintiff "became upset and 'ripped it over her head.'"[25] Following his termination, the plaintiff filed claims of both gender and

15. *Id.* at 792.
16. *Id.* at 793.
17. *Id*. at 794.
18. *Id*.
19. *Id*. at 795.
20. 402 F.3d 1076 (11th Cir. 2005).
21. *Id*. at 1078.
22. *Id.*
23. *Id*.
24. *Id*.
25. *Id*. at 1079.

age discrimination.[26] The district court granted summary judgment for Emory.[27]

On appeal, the Eleventh Circuit agreed with the district court that the plaintiff "never [made] it past the first step of *McDonnell Douglas*."[28] The court of appeals noted that the plaintiff had not "identified any female physician who [had] replaced him."[29] Moreover, the court of appeals noted that the plaintiff failed to show that a comparable female physician who received "nearly identical" patient complaints had been disciplined differently.[30] Accordingly, the Eleventh Circuit agreed with the district court that the plaintiff failed to establish a prima facie case.[31]

In *Gillis v. Georgia Department of Corrections*,[32] the Eleventh Circuit was presented with the issue of whether a plaintiff adequately established the "adverse employment action" element of the prima facie case.[33] In *Gillis* the plaintiff received a pay raise from the defendant, but the raise would have been larger if her performance evaluation had been more favorable.[34] The plaintiff worked as a probation officer for the Georgia Department of Corrections. In this position, she received an annual performance evaluation that determined the amount of her annual pay raise, if any.[35] Under the defendant's evaluation system, an employee who received an "exceeded expectations" evaluation would earn a five percent pay raise; an employee who received an evaluation of "met expectations" would earn a three percent pay raise; and an employee who received an evaluation of "did not meet the expectations" would not receive any pay raise.[36] The plaintiff consistently received ratings of "met expectations," which entitled her to a three percent pay raise. The plaintiff, however, believed that her performance warranted an "exceeded expectations" evaluation and ultimately filed a grievance that was followed by a racial discrimination lawsuit.[37] The district court granted summary judgment for the Department of Corrections

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26. *Id.* at 1080.
27. *Id*. at 1078, 1081.
28. *Id*. at 1082.
29. *Id*.
30. *Id*.
31. *Id*.
32. 400 F.3d 883 (11th Cir. 2005).
33. *Id.* at 886.
34. *Id*. at 884.
35. *Id.* at 884-85.
36. *Id.* at 884.
37. *Id.* at 885.

after it concluded that the plaintiff failed to show she had suffered an adverse employment action.[38]

On appeal, the Eleventh Circuit disagreed with the district court.[39] The court of appeals relied primarily upon the language of the statute itself, which states that it is unlawful to "'discriminate against any individual with respect to his *compensation*, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin.'"[40] The court of appeals held that "an evaluation that directly disentitles an employee to a raise of any significance is an adverse employment action under Title VII."[41] In the plaintiff's case, the difference between the pay raise associated with a "met expectations" evaluation and an "exceeded expectations" evaluation amounted to $76.03 per month, or $912.36 per year.[42] The court held that this amount was sufficiently significant to constitute an adverse employment action.[43] Accordingly, the court of appeals reversed the district court's finding that the plaintiff had failed to establish a prima facie case, and remanded the case to the district court to determine whether the plaintiff had adequately established the issue of pretext (which the district court had not addressed).[44]

b. Pretext. In two cases during the survey period, the Eleventh Circuit was confronted with the issue of whether a plaintiff adequately established a triable issue regarding the third step in the *McDonnell Douglas* formula—whether the defendant's proffered reason for its actions was a pretext for discrimination.

In *Vessels v. Atlanta Independent School System*,[45] the plaintiff, a Caucasian male, alleged that the defendant school system failed to promote him to the position of Coordinator of Psychological Services, on both an interim basis and a permanent basis, on account of his race.[46] Dr. Brinson, the individual vacating the coordinator position, recommended that the defendant fill the position on an interim basis with Jill Fields, an African American school psychiatrist, although it was undisputed that the plaintiff had "more education, theoretical knowl-

38. *Id*. at 884.
39. *Id.*
40. *Id*. at 887 (quoting 42 U.S.C. §§ 2000e-2(a)(1)).
41. *Id*. at 888.
42. *Id.*
43. *Id.* at 888 n.7.
44. *Id*. at 888.
45. 408 F.3d 763 (11th Cir. 2005).
46. *Id.* at 765.

edge, and state certifications than Fields."[47] For the permanent position, the defendant narrowed the field of candidates to the plaintiff, Jill Fields, and Dr. Gwendolyn Jones, an African American female. A panel, consisting of one Caucasian male, one Caucasian female, and four African American females, interviewed and considered the qualifications of each candidate. The panel calculated the candidates' aggregate scores, rating Dr. Jones at 124, the plaintiff at 106, and Fields at 86. The defendant then hired Jones for the permanent position based upon the panel's recommendation. Thereafter, the plaintiff asserted a claim of racial discrimination pursuant to both Title VII and section 1981.[48] The district court granted summary judgment in favor of the school system.[49]

On appeal, the court of appeals acknowledged that the plaintiff established a prima facie case for both the interim and permanent positions, and the school system articulated legitimate, non-discriminatory reasons for its selections.[50] Regarding the issue of pretext, although the court of appeals agreed with the district court that the plaintiff had not established a genuine issue of disputed fact concerning the permanent position, the court disagreed with the district court's conclusion regarding the interim position.[51] The court of appeals pointed to evidence that defendant's officials made statements regarding "the desirability of having black employees in a school system serving a prominently black population."[52] In addition, the court also alluded to Dr. Brinson's (the predecessor in the coordinator position) statement regarding "the superiority of black school psychologists' performance in serving black schoolchildren."[53] The Eleventh Circuit distinguished its prior precedent in promotion cases, and concluded that, to establish pretext, the difference in qualifications must be "so glaring that no reasonable impartial person could have chosen the candidate selected for the promotion in question over the plaintiff."[54]

Furthermore, the court noted that these pretext cases included instances where a plaintiff sought to prove pretext through a disparity in "qualifications alone."[55] The court of appeals further held: "[W]here the qualifications disparity is not the *sole* basis for arguing pretext, the

47. *Id*. at 766.
48. *Id.*
49. *Id*. at 765.
50. *Id.* at 769.
51. *Id.* at 772.
52. *Id.* at 771.
53. *Id*.
54. *Id*. at 772 (citing Alexander v. Fulton County, 207 F.3d 1303, 1340 (11th Cir. 2000)).
55. *Id.*

disparity need not be so dramatic to support an influence of pretext."[56] Accordingly, the court concluded that the plaintiff's superior qualifications on paper, coupled with the evidence of discriminatory statements made by the defendant's officials, was sufficient to create a material issue of fact on the issue of pretext.[57]

In *Jackson v. Alabama State Tenure Commission*,[58] the history of the case reads almost like a John Grisham novel. The plaintiff had worked as a welding instructor at the defendant's vocational high school for almost twenty years. Shortly before the end of the plaintiff's tenure, he wrote a number of insulting and demeaning letters to members of the defendant's Board of Education. Furthermore, before the plaintiff's termination, a student in his class was not wearing safety gloves and was burned on his hands by a welding torch. The plaintiff also attended a board meeting at which he distributed confidential records regarding his special education students. Shortly thereafter, following a public hearing before the Board of Education, the plaintiff's teaching contract was terminated. He then brought suit under Title VII and section 1981. The plaintiff alleged that he had been fired because of his race, and also alleged in his section 1983 claim that he had been fired in retaliation for exercising his First Amendment[59] right of free speech.[60] The original district court judge granted summary judgment to the defendant on all counts.[61] In a prior appeal to the Eleventh Circuit, the court of appeals affirmed in part, but reversed the racial discrimination and retaliation claim.[62] The court held that the school board failed to articulate any reason, much less a non-discriminatory reason, for the plaintiff's termination.[63]

On remand, the case was assigned to a new judge, and after a jury trial, the jury awarded the plaintiff $36,000 in compensatory damages and $150,000 in punitive damages. After the verdict was rendered, however, the district court learned that one of the jurors had falsely answered voir dire questions about her criminal history (she had failed to disclose that she was convicted of murdering one of her children), and thus the district court granted a new trial. The second district court judge then recused himself, and the case was assigned to a third judge.

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56. *Id*.
57. *Id*. at 773.
58. 405 F.3d 1276 (11th Cir. 2005).
59. U.S. CONST. amend. I.
60. *Jackson*, 405 F.3d at 1279.
61. *Id.*
62. *Id.* at 1280.
63. *Id.*

The third judge granted summary judgment for the defendant on the race discrimination claims (on the basis of the record developed in the prior trial), which left only the First Amendment claim. After a full trial on the First Amendment claim, and while the jury was deliberating, the third judge realized that he had made a mistake because the First Amendment question should have been an issue for the court, and not the jury.[64] The third judge then dismissed the jury, announced he was going to grant the defendant's motion for judgment as a matter of law on the First Amendment claim, but also instructed both sides to brief the Rule 50[65] issue (even though he had already announced he was going to grant the motion). However, before he could enter a ruling, the third judge died. The case was then assigned to a fourth judge, who, pursuant to Rule 63 of the Federal Rules of Civil Procedure,[66] decided that he did not need to hear any further testimony, and the fourth judge completed what he deemed the "ministerial task" of entering judgment for the defendant School Board.[67]

On appeal, the Eleventh Circuit, in noting the case's unusual history, remarked that in "eight years of litigation," the case had been "before four district court judges and two juries," and that it was "now before this [c]ourt for the second and final time."[68] A pertinent issue the court addressed was whether the plaintiff demonstrated a genuine issue of disputed facts concerning whether the School Board's articulated reason for discharging the plaintiff was a pretext for racial discrimination.[69] On this issue, the court of appeals had little difficulty concluding that "the inflammatory and disparaging letters that [the plaintiff] sent to various members of the Board" constituted a legitimate, non-discriminatory basis for the plaintiff's discharge.[70] The court of appeals noted: "The right to disagree does not include within it the right to keep one's job after expressing that disagreement with abusive, racist, demeaning invective publicly hurled at those with whom one serves."[71] After stating that the letters sent by the plaintiff "are in the record and they shout for themselves,"[72] the Eleventh Circuit held that the plaintiff

64. *Id.*
65. FED. R. CIV. P. 50.
66. FED. R. CIV. P. 63.
67. *Jackson*, 405 F.3d at 1280-81.
68. *Id*. at 1279.
69. *Id.* at 1289.
70. *Id*. at 1290.
71. *Id*.
72. *Id*.

failed to meet his burden on the issue of pretext and affirmed "for the second and final time."[73]

2. Sexual Harassment

One case decided during the survey period addressed the difficult issue of sexual harassment. In *Cotton v. Cracker Barrel Old Country Store, Inc.*,[74] the plaintiff worked as a part-time cashier and retail associate at a Cracker Barrel store in Gardendale, Alabama. The plaintiff was hired in October and was advised that she was being hired primarily for seasonal work and that she could expect her hours to decrease after the Christmas holidays.[75] Approximately a month after the plaintiff was hired, the general manager of the store, while alone with the plaintiff in the stock room, allegedly "pulled [the plaintiff] towards him and kissed [her] on the mouth and continued to open his mouth and stick his tongue down [the plaintiff's] throat."[76] The day before, the manager had also allegedly asked the plaintiff to go with him to a movie. The plaintiff complained on the defendant's employee hotline. Following an investigation, the general manager was given a written reprimand, and the work schedules were rearranged so that the plaintiff could avoid contact with the general manager.[77] The plaintiff continued to work in the Cracker Barrel store, but claimed that "[she] wasn't treated the same by anybody," following her complaint.[78] The plaintiff filed a lawsuit pursuant to Title VII, alleging both sexual harassment and retaliation. The district court granted summary judgment on both claims in the defendant's favor.[79]

On appeal, the Eleventh Circuit affirmed.[80] The court of appeals focused on whether the plaintiff had established a "causal link" between the tangible employment action (in this case, the reduction in employee hours) and the sexual harassment.[81] In determining that the plaintiff failed to establish the requisite causal connection, the court of appeals noted that the plaintiff had been told when she was hired that her hours

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73. *Id*. at 1279, 1291.

74. 434 F.3d 1227 (11th Cir. 2006). Although technically within the 2006 survey period, we included this case in the 2005 Article because it was issued only four days into the new year.

75. *Id.* at 1229.

76. *Id.*

77. *Id.*

78. *Id*.

79. *Id*. at 1230.

80. *Id.* at 1234.

81. *Id.* at 1231.

of work would be reduced after the Christmas holidays.[82] The court also noted that the plaintiff was partially responsible for the reduction in hours because she took vacation time and sick leave.[83] Likewise, regarding the plaintiff's retaliation claim, the court of appeals concluded that the plaintiff's "bald assertion that '[she] wasn't treated the same by anybody' is insufficient to establish an adverse employment action."[84]

3. Retaliation.

In *Harris v. Corrections Corp. of America*,[85] the Eleventh Circuit addressed the issue of whether a district court had properly granted judgment as a matter of law to the defendant following a jury trial, after which the jury entered a verdict in favor of the plaintiff for retaliation pursuant to Title VII.[86] The plaintiff was terminated by his employer after he filed a charge with the Equal Employment Opportunity Commission ("EEOC") alleging racial discrimination by the employer.[87] On appeal, the Eleventh Circuit focused on the requirement that "[i]t is insufficient for a plaintiff to allege that his belief in this regard [i.e., his filing of a charge of discrimination] was honest and bona fide; the record must also indicate that the belief, though perhaps mistaken, was 'objectively reasonable.'"[88] Citing the Eleventh Circuit's prior decision in *Harper v. Blockbuster Entertainment Corp.*,[89] the court of appeals agreed that a reasonable jury could not find that the plaintiff's belief that the defendant had discriminated against him was objectively reasonable.[90] According to the court, there was no evidence that similarly situated Caucasian employees were treated differently than the plaintiff.[91] Furthermore, there was no evidence that the decisionmaker that terminated the plaintiff was even aware of the plaintiff's EEOC complaint. In fact, the assistant warden who terminated the plaintiff testified without contradiction that she was not aware of the plaintiff's

82. *Id.*
83. *Id.*
84. *Id*. at 1234.
85. 139 F.App'x 156 (11th Cir. 2005).
86. *Id.* at 157-58.
87. *Id.* at 157.
88. *Id*. at 159 (citing Harper v. Blockbuster Entm't Corp., 139 F.3d 1385, 1388 (11th Cir. 1998)).
89. *Harper*, 139 F.3d 1385.
90. *Harris*, 139 F.App'x at 159.
91. *Id.*

EEOC complaint until a week before trial.[92] Accordingly, the Eleventh Circuit affirmed the district court's decision.[93]

B. Procedural Issues Under Title VII

1. Timely Charge

Section 706(e)(1) of Title VII,[94] in so-called "non-deferral" states, requires that a charge of discrimination be filed with the EEOC within 180 days "after the alleged unlawful employment practice occurred."[95] In *Ledbetter v. Goodyear Tire & Rubber Co.,*[96] the Eleventh Circuit addressed Title VII's timely charge-filing requirement in the context of a gender discrimination claim alleging disparate pay.[97] The plaintiff worked as an area manager (and related positions) for Goodyear's tire plant in Gadsden, Alabama, in a career spanning nineteen years. The salaries for the defendant's managerial employees were determined on the basis of an annual merit compensation system. Throughout her career, the plaintiff consistently ranked at or near the bottom of her co-workers with respect to performance (which, of course, impacted her entitlement to merit salary increases).[98] The plaintiff brought an action pursuant to Title VII, alleging gender discrimination with respect to her pay.[99] Following a jury trial, the jury returned a verdict for the plaintiff, recommending back pay of $223,776 and awarding compensatory damages for mental anguish of $4,662 and punitive damages of $3,285,979.[100] The district court remitted the back pay to $60,000, and the compensatory and punitive damages to $300,000 (the statutory cap).[101]

On appeal, the Eleventh Circuit applied the Supreme Court's decision in *National Railroad Passenger Corp. v. Morgan*[102] in the context of a claim for disparate treatment in pay.[103] Under *Morgan* the Eleventh Circuit determined that a claim alleging disparate pay fell within the

92. *Id.* at 160.
93. *Id.* at 161.
94. 42 U.S.C. §§ 2000e to 2000e-17 (2000).
95. 42 U.S.C. §§ 2000e-5(e)(1) (2000).
96. 421 F.3d 1169 (11th Cir. 2005).
97. *Id.* at 1171.
98. *Id.* at 1173.
99. *Id.* at 1175.
100. *Id.* at 1176.
101. *Id*.
102. 536 U.S. 101 (2002).
103. *Id.* at 104.

part of the decision addressing "discrete acts of discrimination."[104] Accordingly, the court of appeals rejected the plaintiff's argument that because she received a "lower-than-wished-for paycheck," this fact alone did not open the door "for a full inquiry into the motivations of every person who ever made a decision contributing to the plaintiff's pay level as it existed during the limitations period" (which, in the plaintiff's case spanned a career of nineteen years).[105] The court then concluded:

> We think, therefore, that at least in cases in which the employer has a system for periodically reviewing and re-establishing employee pay, an employee seeking to establish that his or her pay level was unlawfully depressed may look no further into the past than the last affirmative decision directly affecting the employee's pay immediately preceding the start of the limitations period.[106]

In the plaintiff's case, the court determined that only two pay decisions fell within the scope of the court's ruling.[107] In the first decision, the evidence showed that the plaintiff ranked twenty-third out of twenty-four employees, and fifteenth out of sixteen managers. Furthermore, the male manager ranked below the plaintiff, and the two male managers ranked above the plaintiff, had all been denied raises the same as the plaintiff.[108] Similar evidence supported the defendant's second decision.[109] Because the plaintiff failed to come forward with a "scintilla of probative evidence casting doubt on [the defendant's] explanation for denying her a raise," the Eleventh Circuit reversed the district court and directed that judgment be entered for the defendant as a matter of law.[110]

2. Arbitration

Two cases decided during the survey period concerned *Gilmer*-style[111] arbitration agreements, and both turned on issues of Georgia law. In *Caley v. Gulfstream Aerospace Corp.*,[112] the plaintiffs were a number of current or former employees of the defendant's Savannah, Georgia facility who brought lawsuits alleging the violation of not only Title VII, but also the Age Discrimination in Employment Act ("ADEA"),

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104. *Ledbetter*, 421 F.3d at 1179.
105. *Id*. at 1182.
106. *Id*. at 1182-83.
107. *Id.* at 1177.
108. *Id.* at 1186.
109. *Id.* at 1187.
110. *Id*. at 1189.
111. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20, 26 (1991).
112. 428 F.3d 1359 (11th Cir. 2005).

the Fair Labor Standards Act ("FLSA"),[113] and the Employee Retirement Income Security Act ("ERISA").[114] Prior to the lawsuits, the defendant had adopted a dispute resolution policy ("DRP") that was to serve as the "exclusive method for resolving covered employment-related disputes" between the defendant and its employees.[115] The DRP was mailed to all of the defendant's employees with an explanatory cover letter, it was placed on the company intranet, and it was distributed by e-mail through the defendant's management newsletter. The DRP specified that it was a condition of continued employment, that it constituted a contract, and that continuation of employment by the employee constituted acceptance of the contract.[116] The district court granted the defendant's motion to compel arbitration and dismissed all of the plaintiffs' claims.[117]

On appeal, the Eleventh Circuit initially addressed the plaintiffs' argument that the DRP violated the Federal Arbitration Act ("FAA")[118] because it was not signed by the parties.[119] However, the court of appeals determined that the FAA only required that the agreement be "in writing," and did not require that it be "signed by the parties."[120] The court of appeals then addressed the plaintiffs' argument that the DRP violated their Seventh Amendment[121] right to a jury trial.[122] However, the Eleventh Circuit noted that the Seventh Amendment only confers a right to a jury "'once it is determined that the litigation should proceed before a court.'"[123] Where a party has entered into a "valid agreement to arbitrate, the party is not entitled to a jury trial or to a judicial forum for covered disputes."[124]

Finally, the court addressed the plaintiffs' argument that the DRP was unenforceable under Georgia law because it did not constitute an offer, there was no acceptance, no consideration, and the DRP was unconscionable.[125] The court of appeals rejected each of these arguments under

113. 29 U.S.C. § 201 (2000).
114. 29 U.S.C. §§ 1001-1461 (2000).
115. *Caley*, 428 F.3d at 1364.
116. *Id.*
117. *Id*. at 1367.
118. 9 U.S.C. §§ 1-14 (2000).
119. *Caley*, 428 F.3d at 1368.
120. *Id.* at 1368-69.
121. U.S. CONST. amend. VII.
122. *Caley*, 428 F.3d at 1370.
123. *Id.* at 1371 (quoting Am. Heritage Life Ins. Co. v. Orr, 294 F.3d 702, 711 (5th Cir. 2002)).
124. *Id*. at 1372.
125. *Id.* at 1373.

Georgia law.[126] The court determined that the DRP clearly constituted an offer, and under Georgia law, continued employment constituted acceptance of the offer.[127] The court also noted that there was adequate consideration because "[the] plaintiffs' received reciprocal promises from [the defendant] to arbitrate and be bound by arbitration in covered claims."[128] Furthermore, the court concluded that the DRP provided the defendant would pay for the cost of arbitration and mediation.[129] In addition, the court of appeals rejected the plaintiffs' final argument that the DRP met the very onerous burden under Georgia law required to establish that the DRP was an unconscionable contract.[130]

In *Jackson v. Cintas Corp.*,[131] the plaintiff did not have any better luck avoiding an arbitration agreement. The plaintiff worked as a sales representative for the defendant, and as a condition of employment, she signed an employment agreement that provided for arbitration "as the exclusive method for resolution of all claims" between the plaintiff and the defendant.[132] The employment agreement also contained a severability clause. After the termination of the plaintiff's employment, she brought a lawsuit against the defendant not only under Title VII but also under the Pregnancy Discrimination Act,[133] the Family and Medical Leave Act,[134] the Fair Credit Reporting Act ("FCRA"),[135] and the FLSA. The defendant moved to dismiss or stay the action pending arbitration pursuant to the employment agreement.[136]

The district court concluded that the one-year statute of limitations contained in the employment agreement was "substantively unconscionable" because it potentially deprived the plaintiff of asserting claims under the FCRA and the FLSA, which contained longer limitations periods.[137] The district court also severed this provision, but enforced the remainder of the arbitration clause and dismissed the complaint

126. *Id.* at 1379.
127. *Id.* at 1374-76.
128. *Id.* at 1376.
129. *Id*.
130. *Id*. at 1377-79; *see* Hall v. Fruehauf Corp., 179 Ga. App. 362, 362, 346 S.E.2d 582, 583 (1986) (Agreement not unconscionable under Georgia law unless it is "such an agreement as no sane man not acting under a delusion would make and no honest man would take advantage of.").
131. 425 F.3d 1313 (11th Cir. 2005).
132. *Id.* at 1315.
133. 42 U.S.C. § 2000e(k) (2000).
134. 29 U.S.C. § 2601 (2000).
135. 15 U.S.C. § 1681 (2000).
136. *Jackson*, 425 F.3d at 1315.
137. *Id*.

while compelling arbitration.[138] On appeal, the Eleventh Circuit affirmed.[139] Applying Georgia law, which recognizes severability clauses as enforceable, the court of appeals held that the district court properly "applied the severability clause to enforce the remainder of the arbitration agreement."[140]

3. Evidentiary Issues

In *Joseph v. Publix Super Markets, Inc.*,[141] the district court's erroneous evidentiary rulings resulted in a new trial for the defendant. The plaintiff had brought an action pursuant to Title VII and section 1981, alleging that he had been denied a transfer to a larger and more profitable store on account of his race. At trial, the jury entered a verdict in the plaintiff's favor. The plaintiff was allowed to admit, over defendant's stringent objection, a notice written by the defendant's chief executive officer ("CEO"), which summarized the terms and conditions of a prior settlement agreement that the defendant entered into during a prior lawsuit brought by the EEOC. The plaintiff was also allowed to introduce evidence, again over the defendant's objection, that the plaintiff overheard a former manager of the defendant's using a racial slur.[142] Regarding the CEO's notice, which summarized the EEOC settlement, the Eleventh Circuit relied upon the express language of section 706(b)[143] of the Act, which provides: "'Nothing said or done during and as part of such informal [conciliation] endeavors may be made public by the Commission . . . or used as evidence in a subsequent proceeding without the consent of the persons concerned.'"[144]

The court of appeals held that the notice in question constituted "something 'said or done' by the EEOC" and was therefore inadmissible as evidence.[145] The court of appeals also agreed that the evidence of a racial slur, made by a former manager who had retired several years prior to any of the incidents at issue and who played no role in the decisions impacting the plaintiff, rendered the statement irrelevant and inadmissible.[146] The court of appeals concluded that the "cumulative effect" of these erroneous evidentiary rulings warranted a new trial.[147]

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138. *Id*.
139. *Id.* at 1318.
140. *Id*. at 1317.
141. 151 F.App'x 760 (11th Cir. 2005).
142. *Id.* at 762-63.
143. 42 U.S.C. §§ 2000e-5(b) (2000).
144. *Joseph*, 151 F.App'x at 768-69 (quoting 42 U.S.C. §§ 2000e-5(b) (2000)).
145. *Id.* at 769.
146. *Id.*
147. *Id*.

4. Bond on Appeal

In *Young v. New Process Steel, LP*,[148] the Eleventh Circuit was confronted with an issue of first impression: whether a district court can require, as a condition for appealing a judgment, that a losing plaintiff in a Title VII action post a bond pursuant to Rule 7 of the Federal Rules of Appellate Procedure ("FRAP")[149] that includes the defendant's anticipated appellate attorney fees?[150] In *Young* the plaintiffs brought a lawsuit against the defendant pursuant to both Title VII and section 1981, alleging various forms of racial discrimination. Following a jury trial, the jury entered a verdict for the defendant. After the plaintiffs' notice of appeal, the district court required the plaintiffs to post a cost bond in the amount of $61,000 pursuant to Rule 7.[151] All but $1,000 of the plaintiffs' cost bond was set aside to cover the defendant's anticipated attorney fees on appeal.[152] Relying on its prior decision in *Pedraza v. United Guaranty Corp.*,[153] the Eleventh Circuit held that the term "costs" in Rule 7 includes attorney fees where the fee-shifting statute for the underlying case also includes attorney fees within the meaning of the term costs.[154] However, reading Rule 7 in conjunction with the Supreme Court's prior decision in *Christiansburg Garment Co. v. EEOC*,[155] the Eleventh Circuit held that

> [A] district court may not require an unsuccessful plaintiff in a civil rights case to post an appellate bond that includes not only ordinary costs but also the defendant's anticipated attorney's fees on appeal, unless the court determines that the appeal is likely to be frivolous, unreasonable, or without foundation.[156]

The court of appeals then remanded the case for a determination as to whether the plaintiffs' appeal met this standard.[157]

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148. 419 F.3d 1201 (11th Cir. 2005).
149. FED. R. APP. P. 7.
150. *Young*, 419 F.3d at 1202.
151. *Id.* at 1202-03.
152. *Id*. at 1203.
153. 313 F.3d 1323 (11th Cir. 2002).
154. *Young*, 419 F.3d at 1204. *See* 42 U.S.C. § 1988(b) (2000).
155. 434 U.S. 412 (1978).
156. *Young*, 419 F.3d at 1207-08.
157. *Id*. at 1208.

C. Remedies Under Title VII

1. Back Pay and Compensatory Damages

In *Akouri v. Florida Department of Transportation*,[158] the failure of the plaintiff's counsel to ask two simple questions on direct examination turned a $700,000 victory into a pyrrhic victory amounting to one dollar in nominal damages. The plaintiff worked as an engineer with the Florida Department of Transportation ("FDOT") until he was terminated for alleged misuse of his government computer. Following the plaintiff's termination, he brought suit against the FDOT alleging discrimination pursuant to Title VII. After a jury trial, the jury returned a verdict for the plaintiff in the amount of $148,000 in back pay and benefits, and $552,000 in compensatory damages for emotional pain and mental anguish. Following the entry of judgment, the defendant moved for judgment as a matter of law.[159] Because the district court found no evidence in the record to support either award of damages, it reduced the award to one dollar in nominal damages.[160]

On appeal, the Eleventh Circuit affirmed the district court's ruling and noted that the record was "devoid of any evidence of [the plaintiff's] actual salary at the time he was employed by [the defendant]."[161] Moreover, the Eleventh Circuit commented that the plaintiff's showing "could have easily been accomplished by asking one question to [the plaintiff] or introducing into evidence a pay stub."[162] Likewise, the Eleventh Circuit also determined that there was a similar lack of evidence regarding the jury's award of compensatory damages.[163] Again, the Eleventh Circuit held that the required showing "could have been presented by one or more direct questions during [the plaintiff's] testimony."[164] However, because no such evidence was in the record, the Eleventh Circuit affirmed.[165]

158. 408 F.3d 1338 (11th Cir. 2005).
159. *Id.* at 1341-42.
160. *Id*. at 1342.
161. *Id*. at 1344.
162. *Id*.
163. *Id.*
164. *Id*. at 1346 n.6.
165. *Id*. at 1348-49.

2. Attorney Fees

In *Quintana v. Jenne*,[166] the Eleventh Circuit addressed the issue of whether a prevailing defendant in a Title VII action could properly be awarded attorney fees, where the plaintiff made a prima facie showing in one of his claims for relief, but not the other.[167] The plaintiff, a former deputy sheriff in Broward County, Florida, filed a complaint against the defendant (Sheriff of Broward County, in his official capacity) pursuant to Title VII, alleging racial discrimination and retaliation.[168] The district court granted summary judgment for the defendant on both claims.[169] Subsequently, the district court awarded the defendant $73,890 in attorney fees and costs.[170]

On appeal, the plaintiff raised only the issue of the award of attorney fees to the defendant.[171] Regarding the retaliation claim, the Eleventh Circuit agreed that the claim was frivolous because the plaintiff did not make a prima facie showing and also agreed that an award of attorney fees to the defendant was appropriate.[172] However, with respect to the discrimination claim, the Eleventh Circuit concluded that the claim was not frivolous despite the district court's entry of summary judgment, because the plaintiff had established a prima facie case.[173] The Eleventh Circuit vacated the district court's award of attorney fees and remanded the case so that the district court could apportion the amount of fees attributable to the frivolous retaliation claim.[174]

3. Taxation of Attorney Fees

In *Commissioner of Internal Revenue v. Banks*,[175] a case of significant interest to the parties in the action, but probably to no one else, the Supreme Court resolved the issue of whether the portion of a money judgment or a settlement paid to a plaintiff's attorney pursuant to a contingent fee agreement is taxable income to the plaintiff pursuant to the Internal Revenue Code.[176] In resolving a split among both the

166. 414 F.3d 1306 (11th Cir. 2005).
167. *Id.* at 1307.
168. *Id.* at 1308.
169. *Id.* at 1309.
170. *Id*.
171. *Id.* at 1310.
172. *Id.*
173. *Id.* at 1311.
174. *Id*. at 1312.
175. 543 U.S. 426 (2005).
176. *Id.* at 429.

circuit courts and the Tax Court, the Supreme Court held that "as a general rule, when a litigant's recovery constitutes income, the litigant's income includes the portion of the recovery paid to the attorney as a contingent fee."[177] However, after the Supreme Court cases arose, Congress enacted the American Jobs Creation Act of 2004,[178] which, although not retroactive, allows taxpayers to deduct attorney fees and costs incurred "in connection with any action involving a claim of unlawful discrimination."[179] Unfortunately, this Act came too late to rescue the parties to these actions, who had to bear the burden of attorney fees awards of $150,000 and $3,864,012, respectively, as taxable income.[180] Indeed, timing can be everything!

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Theories of Liability

The most significant age discrimination decision rendered during the survey period was by the Supreme Court in *Smith v. City of Jackson*,[181] on March 30, 2005. The Court settled a circuit split in a sharply divided decision, and concluded that the Age Discrimination in Employment Act ("ADEA")[182] authorizes disparate impact claims.[183] Justice Stevens was joined by three other justices in the decision, while a fifth justice separately concurred in the judgment only.[184] Justices O'Connor, Kennedy, and Thomas concurred in the judgment, but unavailingly argued that disparate impact claims were "not cognizable under the ADEA."[185] Justice Scalia sharply criticized the unsuccessful argument Justice O'Connor made in her concurring opinion.[186]

Due to this ruling, the disparate impact theory first announced by the Court in *Griggs v. Duke Power Co.*[187] is now clearly available to prove

177. *Id.* at 430.
178. 118 Stat. 1418 (2004); 26 U.S.C. § 62(a)(20) (2005).
179. *Banks*, 543 U.S. at 433 (quoting 26 U.S.C. § 62(a)(20) (2005)).
180. *Id.* at 432-33.
181. 544 U.S. 228 (2005) (plurality). Chief Justice Rehnquist took no part in the decision. *Id.* at 1546. Justices Souter, Ginsburg, and Breyer joined Justice Stevens in the opinion of the Court, while Justice Scalia concurred in part and concurred in the judgment. *Id.*
182. 29 U.S.C. §§ 621-634 (2000).
183. *Smith*, 544 U.S. at 232.
184. *Id.* at 229, 243.
185. *Id.* at 248 (O'Connor, Kennedy & Thomas, JJ., concurring).
186. *Id.* at 243-47 (Scalia, J., concurring in part and concurring in the judgment).
187. 401 U.S. 424 (1971).

claims under the ADEA. The *Griggs* decision answered the disparate impact theory question, which the Court previously left unsettled in its 1993 decision in *Hazen Paper Co. v. Biggins.*[188]

Smith arose after the City of Jackson, Mississippi announced a pay plan in 1998 that granted raises to all of its employees. The pay plan was principally designed because of the City's desire to bring the starting salaries of its police officers up to a regional average. Under the plan, those police officers who had less than five years of tenure with the City received proportionately greater pay raises than those with more seniority. Those officers with more seniority who received smaller pay raises under the plan brought suit under the ADEA challenging the plan as disparately discriminatory on the basis of age.[189] The district court granted summary judgment to the City and found that disparate impact claims were not actionable under the ADEA.[190] Subsequently, the Court of Appeals for the Fifth Circuit affirmed the district court's dismissal of the disparate impact claims.[191]

Following the Court's decision in *Hazen Paper*, the circuits were divided on the question of whether the disparate impact theory of liability was available under the ADEA. The First, Seventh, Tenth, and Eleventh Circuits held that the theory was unavailable under the ADEA, while the Second, Eighth, and Ninth Circuits all recognized its availability.[192] The Court's decision in *Smith* resolved the circuit split; however, the decision did not answer questions concerning the precise application of the theory in the context of the age discrimination statute because of differences between the precise language of that statute and the similar statutory provision contained within Title VII.[193]

The ADEA contains language that significantly narrows its coverage by permitting any "'otherwise prohibited'" action "'where the differentiation is based on reasonable factors other than age.'"[194] In the Court's opinion, this statutory distinction was acknowledged, and as a result, the court noted that disparate impact claims may be addressed differently

188. 507 U.S. 604 (1993).

189. *Smith*, 544 U.S. at 231.

190. *Id.*

191. *Id.* (*See* Smith v. City of Jackson, 351 F.3d 183 (5th Cir. 2003)).

192. *Id.* at 237 n.9 (citing BARBARA T. LINDEMANN & DAVID D. KADUE, AGE DISCRIMINATION IN EMPLOYMENT LAW 417 & n.22 (2003)). In *MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 770-71 (11th Cir. 1991), the Eleventh Circuit concluded that disparate impact claims were viable under the ADEA, notwithstanding the Court's decision in *Hazen Paper*.

193. *Smith*, 544 U.S. at 238-39.

194. This is commonly known as the RFOA provision of the ADEA.

by the trial courts in the ADEA context.[195] In her concurring opinion, Justice O'Connor argued that the reasonable factors other than age ("RFOA") provision should provide employers with a "safe harbor" from liability under the ADEA.[196] Furthermore, in her opinion, the availability of this statutory safe harbor was unavailable under the ADEA in claims based upon the disparate impact theory.[197] The opinion of the majority of the Justices differed sharply with Justice O'Connor in this regard.[198] Ultimately, Justice Scalia went to considerable length to take issue with Justice O'Connor's reasoning in this respect in reaching his determination that claims based upon this theory are available under the ADEA.[199]

The majority also noted that the 1991 amendments to Title VII, which overruled the Court's decision in *Wards Cove Packing Co. v. Antonio*,[200] represented another reason why the scope of the disparate impact claim available under the ADEA is narrower than the theory of liability available under Title VII.[201] Recognizing the significant differences between the language of the two statutes, it appears that although impact claims will now continue to be litigated under both laws, they will take a different form under the ADEA, and practitioners will, as a consequence, be required to sharply distinguish between the applicability of the theory under both statutes.

In reaching its consensus decision in *Smith*, a unanimous Court recognized that the initial district court ruling had been sound.[202] Because the older City of Jackson police officers failed to state cognizable claims under the theory, the City's "decision [to give pay raises to its police officers] [was] based on a 'reasonable factor other than age' that responded to the City's legitimate goal of retaining police officers."[203] Demonstrating the distinctions that will evolve because of the language differences between the two statutes, the Court further noted:

> Unlike the business necessity test [available under Title VII], which asks whether there are other ways for the employer to achieve its goals

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195. *Smith*, 544 U.S. at 240.

196. *Id.* at 251 (O'Connor, Kennedy & Thomas, JJ., concurring).

197. *Id.* at 247-48 (O'Connor, Kennedy & Thomas, JJ., concurring).

198. *See id.* at 243 (Scalia, J., concurring in part and concurring in the judgment). The plurality opinion was no less kind to the departing Justice. *See id.* at 236-37 n.6.

199. *Id.* at 243-45 (Scalia, J., concurring in part and concurring in the judgment).

200. 490 U.S. 642 (1989).

201. *Smith*, 544 U.S. at 240-41.

202. *Id.* at 231-32.

203. *Id.* at 242, 242-44 (Scalia, J., concurring in part and concurring in the judgment). Justices O'Connor, Kennedy, and Thomas concurred in the judgment only. *Id.* at 247 (O'Connor, Kennedy & Thomas, JJ., concurring).

> that do not result in a disparate impact on a protected class, the reasonableness inquiry [under the ADEA] includes no such requirement. Accordingly, while we do not agree with the Court of Appeals' holding that the disparate-impact theory of recovery is never available under the ADEA, we affirm its judgment.[204]

Standing alone, Justice Scalia concurred in part and concurred in the judgment.[205] Justice Scalia would have deferred to the opinion of the EEOC under the deferral doctrine established in *Chevron v. Natural Resources Defense Council, Inc.*[206] Justice Scalia stated, "[t]his is an absolutely classic case for deference to agency interpretation."[207] Justice Scalia believed it was unnecessary for the Court to state its views on the availability of the disparate impact theory under the ADEA, because the EEOC had already reached an opinion on this issue.[208] Justice Scalia also sharply criticized Justice O'Connor's arguments that the safe harbor provision makes the liability theory unavailable under the ADEA; stating that several of Justice O'Connor's arguments made "little sense."[209]

In her view, which was shared by Justices Kennedy and Thomas, Justice O'Connor observed that "[i]n the nearly four decades since the ADEA's enactment, however, we have never read the statute to impose liability upon an employer without proof of discriminatory intent."[210] In her desire to continue that trend, Justice O'Connor argued that the statutory differences between Title VII and the ADEA justified not extending the disparate impact theory into the age discrimination litigation arena.[211] Unfortunately for employers, her view did not prevail.

B. Administrative Requirements

Closer to home, the United States Court of Appeals for the Eleventh Circuit concluded during the survey period that the ninety-day limitation period for filing claims under the ADEA starts to run when a charging

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204. *Id.* at 243.

205. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

206. *Id.* (Scalia, J., concurring in part and concurring in the judgment); 467 U.S. 837 (1984).

207. *Smith*, 544 U.S. at 243 (Scalia, J., concurring in part and concurring in the judgment).

208. *Id.* (Scalia, J., concurring in part and concurring in the judgment).

209. *Id.* at 247 (Scalia, J., concurring in part and concurring in the judgment).

210. *Id.* at 247-48 (O'Connor, Kennedy & Thomas, JJ. concurring).

211. *Id.* (O'Connor, Kennedy & Thomas, JJ. concurring).

party has actual notice that the EEOC terminated its investigation of such claims.[212] *Kerr v. McDonald's Corp*.,[213] presented the court with the opportunity to clarify and refine what is known as the "*Franks* rule,"[214] which was first announced by the former Fifth Circuit Court of Appeals many years ago.[215] In *Franks v. Bowman Transportation Co.*,[216] the court stated the general rule that "statutory notification is complete only upon actual receipt of the . . . [right to sue] letter."[217] This rule has caused some confusion over the years about whether it required actual possession by the charging party of the right to sue ("RTS") letter before the ninety-day limitation period set forth in the statute starts.[218] In *Kerr* the court clarified that a complainant's actual knowledge that the investigation of her claim has been terminated is sufficient to start the ninety-day clock.[219] It is no longer necessary that the complainant actually receive the RTS letter to start the clock.

In *Kerr* it was undisputed that the suit had not been commenced until well after the ninety-day period had elapsed.[220] Kerr and Green-Smith, the other plaintiff in the case, argued that the delay should be excused in their cases because they experienced a considerable delay in the actual receipt of their RTS letters from the EEOC.[221] The court determined, however, that both the plaintiffs knew much earlier in time that the EEOC had already completed its investigation of their claims.[222] Despite this knowledge, the plaintiffs did not commence their litigation until well after they actually received the RTS letters from the EEOC.[223]

Clarifying the *Franks* rule, the court noted that it had "imposed upon complainants some 'minimum responsibility . . . for an orderly and expeditious resolution' of their claims, and we have expressed concern

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212. *See* Kerr v. McDonald's Corp., 427 F.3d 947, 954 (11th Cir. 2005).

213. 427 F.3d 947 (11th Cir. 2005).

214. *See* Franks v. Bowman Transp. Co., 495 F.2d 398, 404 (5th Cir. 1974), *rev'd on other grounds* 424 U.S. 747 (1976).

215. All of the Fifth Circuit's decisions issued prior to October 1, 1981, are binding precedent on courts within the Eleventh Circuit. Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981).

216. 495 F.2d 398.

217. *Id.* at 404.

218. This evolving confusion is discussed in note 8 of the court's decision in *Kerr*. 427 F.3d at 952 n.8.

219. *Id.* at 954.

220. *Id.* at 948-49.

221. *Id.* at 949, 950.

222. *Id.* at 951.

223. *Id.* at 948-49.

over enabling complainants to enjoy a 'manipulable open-ended time extension which could render the statutory minimum meaningless.'"[224] The court determined that the plaintiffs in *Kerr* had actual knowledge that the EEOC investigation had concluded based upon decisions they made during the charge investigation phase of their claims.[225] The Eleventh Circuit stated, "[u]nder the *Franks* rule, this would start the time for filing well over a month after the EEOC mailed the original letters, suggesting that [the plaintiffs] may have thus benefit[t]ed from exactly the kind of 'manipulable open-ended time extension' which has caused us concern in the past."[226] The Eleventh Circuit determined that

> [the plaintiffs], in failing to make an inquiry regarding their late or missing letters, failed to assume the minimal responsibility or to put forth the minimal effort necessary to resolve their claims in this case. Their failure to receive the letters was at least in part due to lack of diligence in following up their requests.[227]

As a result of this decision, the clarified *Franks* rule now recognizes that

> actual knowledge on the part of a complainant that the EEOC has terminated its investigation of her claim, as evidenced by her request for a RTS letter, may be sufficient to cause the time for filing to begin running within a reasonable time after written notice of complainant's right to sue has been mailed.[228]

C. Prima Facie Case Requirements

Worth noting, even if only in passing, is the circuit court's decision during the survey period in *Morris v. Emory Clinic, Inc.*,[229] which addressed the evolving requirement for a "similarly situated" comparator to establish a prima facie case in discharge cases.[230] The plaintiff had

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224. *Id.* at 952 (quoting Zillyette v. Capital One Fin. Corp., 179 F.3d 1337, 1340 (11th Cir. 1999)).

225. *Id.* at 951, 954.

226. *Id.* at 953 (quoting *Zillyette*, 179 F.3d at 1340).

227. *Id.*

228. *Id.* at 954.

229. 402 F.3d 1076 (11th Cir. 2005).

230. The trial and appellate courts have increasingly imposed on employees in disparate impact claims the sometimes daunting task of identifying someone outside the protected classification who was treated differently under similar circumstances to create the inference of unlawful discrimination. Refinement of the similarities required to identify an appropriate comparator have taken up much of the time of both litigants and the courts.

been discharged from employment with the Emory Clinic because of patient complaints concerning his "forceful physical examination and off-color remarks . . . ."[231] The plaintiff argued in the lawsuit which followed that he had been fired because the defendant clinic favored younger doctors.[232] The district court granted summary judgment for the defendant and the plaintiff appealed.[233] The court of appeals affirmed, concluding that the plaintiff failed to show that a younger physician who had received nearly identical patient complaints had been treated better than he was.[234] The contours of the "similarly situated comparator" requirement continue to sharpen as a result of circuit decisions such as *Morris*. Plaintiffs in misconduct and poor job performance cases are faced with an increasingly daunting task of establishing that their treatment, without more, establishes a prima facie showing of age discrimination.

D. Constructive Discharge

The often interesting, and sometimes factually difficult question of whether the offer of a voluntary severance package in the face of an impending reduction in workforce constitutes a constructive discharge, was before the court during the survey period in *Rowell v. BellSouth Corp*.[235] The appeal also gave the court an opportunity to discuss an employer's use of competence factors in making reduction of workforce layoff decisions.[236] The court concluded that in the plaintiff's case, he had not been constructively discharged from employment under the circumstances presented by the defendant's offer of a voluntary early retirement option.[237] While recognizing that there are instances where such an offer could constitute a constructive discharge, the court determined, after an extensive review of the record, the defendant's program did not meet this threshold, and therefore passed muster.[238]

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231. *Morris*, 402 F.3d at 1078.
232. *Id.*
233. *Id.*
234. *Id.* at 1078, 1082.
235. 433 F.3d 794 (11th Cir. 2005).
236. *Id.* at 798-801.
237. *Id.* at 806.
238. *Id.* "Until it becomes evident that there is no objectively reasonable opportunity to remain employed [the plaintiff] cannot as a matter of law contend that he has been discharged." *Id.* Because the plaintiff was faced with only unpleasant choices—at least one of which would have enabled him to remain employed, he failed to meet this threshold. *Id.*

III. AMERICANS WITH DISABILITIES ACT

A. Coverage Under the Act

Slomcenski v. Citibank, N.A.,[239] demonstrates the risks associated with simultaneously attempting to maintain different claims under different statutory schemes. The plaintiff challenged, under both the Employee Retirement Income Security Act ("ERISA")[240] and the Americans with Disabilities Act ("ADA"),[241] decisions made by her former employer and its long-term disability plan to terminate her long-term disability benefits because of the plan's time limit for compensating disabilities arising from mental and nervous disorders.[242] The district court had entered summary judgment in favor of each of the defendants with respect to both claims and the plaintiff appealed.[243] To be eligible for long-term disability benefits under the ERISA-regulated plan, the plaintiff had to maintain in the district court that she was unable to perform her job functions.[244] This assertion proved fatal to the plaintiff's ADA claim, however, because the district court found that the plaintiff admitted as a result that she was not a "qualified individual" for purposes of her ADA claim.[245] The court of appeals affirmed and determined that the plaintiff "was not qualified to bring an ADA claim."[246]

B. Prima Facie Case Requirements

While the appeal in *Cordoba v. Dillard's, Inc.*,[247] principally concerned a thorny attorney fee issue, the decision is also quite instructive on a question that occasionally arises in the prima facie case context in ADA cases—the requirement that a plaintiff must demonstrate that a corporate employer knew of the plaintiff's disability at the precise instant that an adverse employment action was taken.[248] The plaintiff was discharged from employment by Groo, one of the defendant's

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239. 432 F.3d 1271 (11th Cir. 2005).
240. 29 U.S.C. §§ 1001-1461 (2000).
241. 42 U.S.C. §§ 12101-12113 (2000).
242. *Slomcenski*, 432 F.3d at 1273.
243. *Id.*
244. *Id.* at 1281.
245. *Id.*
246. *Id.* at 1281 n.6.
247. 419 F.3d 1169 (11th Cir. 2005).
248. *See id.* at 1180-85 (for a good discussion of the various possible forms and levels of knowledge that often come into play in the corporate context).

operations managers.[249] While the plaintiff's immediate supervisor and several of her co-workers had actual knowledge that she suffered from a medical condition that probably rendered her disabled for ADA purposes, Groo had no such knowledge at the time that she fired the plaintiff.[250] Under these facts, the district court expressly found that the plaintiff could not survive summary judgment because she failed to create a material issue of fact as to whether Groo was aware of the plaintiff's alleged disability.[251]

On appeal, the plaintiff argued that the defendant had constructive knowledge of her disability as a result of the actual knowledge possessed by her immediate supervisor and by her co-workers, and that knowledge should be sufficient to withstand summary judgment.[252] Recognizing that this issue had been left unsettled by earlier circuit precedent,[253] the panel attempted to clarify the knowledge requirement in the corporate context.[254] Ultimately affirming the decision of the lower court, the panel rejected the plaintiff's position and decreed that "'[d]iscrimination is about actual knowledge, and real intent, not constructive knowledge and assumed intent.'"[255] The defendant's "corporate entity did not make the decision to fire [the plaintiff]. Rather, Groo fired [the plaintiff], and since Groo was unaware of [the plaintiff's] alleged disability, she obviously did not fire her 'because of' the alleged disability."[256] "Once the issue is framed clearly, it is evident that an employee cannot be fired 'because of' a disability unless the decision-maker has *actual* knowledge of the disability."[257]

In *Collado v. United Parcel Service Co.*,[258] the court wrestled with the causal connection requirement in retaliation cases.[259] The decision of the panel is recommended reading for any practitioner who is struggling to understand the meaning of the phrase "prima facie case" in the *McDonnell Douglas* context.[260] While struggling mainly with

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249. *Id.* at 1173.

250. *Id.* at 1183.

251. *Id.* The plaintiff failed to establish that Groo had any actual knowledge of her various claimed physical infirmities. *Id.* at 1180.

252. *Id.* at 1183.

253. *See* Hilburn v. Murata Elecs. of N. Am., Inc., 181 F.3d 1220, 1226 (11th Cir. 1999); Morisky v. Broward County, 80 F.3d 445, 448 (11th Cir. 1996).

254. *Cordoba*, 419 F.3d at 1183.

255. *Id.* (quoting Silvera v. Orange County Sch. Bd., 244 F.3d 1253, 1262 (11th Cir. 2001)).

256. *Id.*

257. *Id.* at 1185.

258. 419 F.3d 1143 (11th Cir. 2005).

259. *See id.*

260. 411 U.S. 792 (1973).

procedural questions in the Rule 50[261] context, the panel went to considerable lengths to explain that the phrase "prima facie case" has different meanings in different contexts.[262]

C. Reasonable Accommodation

The Eleventh Circuit rendered a potentially significant accommodation decision during the survey period in *D'Angelo v. ConAgra Foods, Inc.*[263] Addressing an issue of first impression in this circuit,[264] the panel determined that employers are obligated to provide reasonable accommodations for individuals falling within any of the ADA's various definitions of disabled, including those employees who are "regarded as" being disabled.[265] The panel concluded that by its plain language, the ADA requires employers to provide reasonable accommodations for such individuals.[266]

D. Retaliation

One retaliation decision the Eleventh Circuit rendered during the survey period is worth noting. *Roberts v. Rayonier, Inc.*,[267] described the perils presented to in-house labor counsel when they seek legal advice from outside employment counsel concerning their own employment circumstances. The plaintiff had conferred with a prominent plaintiffs' employment attorney who had previously sued the defendant on several occasions.[268] The defendant found that by doing so, the plaintiff had compromised his position of employment, and the defendant discharged him from employment as a result. In summary, in-house

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261. FED. R. CIV. P. 50.

262. *Collado*, 419 F.3d at 1149-54.

263. 422 F.3d 1220 (11th Cir. 2005).

264. *Id.* at 1235.

265. *Id.* at 1240. Other circuits addressing this question are divided on the proper answer. Those decisions finding that individuals "regarded as" disabled require no accommodation include Kaplan v. N. Las Vegas, 323 F.3d 1226, 1233 (9th Cir. 2003); Weber v. Strippit, Inc., 186 F.3d 907, 917 (8th Cir. 1999); Workman v. Frito-Lay, Inc., 165 F.3d 460, 467 (6th Cir. 1999); and Newberry v. E. Tex. State Univ., 161 F.3d 276, 280 (5th Cir. 1998); while those finding an accommodation obligation exists include: Williams v. Phila. Hous. Auth. Police Dep't, 380 F.3d 751, 755-76 (3d Cir. 2004); and Katz v. City Metal Co., 87 F.3d 26, 32-33 (1st Cir. 1996).

266. *Collado*, 422 F.3d at 1235.

267. 135 F.App'x 351 (11th Cir. 2005). This case was not selected for publication in the Federal Reporter by the Eleventh Circuit Court of Appeals. *See* 11th Cir. R. 36-2. Nonetheless, we think it is worthy of mentioning in this Article, perhaps simply because the authors know all of the players in this rather dark, convoluted local drama.

268. *Roberts*, 135 F.App'x at 354-55.

counsel seeking such advice should do so at their own peril and should proceed cautiously.[269]

IV. CIVIL RIGHTS ACTS OF 1866 AND 1871

As is the case each year, many of the cases reported on in other sections of this Article also contained section 1981[270] or section 1983[271] claims or both. The following discussion is limited to the issues raised that are unique to claims asserted under the Civil Rights Acts of 1866 (section 1981) and 1871 (section 1983).

A. Section 1981

Unfortunately, outside of the cases already discussed in this Article, there were no noteworthy section 1981 cases reported during the survey period.

B. Section 1983

Two reported decisions during the survey period addressed the often difficult issue of qualified immunity in the section 1983 context. Both rulings went against the public employers.

In *Cook v. Gwinnett County School District*,[272] the Eleventh Circuit concluded that the individual school district officials who had been sued were not entitled to qualified immunity where it was alleged that they had "selectively excluded" viewpoint speech.[273] "But even in a non-public forum, the law is clearly established that the state cannot engage in viewpoint discrimination—that is, the government cannot discriminate in access to the forum on the basis of the government's opposition to the speaker's viewpoint."[274] The panel determined that the 1983 United States Supreme Court decision in *Perry Education Ass'n v. Perry*

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269. *Id.*

270. 42 U.S.C. § 1981 (1994).

271. 42 U.S.C. § 1983 (2000).

272. 414 F.3d 1313 (11th Cir. 2005).

273. *Id.* at 1321. The plaintiff had been involved with a union-like organization which advocated on behalf of Gwinnett County school bus drivers. *Id.* at 1317. The defendant school district sought to curtail the plaintiff's activities on behalf of the organization during working hours on school district property. This litigation ensued, with the plaintiff arguing that by its actions, including transferring her, the defendant violated her rights of speech and association under the First Amendment to the United States Constitution. *Id.* The individual school district members moved for summary judgment with respect to the claims against them in their individual capacities on qualified immunity grounds. *Id.* The district denied their motion and this interlocutory appeal ensued. *Id.*

274. *Id.* at 1321 (citing Perry Ed. Ass'n v. Perry Local Educators' Ass'n, 460 U.S. 37, 45 (1983)).

Local Educators' Ass'n,[275] had given the school district officials sufficiently clear warning that selectively excluding speech because of its viewpoint violated clearly established law.[276] Consequently, the panel affirmed the district court's determination that the officials were not entitled to qualified immunity under the facts alleged in the case.[277]

Akins v. Fulton County[278] addressed whether the individual county officials were on notice that whistle-blowing speech is protected under the First Amendment.[279] Cleaning up some prior circuit qualified immunity jurisprudence along the way,[280] the Eleventh Circuit concluded that a long string of Supreme Court and circuit court decisions had sufficiently placed Fulton County officials on notice that the "[p]laintiffs' speech as whistleblowers was protected by the First Amendment."[281]

V. CONCLUSION

The court of appeals continued to decide important employment discrimination issues during the survey period. While the mere number of reported decisions continues to decline, as has been the trend over the last several years, the issues reached continue to be significant ones for employment law practitioners.

275. 460 U.S. 37 (1983).
276. *Cook*, 414 F.3d at 1321; *Perry*, 460 U.S. at 45.
277. *Cook*, 414 F.3d at 1321.
278. 420 F.3d 1293 (11th Cir. 2005).
279. *Id.* at 1300.
280. The panel attempted to clarify the continued vitality of *Martin v. Baugh*, 141 F.3d 1417 (11th Cir. 1998), in light of the intervening United States Supreme Court decision in *Hope v. Pelzer*, 536 U.S. 730 (2002).
281. *Akins*, 420 F.3d at 1308.