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Employment Discrimination

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The 2008 survey period was a banner year for the United States Supreme Court in the area of employment discrimination.¹ The Court handed down no fewer than six decisions in the employment area during 2008. Leading the way was the Court's decision in *Sprint/United Management Co. v. Mendelsohn*,² an Age Discrimination in Employment Act of 1967 (ADEA)³ case in which the Court addressed the admissibility of "me too" evidence in employment discrimination cases.⁴ In *Meacham v. Knolls Atomic Power Laboratory*,⁵ another ADEA case, the Court held that the employer bears the burden of proof in the "reasonable factors other than age" defense.⁶ Finally, in *Federal Express Corp. v. Holowecki*,⁷ yet another ADEA case, the Court decided the important procedural question of what constitutes an adequate charge of discrimination.⁸

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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 2008. Cases arising under the following federal statutes are included: Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17 (2006); the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (2006); the Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (2006); and the Civil Rights Act of 1866, 42 U.S.C. § 1981 (2006).

2. 128 S. Ct. 1140 (2008).

3. 29 U.S.C. §§ 621-634 (2006).

4. See *Mendelsohn*, 128 S. Ct. at 1143.

5. 128 S. Ct. 2395 (2008).

6. *Id.* at 2398.

7. 128 S. Ct. 1147 (2008).

8. See *id.* at 1157-58.

The United States Court of Appeals for the Eleventh Circuit also had a very busy year in the employment discrimination area; however, continuing the trend from recent years, the vast majority of the court's opinions were unpublished. The Eleventh Circuit handed down approximately 120 unpublished opinions in the employment discrimination area, including approximately 85 on actions pursuant to Title VII of the Civil Rights Act of 1964 (Title VII).⁹ The Eleventh Circuit handed down only fifteen published opinions in the employment discrimination area, including nine Title VII opinions.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. *Theories of Liability and Burdens of Proof*

1. Disparate Treatment. One case during this survey period involved the traditional circumstantial evidence model of proof pursuant to *McDonnell Douglas Corp. v. Green*¹⁰ and *Texas Department of Community Affairs v. Burdine*.¹¹ In *McCann v. Tillman*,¹² the United States Court of Appeals for the Eleventh Circuit addressed the element in the plaintiff's prima facie case that required the plaintiff to establish she was "similarly situated" to other employees not in the plaintiff's protective class who received more favorable disciplinary treatment.¹³ The plaintiff was employed as a correctional officer for the Mobile, Alabama county jail. On her way to work one morning, the plaintiff was notified that her son was incarcerated in a neighboring county jail, so she asked for, and was allowed, an emergency vacation day to go visit him. Unfortunately, however, the plaintiff wore her correctional officer uniform when visiting the neighboring county jail, which violated a regulation forbidding employees from wearing their uniforms off-duty. As a result, the plaintiff was suspended for fifteen days without pay. The plaintiff brought suit under Title VII of the Civil Rights Act of 1964 (Title VII),¹⁴ challenging her suspension as discriminatory on account of race. The United States District Court for the Southern District of Alabama granted summary judgment for the defendant, finding that the plaintiff had not established a prima facie case.¹⁵

9. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

10. 411 U.S. 792 (1973).

11. 450 U.S. 248 (1981).

12. 526 F.3d 1370 (11th Cir. 2008).

13. *See id.* at 1373.

14. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

15. *McCann*, 526 F.3d at 1371-72.

On appeal the Eleventh Circuit, citing its prior decision in *Maniccia v. Brown*,¹⁶ reaffirmed that in order to establish the “similarly situated” prong of the prima facie case requirement, the plaintiff must show that the conduct of the alleged comparator was “nearly identical” to that engaged in by the plaintiff.¹⁷ Acknowledging that “nearly identical” does not mean “exactly identical,”¹⁸ the Eleventh Circuit agreed with the district court that the plaintiff had not met this standard.¹⁹ The Eleventh Circuit held that the two comparators identified by the plaintiff, both Caucasian employees who had received lesser discipline after having been found to have engaged in conduct unbecoming an officer, were “qualitatively different” from the plaintiff.²⁰ In neither of these instances was the alleged comparator violating the uniform directive at the time of misconduct.²¹ The Eleventh Circuit concluded that for this reason, the plaintiff’s conduct “involved an abuse of office, while the conduct of the comparators did not.”²² Accordingly, the Eleventh Circuit held that the plaintiff had not established the “similarly situated” prima facie case requirement, and the decision of the district court was affirmed.²³

2. Sexual Harassment. Two cases during the survey period addressed the ever volatile area of sexual harassment. In *Webb-Edwards v. Orange County Sheriff’s Office*,²⁴ the Eleventh Circuit confronted whether sexual statements on the job were pervasive enough to constitute a hostile and adverse work environment.²⁵ The plaintiff worked as a deputy sheriff for the Orange County Sheriff’s Office in Florida. In February 2004, the plaintiff’s unit was assigned a new supervisor, Sgt. Richard Mankewich.²⁶ Within the first week, Sgt. Mankewich began making statements to the plaintiff along the lines of “that looks hot or you look hot.”²⁷ On other occasions, he remarked that the plaintiff should wear tighter clothes and that he wished his wife

16. 171 F.3d 1364 (11th Cir. 1999).

17. *McCann*, 526 F.3d at 1373 (quoting *Maniccia*, 171 F.3d at 1368).

18. *Id.* at 1374 n.4.

19. *Id.* at 1374.

20. *Id.* at 1375.

21. *Id.* at 1374-75.

22. *Id.* at 1375.

23. *Id.*

24. 525 F.3d 1013 (11th Cir. 2008).

25. *See id.* at 1016.

26. *Id.*

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

wore tighter clothes.²⁸ One day while the plaintiff and Sgt. Mankewich were riding in the car together, the plaintiff's husband telephoned the plaintiff, and before the plaintiff could complete the conversation, Sgt. Mankewich grabbed the telephone and said to her husband: "I don't know what you're saying, but I'm eating your wife."²⁹ The plaintiff then filed a formal complaint against Sgt. Mankewich, but she did not disclose the crude comment that he had made in the car to her husband. The plaintiff was immediately transferred to a different work station pending the investigation of her complaint. The crude telephone comment to the plaintiff's husband did not come to light until a few weeks later when the plaintiff's husband told another sergeant about it and that sergeant in turn reported the incident to his superior. At this point, the plaintiff was given several options: she could either stay with Sgt. Mankewich's unit or transfer to another sector. She was also given the opportunity to participate in mediation with Sgt. Mankewich. The plaintiff chose to transfer to another sector, and agreed to participate in mediation, provided that Sgt. Mankewich wrote her a letter of apology. Sgt. Mankewich sent her a letter apologizing for his behavior, and the plaintiff subsequently never complained of inappropriate conduct by Sgt. Mankewich. Nonetheless, the plaintiff sued the Orange County Sheriff's Office for sexual harassment and retaliation. The United States District Court for the Middle District of Florida granted the defendant's motion for summary judgment.³⁰

On appeal, the Eleventh Circuit described Sgt. Mankewich's comments as "taunting and boorish," but the court of appeals agreed with the district court that the comments were not "physically threatening or humiliating."³¹ The Eleventh Circuit believed the crude comment to the plaintiff's husband was "more troubling."³² However, concluding that the crude comment was "rather clearly a disgusting attempt at humor, unaccompanied by any other improper conduct,"³³ the Eleventh Circuit agreed that the totality of the circumstances failed to establish that the "boorish remarks" were sufficiently severe or pervasive.³⁴ Accordingly, the Eleventh Circuit affirmed.³⁵

28. *Id.*

29. *Id.* at 1017 (internal quotation marks omitted).

30. *Id.* at 1017-19.

31. *Id.* at 1027.

32. *Id.* at 1028.

33. *Id.*

34. *Id.*

35. *Id.* at 1033.

The plaintiff fared better in *Reeves v. C.H. Robinson Worldwide, Inc.*³⁶ In this case, the Eleventh Circuit addressed the issue of whether a hostile work environment claim could be established when none of the offensive conduct in the workplace was directed at the plaintiff.³⁷ The plaintiff worked as a transportation sales representative in the defendant's Birmingham, Alabama branch office and was the only female in her position in the office. Several of the plaintiff's coworkers frequently used sexually crude language in the workplace.³⁸ For instance, one of the coworkers frequently used the phrase "fucking bitch" or "fucking whore" after hanging up the telephone.³⁹ The coworker referred to another female employee as a "bitch" and once remarked that this individual had "a big ass."⁴⁰ Sexual jokes by this coworker were commonplace, including frequent use of the word "fuck." There was also an offensive radio program played in the office every morning, which included discussions of the breast size of female celebrities, sexual arousal, masturbation, erotic dreams, ejaculation, and female pornography. After the plaintiff resigned, she filed suit against the defendant, alleging a sexually hostile work environment in violation of Title VII.⁴¹ The United States District Court for the Northern District of Alabama granted summary judgment for the defendant "on the ground that the alleged harassment was not 'based on' [the plaintiff's] sex."⁴² On appeal, the Eleventh Circuit disagreed.⁴³ Relying largely on a line of prior race discrimination opinions,⁴⁴ the Eleventh Circuit held that the sexually offensive language at issue in this case satisfied the "based on" element of a sexual harassment hostile work environment case even though the offensive language was not specifically targeted at the plaintiff.⁴⁵ The Eleventh Circuit also had little difficulty in concluding that the offensive language in this case was both objectively and subjectively severe or pervasive enough to create a jury issue and survive summary judgment.⁴⁶

36. 525 F.3d 1139 (11th Cir. 2008).

37. *Id.* at 1141.

38. *Id.*

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

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

41. *Id.* at 1141-42.

42. *Id.* at 1142.

43. *Id.* at 1144-45.

44. *See id.* at 1144 & nn. 2&3.

45. *Id.* at 1144-45.

46. *Id.* at 1147.

3. Retaliation. One of the Eleventh Circuit's more active areas of interest during the survey period centered around the troubling concept of retaliation. Of course, in order to trigger the antiretaliation protection afforded by Title VII, it is first necessary to establish that the plaintiff engaged in protected conduct.⁴⁷ That was the issue confronting the Eleventh Circuit in *Butler v. Alabama Department of Transportation*.⁴⁸ The plaintiff, an African-American woman, worked for the Alabama Department of Transportation. One day, the plaintiff went to lunch with a Caucasian coworker. The plaintiff was riding as a passenger in the coworker's pickup truck when the truck collided with another vehicle driven by an African-American man.⁴⁹ Following the collision, the coworker turned to the plaintiff and asked, "Did you see that? Did you see that stupid mother fucking [racial epithet] hit me?"⁵⁰ Then, when the driver of the other vehicle attempted to direct traffic around the accident, the coworker remarked, "Look at him now. Now that stupid ass [racial epithet] down there is trying to direct traffic. I hope something come [sic] over that hill and run over his ass and kill him."⁵¹ Although these remarks were not directed at the plaintiff, she understandably found them offensive. However, she did not complain about them until approximately three months after the incident. Shortly thereafter, the plaintiff received an unfavorable employment evaluation. The plaintiff then filed suit pursuant to Title VII, alleging that the defendants had retaliated against her for complaining about her coworker's use of racial epithets on the job.⁵² The jury returned a verdict for the plaintiff totaling \$200,000 in back wages, emotional distress and suffering, and punitive damages.⁵³

On appeal, the primary issue before the Eleventh Circuit was whether the plaintiff's complaint about the use of racial epithets met the objective reasonableness requirement—namely, whether a reasonable person could have objectively believed that the incident involving a racial epithet amounted to an unlawful employment practice by the Alabama Department of Transportation.⁵⁴ The Eleventh Circuit concluded that

47. *E.g.*, *Butler v. Ala. Dep't of Transp.*, 536 F.3d 1209, 1212-13 (11th Cir. 2008) (quoting *Goldsmith v. Bagby Elevator Co.*, 513 F.3d 1261, 1277 (11th Cir. 2008)).

48. 536 F.3d 1209 (11th Cir. 2008).

49. *Id.* at 1210.

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

51. *Id.* (alteration in original) (internal quotation marks omitted).

52. *See id.* at 1210-11.

53. *Id.* at 1213.

54. *Id.*

the issue was “not even close.”⁵⁵ Although the statements by the coworker were deemed “uncalled for” and “ugly,” the statements occurred away from work, were not within the hearing of any supervisor, and were not aimed at the plaintiff.⁵⁶ The incident also did not affect the plaintiff’s ability to do her job.⁵⁷ The Eleventh Circuit concluded that the plaintiff could not reasonably have believed that this incident constituted a violation of the statute⁵⁸ and, accordingly, the court reversed the jury verdict and directed that judgment be entered in favor of the defendants.⁵⁹

In *Crawford v. Carroll*,⁶⁰ the Eleventh Circuit confronted whether, pursuant to the standard established by the United States Supreme Court in *Burlington Northern & Santa Fe Railway v. White*,⁶¹ the plaintiff had suffered an adverse employment action.⁶² The plaintiff, an African-American, was hired by Georgia State University in the position of wage and salary administrator in the human resources department. The plaintiff received a formal reprimand from her Caucasian supervisor for misuse of the department’s bereavement leave policy (asserting that the plaintiff had missed eighteen full or partial days of work when the policy permitted only three days absence). The plaintiff filed a grievance concerning the reprimand, and the reprimand was reversed and removed from the plaintiff’s file by the defendant’s provost and vice-president for academic affairs.⁶³ Thereafter, the plaintiff received a negative evaluation from the same Caucasian supervisor, which resulted in making the plaintiff ineligible to receive a merit pay increase.⁶⁴ The plaintiff then filed suit pursuant to Title VII alleging race discrimination and retaliation. The United States District Court for the Northern District of Georgia granted summary judgment for the defendants.⁶⁵

On appeal, the primary issue was whether the plaintiff had suffered an “adverse employment action” as that term was redefined by the Supreme Court in *Burlington*.⁶⁶ While noting that the plaintiff’s poor

55. *Id.*

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

57. *Id.*

58. *Id.* at 1214.

59. *Id.* at 1217.

60. 529 F.3d 961 (11th Cir. 2008).

61. 548 U.S. 53 (2006).

62. *See Crawford*, 529 F.3d at 973-74.

63. *Id.* at 964-65.

64. *Id.* at 966.

65. *Id.* at 969.

66. *See id.* at 973-74.

evaluation and compensation (particularly the denial of the merit raise increase) were “inextricably intertwined,”⁶⁷ the Eleventh Circuit had little difficulty in concluding that the plaintiff had suffered an adverse employment action under the more lenient standard adopted in *Burlington*.⁶⁸ The court of appeals also noted that the Supreme Court in *Burlington* had expressly disavowed the prior standard used by the Eleventh Circuit in *Stavropoulos v. Firestone*⁶⁹ and *Gupta v. Florida Board of Regents*.⁷⁰

In *Goldsmith v. Bagby Elevator Co.*,⁷¹ the Eleventh Circuit confronted the issue of whether an employee could be terminated for refusing to sign a dispute resolution agreement that applied to the employee’s pending charge of discrimination before the Equal Employment Opportunity Commission (EEOC).⁷² This case was also an opportunity for the Eleventh Circuit to address the scope of its prior holding in *Weeks v. Harden Manufacturing Corp.*,⁷³ in which the court held that a refusal to sign an arbitration agreement was not deemed protected activity for purposes of a retaliation claim.⁷⁴ However, as the court noted, the critical difference between *Weeks* and *Goldsmith* was that *Weeks* did not address an employee’s refusal to sign an arbitration agreement that also applied to a pending charge of discrimination he had filed.⁷⁵ Because in *Goldsmith* the plaintiff had a pending charge of discrimination before the EEOC when he refused to sign an arbitration agreement that would have included resolution of the pending charge, the Eleventh Circuit held that the plaintiff could pursue a retaliation claim notwithstanding its prior holding in *Weeks*.⁷⁶

B. Procedural Matters

1. Statute of Limitations. In *Shiver v. Chertoff*,⁷⁷ the Eleventh Circuit addressed when the administrative exhaustion period starts ticking for federal employees.⁷⁸ Unlike employees in the private sector,

67. *Id.* at 971 (quoting *Gillis v. Ga. Dep’t of Corr.*, 400 F.3d 883, 888 (11th Cir. 2005)).

68. *Id.* at 973-74.

69. 361 F.3d 610 (11th Cir. 2004).

70. 212 F.3d 571 (11th Cir. 2000); *Crawford*, 529 F.3d at 973-74.

71. 513 F.3d 1261 (11th Cir. 2008).

72. *See id.* at 1267.

73. 291 F.3d 1307 (11th Cir. 2002).

74. *Id.* at 1316-17.

75. *Goldsmith*, 513 F.3d at 1268.

76. *Id.* at 1278-79.

77. 549 F.3d 1342 (11th Cir. 2008).

78. *See id.* at 1343-44.

federal employees are required to file a complaint of discrimination within forty-five days of the discriminatory act.⁷⁹ The United States District Court for the Northern District of Georgia found the plaintiff's complaint untimely because the complaint was not filed within forty-five days of the date the plaintiff learned he was going to be demoted, as opposed to forty-five days from the date that the demotion became effective.⁸⁰ However, relying upon the express language of the regulations, which state that a federal employee must complain to an EEOC counselor "within 45 days of the effective date of the [personnel] action,"⁸¹ the Eleventh Circuit concluded that the plaintiff's complaint was timely and thus vacated the district court's decision and remanded.⁸²

2. Pattern or Practice Actions/Class Actions. In *Davis v. Coca-Cola Bottling Co. Consolidated*,⁸³ a case of first impression, the Eleventh Circuit addressed the issue of whether an individual plaintiff or group of plaintiffs can maintain a "pattern or practice" discrimination action against a defendant company pursuant to section 707(a) of Title VII⁸⁴ without complying with class certification requirements of Federal Rule of Civil Procedure 23.⁸⁵ The plaintiffs brought a broad pattern or practice race discrimination action against the defendant, claiming that the defendant discriminated against qualified African-Americans in its subjective hiring decisions regarding supervisors, gave lighter work assignments to Caucasians in a racially discriminatory manner, and maintained a racially hostile work environment. The United States District Court for the Southern District of Alabama dismissed all of the pattern or practice claims on the ground that the plaintiff had not sought class certification pursuant to Rule 23.⁸⁶

On appeal, while acknowledging that the Eleventh Circuit's prior precedents had "not explicitly foreclos[ed] [the] plaintiffs' argument,"⁸⁷ the Eleventh Circuit agreed with the district court that the plaintiffs, to maintain such an action, had to first meet the class certification requirements of Rule 23.⁸⁸ The Eleventh Circuit noted several impor-

79. *Id.* at 1344 (citing 29 C.F.R. § 1614.105(a)(1) (2008)).

80. *Id.* at 1343.

81. 29 C.F.R. § 1614.105(a)(1).

82. *Shiver*, 549 F.3d at 1344.

83. 516 F.3d 955 (11th Cir. 2008).

84. Civil Rights Act of 1964 § 707(a), 42 U.S.C. §2000e-6(a) (2006).

85. See FED. R. CIV. P. 23; see *Davis*, 516 F.3d at 964, 966.

86. *Davis*, 516 F.3d at 961-62.

87. *Id.* at 967.

88. *Id.* at 968.

tant policy reasons for this result.⁸⁹ According to the court, “[p]otential class members need to know where they stand; are they to become members of a certified class, or must they proceed with their own lawsuits?”⁹⁰ In addition, the Eleventh Circuit was troubled by the prospect that unnamed class members could be barred by potential res judicata and collateral estoppel issues should the employer prevail on the pattern or practice claims.⁹¹

The Eleventh Circuit also used this case as an opportunity to engage in a diatribe against the use of “shotgun” pleadings.⁹² Neither counsel for the plaintiffs nor the defendant were spared from the court’s rhetoric. The court began by noting that the framers of the Federal Rules of Civil Procedure “would roll over in their graves” upon reading the record in this case.⁹³ In commenting on the plaintiffs’ complaint, the court of appeals stated that “[n]o competent lawyer . . . could compose an answer to these sweeping and multifaceted acts of discrimination that would be in keeping with what the framers of the Rules envisioned in fashioning Rule 8(b).”⁹⁴ However, much to the court’s chagrin, the defendant had done so, utilizing “the same shotgun strategy [the] plaintiffs had employed.”⁹⁵ The court then noted five “unacceptable consequences” of shotgun pleadings: (1) they unnecessarily “broaden[] the scope of discovery”,⁹⁶ (2) they “lessen the time and resources the court has available to reach and dispose of the cases”; (3) they “wreak havoc on appellate court dockets”,⁹⁷ (4) they “undermine[] the public’s respect for the courts”; and (5) they “undercut the purpose of Congress’s enactment of Title VII—to bring peace and equity to the workplace.”⁹⁸ Concluding that “[w]hat happened in this case was easily avoidable,”⁹⁹ the Eleventh Circuit ruled in advance that it would “deny a request for attorney’s fees from either side” in the case.¹⁰⁰

89. *See id.* at 968-69.

90. *Id.* at 968.

91. *See id.* at 968-69.

92. *See id.* at 979-84.

93. *Id.* at 979.

94. *Id.* at 980-81; FED. R. CIV. P. 8(b).

95. *Davis*, 516 F.3d at 981.

96. *Id.*

97. *Id.* at 982.

98. *Id.* at 983.

99. *Id.*

100. *Id.* at 984.

C. Remedies

1. Arbitration Agreement. The enforceability of an employer's arbitration policy was before the Eleventh Circuit in *Lambert v. Austin Industries*.¹⁰¹ The defendant was a general contractor that provided construction and maintenance services to petrochemical and refining facilities in the Southeast United States. The company adopted an "Open Door" program, which was a company-wide workplace dispute resolution program. It established a three-tiered process for resolving all workplace disputes: the first tier was a conference with a supervisor, the second tier was mediation, and the third and final tier was arbitration. The program required that all new employees agree to the Open Door policy as a condition of employment. The plaintiff was terminated by the company because he allegedly threatened his supervisor during a meeting five days prior to his termination. The plaintiff then brought an action asserting claims of race and age discrimination and retaliation pursuant to the Age Discrimination in Employment Act of 1967 (ADEA)¹⁰² and Title VII. The United States District Court for the Southern District of Georgia denied the defendant's motion to compel arbitration, finding that the Open Door program was not enforceable pursuant to Georgia law.¹⁰³

On appeal, the Eleventh Circuit noted that the Open Door program was generally governed by the Federal Arbitration Act,¹⁰⁴ which requires that the agreement be in writing, be enforceable under state contract law, and involve claims falling within the scope of the agreement.¹⁰⁵ Applying Georgia law, the Eleventh Circuit noted that the Open Door program would be enforceable if the following elements were shown: (1) a definite offer, (2) complete acceptance, and (3) consideration.¹⁰⁶ As both sides conceded that there was both an offer and an acceptance, the deciding issue became whether there was adequate consideration to support the agreement.¹⁰⁷ In addressing this issue, the Eleventh Circuit concluded that it was "readily apparent that this arbitration agreement contain[ed] mutual promises," and accordingly,

101. 544 F.3d 1192, 1193 (11th Cir. 2008).

102. 29 U.S.C. §§ 621-634 (2006).

103. *Lambert*, 544 F.3d at 1193-95.

104. 9 U.S.C. §§ 1-16 (2006).

105. *Lambert*, 544 F.3d at 1195 (citing 9 U.S.C. §§ 2-4 (2006)).

106. *Id.*

107. *See id.*

the consideration for the agreement was adequate.¹⁰⁸ The Eleventh Circuit also readily concluded that employment termination disputes fell within the scope of the Open Door agreement.¹⁰⁹ Accordingly, the Eleventh Circuit reversed the district court's decision.¹¹⁰

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A number of significant United States Supreme Court decisions regarding the Age Discrimination in Employment Act of 1967 (ADEA)¹¹¹ were decided during the survey period. Each will be briefly highlighted.

A. *Procedural Matters: What Constitutes a Charge?*

In *Federal Express Corp. v. Holowecki*,¹¹² the Supreme Court tackled the question of what constitutes a charge.¹¹³ The Court's conclusion was somewhat surprising. The ADEA provides that a timely charge alleging unlawful discrimination must be filed with the Equal Employment Opportunity Commission (EEOC) at least sixty days before a suit may be commenced.¹¹⁴ The EEOC receives approximately 175,000 inquiries per year. About 100,000 of these are mere inquiries about rights, and about 76,000 are docketed as actual charges.¹¹⁵ The EEOC has traditionally used two separate forms at intake: an intake questionnaire and a charge of discrimination.¹¹⁶ The issue in *Holowecki* was whether a completed intake questionnaire accompanied by an affidavit constitutes a charge.¹¹⁷ The majority of the Court concluded that it did.¹¹⁸ The Court relied on EEOC regulations and policy statements¹¹⁹ to determine that a charge is a writing "reasonably construed as a request for the agency to take remedial action to protect the employee's rights."¹²⁰ The Court concluded that in this particular case, when the questionnaire was read in conjunction with the affidavit, a request for the EEOC to take remedial action had been sufficiently made

108. *Id.* at 1197.

109. *Id.* at 1199.

110. *Id.* at 1199-1200.

111. 29 U.S.C. §§ 621-634 (2006).

112. 128 S. Ct. 1147 (2008).

113. *See id.* at 1152-53.

114. *Id.* (quoting 29 U.S.C. § 626(d) (2006)).

115. *Id.* at 1157.

116. *See id.* at 1159.

117. *See id.* at 1153.

118. *See id.*

119. *See id.* at 1156-57.

120. *Id.* at 1158.

so as to constitute a charge.¹²¹ Consequently, given its content, an intake questionnaire may constitute a charge if it is clear that agency action is being sought. From now on, an individualized review of intake questionnaires and accompanying materials will be necessary to determine whether a charge has been asserted.

B. Evidence of Discrimination

*Sprint/United Management Co. v. Mendelsohn*¹²² presented the Supreme Court with an opportunity to resolve a deep split in the circuit courts over “me too” evidence.¹²³ “Me too” evidence is usually coworker testimony about wrongs they have suffered at the hands of different supervisors that is offered to support a plaintiff’s claim of similar treatment.¹²⁴ Courts have long struggled with the questions of the admissibility of such evidence in all types of discrimination litigation.

A unanimous Supreme Court saw this struggle to be a simple evidence question: trial courts must determine the admissibility of such evidence on a case-by-case basis, weighing the probative value of specific evidence against its possible prejudicial effect under Federal Rules of Evidence 401¹²⁵ and 403.¹²⁶ The Court refused to adopt a per se rule concerning the admissibility of such evidence.¹²⁷

As with most admissibility determinations, the facts of the case will determine the admissibility of such evidence in the future.¹²⁸ Those expecting bright line direction from the Court will be disappointed.

In *Van Voorhis v. Hillsborough County Board of County Commissioners*,¹²⁹ the United States Court of Appeals for the Eleventh Circuit reversed the United States District Court for the Middle District of Florida’s grant of summary judgment for the employer because the panel concluded that the job applicant had presented direct evidence of age discrimination.¹³⁰ The plaintiff had applied for the position of helicopter pilot and his application was rejected.¹³¹ The district court concluded that the applicant had not presented any direct evidence of age

121. *Id.* at 1159-60.

122. 128 S. Ct. 1140 (2008).

123. *See id.* at 1147.

124. *See id.* at 1143.

125. FED. R. EVID. 401.

126. *Mendelsohn*, 128 S. Ct. at 1147; FED. R. EVID. 403.

127. *Mendelsohn*, 128 S. Ct. at 1143, 1147.

128. *See id.* at 1147.

129. 512 F.3d 1296 (11th Cir. 2008).

130. *Id.* at 1301.

131. *Id.* at 1298.

discrimination.¹³² Based upon its review of the record, the Eleventh Circuit concluded that a statement allegedly made by the hiring decision-maker, that he “didn’t want to hire an old pilot,” constituted direct evidence of age discrimination.¹³³ “The import of the alleged statements ‘could be nothing other than to discriminate on the basis of age.’”¹³⁴

C. Theories of Liability and Burdens of Proof

The other Supreme Court ADEA decisions rendered during the survey period dealt with theories and burdens. In *Meacham v. Knolls Atomic Power Laboratory*,¹³⁵ the Court built on its earlier decision in *Smith v. City of Jackson*.¹³⁶ In *Smith* the Court concluded that the disparate impact theory is available to prove claims under the ADEA.¹³⁷ In *Meacham* the Court determined which party bears the evidentiary burden under the theory.¹³⁸ Not unexpectedly, the Court concluded that the burden falls on the employer to prove reasonable factors other than age to determine layoff decisions.¹³⁹

In *Kentucky Retirement Systems v. EEOC*,¹⁴⁰ another disparate treatment case, a closely divided Court upheld Kentucky’s public sector retirement plan under challenge.¹⁴¹ In *Hazen Paper Co. v. Biggins*,¹⁴² a majority of the Court concluded that differences in treatment occurring under the retirement plan at issue in that case were not motivated by age.¹⁴³ The Court announced the rule that a plaintiff claiming disparate treatment based on age must prove that age “actually motivated the employer’s decision.”¹⁴⁴

“[F]ollowing *Hazen Paper’s* approach,” the Court in *Kentucky Retirement Systems* concluded that the EEOC was unable to prove that age motivated the employer’s decision regarding the retirement plan at

132. *Id.* at 1299. The district court also erroneously concluded that the plaintiff failed to present any evidence that he suffered an adverse employment action. *Id.* at 1300.

133. *Id.* at 1300.

134. *Id.* (quoting *Carter v. City of Miami*, 870 F.2d 578, 582 (11th Cir. 1989)).

135. 128 S. Ct. 2395 (2008).

136. 544 U.S. 228 (2005).

137. *Id.* at 240.

138. See *Meacham*, 128 S. Ct. at 2398.

139. *Id.* Since it is generally described as an affirmative defense, it is not surprising that a majority of the Court concluded that the defendant bears the burden of proof. *Id.* at 2400.

140. 128 S. Ct. 2361 (2008).

141. *Id.* at 2364.

142. 507 U.S. 604 (1993).

143. *Id.* at 611-12.

144. *Id.* at 610.

issue.¹⁴⁵ The Court stated that age and pension statuses are “‘analytically distinct’ concepts.”¹⁴⁶ Additionally, the Court concluded that there was a clear non-age-related rationale for the alleged disparate treatment in the case.¹⁴⁷

The four dissenters claimed that in deciding *Kentucky Retirement Systems* the Court “ignore[d] established rules for interpreting and enforcing one of the most important statutes Congress has enacted to protect the Nation’s work force from age discrimination.”¹⁴⁸ Justice Kennedy elaborated:

By embracing the approach rejected by the en banc panel and all other Courts of Appeals that have addressed this issue, this Court creates unevenness in administration, unpredictability in litigation, and uncertainty as to employee rights once thought well settled. These consequences, and the Court’s errors in interpreting the statute and our cases, require this respectful dissent.¹⁴⁹

Given the closeness of the decision, the subtleties of the majority’s analysis, and the strong dissent, pension plan practitioners would be well served to closely read both the majority and dissenting opinions.

*Gomez-Perez v. Potter*¹⁵⁰ drew a number of opinions from the members of the Court. Chief Justice Roberts wrote a dissenting opinion and was joined in part by Justices Scalia and Thomas.¹⁵¹ Justice Thomas also wrote a separate dissenting opinion and was joined by Justice Scalia.¹⁵² In the Court’s seemingly unending expansion of the retaliation cause of action throughout the employment world,¹⁵³ the majority recognized a federal employee’s claim of retaliation as actionable under the ADEA.¹⁵⁴

Apparently taking a lesson from the Supreme Court, the Eleventh Circuit also expanded the scope of actionable retaliation under the ADEA during the survey period. In *Stone v. Geico General Insurance Co.*,¹⁵⁵ the panel vacated a grant of summary judgment for the employ-

145. *Ky. Ret. Sys.*, 128 S. Ct. at 2367.

146. *Id.* (quoting *Hazen Paper*, 507 U.S. at 611).

147. *Id.* at 2368.

148. *Id.* at 2371 (Kennedy, J., dissenting).

149. *Id.* at 2372.

150. 128 S. Ct. 1931 (2008).

151. *See id.* at 1943 (Roberts, C.J., dissenting).

152. *See id.* at 1951 (Thomas, J., dissenting).

153. In recent years, the Court has expanded the breadth of retaliation claims under the various employment laws. *See, e.g.*, *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006).

154. *See Gomez-Perez*, 128 S. Ct. at 1935 (majority opinion).

155. 279 F. App’x 821 (11th Cir. 2008).

er.¹⁵⁶ The employer argued that the employee's internal report of perceived age discrimination to the employer's human resources manager was not protected activity.¹⁵⁷ The panel held that the plaintiff's belief that her employer had engaged in discriminatory activities was objectively reasonable¹⁵⁸ and remanded the case for further proceedings.¹⁵⁹

III. AMERICANS WITH DISABILITIES ACT

A. *Passage of the Americans with Disabilities Act Amendments Act*

On September 25, 2008, the ADA Amendments Act of 2008 (ADAAA)¹⁶⁰ was signed into law. The stated purpose of the ADAAA is “[t]o restore the intent and protections of the Americans with Disabilities Act of 1990.”¹⁶¹ In effect, the ADAAA overrules the Supreme Court's interpretation of the term “disability” articulated in *Sutton v. United Air Lines, Inc.*¹⁶² and *Toyota Motor Manufacturing, Kentucky, Inc. v. Williams*.¹⁶³ The expected result will be to expand the class of individuals who are entitled to protection under the ADA.¹⁶⁴

The ADAAA alters the definition of the term “disability” in four major ways. First, the law clarifies what constitutes a “major life activity” under the Americans with Disabilities Act of 1990 (ADA)¹⁶⁵ by substantially adding to the list of those activities enumerated in the original definition.¹⁶⁶ Second, the ADAAA states that the standard articulated in *Toyota*—that “substantially limits” means “prevents or severely restricts”¹⁶⁷—“has created an inappropriately high level of limitation necessary to obtain coverage under the ADA.”¹⁶⁸ In this respect, Congress has decided that the current EEOC regulations, which define

156. *Id.* at 824.

157. *Id.* at 823. Apparently anticipating the decision of the Supreme Court in *Crawford v. Metropolitan Government of Nashville*, 129 S. Ct. 846 (2009), the panel found this argument to be “unavailing.” *Stone*, 279 F. App'x at 823.

158. *Stone*, 279 F. App'x at 823.

159. *Id.* at 824.

160. Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified in scattered sections of 29 and 42 U.S.C. (effective Jan. 2009)).

161. 122 Stat. at 3553.

162. 527 U.S. 471 (1999).

163. 534 U.S. 184 (2002); see ADA Amendments Act §§ 2(b)(2)-(3), 122 Stat. at 3554.

164. See ADA Amendments Act § 2(b)(1), 122 Stat. at 3554.

165. 42 U.S.C. §§ 12101-12213 (2006).

166. See ADA Amendments Act § 4(a), 122 Stat. at 3555.

167. *Williams*, 534 U.S. at 198.

168. ADA Amendments Act § 2(b)(5), 122 Stat. at 3554.

the term “substantially limits” as “significantly restricted,” contain a greater degree of limitation than Congress had intended.¹⁶⁹ Thus Congress expects the EEOC to revise its definition.¹⁷⁰

Third, the ADAAA rejects the Supreme Court’s requirement in *Sutton* that the issue of whether an impairment substantially limits a major life activity must be determined with reference to mitigating measures.¹⁷¹ The ADAAA makes it explicit that the “substantially limits” inquiry

shall be made without regard to the ameliorative effects of mitigating measures such as—

(I) medication, medical supplies, equipment, or appliances, low-vision devices . . . , prosthetics, including limbs and devices, hearing aids, and cochlear implants . . . , mobility devices, or oxygen therapy equipment and supplies;

(II) use of assistive technology;

(III) reasonable accommodations or auxiliary aids or services; or

(IV) learned behavioral or adaptive neurological modifications.¹⁷²

Impairments are to be evaluated in their unmitigated state, so that, for example, diabetes will be assessed in terms of its limitations on major life activities when the diabetic does not take insulin injections or medicine and does not require behavioral adaptations such as a strict diet.¹⁷³

Finally, the ADAAA includes in the definition of a disability those impairments that are episodic or in remission if the medical condition would fall within the definition when active.¹⁷⁴ Many conditions go into remission. Now, all persons with conditions that have gone into remission will be covered by the ADA for their lifetimes, even if the disease or condition never becomes active again.

It can now be fairly argued that the ADA as amended by the ADAAA extends protection to most individuals over fifty years of age. Most people who are older than fifty have some deterioration in their body, and that is all that is required to fall under the new and improved ADA.

169. *Id.* § 2(a)(8), 122 Stat. at 3554.

170. *Id.* § 2(b)(6), 122 Stat. at 3554.

171. *Id.* § 2(b)(2), 122 Stat. at 3554.

172. *Id.* § 4(a), 122 Stat. at 3556 (codified as amended at 42 U.S.C. § 12102(4)(E)(i)). The only excepted mitigating measures are ordinary eyeglasses or contact lenses, which “shall be considered in determining whether an impairment substantially limits a major life activity.” *Id.* (codified as amended at 42 U.S.C. § 12102(4)(E)(ii)).

173. See H.R. REP. NO. 110-730, at 15-16 (2008).

174. See ADA Amendments Act § 4(a), 122 Stat. at 3556 (codified as amended at 42 U.S.C. § 12102(4)(D)).

The ADAAA will also result in a renewed emphasis on the requirement for reasonable accommodation under the ADA.¹⁷⁵ Given the broad coverage of the ADA intended by Congress, employers in most cases will no longer be able to argue over whether an individual is covered by the ADA. The shifted focus will be on whether the employer engaged in the interactive process required under the ADA and provided reasonable accommodations.

The ADAAA became effective on January 1, 2009.¹⁷⁶ ADA cases decided during the survey period under the old definition of the term “disability” have no precedential value in light of the substantially amended definition of that term under the ADAAA. Likewise, reasonable accommodation cases will be of little precedential value. Unsettled in the Eleventh Circuit is whether the amendments should be given retroactive effect by the courts.¹⁷⁷

IV. EQUAL PAY ACT

No noteworthy published or unpublished Equal Pay Act of 1963¹⁷⁸ cases were reported during the survey period. On January 29, 2009, however, just after the survey period ended, President Barack Obama signed into law the Lilly Ledbetter Fair Pay Act of 2009 (LLFPA).¹⁷⁹ The new law dramatically changes litigation for pay discrimination claims. It resets the statute of limitations for filing a wage claim each time an employee receives a paycheck, benefits, or “other compensation.”¹⁸⁰ Further, it applies to alleged discriminatory pay practices based on all protected categories, including race, sex, age, color, disability, national origin, and religion.¹⁸¹ The LLFPA also expands the definition of “unlawful employment practice” to include not only

175. *See id.* § 2(b)(5), 122 Stat. at 3554.

176. *Id.* § 8, 122 Stat. at 3559.

177. Several other United States Courts of Appeals have held that the amendments were not retroactive. *See* EEOC v. Argo Distrib. LLC, No. 07-60447, 2009 U.S. App. LEXIS 959, at *14 n.8 (5th Cir. Jan. 15, 2009); *Verhoff v. Time Warner Cable, Inc.*, No. 07-4265/07-4348, 2008 U.S. App. LEXIS 22488, at *12, (6th Cir. Oct. 24, 2008); *Kiesewetter v. Caterpillar Inc.*, 295 F. App'x 850, 851 (7th Cir. 2008).

178. 29 U.S.C. § 206(d) (2006).

179. Pub. L. No. 111-2, 123 Stat. 5 (2009). This was the first piece of legislation enacted during the Obama administration. Barack Obama, The White House Office of the Press Secretary, Remarks of President Barack Obama on the Lilly Ledbetter Fair Pay Restoration Act Bill Signing (Jan. 29, 2009) *available at* http://www.whitehouse.gov/the_press_office/RemarksOfPresidentBarackObamaontheLillyLedbetterFairPayRestorationAct-BillSigning. Perhaps this is a sign of things to come. *See id.* (“Now it’s up to us to continue the work. This bill is an important step . . . And this is only the beginning”).

180. *See* Lilly Ledbetter Fair Pay Act § 3, 123 Stat. at 5-6.

181. *Id.* §§ 3-5, 123 Stat. at 5-7.

discreet decisions regarding compensation but also any other practice that affects an employee's compensation.¹⁸² Perhaps most significantly, the statute applies retroactively to May 28, 2007.¹⁸³ Anticipate an immediate uptick in pay cases as a result.

V. SECTION 1981

A. Retaliation

Still continuing its recent trend of expanding the scope of retaliation under the employment discrimination laws,¹⁸⁴ the United States Supreme Court in *CBOCS West, Inc. v. Humphries*¹⁸⁵ concluded that a cause of action could be maintained under 42 U.S.C. § 1981¹⁸⁶ for retaliation.¹⁸⁷ A majority of the Court concluded that stare decisis required such a conclusion.¹⁸⁸

Justice Thomas wrote a sharp dissenting opinion, which Justice Scalia joined.¹⁸⁹ Justice Thomas relied principally on the clear language of § 1981 to unavailingly argue that the doctrine of statutory interpretation required a different result: "Unable to justify its holding as a matter of statutory interpretation, the Court today retreats behind the figleaf of ersatz stare decisis."¹⁹⁰

B. Qualified Immunity

In *Rioux v. City of Atlanta*,¹⁹¹ the United States Court of Appeals for the Eleventh Circuit expounded upon the court of appeals' previous explanation, for qualified immunity purposes, of what constitutes clearly

182. *Id.*

183. *Id.* § 6, 123 Stat. at 7.

184. *See supra* note 153 and accompanying text.

185. 128 S. Ct. 1951 (2008).

186. 42 U.S.C. § 1981 (2006).

187. *Humphries*, 128 S. Ct. at 1954.

188. *Id.* at 1954-55.

189. *See id.* at 1961 (Thomas, J., dissenting).

190. *Id.* at 1965.

191. 520 F.3d 1269 (11th Cir. 2008).

established law.¹⁹² The court winds the reader through the thorny territory that is qualified immunity.

C. Statute of Limitations

In *Baker v. Birmingham Board of Education*,¹⁹³ an issue of first impression was presented concerning the proper statute of limitations for a § 1981 action arising in the state of Alabama.¹⁹⁴ The panel concluded that the four-year statute of limitations, set forth in 28 U.S.C. § 1658,¹⁹⁵ applies to § 1981 actions in Alabama.¹⁹⁶

VI. CONCLUSION

While reported employment law cases have been on the decline in past survey years, that trend is now expected to change in the upcoming survey periods, both as a result of new legislation and judicially expanded retaliation claims. It is likely that Americans with Disabilities Act of 1990¹⁹⁷ cases and Equal Pay Act of 1963¹⁹⁸ cases will see significant increases in the years to come.

192. See *id.* at 1282. In *Rioux* the court noted what the proper judicial inquiry is, as established by *Foy v. Holston*, 94 F.3d 1528 (11th Cir. 1996):

The relevant inquiry is whether “it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted.” Thus, “[i]f objective observers cannot predict—at the time the official acts—whether the act was lawful or not, and the answer must await full adjudication in a district court years in the future, the official deserves immunity from liability for civil damages.”

Rioux, 520 F.3d at 1282 (internal citations omitted) (quoting *Foy*, 94 F.3d at 1534).

193. 531 F.3d 1336 (11th Cir. 2008).

194. See *id.* at 1337-38. A four-year statute of limitations applies to any “civil action arising under an Act of Congress enacted after” December 1, 1990. 28 U.S.C. § 1658(a) (2006). A two-year limitations statute applies to § 1983 actions in Alabama. *Baker*, 531 F.3d at 1337. No published opinion had addressed the appropriate statute of limitations for a § 1981 action in Alabama. *Id.* at 1338.

195. 28 U.S.C. § 1658 (2006).

196. *Baker*, 531 F.3d at 1339. The panel held that to decide otherwise would be inconsistent with the decision in *Jones v. R.R. Donnelley & Sons Co.*, 541 U.S. 369, 382-83 (2004), in which the Supreme Court applied a broad interpretation of § 1658. *Baker*, 531 F.3d at 1338.

197. 42 U.S.C. §§ 12101-12113 (2006).

198. 29 U.S.C. § 206(d) (2006).