

# Employment Discrimination

by Peter Reed Corbin\*  
and John E. Duvall\*\*

During the 2007 survey period, the United States Court of Appeals for the Eleventh Circuit continued its recent trend of issuing many opinions—most unpublished—regarding employment discrimination.<sup>1</sup> The court rendered eight published decisions concerning Title VII of the Civil Rights Act of 1964 (“Title VII”)<sup>2</sup> and fifteen published opinions generally concerning employment discrimination. Unpublished opinions in this area continued to flourish, however, with at least forty-nine unpublished decisions regarding Title VII and fifty-seven unpublished employment discrimination opinions overall. Clearly, the case that received the most press coverage during the survey period was the United States Supreme Court’s decision in *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>3</sup> which clarified the statute of limitations in Title VII cases involving pay discrimination claims on the basis of gender.<sup>4</sup> The Eleventh Circuit focused its attention on sexual harassment cases,

---

\* Partner in the firm of Ford & Harrison LLP, Jacksonville, Florida. University of Virginia (B.A., 1970); Mercer University, Walter F. George School of Law (J.D., cum laude, 1975). Member, State Bars of Georgia and Florida.

\*\* Partner in the firm of Ford & Harrison LLP, Jacksonville, Florida. Florida State University (B.S., 1973); Mercer University, Walter F. George School of Law (J.D., cum laude, 1985). Member, State Bar of Florida.

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 2007. 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. §§ 2000 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. §§ 12101-12213 (2000 & Supp. V 2005)); the Civil Rights Acts of 1866 and 1871 (codified as amended at 42 U.S.C. § 1981 (2000) and 42 U.S.C. § 1983 (2000)).

2. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

3. 127 S. Ct. 2162 (2007).

4. *Id.* at 2166.

issuing two significant opinions,<sup>5</sup> which clarified the *Faragher–Ellerth* affirmative defense<sup>6</sup> for employers.

## I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

### A. *Theories of Liability and Burdens of Proof*

**1. Religious Discrimination.** The United States Court of Appeals for the Eleventh Circuit considered one religious discrimination case during the survey period. In *Morrisette-Brown v. Mobile Infirmary Medical Center*,<sup>7</sup> the court considered an employer's reasonable accommodation obligation pursuant to Title VII's<sup>8</sup> religious discrimination provisions.<sup>9</sup> The plaintiff, a member of the Seventh-Day Adventist Church, brought suit under Title VII, alleging that she was terminated from her secretary position because her religious beliefs prevented her from working Friday or Saturday shifts from 3:00 p.m. to 11:00 p.m. Following a bench trial, the district court entered judgment in favor of the infirmary. On appeal, the plaintiff alleged that the district court erred in finding that the infirmary had reasonably accommodated her religious beliefs.<sup>10</sup> However, the court of appeals noted that (1) the employer seemed to utilize a neutral rotating system of assigning shifts, and (2) the employer had approved all the plaintiff's requests for a shift swap when she was assigned a shift that conflicted with her religious beliefs.<sup>11</sup> The court also observed that the infirmary posted a master schedule of all employees' shift schedules to make it easier for the shift swaps to occur.<sup>12</sup> Finally, the court noted that the infirmary had offered the plaintiff a transfer to another position that would not have involved working any Friday or Saturday shifts, but the plaintiff turned down the employer's offer.<sup>13</sup> Consequently, the court concluded that this evidence more than adequately supported the district court's finding

---

5. See Nurse "BE" v. Columbia Palms W. Hosp. Ltd. P'ship, 490 F.3d 1302 (11th Cir. 2007); Baldwin v. Blue Cross/Blue Shield of Ala, 480 F.3d 1287 (11th Cir. 2007).

6. See *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).

7. 506 F.3d 1317 (11th Cir. 2007).

8. 42 U.S.C. §§ 2000e to 2000e-17 (2000).

9. *Morrisette-Brown*, 506 F.3d at 1319.

10. *Id.*

11. *Id.* at 1323.

12. *Id.*

13. *Id.* at 1324 n.6.

that the plaintiff had been reasonably accommodated, and it affirmed the district court's decision.<sup>14</sup>

**2. Sexual Harassment.** In two cases during the survey period, the Eleventh Circuit clarified the employer's *Faragher-Ellerth* affirmative defense in sexual harassment cases, with both cases resulting in significant victories for the employer.<sup>15</sup> In the first case, *Baldwin v. Blue Cross/Blue Shield of Alabama*,<sup>16</sup> the plaintiff worked as a marketing representative for the Blue Cross office in Huntsville, Alabama. In November 2000 a gentleman named Scott Head became the plaintiff's boss when Head was promoted to district manager. In the months that followed, Head, setting perhaps a new low for office decorum, used profanity on a daily basis and regularly used the "f" word in general office conversation. Head referred to most of the women in the office as "babe" and frequently used the "b" word when referring to women in general.<sup>17</sup> Not limiting his profane comments to women, however, Head also generally referred to the male marketing representatives in the office as "cocksuckers" and "peckerwoods."<sup>18</sup> There were two incidents that occurred between Head and the plaintiff that could be deemed sexual in nature.<sup>19</sup> On one occasion, Head called the plaintiff into his office, closed the door, walked up behind her, and said, "Hey, Babe, blow me."<sup>20</sup> On another occasion, after attending a banquet with the plaintiff in Birmingham, Head invited the plaintiff to stay in Birmingham with him for a "night of dancing and partying."<sup>21</sup> The plaintiff declined the offer.<sup>22</sup>

---

14. *Id.* at 1324.

15. See *Nurse "BE" v. Columbia Palms W. Hosp. Ltd. P'ship*, 490 F.3d 1302 (11th Cir. 2007); *Baldwin v. Blue Cross/Blue Shield of Ala.*, 480 F.3d 1287 (11th Cir. 2007). To successfully maintain a *Faragher-Ellerth* defense, an employer must establish two elements. *Baldwin*, 480 F.3d at 1292. First, the employer must show that it "exercised reasonable care to prevent and correct promptly any sexually harassing behavior." *Id.* at 1303 (quoting *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 765 (1998)). Second, the employer must establish that the employee "unreasonably failed to take advantage of any preventative or corrective opportunities [it] provided." *Id.* (brackets in original) (quoting *Faragher*, 524 U.S. at 807; *Burlington Indus., Inc.*, 524 U.S. at 765).

16. 480 F.3d 1287 (11th Cir. 2007).

17. *Id.* at 1292-93.

18. *Id.* at 1293 (internal quotation marks omitted).

19. *Id.* at 1294.

20. *Id.* (internal quotation marks omitted).

21. *Id.*

22. *Id.*

The plaintiff did not file a complaint concerning any of Head's behavior until November 2001, a full year after Head had become her boss (and over three months after the banquet incident in Birmingham).<sup>23</sup> Blue Cross immediately conducted an investigation of the plaintiff's complaint, including interviews with both the plaintiff and Head and interviews with any other potential witnesses in the office. However, none of the plaintiff's allegations could be substantiated. None of the witnesses corroborated the plaintiff's allegations, and several said that the plaintiff also used profanity in the office. Blue Cross responded to the complaint by issuing Head a warning. The company also offered to hire an expert counselor for both the plaintiff and Head and to monitor any future interactions. The plaintiff was also offered a transfer to a marketing representative position in the Birmingham office. The plaintiff refused both of these options and demanded that Head be fired. The company declined to fire Head and offered the plaintiff the option of counseling or a transfer on three different occasions. When the plaintiff continued to refuse both options, Blue Cross requested the plaintiff's resignation.<sup>24</sup>

The plaintiff then brought a Title VII claim against Blue Cross, alleging that she had been subjected to a sexually hostile work environment. The district court granted summary judgment in favor of Blue Cross.<sup>25</sup> On appeal, the Eleventh Circuit addressed whether Blue Cross had established its defense and determined that Blue Cross had established both elements of the defense.<sup>26</sup> As to the first element, the Eleventh Circuit noted that this element focuses on the employer's response to a harassment complaint.<sup>27</sup> Regarding the employer's response, the court stated that the employer's obligation was to conduct "an investigation that is reasonable given the circumstances."<sup>28</sup> Determining that the investigation in this case was reasonable (although the plaintiff's allegations could not be corroborated), the court noted: "Nothing in the *Faragher-Ellerth* defense puts a thumb on either side of the scale in a he-said, she-said situation."<sup>29</sup>

The court also held that Blue Cross had met the second element of the defense because the plaintiff had "waited too long to complain."<sup>30</sup> The

---

23. *Id.* at 1297.

24. *Id.* at 1298-99.

25. *Id.* at 1299-1300.

26. *Id.* at 1303-07.

27. *Id.* (citing *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765).

28. *Id.*

29. *Id.*

30. *Id.* at 1307.

court noted that the plaintiff had waited over three months before complaining about Head's sexual comment and proposition (the only aspects of his offensive behavior that were sexual in nature).<sup>31</sup> Accordingly, the court of appeals concluded that Blue Cross had met both elements of the *Faragher–Ellerth* defense as a matter of law and affirmed the district court.<sup>32</sup>

The Eleventh Circuit reached a similar result in the second case, *Nurse “BE” v. Columbia Palms West Hospital Ltd. Partnership*.<sup>33</sup> The plaintiff worked as a nurse at the defendant-hospital. A pediatric neurosurgeon at the hospital, Dr. Michael Chaparro, had privileges to practice medicine at the hospital but was not employed by the hospital. In late 2002 or early 2003, Dr. Chaparro began calling the plaintiff's cell phone asking her to meet him for a late drink or to go out to dinner. After three to five of these telephone calls, the plaintiff mentioned the calls to her nurse supervisor and asked that her telephone number be removed from the staff directory. However, she also specifically requested that the incidents not be reported to the hospital administration for fear of retaliation. In May 2003 Dr. Chaparro allegedly began making lewd and sexual comments to the plaintiff, but again, the plaintiff did not report the comments. Finally, after an incident in November 2003, in which Dr. Chaparro entered a closet behind the plaintiff and began making sexual advances to her, the plaintiff filed a complaint with the human resource director.<sup>34</sup>

The hospital immediately began an investigation. The plaintiff was offered a leave of absence pending the investigation and was also offered the use of the hospital's employee assistance program. In investigating the complaint, the hospital interviewed both the plaintiff and Dr. Chaparro. Dr. Chaparro acknowledged the incident in the supply room but submitted that the incident occurred after a long history of mutual flirting between himself and the plaintiff. Dr. Chaparro was not disciplined by the hospital because he was not a hospital employee. However, he was reprimanded by the private clinic that employed him. It was also undisputed that there was no further contact between the plaintiff and Dr. Chaparro after the plaintiff's complaint.<sup>35</sup> The plaintiff, not satisfied with the outcome of the investigation, resigned approximately one month later. The plaintiff then brought suit pursuant to Title VII against both Dr. Chaparro and the hospital,

---

31. *Id.*

32. *Id.*

33. 490 F.3d 1302 (11th Cir. 2007).

34. *Id.* at 1304-05.

35. *Id.* at 1305-06.

alleging that she was subjected to a sexually hostile work environment. Following a jury trial, the jury entered a verdict in the plaintiff's favor for \$10,000.<sup>36</sup>

On appeal, the Eleventh Circuit focused entirely on the second element of the *Faragher–Ellerth* defense: “whether [the plaintiff] unreasonably failed to take advantage of [the hospital’s] sexual harassment policy, and if not, whether [the hospital] responded by taking reasonable and prompt corrective action.”<sup>37</sup> The key inquiry was whether the plaintiff’s report to her supervisor of Dr. Chaparro’s calls to the plaintiff’s cell phone constituted notice to the hospital sufficient to trigger the hospital’s obligation to take prompt and reasonable corrective action.<sup>38</sup> The Eleventh Circuit held that the calls to the plaintiff’s cell phone did not put the hospital on notice as a matter of law.<sup>39</sup> As the court of appeals concluded, “[a]t best, the phone calls . . . amounted to co-worker congeniality,” and “[a]t worst, they described a persistent but non-threatening suitor, which still does not amount to harassment.”<sup>40</sup> The court of appeals was also influenced by the plaintiff’s request that her report about the phone calls be kept confidential and not be reported.<sup>41</sup> When the hospital was finally put on notice by the plaintiff’s complaint in November 2003, the hospital began its investigation within one day of the complaint.<sup>42</sup> The court of appeals determined that this was more than sufficient to meet the hospital’s obligation to take “prompt and corrective action.”<sup>43</sup> Accordingly, the Eleventh Circuit vacated the jury’s verdict and directed that judgment be entered for the defendant.<sup>44</sup>

In *Scarborough v. Board of Trustees Florida A&M University*,<sup>45</sup> the Eleventh Circuit was confronted with a case of female on male sexual harassment. The plaintiff was employed as an academic advisor for the Florida A&M School of Nursing. Shortly after he was hired, the plaintiff alleged that he was subjected to inappropriate sexual advances by his supervisor, a female. After he rejected his supervisor’s sexual advances,

---

36. *Id.* at 1307-08.

37. *Id.* at 1309. The court did not analyze the first element (whether the hospital took reasonable steps to *prevent* sexual harassment) because the plaintiff did not cross-appeal the jury’s finding that the hospital had satisfied this element. *Id.*

38. *Id.*

39. *Id.* at 1310.

40. *Id.*

41. *Id.* at 1310-11.

42. *Id.* at 1311-12.

43. *Id.* at 1312.

44. *Id.*

45. 504 F.3d 1220 (11th Cir. 2007).

the plaintiff alleged that his supervisor then overloaded him with job duties and verbally abused him in the workplace. Several months later, the plaintiff interviewed for another position within the university.<sup>46</sup> Several days later, the supervisor “confronted [the plaintiff] in his office, verbally attacked him with abusive and profane language, spit on his face, and knocked papers out of his hands.”<sup>47</sup> The plaintiff then filed a formal complaint against his supervisor with the university’s Equal Opportunity Program’s Office. After the tires on his car were slashed, he also reported the matter to the campus police.<sup>48</sup> A day later, the dean of the university, who had recommended the plaintiff for the coordinator position for which he had applied, promptly withdrew her recommendation and fired the plaintiff “for ‘unprofessionalism.’”<sup>49</sup> The plaintiff filed suit against the university pursuant to Title VII, alleging that his termination was in retaliation for his sexual harassment complaint. The district court entered summary judgment for the university.<sup>50</sup> On appeal, the Eleventh Circuit had little difficulty in holding that a disputed issue of material fact existed about whether the university’s proffered reason for termination was a legitimate and nondiscriminatory reason.<sup>51</sup> Accordingly, the court of appeals vacated the district court’s judgment and remanded the case for further proceedings.<sup>52</sup>

**3. Retaliation.** Two reported decisions during the survey period addressed Title VII retaliation claims. In *Crawford v. City of Fairburn*,<sup>53</sup> the plaintiff was hired as a major in the police department for the City of Fairburn, Georgia, with his responsibilities including personnel matters and internal affairs investigations. Several months after he was hired, the plaintiff conducted an investigation of a sexual harassment complaint filed by a female officer in the police department. At the conclusion of his investigation, the plaintiff submitted a report to the police chief that found no sexual harassment violations. The plaintiff’s report, however, went further, detailing violations within the department of insubordination, a failure to support the police department, and gossiping within the department. Approximately a month

---

46. *Id.* at 1221.

47. *Id.*

48. *Id.* at 1222.

49. *Id.*

50. *Id.* at 1220.

51. *Id.* at 1222.

52. *Id.* at 1222-23.

53. 482 F.3d 1305 (11th Cir. 2007), *cert. denied*, 128 S. Ct. 495 (2007).

later, the city had become dissatisfied with the plaintiff's performance.<sup>54</sup> At a city council meeting, the council, in agreement with the mayor, terminated the plaintiff for "staff discontent, unfair scheduling practices, poor management, and poor communication with the [c]ity."<sup>55</sup> The plaintiff brought suit against the city alleging Title VII retaliation. The district court entered summary judgment for the city.<sup>56</sup> On appeal, the plaintiff argued that a statement by the city administrator, to the effect that the plaintiff's investigation of the sexual harassment complaint "had opened up a 'can of worms' and was going to get the [c]ity sued," presented a jury question about whether the city's articulated reason for termination was pretextual.<sup>57</sup> However, the Eleventh Circuit disagreed because the city administrator's alleged statement did not rebut any of the several nondiscriminatory reasons that the city had articulated for the plaintiff's termination.<sup>58</sup> Because the plaintiff had failed to rebut "each" of the various reasons for termination articulated by the city, the court of appeals concluded that the plaintiff had not presented a jury question on the issue of pretext.<sup>59</sup>

The plaintiff in *Thomas v. Cooper Lighting, Inc.*<sup>60</sup> did not fair any better. The plaintiff worked as an assembler and floater for the defendant, Cooper Lighting, Inc. A little over a year after she was hired, the plaintiff filed a sexual harassment complaint against her supervisor, complaining about sexual comments that the supervisor had made. Approximately three months later, the plaintiff's employment was terminated for excessive absenteeism. The plaintiff then brought suit under Title VII, alleging that she was terminated in retaliation for having complained of sexual harassment. The district court entered summary judgment for the employer.<sup>61</sup> On appeal, the primary issue was whether the plaintiff had established the "causation" element of her prima facie case—whether the plaintiff had established a "causal relation" between her complaint of harassment and her termination.<sup>62</sup> The Eleventh Circuit noted that the causation element can be established "by showing close temporal proximity," but when there is no other evidence of causation, the court concluded that the temporal proximity must be

---

54. *Id.* at 1307.

55. *Id.*

56. *Id.* at 1308.

57. *Id.* at 1308-09.

58. *Id.* at 1309.

59. *Id.*

60. 506 F.3d 1361 (11th Cir. 2007).

61. *Id.* at 1363.

62. *Id.* at 1363-64 (quoting *Meeks v. Computer Assocs. Int'l*, 15 F.3d 1013, 1021 (11th Cir. 1994)).

“very close.”<sup>63</sup> In this case, the court found that a disparity of three to four months was “not enough” as a matter of law.<sup>64</sup> Accordingly, the Eleventh Circuit affirmed the district court.<sup>65</sup>

### B. Procedural Matters

**1. Statute of Limitations.** As noted above, the case receiving the most press coverage during the survey period was *Ledbetter v. Goodyear Tire & Rubber Co.*,<sup>66</sup> in which the Supreme Court affirmed the Eleventh Circuit’s decision<sup>67</sup> regarding the application of the statute of limitations for filing a pre-suit charge of discrimination with the Equal Employment Opportunity Commission (“EEOC”).<sup>68</sup> The Court was called upon to determine when the discriminatory act occurs that triggers the statute of limitations for a claim of discrimination in pay on the basis of gender.<sup>69</sup> The plaintiff had worked for Goodyear’s tire plant in Gadsden, Alabama, since 1979. In 1998 she filed a charge with the EEOC, alleging discrimination in pay because of her gender. In the plaintiff’s subsequent Title VII action, following a jury trial, the jury found for the plaintiff and awarded her back pay and damages.<sup>70</sup> The Eleventh Circuit reversed, holding that all the pay decisions made by Goodyear occurring more than 180 days prior to the filing of the plaintiff’s charge were time-barred.<sup>71</sup> Because the Eleventh Circuit also held that the only two pay decisions occurring within the 180 day period were not discriminatory as a matter of law, the court directed that judgment be entered for the defendant.<sup>72</sup>

Arguing before the Supreme Court, the plaintiff proffered that each paycheck the plaintiff received during the 180 day period prior to her charge constituted a separate act of discrimination.<sup>73</sup> Relying heavily

---

63. *Id.* at 1364 (quoting *Clark County Sch. Dist. v. Breeden*, 532 U.S. 268, 273 (2001) (per curiam)).

64. *Id.*

65. *Id.*

66. 127 S. Ct. 2162 (2007).

67. For a discussion of *Ledbetter* as it appeared before the Eleventh Circuit, see Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 57 MERCER L. REV. 1039, 1049 (2006).

68. *Id.* at 2165.

69. *Id.*

70. *Id.* at 2165-66.

71. *Id.* at 2166 (citing *Ledbetter v. Goodyear Tire & Rubber Co.*, 421 F.3d 1169, 1182-83 (11th Cir. 2005)).

72. *Id.* (citing *Ledbetter*, 421 F.3d at 1189-90).

73. *Id.* at 2167.

upon its prior decisions in *National Railroad Passenger Corp. v. Morgan*<sup>74</sup> and *United Air Lines, Inc. v. Evans*,<sup>75</sup> the Supreme Court rejected the plaintiff's argument.<sup>76</sup> The Court concluded: "We therefore reject the suggestion that an employment practice committed with no improper purpose and no discriminatory intent is rendered unlawful nonetheless because it gives some effect to an intentional discriminatory act that occurred outside the charging period. [The plaintiff's] claim is, for this reason, untimely."<sup>77</sup>

**2. Mixed Motive Defense.** In *Chambless v. Louisiana-Pacific Corp.*,<sup>78</sup> the Eleventh Circuit was confronted with the issue of whether the defendant-employer had waived its "mixed-motive" defense by not pleading it as an affirmative defense in its answer to the complaint (and hence, whether the district court had erred in instructing the jury on the defense).<sup>79</sup> However, the Eleventh Circuit, in affirming the district court's decision, came to the employer's rescue by holding that both the plaintiff and the court were deemed to have sufficient notice of the defense because the mixed-motive defense had been included as an issue in the district court's pretrial order.<sup>80</sup>

### C. Remedies

**1. Attorney Fees.** In *Jones v. United Space Alliance, L.L.C.*,<sup>81</sup> the Eleventh Circuit was confronted with an issue regarding the interaction between the federal offer-of-judgment rule, set forth in Rule 68 of the Federal Rules of Civil Procedure,<sup>82</sup> and Florida Statute section 768.-79,<sup>83</sup> the comparable Florida state law rule.<sup>84</sup> The defendant-employer

---

74. 536 U.S. 101 (2002).

75. 431 U.S. 553 (1977).

76. *Ledbetter*, 127 S. Ct. at 2166-72.

77. *Id.* at 2172.

78. 481 F.3d 1345 (11th Cir. 2007).

79. *Id.* at 1348.

80. *Id.* at 1349.

81. 494 F.3d 1306 (11th Cir. 2007).

82. FED. R. CIV. P. 68 (1987) (amended 2007).

83. FLA. STAT. ANN. § 768.79 (West 2005).

84. *Jones*, 494 F.3d at 1309. Before its amendment in December 2007, Federal Rule of Civil Procedure 68 provided in part: "If the judgment finally obtained by the offerree is not more favorable than the offer [of judgment], the offeree must pay the costs incurred after the making of the offer." FED. R. CIV. P. 68 (1987) (amended 2007). By comparison, Florida Statute Section 768.79 provides in part:

the defendant shall be entitled to recover reasonable costs and attorney's fees incurred by her or him . . . from the date of filing of the offer if the judgment is

had successfully defended against the plaintiff's claims before the district court pursuant to both Title VII and the Florida Civil Rights Act of 1992 ("FCRA"),<sup>85</sup> culminating with the district court's grant of the defendant's motion for summary judgment on all claims. Because the plaintiff had not accepted the defendant's offer of judgment in the amount of \$2,500, the defendant moved for an award of attorney fees pursuant to section 768.79. However, the district court denied the employer's motion, finding that section 768.79 was preempted by the federal attorney fee statute set forth in 42 U.S.C. § 1988.<sup>86</sup>

On appeal, the Eleventh Circuit affirmed the district court's denial of attorney fees but for a different reason.<sup>87</sup> The Eleventh Circuit did not reach the merits of the preemption issue.<sup>88</sup> Rather, the court of appeals held that under state law, Florida courts had adopted the *Christiansburg* standard<sup>89</sup> for the defendants' awards of attorney fees.<sup>90</sup> Under this standard, defendants are entitled to fees only if the action is found to be "frivolous, unreasonable, or without foundation."<sup>91</sup> Because Florida law also mandated that Title VII and the FCRA be interpreted consistently, the court of appeals concluded that attorney fees were not available in this case pursuant to section 768.79.<sup>92</sup>

## II. AGE DISCRIMINATION IN EMPLOYMENT ACT—PRETEXT

For years, lawyers have encouraged employers to publish and widely disseminate written policy statements of their commitment to nondiscrimination. The lawyers argued that the published policies were an important defense tool in any subsequent litigation. In the unpublished decision issued in *Hoard v. CHU2A, Inc. Architecture Engineering Planning*,<sup>93</sup> the United States Court of Appeals for the Eleventh Circuit addressed the significance of an employer's failure to have a published antidiscrimination policy and concluded that the failure did not prove that the employer's stated reason for its adverse employment action was

---

one of no liability or the judgment obtained by the plaintiff is at least 25 percent less than such offer, and the court shall set off such costs and attorney's fees against the award.

FLA. STAT. ANN. § 768.79 (emphasis added).

85. FLA STAT. ANN. §§ 760.01-760.11 (West 2005).

86. *Jones*, 494 F.3d at 1308-09; 42 U.S.C. § 1988 (2000).

87. *Jones*, 494 F.3d at 1311.

88. *Id.* at 1309.

89. *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 421 (1978).

90. *Jones*, 494 F.3d at 1310.

91. *Id.* at 1311 (quoting *Christiansburg Garment Co.*, 434 U.S. at 421).

92. *Id.*

93. 228 F. App'x 955 (11th Cir. 2007) (per curiam).

pretextual.<sup>94</sup> In *Hoard* the plaintiff-employee was a fifty-eight year old man who filed a complaint against CHU2A, alleging age discrimination as prohibited by the Age Discrimination in Employment Act (“AD-EA”).<sup>95</sup> After an adverse district court decision, Hoard argued on appeal that the absence of a published policy by the employer constituted evidence of pretext.<sup>96</sup> The district court entered summary judgment in favor of CHU2A because Hoard failed to establish any evidence of pretext to rebut the employer’s stated legitimate, nondiscriminatory reason for the adverse employment action taken against him.<sup>97</sup> The court summarily rejected this argument and affirmed the district court’s decision.<sup>98</sup>

### III. AMERICANS WITH DISABILITIES ACT

#### A. *Substantial Limitation of a Major Life Activity*

The long-established trend to narrowly construe the term “disability” for purposes of determining coverage under the American with Disabilities Act (“ADA”) continued during the survey period.<sup>99</sup> The United States Court of Appeals for the Eleventh Circuit issued three decisions during the period in which a narrow definition of the term “disability” precluded the plaintiffs’ claims.

In *Littleton v. Wal-Mart Stores, Inc.*,<sup>100</sup> the court determined that the plaintiff’s mental retardation did not constitute an ADA disability.<sup>101</sup> Wal-Mart denied Littleton employment after a bad job interview.<sup>102</sup> A suit ensued and the district court subsequently granted summary judgment to Wal-Mart, finding that Littleton was not substantially limited in any major life activity due to his mental retardation.<sup>103</sup> Because Littleton had failed to adduce any evidence to indicate that he was substantially limited, the court of appeals affirmed.<sup>104</sup> The court cited *Williams* which held: “Merely having an impairment does not

---

94. *Id.* at 958; 29 U.S.C. §§ 621-34 (2000).

95. *Hoard*, 228 F. App’x at 960.

96. *Id.*

97. *Id.*

98. *Id.*

99. The United States Supreme Court held that the term “disability” is to be “interpreted strictly to create a demanding standard for qualifying as disabled.” *Toyota Motor Mfg., Ky., Inc. v. Williams*, 534 U.S. 184, 197 (2002).

100. 231 F. App’x 874 (11th Cir. 2007) (per curiam).

101. *Id.* at 877-78.

102. *Id.* at 875.

103. *Id.* at 876-77.

104. *Id.*

make one disabled for purposes of the ADA. Claimants also need to demonstrate that the impairment limits a major life activity.”<sup>105</sup>

In *Greenburg v. BellSouth Telecommunications, Inc.*,<sup>106</sup> the court held that the plaintiff’s morbid obesity did not limit his ability to work a broad class of jobs and therefore was not a disability for purposes of the ADA.<sup>107</sup> The court affirmed the grant of summary judgment to the employer.<sup>108</sup>

Finally, in *Butler v. Greif Bros. Service*,<sup>109</sup> the court held that an individual was not substantially limited by his back problems.<sup>110</sup> A doctor diagnosed Butler with a bulging disc and degenerative disc disease. He worked for a year and a half without incident following the diagnosis. Subsequently, Greif, Butler’s employer, announced that employees in his job classification would now be required occasionally to perform additional job duties that involved bending and lifting. Butler informed his employer that he was unable to perform these additional job duties due to his back condition. When Butler produced a medical certification stating that he could not bend, Greif became concerned that Butler could no longer safely perform his regular job because of the no bending restriction imposed by his medical provider. Greif required Butler to obtain a no restrictions certification from his medical provider before it would allow him to return to work. Butler was placed on an unpaid leave of absence, and he subsequently commenced suit alleging that he had been constructively discharged from employment. During the jury trial, Greif moved for judgment as a matter of law at the close of Butler’s case. The district court granted the motion and an appeal ensued.<sup>111</sup>

Affirming the ruling of the district court, the court of appeals determined that Butler had failed to establish that he was substantially limited in his ability to work for a number of reasons.<sup>112</sup> The court determined that it was significant that Butler continued to work in his same job capacity for a year and a half following his initial diagnosis.<sup>113</sup> Additionally, the court determined it was significant that Butler

---

105. *Id.* at 877 (quoting *Williams*, 534 U.S. at 195).

106. 498 F.3d 1258 (11th Cir. 2007) (per curiam).

107. *Id.* at 1264.

108. *Id.* at 1265.

109. 231 F. App’x 854 (11th Cir. 2007) (per curiam).

110. *Id.* at 858.

111. *Id.* at 855-56.

112. *Id.* at 857.

113. *Id.*

had worked in a number of different occupations following his departure from Greif.<sup>114</sup> The court noted

Butler testified that he worked as a roofer, a mattress mover, a handyman, and a truck driver after he was placed on leave by Greif. Butler's ability to perform such jobs indicates that he was not substantially limited from a class of jobs or a broad range of jobs as compared to the average person having comparable training, skills, and abilities.<sup>115</sup>

### *B. Reasonable Accommodation*

The attempted across-the-board application of a strict punctuality policy failed to pass judicial muster in *Holly v. Clairson Industries, L.L.C.*<sup>116</sup> Clairson, the employer, implemented a new, no-fault punctuality policy in 2003.<sup>117</sup> Holly, a paraplegic since 1984, lost his job because of the new policy.<sup>118</sup> Clairson hired Holly in 1986 as a mold polisher in its custom plastic injections molding plant. Due to his disability, Holly frequently arrived late to work.<sup>119</sup> His tardiness did not interfere with Clairson's production process, however, because mold polishing was not as time sensitive as other aspects of that process.<sup>120</sup>

In 2003 Clairson hired a new employee benefits specialist, who eventually became the president of the company. That same year, at the specialist's behest, Clairson implemented its new zero-tolerance attendance policy.<sup>121</sup> Under the new policy, each absence from work counted as an "occurrence," while each partial absence—or tardy—count[ed] as a one-half occurrence.<sup>122</sup> The new policy stated that an employee who clocked in one second past his shift start time received a one-half occurrence.<sup>123</sup> "The policy provide[d] for a progressive series of verbal and written warnings as an employee accrue[d] more occurrences, and provide[d] for [the] immediate termination [from employment of any employee] upon the accrual of eighteen tardies (or nine occurrences) within one year."<sup>124</sup> The policy expressly stated that "[a]ttendance is an essential job function for all at the Company. Employees with

---

114. *Id.*

115. *Id.*

116. 492 F.3d 1247 (11th Cir. 2007).

117. *Id.* at 1253.

118. *Id.* at 1249, 1254.

119. *Id.* at 1249.

120. *Id.* at 1252.

121. *Id.* at 1253.

122. *Id.*

123. *Id.*

124. *Id.*

American Disability Act [sic] situations are not exempt from this policy.”<sup>125</sup> Holly was eventually terminated from employment because of his recurrent tardies.<sup>126</sup>

In the litigation that ensued, the district court granted summary judgment to Clairson based upon the policy.<sup>127</sup> The district court concluded “that strict punctuality, as defined by Clairson’s policy, was an *essential* function of Holly’s position, and that no reasonable accommodation would enable him to perform that function.”<sup>128</sup> Additionally, the district court held that Holly had failed to provide any evidence that Clairson treated him any differently from nondisabled employees; his claim failed for this reason as well.<sup>129</sup> On appeal, the court of appeals reversed the district court on both grounds.<sup>130</sup>

First, the court of appeals concluded that, notwithstanding the plain language of the policy, strict punctuality was not an essential function of Holly’s particular job.<sup>131</sup> The court observed that Holly’s own supervisors testified that punctuality was not an essential job function for all job classifications in the plant.<sup>132</sup> The court explained, “[W]hen considering the employer’s judgment regarding what is an essential function, we have previously considered not only the company’s ‘official position,’ but also testimony from the the plaintiff’s supervisor.”<sup>133</sup> Two of Holly’s supervisors had testified in the lower court that mold polishing was not time sensitive and prompt attendance by mold polishers, such as Holly, was not critical to the overall plastic injections molding process.<sup>134</sup> The court concluded, “Thus, we think the record fairly reflects a genuine issue of material fact on this factor alone.”<sup>135</sup>

As for the second ground for reversal, the court concluded:

Clairson is not insulated from liability under the ADA by treating its non-disabled employees exactly the same as its disabled employees. In race and sex employment discrimination cases, discrimination is usually proved by showing that employers treat similarly situated employees differently because of their race or sex. However, the very purpose of reasonable accommodation laws is to *require* employers to

---

125. *Id.* (alteration in original) (brackets in original).

126. *Id.* at 1254.

127. *Id.* at 1255.

128. *Id.*

129. *Id.*

130. *Id.* at 1264.

131. *Id.* at 1260.

132. *Id.*

133. *Id.* at 1257.

134. *Id.*

135. *Id.* at 1258.

treat disabled individuals differently in some circumstances—namely, when different treatment would allow a disabled individual to perform the essential functions of his position by accommodating his disability without posing an undue hardship on the employer. Allowing uniformly-applied, disability-neutral policies to trump the ADA requirement of reasonable accommodations would utterly eviscerate that ADA requirement.<sup>136</sup>

The court summarized,

“[T]he fact that Holly’s non-disabled co-workers were equally subjected to Clairson’s punctuality policy is not relevant to the question whether Clairson discriminated against Holly by failing to reasonably accommodate his disability, and it was error for the district court to hold otherwise.”<sup>137</sup>

In *Moore v. Accenture, LLP*,<sup>138</sup> an employer’s failure to engage in the interactive process required under the ADA to formulate reasonable accommodations was not actionable because the plaintiff failed to state a claim for which relief could be granted.<sup>139</sup> Moore had worked for Accenture from 1987 until 1992, when he became disabled. Thereafter, he took a ten-year leave of absence from work during which time, in accordance with the employer’s policy in effect at the time, his employer allowed him to keep his health, dental, and life insurance coverage in place.<sup>140</sup> In 2002, however, Accenture attempted to implement a new policy requiring disabled employees on long term leave (including the plaintiff) to “return to work by 1 January 2005 or their employment, as well as their insurance coverage, would be terminated.”<sup>141</sup>

Upon learning of the new policy, Moore’s attorney wrote to Accenture, alleging that the policy violated the ADA and demanding that the employer grant one of three proposed accommodations set forth within the correspondence. The accommodations proposed by the attorney were that the plaintiff (1) remain on leave of absence under the old policy, (2) return to work with reasonable accommodation, or (3) receive a severance package that would defray the costs of his ongoing health care. The defendant did not offer the plaintiff a position that would accommodate his disability and did not engage in the interactive process of determining whether such a position was available. Rather, Accenture notified all its employees on long-term disability leaves of

---

136. *Id.* at 1262-63.

137. *Id.* at 1263.

138. No. 06-15650, 2007 WL 3313152 (11th Cir. Nov. 9, 2007).

139. *Id.* at \*4.

140. *Id.* at \*1.

141. *Id.*

absence, including the plaintiff, that they would not be terminated under the new policy but would instead retain their leave of absence status under the old policy.<sup>142</sup>

Notwithstanding Accenture's change of heart, Moore subsequently sued, claiming "that [the defendant] essentially refused to enter into the interactive process of determining whether an accommodated position was available for [the plaintiff]."<sup>143</sup> Accenture moved to dismiss the suit under Rule 12(b)(6) of the Federal Rules of Civil Procedure<sup>144</sup> for failure to state a claim upon which relief could be granted.<sup>145</sup> Instead, the district court dismissed the complaint for lack of subject matter jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure,<sup>146</sup> finding that Moore could not establish an injury in fact—and therefore lacked standing to bring suit—because the defendant "never failed to provide the accommodation which [the plaintiff] had previously received and which, when notified of its termination, [the plaintiff] requested to be continued."<sup>147</sup>

On appeal, Moore argued that this ruling by the district court was erroneous.<sup>148</sup> The court of appeals agreed but still affirmed the district court's ruling.<sup>149</sup>

We disagree with the district court's conclusion that [the plaintiff's] claim does not present injury in fact for the purpose of constitutional standing. As long as [the defendant] had a legal duty under the ADA to engage in the interactive process of finding [the plaintiff] an accommodated position, its failure to engage in that process would create an injury in fact that is both concrete and specific.

By "conflating the standing inquiry with resolution of the merits," the district court improperly relied on standing analysis to dismiss [the plaintiff's] claim under Rule 12(b)(1), even though the dispositive issue went to the merits. The issue was not whether [the plaintiff] was injured by [the defendant's] refusal to engage in the interactive process of determining a reasonable accommodation; instead, the issue was whether [the defendant] had a legal duty to do so. Thus, rather than dismissing [the plaintiff's] claim for lack of standing, the district court should have examined whether, accepting [the plaintiff's] allegations as

---

142. *Id.*

143. *Id.* at \*2.

144. FED. R. CIV. P. 12(b)(6) (2000) (amended 2007).

145. *Moore*, 2007 WL 3313152, at \*2.

146. FED. R. CIV. P. 12(b)(1) (2000) (amended 2007).

147. *Moore*, 2007 WL 3313152, at \*2.

148. *Id.* at \*1.

149. *Id.* at \*3.

true, his complaint stated a claim for relief under the ADA pursuant to Rule 12(b)(6).<sup>150</sup>

The court added, “To establish an ADA violation, it is not enough to show that [the defendant]—while granting a reasonable and full accommodation—denied a different requested accommodation. We have made clear ‘that an employer is not required to accommodate an employee in any manner in which that employee desires.’”<sup>151</sup> Thus, the court concluded,

Because [the defendant] afforded [the plaintiff] reasonable accommodation by allowing him to remain on leave of absence and thus to retain his insurance benefits, we conclude that [the defendant] had no duty under the ADA to provide [the plaintiff] with his choice of a different accommodation. To the extent, then, that [the plaintiff] alleges that [the defendant] violated the ADA by denying him a paid position or by refusing to engage in the interactive process of finding a reasonable accommodation for [the plaintiff] to return to work, [the plaintiff’s] complaint fails to state a claim for which we may grant relief.<sup>152</sup>

In *Novella v. Wal-Mart Stores, Inc.*,<sup>153</sup> the court of appeals determined that the reasonable accommodation requirements of the ADA did not extend to providing sign interpreters at termination meetings.<sup>154</sup> Novella was deaf. Wal-Mart, his employer, decided to discharge him from employment after it concluded that he had written obscene graffiti on the bathroom walls. Novella requested that an interpreter be present at this termination meeting, and his employer denied his request. Litigation ensued, and the district court entered summary judgment for Wal-Mart.<sup>155</sup> On appeal, Novella argued “that the ability to communicate effectively at his termination meeting was both an ‘essential function’ of his job and one of the ‘privileges and benefits’ of employment, requiring a reasonable accommodation.”<sup>156</sup> In reliance on an earlier panel decision in *LaChance v. Duffy’s Draft House, Inc.*,<sup>157</sup> the court of

---

150. *Id.* at \*2-\*3 (citations omitted) (quoting *Wooden v. Bd. of Regents of the Univ. Sys. of Ga.*, 247 F.3d 1262, 1280 (11th Cir. 2001)).

151. *Id.* at \*3 (quoting *Stewart v. Happy Herman’s Cheshire Bridge, Inc.*, 117 F.3d 1278, 1285 (11th Cir. 1997)).

152. *Id.* at \*4.

153. 226 F. App’x 901 (11th Cir. 2007) (per curiam).

154. *Id.* at 903.

155. *Id.* at 902.

156. *Id.*

157. 146 F.3d 832 (11th Cir. 1998). “An ‘accommodation’ is ‘reasonable’—and, therefore required under the ADA—only if it enables the employee to perform the essential functions of the job.” *Id.* at 835.

appeals concluded “that communication at a termination meeting, the purpose of which is to give the employee notice of his termination, is not an ‘essential function’ of an employee’s job.”<sup>158</sup>

### C. Personal Liability

In perhaps the most significant ADA decision rendered during the survey period, *Albra v. Advan, Inc.*,<sup>159</sup> the court of appeals determined that, unlike private suits brought under other provisions of the ADA, individuals may not be held personally liable for violations of the antidiscrimination provisions in the employment subchapter.<sup>160</sup> Distinguishing *Shotz v. City of Plantation*,<sup>161</sup> which dealt with the ADA prohibitions against disability discrimination in the provision of public services, the court determined that because the employment subchapter was modeled after Title VII of the Civil Rights Act of 1964<sup>162</sup> as amended, personal liability did not accrue for alleged violations of the employment subchapter.<sup>163</sup>

## IV. REHABILITATION ACT OF 1973

### A. Substantially Limited

The plaintiff in *Garrett v. University of Alabama at Birmingham Board of Trustees*<sup>164</sup> was unable to convince the United States Court of Appeals for the Eleventh Circuit that under the Rehabilitation Act of 1973,<sup>165</sup> treatment for breast cancer had rendered her an individual with a disability.<sup>166</sup> Although acknowledging that the plaintiff had suffered from severe periods of limitation during the course of her cancer treatment, the court concluded that those periods of limitation were “short-term, temporary, and contemporaneous with [the] treatment” and not because of her condition.<sup>167</sup> The court explained, “A severe limitation that is short-term and temporary is not evidence of a disability.”<sup>168</sup>

---

158. *Novella*, 226 F. App’x at 903.

159. 490 F.3d 826 (11th Cir. 2007).

160. *Id.* at 834.

161. 344 F.3d 1161, 1179-80 (11th Cir. 2003).

162. 42 U.S.C. 2000e to 2000e-17 (2000).

163. *Albra*, 490 F.3d at 833.

164. 507 F.3d 1306 (11th Cir. 2007).

165. 29 U.S.C. §§ 701-796l (2000 & Supp. V 2005).

166. *Garrett*, 507 F.3d at 1315.

167. *Id.*

168. *Id.*

### B. Reasonable Accommodation

In *Nadler v. Harvey*,<sup>169</sup> the appellate court determined that punctuality was an essential function of the plaintiff's job.<sup>170</sup> The court concluded on appeal that the plaintiff failed to establish that his insomnia and depression had adversely affected his major life activity of sleeping.<sup>171</sup> Nadler unsuccessfully argued that although he slept an average of five-and-a-half to six-and-a-half hours per night, his sleep patterns justified his demand for a flexible work schedule.<sup>172</sup> The district court granted summary judgment for the employer on Nadler's claim, finding that he was not substantially limited by his sleep pattern.<sup>173</sup> The court of appeals affirmed, concluding that Nadler's sleep pattern did not differ significantly from those experienced by the general population.<sup>174</sup>

"Difficulty sleeping is extremely widespread," and a plaintiff must present evidence, beyond vague assertions of "a rough night's sleep" or a need for medication, "that his affliction is [] worse than [that] suffered by [a] large portion of the nation's adult population. [S]omeone who . . . sleeps moderately below average is not disabled under the Act."<sup>175</sup>

*Nadler* is additionally noteworthy because the court took the occasion to join with a majority of its sister circuits<sup>176</sup> in holding that the *McDonnell Douglas* burden shifting equation<sup>177</sup> is not applicable to reasonable accommodation cases under the ADA:

An employer *must* reasonably accommodate an otherwise qualified employee with a *known* disability unless the accommodation would impose an undue hardship in the operation of the business. Thus, applying *McDonnell Douglas* to reasonable accommodation cases would

---

169. No. 06-12692, 2007 WL 2404705 (11th Cir. Aug. 24, 2007).

170. *Id.* at \*7.

171. *Id.* at \*6.

172. *Id.*

173. *Id.* at \*1.

174. *Id.* at \*6, \*9.

175. *Id.* at \*6 (first, second, and fourth brackets in original) (citation omitted) (quoting *Rossbach v. City of Miami*, 371 F.3d 1354, 1358 (11th Cir. 2004)).

176. *Id.* at \*9 (citing *Peebles v. Potter*, 354 F.3d 761, 766 (8th Cir. 2004); *Lenker v. Methodist Hosp.*, 210 F.3d 792, 799 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 264 (1st Cir. 1999); *Aka v. Wash. Hosp. Ctr.*, 156 F.3d 1284, 1288 (D.C. Cir. 1998) (en banc); *Williams v. Channel Master Satellite Sys., Inc.*, 101 F.3d 346, 348 n.1 (4th Cir. 1996), *abrogated by Baird ex rel. Baird v. Rose*, 192 F.3d 462 (1999)).

177. *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973).

be superfluous, since there is no need to prove discriminatory motivation.<sup>178</sup>

#### V. EQUAL PAY ACT

In *Hankinson v. Thomas County School System*,<sup>179</sup> the United States Court of Appeals for the Eleventh Circuit reversed the district court's grant of summary judgment to the Thomas County School System.<sup>180</sup> Hankinson, a softball coach, claimed that she received less pay than male baseball coaches, which is an Equal Pay Act (EPA)<sup>181</sup> claim, and she argued that her claim had vitality because coaching softball was substantially similar to coaching baseball. The district court rejected this contention.<sup>182</sup> The court of appeals determined on appeal that a reasonable jury could infer that the two coaching positions were substantially similar for purposes of the EPA.<sup>183</sup> Thus, the court concluded that it was improper for the district court to have granted summary judgment based upon the plaintiff's alleged failure to establish a prima facie case.<sup>184</sup>

#### VI. SECTION 1981—PRETEXT

An employee failed to demonstrate that an employer's subjective promotion decision was a pretext for discrimination under 42 U.S.C. § 1981,<sup>185</sup> in *Springer v. Convergys Customer Management Group Inc.*<sup>186</sup> The plaintiff, an African-American, contended that her former employer discriminated against her based upon her race when it promoted another employee, a Caucasian. The plaintiff claimed that she was more qualified than the individual who was promoted. The district court granted summary judgment in favor of the employer on two of the plaintiff's claims—unlawful failure to promote and disparate pay under 42 U.S.C. § 1981.<sup>187</sup>

On appeal, the court determined that summary judgment had been properly granted below because the plaintiff failed to demonstrate that

---

178. *Nadler*, 2007 WL 2404705, at \*8 (citation omitted).

179. No. 07-11948, 2007 WL 4226389 (11th Cir. Dec. 3, 2007) (per curiam).

180. *Id.* at \*4.

181. 29 U.S.C. § 206(d) (2000).

182. *Hankenson*, 2007 WL 4226389, at \*1.

183. *Id.* at \*2.

184. *Id.*

185. 42 U.S.C. § 1981 (2000).

186. 509 F.3d 1344, 1350 (11th Cir. 2007) (per curiam).

187. *Id.* at 1346-47. The plaintiff voluntarily dismissed two of her claims against her employer, and a jury found her remaining claims to be "baseless." *Id.* at 1347.

that employer's promotion decision was motivated by race.<sup>188</sup> Although she argued that she was more qualified for the position than the individual selected for promotion, the court of appeals concluded that the plaintiff failed to demonstrate "that the disparities between the successful applicant's and [her] own qualifications were 'of such weight and significance that no reasonable person, in the exercise of impartial judgment, could have chosen the candidate selected over the plaintiff.'"<sup>189</sup>

The supervisory nature of the promotion at issue and the subjective qualities that often mark a good supervisor played in the court's decision. "Personal qualities . . . factor heavily into employment decisions concerning supervisory or professional positions. Traits such as common sense, good judgment, originality, ambition, loyalty, and tact often must be assessed primarily in a subjective fashion, yet they are essential to an individual's success in a supervisory or professional position."<sup>190</sup> The plaintiff failed to present any evidence that the employer's reliance on these subjective considerations was "a mask for racial discrimination. 'Absent evidence that subjective hiring criteria were used as a mask for discrimination, the fact that an employer based a hiring or promotion decision on purely subjective criteria will rarely, if ever, prove pretext.'"<sup>191</sup>

#### VII. SECTION 1983—FIRST AMENDMENT—MATTERS OF PUBLIC CONCERN

The free speech cases under 42 U.S.C. § 1983,<sup>192</sup> and the First Amendment<sup>193</sup> continue to reflect the predicted contraction following the decision of the United States Supreme Court in *Garcetti v. Ceballos*.<sup>194</sup> Social workers who complained to their supervisors about agency management and excessive workloads were communicating as government employees, rather than as citizens, in *Boyce v. Andrew*.<sup>195</sup> While acknowledging that the social workers' speech was "ostensibly intermingled with issues of child safety and . . . mismanagement," the United States Court of Appeals for the Eleventh Circuit determined that

---

188. *Id.* at 1350.

189. *Id.* at 1349 (quoting *Cooper v. S. Co.*, 390 F.3d 695, 732 (11th Cir. 2004)).

190. *Id.* (alteration in original) (quoting *Denney v. City of Albany*, 247 F.3d 1172, 1186 (11th Cir. 2001)).

191. *Id.* (quoting *Denney*, 247 F.3d at 1185).

192. 42 U.S.C. § 1983 (2000).

193. U.S. CONST. amend. I.

194. 547 U.S. 410 (2006).

195. 510 F.3d 1333, 1337, 1347 (11th Cir. 2007).

the speech “was not intended to address matters of public concern from the perspective of a citizen.”<sup>196</sup> Instead, the court concluded that the speech addressed personal grievances and job frustrations.<sup>197</sup>

To the same effect, in *D’Angelo v. School Board of Polk County*,<sup>198</sup> the court held that employee speech had occurred.<sup>199</sup> D’Angelo was a high school principal who claimed that his school board terminated him in retaliation for his efforts to convert his school to a charter school.<sup>200</sup> The district court determined that his efforts to convert his school to charter status were “part and parcel of his official duties.”<sup>201</sup> The court affirmed the grant of judgment as a matter of law to the school board.<sup>202</sup>

### VIII. CONCLUSION

During this survey period, the number of reported, published decisions on employment discrimination issues continued to decline. The Authors have noted this trend annually over the past several years and expect that it will continue. Some interesting employment issues were nevertheless decided during the survey period.

---

196. *Id.* at 1344-45.

197. *Id.* at 1345.

198. 497 F.3d 1203 (11th Cir. 2007).

199. *Id.* at 1206.

200. *Id.* at 1205.

201. *Id.* at 1206.

202. *Id.* at 1213.