

Employment Discrimination

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The United States Court of Appeals for the Eleventh Circuit issued a significantly higher number of *published* decisions in the area of employment discrimination during the 2010 survey period.¹ It is too early to tell whether this will become a new trend or is a one year aberration. However, the Eleventh Circuit handed down eight published Title VII decisions during the survey period (as opposed to only one published decision the year before), and thirteen published employment discrimination opinions overall (as opposed to only three during the 2009 survey period). Three of these decisions were in the ever troublesome area of sexual harassment.

The Supreme Court of the United States continued to be active in the employment discrimination arena as well. In *Lewis v. City of Chicago*,² the Court clarified the application of the appropriate statute of limitations in the context of a disparate impact case, and in the process, allowed a class of African-American firefighter candidates to move

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1. This Article covers significant cases in the area of employment discrimination law decided by the Supreme Court of the United States and the United States Court of Appeals for the Eleventh Circuit during 2010. Cases arising under the following Federal statutes are included: The Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§621-634 (2006); the Civil Rights Acts of 1866 and 1871, 42 U.S.C. §§ 1981, 1983 (2006); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2006); and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§12101-12213 (2006). For analysis of Eleventh Circuit employment discrimination law during the prior survey period, see Peter Reed Corbin & John E. Duvall, *Employment Discrimination, 2009 Eleventh Circuit Survey*, 61 MERCER L. REV. 1073 (2010).

2. 130 S. Ct. 2191 (2010).

forward with their Title VII class action lawsuit against the City of Chicago's firefighter entrance exam.³ In other action, the Court in *Perdue v. Kenny*,⁴ and pursuant to 42 U.S.C. § 1988,⁵ determined the propriety of enhanced attorney fee awards for outstanding results.⁶

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. *Theories of Liability and Burdens of Proof*

1. Disparate Treatment. In *Alvarez v. Royal Atlantic Developers, Inc.*,⁷ the Eleventh Circuit was confronted with the application of the so-called Vince Lombardi rule⁸ in the context of a national origin discrimination case. The plaintiff, Eliuth Alvarez, a Cuban-American, was hired as the controller for Royal Atlantic Developers, Inc.⁹ Alvarez reported to Heidi Verdezoto, the Chief Financial Officer, who had a reputation as someone who was "impossible to please."¹⁰ Indeed, Alvarez's two predecessors, one an Indian-American and the other an Anglo-American, had both been fired because they could not meet Heidi's strict standards.¹¹ Predictably, Alvarez could not meet those standards either, and after approximately three months, it was determined that she would be fired as soon as a replacement could be found. In the meantime, Alvarez wrote a letter to CEO Edwin Verdezoto complaining that she was being discriminated against because she was Cuban. After receiving this letter, the Verdezotos decided not to wait for a replacement and fired Alvarez the following morning.¹² Alvarez filed suit pursuant to Title VII of the Civil Rights Act of 1964 (Title VII),¹³ complaining of

3. *Id.* at 2196, 2199, 2201.

4. 130 S. Ct. 1662 (2010).

5. 42 U.S.C. § 1988 (2006).

6. *Perdue*, 130 S. Ct. at 1673-74.

7. 610 F.3d 1253 (11th Cir. 2010).

8. According to the Vince Lombardi rule, none of the players could accuse Coach Lombardi of discrimination "because he treated all of them like dogs." *Id.* at 1258 (citing *Baldwin v. Blue Cross/Blue Shield of Alabama*, 480 F.3d 1287, 1301 n.1 (11th Cir. 2007)).

9. *Id.* at 1258-59.

10. *Id.* at 1258.

11. *Id.*

12. *Id.* at 1260-62.

13. 42 U.S.C. §§ 2000e to 2000e-17 (2006).

national origin discrimination and retaliation.¹⁴ The district court granted summary judgment in favor of the company.¹⁵

On appeal the Eleventh Circuit, as to the national origin discrimination claim, noted that “Heidi was within her rights to insist on a controller who could whip the company’s books into shape overnight while accommodating her own prickly personality and performing every task perfectly, even if there was little or no chance she would ever find such a miracle worker.”¹⁶ The court went on to conclude that “[t]his [was] a classic example of the Vince Lombardi rule: someone who treats everyone badly is not guilty of discriminating against anyone.”¹⁷ Accordingly the court affirmed as to the discrimination claim.¹⁸ With respect to the retaliation claim, although emphasizing that the retaliation provision does not insulate from discipline an employee “who [is] already on thin ice,” the court noted that the disputed facts concerning the timing of this decision made summary judgment inappropriate and thus remanded this aspect of the case for further proceedings.¹⁹

In *Brown v. Alabama Department of Transportation*,²⁰ the Eleventh Circuit was confronted with the latest chapter in what has been many years of civil rights lawsuits against various state agencies in the State of Alabama, including the Alabama Department of Transportation. The plaintiff, Geneva Brown, an African-American civil engineer, had worked for the Alabama DOT since 1977. She brought a Title VII lawsuit against the agency, alleging that she was denied nine different promotions between 2000 and 2005 on account of her race.²¹ Following a jury trial, the jury agreed with Brown and awarded her \$65,697.65 in back pay and \$25,000 in damages for mental anguish.²² On appeal however, the Eleventh Circuit, after applying the familiar *McDonnell Douglas Corp. v. Green*²³ circumstantial evidence model of proof to each promotion, concluded that the evidence would support an inference of discrimination or retaliation in only three of the nine promotion decisions.²⁴ As a result, the court of appeals reversed the district

14. *Alvarez*, 610 F.3d at 1262.

15. *Id.* at 1263.

16. *Id.* at 1267.

17. *Id.*

18. *Id.* at 1268.

19. *Id.* at 1270-71.

20. 597 F.3d 1160 (11th Cir. 2010).

21. *Id.* at 1167-68.

22. *Id.* at 1173.

23. 411 U.S. 792 (1973).

24. *Brown*, 597 F.3d at 1181-83.

court's decision and remanded the case for a recalculation of the plaintiff's back pay award.²⁵

2. Disparate Impact. In *Lewis v. City of Chicago*,²⁶ the Supreme Court was confronted with a disparate impact challenge against the written examination utilized by the Chicago Fire Department for all applicants to the firefighter position. The city utilized the written examination in July 1995.²⁷ Thereafter it randomly hired its firefighter candidates from among those who were deemed "well qualified," in other words, "those who scored 89 or above (out of 100)" on the test.²⁸ The plaintiffs were six African-American applicants, all of whom were in the "qualified" category (they scored between 65 and 88 on the test).²⁹ They filed charges of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging that the city's examination discriminated against them in its application on account of their race.³⁰ In the ensuing lawsuit pursuant to Title VII, the district court agreed that the examination had a "severe disparate impact against African Americans," and ordered that the City randomly hire 132 of the African-American applicants in the qualified category, while also awarding back pay.³¹ The United States Court of Appeals for the Seventh Circuit reversed this decision, finding that the earliest Equal Employment Opportunity Commission (EEOC) charge filed by the plaintiffs was untimely because it had been filed more than 300 days after the alleged discriminatory act, in this case the administration of the exam.³²

When the case came before the Supreme Court, the issue framed was whether a plaintiff who failed to file a timely charge as to the adoption of a practice (in this case, the city's initial administration of the written examination) may assert a disparate impact claim following a timely charge challenging the later application of that practice—the city's selection of firefighters based upon the results of the exam.³³ The Court concluded that the plaintiffs could bring such a claim.³⁴ In reaching its decision, the Court was greatly influenced by the express

25. *Id.* at 1189.

26. 130 S. Ct. 2191 (2010).

27. *Id.* at 2195.

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

29. *Id.* at 2195-96.

30. *Id.* at 2196.

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

32. *Id.*

33. *Id.* at 2195.

34. *Id.* at 2197.

language of the Civil Rights Act of 1991,³⁵ which codified the burden of proof in disparate impact claims.³⁶ Under this language, a claim could be made by showing that an employer “uses a particular employment practice that causes a disparate impact” on a prohibited ground.³⁷ Because the city *used* the results of its examination each time it selected applicants, its practice was found to fall within the scope of the statutory language, and the plaintiffs’ case was allowed to proceed.³⁸

3. Religious Discrimination. Title VII claimants can present their case either through the submission of direct or circumstantial evidence.³⁹ In *Dixon v. Hallmark Cos.*,⁴⁰ the Eleventh Circuit was confronted with the more uncommon of these two types of evidence, potential direct evidence.⁴¹ The plaintiffs worked as a husband and wife team—property manager and maintenance technician, respectively—at an apartment complex owned by the defendant. The company maintained an established policy that religious items were not allowed to be displayed in the management office.⁴² During a periodic inspection by the plaintiffs’ supervisor, the supervisor noticed a picture of flowers hanging on the wall of the management office that included the words, “Remember the Lilies . . . Matthew 6:28.”⁴³ Upon confirming that this was a Bible verse, the supervisor directed that the artwork be removed. The plaintiff wife stated that she first wanted to talk with her husband about the issue. While she was gone, the supervisor called her superior, who directed the supervisor to remove the picture herself. When the plaintiffs returned to the office, a dispute about the painting broke out, and both plaintiffs were fired.⁴⁴ During the course of the dispute, the supervisor allegedly remarked to the plaintiff husband, “You’re fired, too. You’re too religious.”⁴⁵ The plaintiffs then filed suit pursuant to Title VII, alleging religious discrimination. The district court granted summary judgment for the defendant.⁴⁶ On appeal,

35. Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 42 U.S.C.).

36. See 42 U.S.C. § 2000e-2(k).

37. *Id.* § 2000e-2(k)(1)(A)(i) (emphasis added).

38. *Lewis*, 130 S. Ct. at 2197-98.

39. *Dixon v. Hallmark Cos.*, 627 F.3d 849, 854 (11th Cir. 2010).

40. 627 F.3d 849 (11th Cir. 2010).

41. *Id.* at 854.

42. *Id.* at 852-53.

43. *Id.* at 853 (internal quotation marks omitted).

44. *Id.*

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

46. *Id.* at 853-54.

however, the Eleventh Circuit disagreed, finding that the alleged remark made by the supervisor to the husband, if believed, would constitute direct evidence of religious discrimination.⁴⁷ Because the supervisor denied making this comment, the court of appeals found that there were disputed issues of material fact and remanded the case for further proceedings.⁴⁸

4. Sexual Harassment. In *Beckford v. Department of Corrections*,⁴⁹ the Eleventh Circuit addressed the issue of third party sexual harassment.⁵⁰ The question before the court was whether the Florida Department of Corrections could be held liable under Title VII because it failed to remedy a sexually hostile work environment created by the male inmates at the Martin Correctional Institution.⁵¹ The plaintiffs were fourteen former female employees at Martin who had previously worked as nurses or in other non-security positions.⁵² The nurses would interact with the prisoners on a daily basis to “pass out medication to inmates, answer sick calls, and respond to medical emergencies[,]” and the other plaintiffs frequently interacted with the prisoners in a similar manner.⁵³ There really was no question in this case as to whether the inmates created a sexually hostile environment. While performing their duties, the plaintiffs were routinely subjected to very graphic sexual language and the practice of “gunning,” in which inmates exposed themselves and masturbated directly at the plaintiffs.⁵⁴ This practice of gunning was a particularly “frequent phenomenon.”⁵⁵ When the plaintiffs’ complaints to prison management did not result in any attempt to curb the inmates’ behavior, the plaintiffs brought suit against the Department of Corrections pursuant to Title VII. Following a jury trial, the jury found for the plaintiffs and awarded each of them \$45,000 in damages.⁵⁶

On appeal, one issue was whether the department could be found liable under Title VII for the admittedly harassing behavior of the third party inmates.⁵⁷ The department argued that the behavior of the

47. *Id.* at 855.

48. *Id.* at 855-59.

49. 605 F.3d 951 (11th Cir. 2010).

50. *Id.* at 953, 957.

51. *Id.* at 957.

52. *Id.* at 953.

53. *Id.*

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

55. *Id.* at 955.

56. *Id.* at 956.

57. *Id.* at 957.

inmates could not be reasonably controlled and that the plaintiffs knew about the nature of their working environment when they accepted their job positions.⁵⁸ The Eleventh Circuit, drawing upon its prior precedent finding employers liable under Title VII for the sexually harassing behavior of third party customers,⁵⁹ disagreed.⁶⁰ The court, although noting that “some harassment by inmates” could not be avoided, held that the department also could not “refuse to adopt reasonable measures to curtail harassment by inmates.”⁶¹ Given this conclusion, the Eleventh Circuit affirmed.⁶²

In a similar vein, the Eleventh Circuit, in *Reeves v. C.H. Robinson Worldwide, Inc.*⁶³ sitting en banc, struck a blow for work place propriety.⁶⁴ The plaintiff was employed as a transportation sales representative for the shipping company, C.H. Robinson, at its Birmingham, Alabama facility.⁶⁵ She “was the only woman working on the sales floor” along with six other male coworkers in an area described as a “pod of cubicles.”⁶⁶ To put it mildly, the language out on the sales floor was coarse, described by the court as “incessant, vulgar, and generally offensive.”⁶⁷ While much of the vulgar language was not gender-specific, the plaintiff’s male coworkers referred to individuals on a daily basis as “bitch, fucking bitch, fucking whore, crack whore, and cunt.”⁶⁸ The male coworkers also routinely “tuned the office radio to a crude morning show” that had graphic discussions about sexual matters; and “[o]n one occasion, [one of the coworkers] displayed a pornographic image of a fully naked woman . . . on his computer screen.”⁶⁹ When the plaintiff’s complaints about this environment fell on deaf ears, she resigned from her position and brought suit against the company pursuant to Title VII.⁷⁰ The district court granted summary judgment in favor of the company, finding that the plaintiff “was not intentionally singled out for adverse treatment because of her sex.”⁷¹ The Eleventh

58. *Id.*

59. *See, e.g.,* *Watson v. Blue Circle, Inc.*, 324 F.3d 1252, 1258 n.2 (11th Cir. 2003).

60. *Beckford*, 605 F.3d at 957-58.

61. *Id.* at 959.

62. *Id.* at 962.

63. 594 F.3d 798 (11th Cir. 2010) (en banc).

64. *See id.* at 803.

65. *Id.*

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

67. *Id.* at 804.

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

69. *Id.*

70. *Id.* at 806.

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

Circuit, in its initial panel decision, held that a jury question had been presented and reversed the summary judgment ruling.⁷² However, that opinion was vacated and the Eleventh Circuit reheard the case en banc.⁷³

In its en banc opinion, the Eleventh Circuit reaffirmed the concept that “general vulgarity or references to sex that are indiscriminate in nature will not, standing alone, generally be actionable.”⁷⁴ At the same time, the court held as follows:

Nevertheless, a member of a protected group cannot be forced to endure pervasive, derogatory conduct and references that are gender-specific in the workplace, just because the workplace may be otherwise rife with generally indiscriminate vulgar conduct. Title VII does not offer boorish employers a free pass to discriminate against their employees specifically on account of gender just because they have tolerated pervasive but indiscriminate profanity as well.⁷⁵

The court went on to hold that even though the words had not been specifically directed at the plaintiff, it was enough for her to hear coworkers referring to females on a daily basis as “bitches [and] whores . . . to understand that they view[ed] women negatively, and in a humiliating or degrading way.”⁷⁶ Finding that it was up to the jury to decide if the necessary intent could be inferred from this behavior, the court reversed the summary judgment, and remanded the case for further proceedings.⁷⁷

As most Title VII practitioners are very much aware, Title VII sexual harassment claims are often accompanied by common law tort claims under state law. It was the accompanying tort claims, in *Myers v. Central Florida Investments, Inc.*,⁷⁸ that predominated the court’s decision.⁷⁹ The plaintiff originally began working for the defendant, a real estate company specializing in the development and sale of timeshare resorts, as a sales person. However, she was also a very talented cosmetologist, and her dream was to one day develop a spa at one of the defendant’s resorts. The defendant’s CEO eventually authorized creation of the spa. As it turned out, he had a romantic interest in the plaintiff. On one occasion, the CEO asked her to dance at a company function and

72. *Id.* at 807.

73. *Id.*

74. *Id.* at 809.

75. *Id.* at 810.

76. *Id.* at 811 (internal quotation marks omitted).

77. *Id.* at 813-14.

78. 592 F.3d 1201 (11th Cir. 2010).

79. *Id.* at 1205.

unexpectedly kissed her during the dance. On two occasions, he offered her boyfriend one million dollars if he could spend the night with the plaintiff. He also made several marriage proposals. Over a period of time, the CEO's desires evolved into a number of instances involving his touching the plaintiff inappropriately and making other suggestive, inappropriate comments. The plaintiff asked him on many occasions to stop his behavior, but to no avail.⁸⁰ Inexplicably, the plaintiff and the CEO "continued to work closely together, and continued to be friends."⁸¹ Eventually the plaintiff's continued rejection of the CEO's advances was her demise, and she was terminated from her position. The plaintiff's original lawsuit resulted in a summary judgment finding in favor of the defendant.⁸²

On appeal, however, the Eleventh Circuit found that sufficient evidence had been presented on her claims to defeat summary judgment and remanded the case for further proceedings.⁸³ On remand, the case proceeded to a jury trial. As to the plaintiff's Title VII claim, the jury found that although the plaintiff had been subjected to a sexually hostile work environment, no sexually harassing conduct had occurred after September 15, 2000; accordingly, her Title VII claim was barred by the statute of limitations.⁸⁴ "As for the [plaintiff's] battery claim, however, the jury awarded [the plaintiff] \$102,223.14 in compensatory damages and \$5,276,640.00 in punitive damages."⁸⁵ On appeal a second time, the Eleventh Circuit affirmed the jury in all respects, agreeing that the plaintiff's Title VII claim was barred by the statute of limitations and further agreeing that the jury's damages award was constitutional.⁸⁶

5. Retaliation. In order to support a retaliation claim under Title VII's "opposition clause,"⁸⁷ a plaintiff must have complained about an alleged act of discrimination that the plaintiff reasonably and objectively believed was discriminatory, based on the facts and circumstances.⁸⁸ Whether the plaintiff, in *Howard v. Walgreen Co.*,⁸⁹ had such a reasonable, objective belief was the issue presented to the court.⁹⁰ The

80. *Id.* at 1205-07.

81. *Id.* at 1207.

82. *Id.* at 1209-10.

83. *Id.* at 1210.

84. *Id.*

85. *Id.* at 1211.

86. *Id.* at 1223, 1225, 1227.

87. 42 U.S.C. § 2000e-3(a).

88. *Howard v. Walgreen Co.*, 605 F.3d 1239, 1244 (11th Cir. 2010).

89. 605 F.3d 1239 (11th Cir. 2010).

90. *Id.* at 1242.

plaintiff was an African-American pharmacist who worked at a Walgreen's store in Ft. Myers, Florida. Feeling ill with cold or flu like symptoms on December 7th, the plaintiff called in sick for work. The following day, the plaintiff felt worse and called in again, stating that he would not be in to work that evening, and likely would not be in the following evening as well, December 9th.⁹¹ After the plaintiff was in fact absent on December 9th, but without calling in, his supervisor called the plaintiff's house and "left a [voice] message stating that [the plaintiff's] 'job was in jeopardy' because he 'pulled a No call/No show.'"⁹² In a subsequent telephone conversation between the plaintiff and his supervisor concerning this voice message, a dispute between the two ensued, which resulted in the supervisor remarking "who the hell do you think you are," and hanging up.⁹³ The plaintiff then delivered a letter to Walgreen's upper management complaining about the way he was being treated and stating that he felt that his treatment was based on discrimination. When the plaintiff returned to work, he learned that his supervisor had terminated his employment. In his subsequent lawsuit under Title VII alleging retaliation, the jury returned a verdict in favor of the plaintiff and awarded him \$300,000 in damages.⁹⁴

On appeal however, the Eleventh Circuit concluded that the jury's verdict could not stand, finding as a matter of law that the plaintiff had not engaged in protected conduct.⁹⁵ Engaging in protected conduct required the plaintiff to have held a reasonable objective belief that he had been discriminated against.⁹⁶ The court of appeals concluded that to have been discriminated against, the plaintiff was required to have been subjected to an adverse employment action.⁹⁷ The closest thing to an adverse employment action that the plaintiff could cite to was the supervisor's voice message telling the plaintiff that his "job was in jeopardy."⁹⁸ Finding that this voice message fell "well short of an adverse action," the Eleventh Circuit reversed the judgment for the plaintiff and directed that a judgment be entered in favor of Walgreen's.⁹⁹

91. *Id.* at 1240-41.

92. *Id.* at 1241.

93. *Id.* at 1241-42 (internal quotation marks omitted).

94. *Id.* at 1242.

95. *Id.* at 1245.

96. *Id.* at 1244.

97. *Id.*

98. *Id.* at 1245.

99. *Id.*

B. Remedies

1. Consent Decrees. In *Birmingham Firefighters Ass'n 117 v. City of Birmingham*,¹⁰⁰ over three decades of civil rights litigation regarding the City of Birmingham and the personnel board of Jefferson County came to an end.¹⁰¹ After all of that litigation, the final judicial pronouncement turned on a minor procedural ruling.¹⁰² The history of the litigation produced several comprehensive consent decrees and close district court supervision concerning the hiring practices for the city. In 2007, in response to two vacant positions on the Jefferson County Personnel Board, the district court exercised its authority under the consent decrees and appointed two individuals to fill the positions.¹⁰³ “Shortly thereafter, and perhaps in response to the district court’s appointments, the Alabama legislature passed Act 408, . . . [which] entirely reconstituted the composition of the Board,” increasing the number of its members from three to seven and requiring that two of the members be African-American.¹⁰⁴ Soon thereafter, the district court entered an order finding that Act 408 was void and in violation of the Supremacy Clause of the United States Constitution.¹⁰⁵ It was this order that the City of Birmingham appealed in this case. However, two months later, the district court entered another order, this time a final order, terminating the personnel board’s consent decree. No party appealed this order.¹⁰⁶

On appeal, the Eleventh Circuit considered whether the order before it was a final, appealable order.¹⁰⁷ The court of appeals noted that 28 U.S.C. § 1292¹⁰⁸ initially gave the court jurisdiction because the order was in the nature of an interlocutory injunction.¹⁰⁹ However, the court also noted that intervening events could affect its jurisdiction, which it

100. 603 F.3d 1248 (11th Cir. 2010).

101. *Id.* at 1251 n.1.

102. *Id.* at 1254-55.

103. *Id.* at 1251-52.

104. *Id.* at 1252.

105. *Id.* at 1253; see U.S. CONST. art. IV, § 2.

106. *Birmingham Fire Fighters*, 603 F.3d at 1253-54.

107. *Id.* at 1254-55.

108. 28 U.S.C. § 1292 (2006). Section 1292(a)(1) provides in part that a court of appeals has jurisdiction to hear appeals from “[i]nterlocutory orders of the district courts of the United States . . . granting, continuing, modifying, refusing or dissolving injunctions”

109. *Birmingham Fire Fighters*, 603 F.3d at 1254.

found to be the case with respect to the subsequent final order.¹¹⁰ The court of appeals found that this final order, which reaffirmed the earlier interlocutory order, stripped the court of its jurisdiction, and the city's appeal was dismissed.¹¹¹ Hence, with this whimper, over three decades of civil rights litigation came to an end.

2. Sanctions. The Eleventh Circuit took a hard swing at vexatious litigation with its decision in *Norelus v. Denny's, Inc.*¹¹² In this case, the court of appeals upheld sanctions of almost \$400,000 against Karen C. Amlong and William R. Amlong of the civil rights law firm Amlong and Amlong in Ft. Lauderdale, Florida.¹¹³ The Amlongs represented Floride Norelus, an illegal immigrant from Haiti, in a Title VII lawsuit against Denny's, in which the plaintiff alleged that she had suffered from nearly a year of sexual abuse, including rape, while working for two Denny's restaurants. After extensive discovery, not a shred of evidence could be developed to support the plaintiff's allegations.¹¹⁴ When the plaintiff herself was deposed, she proved to be a very unreliable witness, lying at various points during her deposition. Indeed, the only evidence supporting her allegations was a sixty-three page errata sheet that her counsel submitted following her deposition, making 868 changes to the plaintiff's sworn deposition testimony. The district court ultimately dismissed the lawsuit, after which, the defendant moved for an award of sanctions against both the plaintiff and her counsel. Without an evidentiary hearing, the district court imposed sanctions against the Amlong law firm in the amount of \$389,739.07, which represented the attorney fees and costs incurred by the defendants following the filing of the plaintiff's errata sheet.¹¹⁵

An earlier appeal to the Eleventh Circuit resulted in a remand of the case on procedural grounds.¹¹⁶ On remand, the district court again imposed sanctions against the Amlongs, this time in the amount of \$387,738.45.¹¹⁷ The Amlongs then brought a second appeal, and the Eleventh Circuit affirmed.¹¹⁸ The court noted that the Amlongs' filing of "the novella-length errata sheet making a slew of material changes to

110. *Id.*

111. *Id.* at 1254-55.

112. 628 F.3d 1270 (11th Cir. 2010).

113. *Id.* at 1273, 1297 n.9, 1302.

114. *Id.* at 1273-74.

115. *Id.* at 1276-79.

116. *Id.* at 1279.

117. *Id.* at 1279-80.

118. *Id.* at 1280, 1302.

their client's deposition testimony was [clearly] improper."¹¹⁹ The court also found that counsel "unreasonably and vexatiously" perpetuated the litigation after this point.¹²⁰ As the court noted, "[s]till, like Ahab hunting the whale, the Amlongs relentlessly pursued the claims When the truth was thrust in the Amlongs' faces, they stubbornly ignored it and kept on litigating."¹²¹ That decision turned out to be an expensive one indeed.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Piggybacking*

Under the Age Discrimination in Employment Act (ADEA),¹²² a plaintiff must file a timely charge of discrimination with the United States Equal Employment Opportunity Commission (EEOC) or appropriate state or local agency before commencing an action for age discrimination or retaliation.¹²³ In *Sheffield v. United Parcel Service*,¹²⁴ an unpublished decision, the court of appeals affirmed the dismissal of an age discrimination suit because the plaintiff failed to exhaust his administrative remedies.¹²⁵ The district court found that Sheffield failed to state a claim because he did not file a charge of discrimination before commencing his civil action.¹²⁶ On appeal Sheffield argued that the district court erred in finding that he could not "piggyback" his claim onto claims previously brought by others.¹²⁷ The court of appeals affirmed, finding that Sheffield did not meet the piggybacking requirements.¹²⁸

As the court explained,

[t]he "single filing rule," sometimes referred to as the "piggybacking rule," provides a limited exception to the ADEA's charge-filing requirement. The rule provides that, in some circumstances, a plaintiff who did not file a timely charge of discrimination with the EEOC may "piggyback" onto a timely charge filed by another individual. To qualify

119. *Id.* at 1281.

120. *Id.* at 1287.

121. *Id.* at 1282-83.

122. 29 U.S.C. §§ 621-634 (2006).

123. 29 U.S.C. § 626(d) (2006 & Supp. III 2009).

124. 403 F. App'x 452 (11th Cir. 2010).

125. *Id.* at 453.

126. *Id.*

127. *Id.*

128. *Id.* at 453, 455.

for this exception a plaintiff must show that “(1) the relied upon charge is not invalid, and (2) the individual claims of the filing and non-filing plaintiff arise out of similar discriminatory treatment in the same time frame.”¹²⁹

Confirming the continued vitality of the rule set forth in *Hipp v. Liberty National Life Insurance Co.*,¹³⁰ the panel held that the “same time frame” requirement is still needed in order to successfully piggyback a new claim onto an older one.¹³¹ Holding that the earlier claims did not arise in the same time frame as Sheffield’s, the panel concluded that Sheffield could not piggyback his claim onto the earlier claims.¹³²

B. Adverse Employment Action

In some instances, a plaintiff’s attempted claim can fail because the individual has not suffered a cognizable adverse employment action. *Guimaraes v. NORS*,¹³³ another unpublished decision, presented just such a case. Guimaraes brought suit when his employer moved him to an isolated work cubicle after female co-workers complained about his behavior. The plaintiff appealed an adverse summary judgment ruling in the district court on his resulting disparate treatment claim. The trial court found that Guimaraes was not entitled to a trial on this claim because he had not suffered an adverse employment action as a result of the move to a different work area under the circumstances presented.¹³⁴ The court of appeals similarly held that the employer’s articulated reason for the move—complaints by coworkers—was not suspect.¹³⁵

C. The Impact of *Gross v. FBL Financial Services Motivating Factor*

When announced, the Supreme Court’s recent decision in *Gross v. FBL Financial Services, Inc.*¹³⁶ was viewed by most as a pro-employer decision. Its application in the Eleventh Circuit during the survey period would seem to indicate otherwise, however. During the survey period, two reported decisions applying *Gross* went against the employer.

129. *Id.* at 454 (citations omitted).

130. 252 F.3d 1208 (11th Cir. 2001).

131. *Sheffield*, 403 F. App’x at 454-55 (internal quotation marks omitted).

132. *Id.*

133. 366 F. App’x 51 (11th Cir. 2010).

134. *Id.* at 52-53.

135. *Id.* at 55.

136. 129 S. Ct. 2343 (2009).

The case of *Mock v. Bell Helicopter Textron, Inc.*,¹³⁷ had originally been decided in the plaintiff's favor in the district court in 2007.¹³⁸ In May 2009, the court of appeals affirmed the district court's judgment.¹³⁹ Several days later, in June of that year, the Supreme Court announced its decision in *Gross* ruling that a higher proof standard does not apply in ADEA cases.¹⁴⁰ Age must be the employer's motivating factor before unlawful age discrimination can be found under the ADEA following *Gross*.¹⁴¹ After the decision in *Gross* was announced, Bell Helicopter Textron moved for post judgment relief in the district court under Federal Rules of Civil Procedure 60(b),¹⁴² claiming that an improper jury instruction based upon a pre-*Gross* burden of proof allocation had resulted in the unfavorable verdict in the earlier proceeding. The district court denied the motion and this second appeal ensued.¹⁴³

Finding an absence of the extraordinary circumstances necessary to grant such relief under Rule 60, the court of appeals affirmed the lower court's ruling that the defendant was not entitled to a new trial.¹⁴⁴ Observing that "something more than a 'mere' change in the law is necessary" to invoke Rule 60 relief, even though some factors weighed in favor of granting such relief, the Eleventh Circuit held the district court's decision was entitled to deference.¹⁴⁵

Another employer fared no better following application of another aspect of *Gross* to its facts. In *Mora v. Jackson Memorial Foundation, Inc.*,¹⁴⁶ a panel vacated a ruling below that had been favorable to the employer.¹⁴⁷ The employer, Jackson, had obtained summary judgment below based upon the "same decision" affirmative defense.¹⁴⁸ A unanimous panel reversed this ruling, concluding that under *Gross*, employers are no longer entitled to the defense in ADEA actions.¹⁴⁹

137. 373 F. App'x 989 (11th Cir. 2010).

138. *Id.* at 990.

139. *Id.*

140. *Gross*, 129 S. Ct. at 2351 n.4.

141. *Id.* at 2352.

142. FED. R. CIV. P. 60.

143. *Mock*, 373 F. App'x at 990.

144. *Id.* at 991-92.

145. *Id.* at 991 (alteration in original) (quoting *Booker v. Singletary*, 90 F.3d 440, 442 (11th Cir. 1996) (internal quotation marks omitted).

146. 597 F.3d 1201 (11th Cir. 2010).

147. *Id.* at 1202.

148. *Id.* (internal quotation marks omitted) "Because an ADEA plaintiff must establish 'but for' causality, no 'same decision' affirmative defense can exist . . ." *Id.* at 1204.

149. *Id.* at 1204.

Because the Supreme Court has excluded the whole idea of a “mixed motive” ADEA claim-and the corresponding “same decision” defense-we need not consider the district court’s analysis of [Jackson’s] affirmative defense. Instead, we look at [Jackson’s] motion for summary judgment in accord with the “ordinary default rule that plaintiffs bear the risk of failing to prove their claims.” Making all reasonable inferences in [Mora’s] favor, we look to determine whether a material factual question exists on this record about whether [Jackson] discriminated against her.¹⁵⁰

Concluding that there were factual issues to be decided, the panel reversed and remanded the case for further proceedings.¹⁵¹

III. AMERICANS WITH DISABILITIES ACT

The Authors note an uptick in reported Americans with Disability Act (ADA)¹⁵² decisions during the survey period. Five of those decisions, including one published decision, are worthy of note.

A. *Qualified Individuals with Disabilities and Reasonable Accommodation*

“To establish a prima facie case of [disability] discrimination under the ADA, a plaintiff must show: (1) [that] he is disabled; (2) he is a qualified individual; and (3) he was subjected to unlawful discrimination because of his disability.”¹⁵³ The ADA defines a “qualified individual” as an individual “with a disability who, with or without reasonable accommodation, can perform the essential functions” of his job.¹⁵⁴ “[E]ssential functions ‘are the fundamental job duties of a position that an individual with a disability is actually required to perform.’”¹⁵⁵ However, an employer is not required to alter the essential functions of a job to accommodate an individual with a disability and has a say in what constitutes a reasonable accommodation.¹⁵⁶

Two decisions issued during the survey period demonstrate these principles. In light of the shift in focus of ADA claims following enactment of the Americans with Disabilities Act Amendment Act of

150. *Id.* (citation omitted) (quoting *Gross*, 129 S. Ct. at 2351).

151. *Id.* at 1205.

152. 42 U.S.C. §§ 12101-12213 (2006).

153. *Holly v. Clairson Indus., L.L.C.*, 492 F.3d 1247, 1255-56 (11th Cir. 2007).

154. *Id.* at 1256; *see also* 42 U.S.C. § 12111(8).

155. *Holly*, 492 F.3d at 1257 (quoting *Earl v. Mervyns, Inc.*, 207 F.3d 1361, 1365 (11th Cir. 2000)).

156. *Id.* at 1256.

2008,¹⁵⁷ the reasonableness of requested accommodations shall continue to be an area of disagreement between employers and employees and shall serve as a primary contention in litigation disputes.

In *Anderson v. Embarq/Sprint*,¹⁵⁸ Anderson, a distribution center employee, who had been injured while at a grocery store, sought an accommodation from Embarq for his injury and requested a light duty assignment.¹⁵⁹ Embarq denied Anderson's request.¹⁶⁰ Anderson sued and the district court granted his employer's motion for summary judgment.¹⁶¹ Affirming the ruling in the district court, the panel concluded, in an unpublished decision, that Anderson had failed to establish a necessary element of his required prima facie case in the district court, that he could perform an essential function of his particular job—lifting and carrying boxes frequently and continuously—under the particular accommodation he requested, a forklift only assignment.¹⁶² “Accordingly, lifting was an essential function of Anderson's job. Anderson's request for forklift work only, however, eliminates this essential function. Thus, because Anderson's requested accommodation would eliminate an essential function of his job, it was not reasonable and was therefore not required under the statute.”¹⁶³ Anderson, therefore, was not “qualified” in the context of the ADA.¹⁶⁴

To the same effect, in *McKane v. UBS Financial Services, Inc.*,¹⁶⁵ the Eleventh Circuit affirmed another district court's summary judgment for the employer in another accommodation case.¹⁶⁶ McKane sought the relocation of his workplace away from coworkers so he could interact peacefully with them. His employer denied the request.¹⁶⁷ McKane had been fired by UBS for verbally abusing his coworkers. The culminating incident occurred in his office after he summoned a coworker there and a verbal dispute ensued. Concluding that the accommodation sought by McKane would not necessarily have eliminated his need to interact with coworkers, the district court concluded that

157. ADA Amendments Act of 2008, Pub. L. No. 110-325, 122 Stat. 3553 (2008) (codified at 42 U.S.C. §§ 12101-12210 (2006); 29 U.S.C. 705-706 (2006)).

158. 379 F. App'x 924 (11th Cir. 2010).

159. *Id.* at 927 n.5.

160. *Id.* at 927.

161. *Id.* at 926.

162. *Id.* at 928.

163. *Id.*

164. *Id.*

165. 363 F. App'x 679 (11th Cir. 2010).

166. *Id.* at 682.

167. *Id.*

his requested accommodation was not reasonable.¹⁶⁸ The Eleventh Circuit agreed—“McKane has failed to show a genuine issue of material fact regarding whether he was a qualified individual for the purpose of his ADA failure to accommodate claim”¹⁶⁹

B. *Medical Inquiries*

The ADA restricts an employer’s ability to make medical examinations or inquiries that relate to a job applicant’s disability status.¹⁷⁰ *Harrison v. Benchmark Electronics Huntsville, Inc.*,¹⁷¹ a published decision, provided the court of appeals with its first opportunity to explore the scope of this restriction in the context of hidden disabilities and to determine whether the ADA creates a private cause of action for an improper medical inquiry.¹⁷² *Harrison* demonstrates the risk of asking medical questions at the wrong time and place in the hiring process.

Harrison, an epileptic, sought employment with Benchmark through a temporary employment service. After working for a while as a temporary employee, Benchmark eventually asked him to submit an application for regular employment. As a condition of employment, however, Harrison was required to undergo mandatory drug testing. Harrison tested positive for a prohibited substance on the drug test due to the presence of a medication he lawfully took to control his epilepsy. Benchmark was notified of the positive test result, and one of Harrison’s supervisors notified Harrison of the test results. At that time, Harrison disclosed his medical condition to the supervisor who then telephoned the employer’s medical review officer. The medical review officer questioned Harrison over the telephone about his epilepsy while the supervisor remained in the room with Harrison. While the medical review officer eventually cleared Harrison’s drug test result, the supervisor thereafter declined to extend an employment offer to Harrison and additionally requested that the temporary agency no longer assign Harrison to any available work at Benchmark. The temporary agency thereupon fired Harrison.¹⁷³

Harrison sued Benchmark under the ADA asserting a number of distinct claims, including an attempted cause of action based upon an improper medical inquiry. The district court granted summary judgment

168. *Id.*

169. *Id.*

170. 42 U.S.C. § 12112(d)(2)(A).

171. 593 F.3d 1206 (11th Cir. 2010).

172. *Id.* at 1211.

173. *Id.* at 1209-10.

for the employer on the medical inquiry claim.¹⁷⁴ On appeal the panel reversed, finding that the supervisor's presence in the room could lead a reasonable jury to infer that the employer violated the ADA.¹⁷⁵

The court of appeals concluded that a job applicant may sue a prospective employer for making a prohibited medical inquiry during the pre-job offer stage regardless of whether the applicant is disabled under the ADA.¹⁷⁶ The panel determined that 42 U.S.C. § 12112(d) provides a private cause of action for any violation of its restrictions.¹⁷⁷ "The regulations clarify that while it is appropriate for an employer to inquire into an applicant's ability to perform job-related functions, it is illegal for him to make targeted disability-related inquiries."¹⁷⁸

Although [Benchmark] was permitted to ask follow-up questions to ensure that Harrison's positive drug test was due to a lawful prescription, a jury may find that these questions exceeded the scope of the likely-to-elicited standard, and that [the supervisor's] presence in the room violated the ADA. . . . A reasonable jury could infer that [the supervisor's] presence in the room was an intentional attempt *likely to elicit* information about a disability in violation of the ADA's prohibition against pre-employment medical inquiries.¹⁷⁹

C. *Res Judicata*

Two ADA cases decided during the survey period concerned the issue of res judicata. Under the res judicata doctrine, a subsequent action is barred when four requirements are met: (1) there must be "a final judgment on the merits;" (2) "the prior decision must have been rendered by a court of competent jurisdiction;" (3) the "parties or their privies" must be identical in both suits; and (4) the same cause of action must be involved in both cases.¹⁸⁰ Both decisions decided during the survey period affirmed ruling for employers on the fourth prong of the res judicata doctrine.

In *Horne v. Potter*,¹⁸¹ the plaintiff's complaint had been dismissed below because of a prior similar lawsuit.¹⁸² On appeal, the plaintiff-appellee, Horne, asserted a number of grounds as error, including that

174. *Id.* at 1209.

175. *Id.* at 1209, 1217.

176. *Id.* at 1213.

177. *Id.* at 1213-14.

178. *Id.* at 1215.

179. *Id.* at 1216.

180. *In re Piper Aircraft Corp.*, 244 F.3d 1289, 1296 (11th Cir. 2001).

181. 392 F. App'x 800 (11th Cir. 2010).

182. *Id.* at 801.

her two claims were distinct and distinguishable. The district court concluded, however, that the plaintiff's second attempted lawsuit arose out of the same nucleus of operative facts as the claims asserted in the plaintiff's first complaint.¹⁸³ Principally, the plaintiff argued that since she had received two different letters from her employer advising her of the termination of her employment, each cause of action was based on a separate adverse employment action.¹⁸⁴ However, the court of appeals concluded that the two letters were based on the same operative facts; therefore, res judicata barred Horne's second attempted claim.¹⁸⁵

To the same effect, in *Hodges v. Publix Super Markets, Inc.*,¹⁸⁶ the plaintiff attempted to bring an ADA action under the Family and Medical Leave Act (FMLA),¹⁸⁷ after previously commencing and dismissing with prejudice a prior action.¹⁸⁸ Hodges contended on appeal that "his ADA and FMLA claims" were different and "did not arise out of the same nucleus of operative fact[s]" as his prior claim.¹⁸⁹ He argued that his FMLA cause of action challenged only his termination from employment while his ADA lawsuit challenged his former employer's refusal to rehire him. Hodges attempted to distinguish his claims, asserting that res judicata did not bar his second suit because the facts on which it was based were not in existence when his first suit began.¹⁹⁰ The panel rejected this assertion, finding instead that the facts he alleged in the second suit were already in existence when Hodges filed his first suit and that he had actually alleged the same facts in both suits.¹⁹¹ "Accordingly, [the court held] that Hodges could have raised his ADA and [FMLA] claims in *Hodges I*, and therefore the district court did not err in dismissing the present action as barred by the doctrine of res judicata."¹⁹²

183. *Id.*

184. *Id.* at 803.

185. *Id.* at 804-05.

186. 372 F. App'x 74 (11th Cir. 2010).

187. 29 U.S.C. §§ 2601-2654 (2006).

188. *Hodges*, 372 F. App'x at 75.

189. *Id.* at 76.

190. *Id.* at 76-77.

191. *Id.* at 77.

192. *Id.*

IV. SECTION 1981

A. Ministerial Exemption

In an unpublished decision, a panel concluded that the ministerial exemption applies to § 1981¹⁹³ causes of action.¹⁹⁴ In *McCants v. Alabama-West Florida Conference of the United Methodist Church, Inc.*,¹⁹⁵ the district court's dismissal of a cause of action based upon the ministerial exemption was affirmed.¹⁹⁶ McCants sued over his failure to be reappointed as a pastor. He contended that the decision was made due to his race. The district court's dismissal of the suit was based upon the ministerial exemption.¹⁹⁷ The panel agreed with the district court that the exemption extends to § 1981 causes of action.¹⁹⁸

B. Contract Rights

The case of *Jimenez v. Wellstar Health System*¹⁹⁹ presented an interesting analysis of the contours of contract requirement in § 1981 causes of action. The defendants, a private health care provider and physicians and administrators associated with a Georgia hospital, had suspended the African-American plaintiff's medical staff privileges at the hospital. The plaintiff thereupon sued under § 1981 claiming impairment of his right to contract due to his race. Concluding that the plaintiff had no contract right or property interest in continuing medical staff privileges at the hospital under Georgia law, the district court

193. 42 U.S.C. § 1981 (2006).

194. Title VII expressly provides that its provisions do not apply "to a religious corporation, association, educational institution, or society with respect to the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution, or society of its activities." 42 U.S.C. § 2000e-1. There is no similar provision in § 1981.

195. 372 F. App'x 39 (11th Cir. 2010).

196. *Id.* at 40.

197. *Id.*

198. *Id.* at 42. Relying on *Simpson v. Wells Lamont Corp.*, 494 F.2d 490, 494 (5th Cir. 1974), the court concluded "that civil courts are not an appropriate forum for review of internal ecclesiastical decisions." 372 F. App'x at 42. In *Bonner v. City of Pritchard*, the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to the close of business on September 20, 1981. 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

199. 596 F.3d 1304 (11th Cir. 2010). To state a cause of action under § 1981, a plaintiff must allege an interference with a right enumerated under the statute. *Kinnon v. Arcoub, Copman and Associates, Inc.*, 490 F.3d 886, 890 (11th Cir. 2007).

dismissed the action as failing to state a claim under § 1981.²⁰⁰ The court of appeals affirmed.²⁰¹

V. SECTION 1983

A. *Pickering Balancing*

Demonstrating that the *Pickering* doctrine²⁰² continues to be a force in § 1983²⁰³ causes of action, the court of appeals affirmed the district court's order of summary judgment in a somewhat salacious case.²⁰⁴ The plaintiff, a former county firefighter supervisor, sued the county after he was demoted following revelations of his extra-marital affair with a subordinate employee. The plaintiff argued that he had a fundamental First Amendment²⁰⁵ right to associate with and have an intimate relationship with subordinate employees in the workplace.²⁰⁶

Applying the *Pickering* balancing test, the court of appeals concluded that while that might be so, "the County's interest in discouraging intimate associations between supervisors and subordinates [was] so critical to the effective functioning of [the] Fire Department that" the fire department's interest outweighed any First Amendment right that the plaintiff may have enjoyed to intimately associate with a subordinate.²⁰⁷ Thus, a public employer remains free to regulate such conduct.

B. *Qualified Immunity*

Two noteworthy qualified immunity decisions were decided during the survey period. The first, *Ham v. City of Atlanta*,²⁰⁸ concerned reverse discrimination.²⁰⁹ The second, *Hickey v. Columbus Consolidated Government*,²¹⁰ concerned the applicability of the broadened retaliation standard articulated by the Supreme Court in *Burlington Northern &*

200. *Jimenez*, 596 F.3d at 1307-08.

201. *Id.* at 1310-11.

202. The doctrine derives from the plurality decision from the Supreme Court in *Pickering v. Board of Education*, 391 U.S. 563 (1968). "*Pickering* balancing, in the public employment context, involves the weighing of the employee's interest in the exercise of a constitutional right against the employer's interest in maintaining an efficient workplace." *Shahar v. Bowers*, 114 F.3d 1097, 1112 (11th Cir. 1997) (Tjoflat, J., concurring).

203. 42 U.S.C. § 1983 (2006).

204. *Starling v. Bd. of Cnty. Comm'rs*, 602 F.3d 1257, 1260-61, 1263 (11th Cir. 2010).

205. U.S. CONST. amend. I.

206. *Starling*, 602 F.3d at 1259-60.

207. *Id.* at 1261.

208. 386 F. App'x 899 (11th Cir. 2010).

209. *Id.* at 900.

210. 372 F. App'x 11 (11th Cir. 2010).

*Santa Fe Railway Co. v. White*²¹¹ to claims arising prior to the Supreme Court's pronouncement of that decision.²¹²

In *Ham*, a Caucasian fire rescue department's employee, who was passed over for promotion sued the city and its fire chief claiming reverse discrimination.²¹³ The lower court held that the fire chief was not entitled to qualified immunity based upon the facts alleged.²¹⁴ It had been alleged that the fire chief told an employee that "he could not appoint a white male to the [promotional] position" in question and that the chief had also made other statements indicating that he considered race in making appointments.²¹⁵ Based upon that evidence, the court of appeals affirmed the district court's finding that the chief's actions, if proven, constituted a violation of a clearly established constitutional right.²¹⁶

In *Hickey* the district court had concluded that the broadened retaliation standard articulated by the Supreme Court in *Burlington Northern* applied to a claim of retaliation arising prior to the announcement of the *Burlington Northern* decision.²¹⁷ The court of appeals reversed, specifically finding that

subsequent law cannot be applied in a qualified immunity context unless pre-existing law, at the time of the allegedly unlawful conduct, is clearly established such that it would give notice to a reasonable official of the wrongfulness of the conduct. . . . [The defendant's] actions . . . must be evaluated under the clearly established law existing at the time of the alleged unlawful conduct. . . .²¹⁸

Under the law that existed in the Eleventh Circuit in January 2006, a "decision to reprimand or transfer an employee, if rescinded before the employee suffers a tangible harm, [was] not an adverse employment action."²¹⁹ While *Burlington Northern* might have changed the standard, it had no retroactive effect in the qualified immunity context.

211. 548 U.S. 53 (2006).

212. *Hickey*, 372 F. App'x at 13.

213. 386 F. App'x at 900.

214. *Id.* at 904.

215. *Id.* at 906-08.

216. *Id.* at 906.

217. 372 F. App'x at 13.

218. *Id.* at 14.

219. *Id.* (citing *Pennington v. City of Huntsville*, 261 F.3d 1262, 1267 (11th Cir. 2001)).

VI. SECTION 1985 AND LIMITATION ON CAUSES OF ACTION

*Jimenez v. Wellstar Health System*²²⁰ also presented the court of appeals with an opportunity to clarify that only limited rights under Section 1985²²¹ are enforceable against private conspirators.²²² Jimenez alleged in his civil complaint a conspiracy to violate his § 1981²²³ rights.²²⁴ The panel concluded that § 1981 cannot serve as a basis for a claim under § 1985.²²⁵ Only those limited rights specifically set forth within § 1985 are enforceable against private conspirators under § 1985.²²⁶

VII. SECTION 1988 AND CALCULATION OF THE PROPER FEE

In a case arising out of the Eleventh Circuit, a very divided Supreme Court provided some clarity to § 1988²²⁷ concerning the availability of enhanced fees. In *Perdue v. Kenny*,²²⁸ the Court reversed the judgment of the court of appeals, unanimously reaffirming the principal that an attorney fee award under § 1988 can include an enhancement for superior performance, but that such enhancements should be granted only in extraordinary circumstances.²²⁹ The lodestar calculation is the usual measure of such awards, according to the Court.²³⁰ The Court split five to four on the question of whether the enhancement, which the district court granted and the court of appeals affirmed, was proper in this particular case.²³¹

Writing for the Court, Justice Alito observed “that an enhancement may not be awarded based on a factor that is subsumed in the lodestar calculation,” such as the case’s novelty and complexity, or the quality of

220. 596 F.3d 1304 (11th Cir. 2010).

221. 42 U.S.C. § 1985 (2006).

222. *Jimenez*, 596 F.3d at 1312.

223. 42 U.S.C. § 1981 (2006).

224. *Jimenez*, at 1311-12.

225. *Id.* at 1312.

226. *Id.* “The only rights the Supreme Court has expressly declared enforceable against private conspirators under § 1985(3) are the right to interstate travel and the right against involuntary servitude.” *Id.*

227. 42 U.S.C. § 1988 (2006).

228. 130 S. Ct. 1662 (2010).

229. *Id.* at 1669.

230. *Id.*

231. *Id.* at 1669, 1678. Justices Alito, Roberts, Scalia, Kennedy, and Thomas joined in the opinion of the Court. Justices Kennedy and Thomas filed concurring opinions. Justice Breyer filed an opinion concurring in part and dissenting in part, in which Justices Stevens, Ginsburg, and Sotomayer joined. *Id.* at 1669.

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the attorneys' performance.²³² A strong presumption exists that the lodestar is reasonable and can only be overcome in those rare circumstances in which the lodestar does not adequately account for the properly considered facts.²³³ Justice Alito further noted that the party making the fees application has the burden to prove that an enhancement is necessary.²³⁴ In order to do so, the party must submit specific evidence supporting the award.²³⁵ Because the trial court had failed to provide a sufficiently specific explanation for various aspects of its fee determination in this case, the case was remanded for further proceedings.²³⁶ The decision is expected to have general application in the employment area as fees awarded under § 1988 are subject to the same general standards applied to attorney fees awarded under the whole range of federal employment discrimination statutes.

VIII. CONCLUSION

Employment law continued its subtle evolution in the Eleventh Circuit during the survey period. Significantly, this year more published decisions were issued than in recent years.

232. *Id.* at 1673.

233. *Id.*

234. *Id.* at 1669.

235. *Id.*

236. *Id.* at 1676-77.