Employment Discrimination

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The United States Supreme Court was the center of the action in the area of employment discrimination during the 2011 survey period.[1] The most talked about decision was the Court's opinion in *Wal-Mart Stores, Inc. v. Dukes*.[2] The much-anticipated decision in *Dukes* was the most significant opinion handed down by the Court in the area of employment discrimination class actions since its 1982 decision in *General Telephone Co. v. Falcon*,[3] and perhaps ever. The Court also continued to broaden the scope of potential Title VII[4] retaliation actions with its decision in *Thompson v. North American Stainless, LP*.[5]

As for the United States Court of Appeals for the Eleventh Circuit, the court continued to hand down a large number of employment discrimination decisions, but virtually all of them were unpublished. In fact, the court handed down only one published Title VII opinion during the

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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 2011. 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 & Supp. IV 2010); the Civil Rights Act 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 & Supp. IV 2010); and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2006 & Supp. IV 2010). For analysis of Eleventh Circuit employment discrimination law during the prior survey period, see Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, *Eleventh Circuit Survey,* 62 MERCER L. REV. 1125 (2011).

2. 131 S. Ct. 2541 (2011).

3. 457 U.S. 147 (1982).

4. 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2010).

5. 131 S. Ct. 863 (2011).

survey period, and only three published opinions in the employment discrimination area overall.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Theories of Liability and Burdens of Proof

1. Disparate Treatment. Several cases during the survey period dealt with the issue of whether a plaintiff, as part of the initial *prima facie* case showing, had presented sufficient evidence of a comparator receiving more favorable treatment than the plaintiff–that is, "a similarly situated"[6] person not in the plaintiff's protected category who received more favorable treatment than the plaintiff. For instance, in *Lane v. McKeithen*,[7] the issue before the Eleventh Circuit was whether the district court had abused its discretion in excluding from evidence the plaintiff's alleged comparator evidence. The plaintiff brought a Title VII[8] action alleging that he was not hired as a corrections officer at the Bay County jail on account of his race. The defendant sheriff argued that the plaintiff had not been hired because of his criminal background, which included being charged with conspiracy to commit murder and acting as an accessory after the fact. In support of his claim, the plaintiff attempted to show that the defendant had hired a Caucasian detention specialist who had been charged with aggravated manslaughter, although he was later acquitted. The district court granted defendant's motion *in limine*, excluding this evidence.[9] On appeal, the Eleventh Circuit ruled that the district court had not abused its discretion in excluding this evidence, holding that there were "material differences" between the detention specialist position that the alleged comparator had applied for, and the corrections officer position that the plaintiff had applied for.[10] In reaching its decision, the court relied upon the prior decision in *Maniccia v. Brown*,[11] where the court noted that alleged comparators must be similarly situated in all relevant respects to avoid "confusing apples with oranges."[12]

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6. *See, e.g.*, Holifield v. Reno, 115 F.3d 1555, 1562 (11th Cir. 1997).
7. 423 F. App'x 903 (11th Cir. 2011).
8. 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2010).
9. *Lane*, 423 F. App'x at 904-05 (footnote omitted).
10. *Id.*
11. 171 F.3d 1364 (11th Cir. 1999).
12. *Id.* at 1368; *see also* Summers v. City of Dothan, 444 F. App'x 346, 348 (11th Cir. 2011) (holding that summary judgment for employer was affirmed where conduct of alleged comparator not "nearly identical" to conduct of the plaintiff).

In stark contrast to *Lane v. McKeithen*, however, was the Eleventh Circuit's opinion in *Smith v. Lockheed-Martin Corp.*,[13] the court's only published Title VII decision during the survey period. In this case, the plaintiff, a Caucasian male, brought a "reverse" discrimination case under Title VII and Section 1981[14] alleging that his former employer, Lockheed-Martin Aeronautics Company, had discriminated against him because of his race when it terminated his employment.[15] The plaintiff had worked as a supervisor at Lockheed-Martin's plant in Marietta, Georgia.[16] He had received a racially insensitive joke email entitled "Top Ten Reasons Why There are No Black NASCAR Drivers" and had forwarded the joke email to his supervisor, without reporting it to the Human Resources Department.[17] Following an investigation, the plaintiff was terminated for violating Lockheed-Martin's zero tolerance policy prohibiting workplace discrimination and harassment. In support of his claim, the plaintiff presented evidence of two African American non-supervisors at the Marietta facility who had violated the zero tolerance policy by transmitting racially insensitive emails, but who were only suspended for their conduct as opposed to terminated.[18] In granting summary judgment for Lockheed-Martin, the district court found that the African American non-supervisors were not "similarly situated" to the plaintiff.[19]

On appeal, however, the Eleventh Circuit ventured off into a totally new and different direction. Although the court of appeals agreed with the district court that the plaintiff had not presented valid comparator evidence, indeed, nowhere in the court's lengthy decision is there any reference to the Eleventh Circuit's decision in *Maniccia v. Brown*,[20] the court of appeals nonetheless reversed the district court's grant of summary judgment.[21] Reasoning that "establishing the elements of the *McDonnell Douglas* framework is not, and never was intended to be, the *sine qua non* for a plaintiff to survive a summary judgment motion," the court held that a plaintiff "will always survive summary judgment" if there is the presentation of other "circumstantial evidence" creating a "triable issue concerning the employer's discriminatory intent."[22] In

13. 644 F.3d 1321 (11th Cir. 2011).
14. 42 U.S.C. § 1981 (2006).
15. *Lockheed-Martin Corp.*, 644 F.3d at 1323.
16. *Id.* at 1324.
17. *Id.*
18. *Id.*
19. *Id.* at 1326.
20. 171 F.3d 1364 (11th Cir. 1999).
21. *Lockheed-Martin Corp.*, 644 F.3d at 1328.
22. *Id.*; *see generally* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

this case, the crux of the other "circumstantial evidence" was evidence that the defendant was very concerned about an ABC news report critical of the defendant's Human Resources Department that was scheduled to air shortly after the plaintiff was terminated.[23] The court of appeals concluded that this other circumstantial evidence precluded summary judgment because a jury could have reasonably inferred that the plaintiff had been fired because he was white.[24] This case is instructive because it is the type of case in which the Eleventh Circuit has affirmed a summary judgment numerous times in the past, utilizing the analysis described above (in other words, the plaintiff's failure to present evidence of a "similarly situated" comparator). It remains to be seen whether the court will deny future summary judgment motions because of a plaintiff's presentation of alleged "other circumstantial evidence," even where there is no valid evidence of a similarly situated comparator.

2. Retaliation. In *Thompson v. North American Stainless, LP*,[25] the Supreme Court continued its trend of significantly expanding the scope of potential retaliation actions under Title VII. The plaintiff and his fiancée were both employed by the defendant, North American Stainless (NAS). The plaintiff's fiancée filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC). Three weeks later, NAS fired the plaintiff from his position. The plaintiff then brought an action under Title VII, alleging that NAS had retaliated against him because his fiancée had filed an EEOC charge.[26] The district court granted summary judgment for the defendant, finding that Title VII "does not permit third party retaliation claims."[27] On appeal to the United States Court of Appeals for the Sixth Circuit, a three-judge panel initially reversed the ruling, but after granting rehearing *en banc*, the Sixth Circuit affirmed the district court by a vote of ten to six.[28]

The Supreme Court focused on two questions: (1) whether the defendant's firing of the plaintiff constituted unlawful retaliation; and (2) if it did, whether Title VII granted the plaintiff a cause of action.[29] As to the first question, the Supreme Court, relying upon its prior decision in *Burlington Northern & Santa Fe Railway Co. v. White*,[30]

23. *See Lockheed-Martin Corp.*, 644 F.3d at 1331.
24. *Id.* at 1341.
25. 131 S. Ct. 863 (2011).
26. *Id.* at 867.
27. *Id.* (citation and internal quotation marks omitted).
28. *Id.*
29. *Id.*
30. 548 U.S. 53 (2006).

had "little difficulty" in deciding that a reasonable worker could have been "dissuaded from engaging in protected activity" if she had known that her filing of a charge would have resulted in her fiancée being fired.[31] The "more difficult" question was the second one.[32] However, the Court held that Title VII's retaliation provision protects "any plaintiff with an interest 'arguably . . . protected by the statutes.'"[33] Concluding that the plaintiff did fall within the "zone of interests protected by Title VII," the Supreme Court reversed and remanded, finding that the plaintiff was "a person aggrieved with standing to sue."[34]

Two unpublished decisions within the survey period addressed the issue of whether a plaintiff had adequately established causation, as part of the initial prima facie showing required in retaliation cases. In *Williams v. Waste Management, Inc.*,[35] the Eleventh Circuit, in affirming summary judgment for a defendant, agreed with the district court that a two-month gap between the protected conduct and the adverse action against the plaintiff was not close enough to create an inference of causation.[36] Similarly, in *Jones v. Flying J, Inc.*,[37] the Eleventh Circuit, again affirming summary judgment for a defendant, agreed with the district court that the plaintiff had not established causation, because in this instance there was no evidence that the decision maker in the case, the individual terminating the plaintiff's employment, had any knowledge of the plaintiff's protected conduct.[38]

B. Procedural Issues

In *Wal-Mart Stores, Inc. v. Dukes*,[39] the Supreme Court brought an abrupt halt to what likely was the most massive class action in the history of Title VII jurisprudence. In this action, the district court certified a class of approximately one and a half million plaintiffs, all of whom were current and former female employees of Wal-Mart, who were alleging that Wal-Mart's pay and promotion practices as exercised by its local supervisors discriminated against the class on the basis of

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31. *Thompson*, 131 S. Ct. at 867-68.
32. *Id.* at 869.
33. *Id.* at 870 (quoting Nat'l Credit Union Admin. v. First Nat'l Trust Co., 522 U.S. 479, 495 (1998)).
34. *Id.*
35. 411 F. App'x 226 (11th Cir. 2011).
36. *Id.* at 230.
37. 409 F. App'x 290 (11th Cir. 2011).
38. *Id.* at 294-95.
39. 131 S. Ct. 2541 (2011).

gender.[40] On appeal, the district court's certification order was substantially affirmed by a divided Ninth Circuit, sitting *en banc*.[41]

Before the Supreme Court, the issues were twofold: (1) whether the plaintiffs' huge class met the commonality requirement of Rule 23(a) of the Federal Rules of Civil Procedure; and (2) whether the plaintiffs' claims for back pay on behalf of the class could be certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[42] In answering the first question, the Court held that the commonality requirement had not been met, although this aspect of the Court's decision was sharply divided with the majority eking out a five-four decision.[43] Writing for the Court, Justice Scalia concluded:

> Here [the plaintiffs] wish to sue about literally millions of employment decisions at once. Without some glue holding the alleged *reasons* for all those decisions together, it will be impossible to say that examination of all the class members' claims for relief will produce a common answer to the crucial question *why was I disfavored*.[44]

The majority noted that Wal-Mart's practice of granting discretion to its local supervisors to make pay and promotion decisions actually worked against the plaintiffs' claim of discriminatory company-wide employment practices.[45] Although the plaintiffs had attempted to make this showing through the use of statistical and anecdotal evidence, the Court concluded that the plaintiffs' evidence fell "well short."[46]

As to the second question, the Court unanimously concluded that the plaintiffs' claims for back pay had been improperly certified under Rule 23(b)(2) of the Federal Rules of Civil Procedure.[47] The Court rejected the Ninth Circuit's "Trial by Formula" method of determining back pay.[48] According to this formula, a sample set of class members would have been selected for determination by a special master, and the percentage of claims determined by the master to be valid would then have been applied to the entire class.[49] Rejecting this "novel pro-

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40. *Id.* at 2547.
41. *Id.* at 2549.
42. *See id.* at 2547.
43. *See id.* at 2556-57, 2561.
44. *Id.* at 2552.
45. *Id.* at 2554-55.
46. *Id.* at 2555.
47. *Id.* at 2557, 2561.
48. *Id.* at 2561.
49. *Id.*

ject," the Supreme Court found that Wal-Mart was "entitled to individualized determinations of each employee's eligibility for backpay."[50] Writing for the dissent, Justice Ginsberg, while joining the Court's opinion as to the back pay question under Rule 23(b)(2), disagreed with the majority's conclusion that the plaintiffs had not met the commonality requirement of Rule 23(a).[51] According to Justice Ginsberg, the plaintiffs' showing of commonality was adequate to proceed, and the purported class should not have been disqualified "at the starting gate."[52]

Wal-Mart Stores, Inc. v. Dukes[53] easily was the most talked about and written about case during the survey period. It certainly will become one of those seminal cases cited by many future courts and will be discussed for years to come. It also, no doubt, will prove to be a significant hurdle for future plaintiffs to overcome in seeking to certify Title VII class actions of any significant size.

C. Evidentiary Issues

Two unpublished opinions during the survey period concerned evidentiary issues in affirming summary judgments for defendants. In *Henderson v. FedEx Express*,[54] the Eleventh Circuit rejected the plaintiff's argument that the district court had relied upon inadmissible hearsay evidence in granting the defendant's motion for summary judgment.[55] The plaintiff had been fired for having another employee clock in for him. In support of its defense that the plaintiff had been fired for falsifying his time card, the defendant submitted the deposition testimony of its managers, who had reviewed a videotape of the time clock area. It was this evidence that the plaintiff argued was inadmissible hearsay.[56] However, the court of appeals agreed with the district court that the "[deposition] testimony was not hearsay because it was based on the personal observations" of the defendant's managers, and because it was submitted

50. *Id.* at 2560-61.
51. *Id.* at 2561-62 (Ginsberg, J., dissenting).
52. *Id.*
53. 131 S. Ct. 2541 (2011).
54. 442 F. App'x 502 (11th Cir. 2011).
55. *Id.* at 503.
56. *Id.* at 504-05.

"as evidence of the decisionmakers' state of mind at the time that they terminated [the plaintiff's] employment."[57]

The evidentiary issue before the court in *Young v. FedEx Express*[58] was the admissibility of an EEOC cause determination. The plaintiff had brought an action pursuant to Title VII and Section 1981, alleging that he had been terminated on account of his race. The district court granted the defendant's motion for summary judgment. On appeal, the plaintiff argued that the district court had erroneously refused to consider a cause determination that had been issued by the EEOC.[59] The Eleventh Circuit, acknowledging its prior precedent that EEOC cause determinations are generally admissible pursuant to the hearsay exception for public records, held that the district court nonetheless had not abused its discretion in refusing to consider the cause determination in this case.[60] According to the court of appeals, there was sufficient evidence that the determination lacked trustworthiness because the copy submitted to the court was unsigned, the determination did not specify the basis for several of its conclusions, and the report contained non-binding legal analysis in addition to its factual content.[61]

D. Remedies

1. Punitive Damages. Although an unpublished decision, *Howell v. Compass Group*[62] is important for employers defending Title VII punitive damage claims. At trial, the district court granted judgment as a matter of law for the defendant on the plaintiff's claim for punitive damages.[63] In doing so, the district court relied upon the Eleventh Circuit's prior decision in *Dudley v. Wal-Mart Stores, Inc.*[64] and determined that the defendant's Director of Food Services "was not high enough up the corporate ladder to impute liability for his actions to the company."[65] On appeal, the plaintiff argued that, in light of the Supreme Court's

57. *Id.* at 505.
58. 432 F. App'x 915 (11th Cir. 2011).
59. *Id.* at 916.
60. *Id.* at 917 (citing Walker v. NationsBank of Fla. N.A., 53 F.3d 1548, 1554 n.7 (11th Cir. 1995); Barfield v. Orange Cnty., 911 F.2d 644, 650 (11th Cir. 1990)).
61. *Id.* at 918.
62. 448 F. App'x 30 (11th Cir. 2011).
63. *Id.* at 32.
64. 166 F.3d 1317 (11th Cir. 1999).
65. *Howell*, 448 F. App'x at 37.

intervening decision in *Kolstad v. American Dental Ass'n*,[66] *Dudley* was no longer good law.[67] However, the Eleventh Circuit rejected this argument, finding that *Dudley* is still good law.[68] The Eleventh Circuit concluded as follows: "*Dudley's* high-enough-up-the-ladder or 'corporate hierarchy' requirement for an award of punitive damages against a corporate employer is still good law and still binds this Court. *Kolstad* only did away with the egregiousness requirement for punitive damages."[69]

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Charge Questions

Kelly v. Dun & Bradstreet Corp.,[70] an unpublished decision, resulted in the vacation of a summary judgment that had been granted in favor of the employer. In the proceeding below, Kelly alleged that he first filed a charge of discrimination with the EEOC in June 2003 and then filed a charge for a second time in February 2005. The only charge the EEOC had on record, however, was another one that Kelly filed in August 2007. Only the 2007 charge was marked as received by the EEOC and assigned a charge number. The employer moved for summary judgment, arguing that Kelly's untimely 2007 charge meant he had failed to exhaust administrative remedies. The district court agreed that the 2007 charge was untimely and, because equitable tolling would not render it timely, granted the employer's motion.[71] Based on its review of the record on appeal, the Eleventh Circuit determined that Kelly had presented sufficient evidence to create a genuine question as to whether he in fact had filed charges in 2003 and 2005.[72] On remand, the district court was to "determine which of Kelly's allegations relate to or grow out of the allegations in the 2003 questionnaire and charge and whether any of [his] timely claims [had] merit."[73]

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66. 527 U.S. 526 (1999).
67. *Howell*, 448 F. App'x at 37.
68. *Id.* at 38.
69. *Id.* (citations omitted).
70. 457 F. App'x 804 (11th Cir. 2011).
71. *Id.* at 805.
72. *Id.* at 806.
73. *Id.*

B. Gross *And But For Causation*

The Eleventh Circuit affirmed summary judgment in favor of the employer in *Horn v. United Parcel Services, Inc.*[74] While Horn raised a number of issues upon appeal, only the court's discussion of the impact of *Gross v. FBL Financial Services, Inc.*[75] is worthy of note. The Eleventh Circuit observed that in *Gross*, the Supreme Court "clarified that a plaintiff must prove that age was the 'but-for' cause for [an] adverse employment action in order to prevail" on an Age Discrimination in Employment Act (ADEA)[76] claim under a disparate treatment theory.[77] Noting that the Eleventh Circuit had "yet to address the effect of *Gross* on a court's summary judgment analysis in a single motive ADEA case," the panel observed that "a majority of . . . sister circuits . . . continue[] to rely on the *McDonnell Douglas* framework."[78] Absent a Supreme Court ruling to the contrary, it appears likely from the panel's discussion that the Eleventh Circuit will join the majority of its sister circuits on this question if it is ever asked to weigh in on this question.

A month later, another panel also addressed the impact of *Gross* and expressly relied on the *McDonnell Douglas*[79] framework to affirm the grant of summary judgment for an employer.[80] In *East v. Clayton County*,[81] the former employee had not shown that he had been treated less favorably than any younger similarly situated employee.[82] The court reasoned that "[s]ince the Supreme Court did not explicitly overrule our precedent in applying the *McDonnell Douglas* test to ADEA cases involving circumstantial evidence, we review East's claims under both *McDonnell Douglas* and *Gross*."[83]

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74. 433 F. App'x 788, 796 (11th Cir. 2011).
75. 129 S. Ct. 2343 (2009).
76. 29 U.S.C. §§ 621-634 (2006 & Supp. IV 2010).
77. *Horn*, 433 F. App'x at 793 (citing *Gross*, 129 S. Ct. at 2351).
78. *Id.* (citing Gorzynski v. JetBlue Airways Corp., 596 F.3d 93, 106 (2d Cir. 2010); Anderson v. Durham D & M L.L.C., 606 F.3d 513, 523 (8th Cir. 2010); Smith v. City of Allentown, 589 F.3d 684, 691 (3d Cir. 2009); Geiger v. Tower Auto., 579 F.3d 614, 622 (6th Cir. 2009)).
79. McDonnell-Douglas Corp. v. Green, 411 U.S. 792 (1973).
80. East v. Clayton Cnty., 436 F. App'x 904 (11th Cir. 2011).
81. 436 F. App'x 904 (11th Cir. 2011).
82. *Id.* at 912.
83. *Id.* at 911.

C. Prima Facie Case

1. Failure to Apply. In *Howell v. Compass Group*,[84] a former employee appealed in part the district court's grant of summary judgment in favor of her former employer on her failure to promote claim. The district court concluded that Howell could not establish a prima facie case of age discrimination because she had never applied for the position in question.[85] The court of appeals affirmed.[86] Although the multi-factor analysis employed in failure to promote claims does not expressly require a plaintiff to apply for promotion, the panel nevertheless concluded that to be an implicit prima facie requirement.[87]

To the same effect, in *Gortemoller v. International Furniture Marketing, Inc.*,[88] the court of appeals held that an age discrimination plaintiff must still demonstrate that he was replaced by a younger individual in order to establish a prima facie ADEA claim.[89] The court explained as follows: "When Gortemoller was fired, [the] [d]efendants streamlined their product-design process . . . . While Evans–who [the] [d]efendants employed for eight years leading up to Gortemoller's termination–oversees this streamlined process, he does not perform Gortemoller's former duties; no one in particular does . . . ."[90]

2. Failure to Comply with Progressive Discipline Policy. In *Ritchie v. Industrial Steel, Inc.*,[91] an employer's failure to adhere to its own progressive discipline policy did not prevent the grant of summary judgment in its favor.[92] The plaintiff had been terminated from employment for a variety of job performance issues, including an accident he caused.[93] The court of appeals noted as follows: "A plaintiff can also show pretext by demonstrating that the employer did not follow its normal procedures in terminating his

84. 448 F. App'x 30 (11th Cir. 2011).
85. *Id.* at 32-33.
86. *Id.* at 39.
87. *Id.* at 34.
88. 434 F. App'x 861 (11th Cir. 2011).
89. *Id.* at 862.
90. *Id.* at 863.
91. 426 F. App'x 867 (11th Cir. 2011).
92. *Id.* at 868.
93. *Id.* at 870.

employment."[94] It was undisputed in the record that the employer did not follow its normal procedures with respect to Ritchie.[95] Nevertheless, the panel was unpersuaded: "Finally, even assuming that the company did not comply with its progressive discipline policy in terminating Ritchie, [the decision maker] testified that the policy was not followed in every case. Therefore, the company's failure to conform to the policy in Ritchie's case does not establish pretext."[96]

D. Retaliation

Bradley v. Pfizer, Inc.[97] presented the interesting question of whether an employer's issuance of a litigation hold[98] constitutes retaliation.[99] After being notified that Bradley had filed a complaint of age discrimination with the EEOC, his employer placed a litigation hold on his company-issued laptop and copied its contents. Bradley asserted that those actions constituted retaliation.[100] The district court granted summary judgment to Pfizer on this claim.[101] The court of appeals affirmed because litigation holds were common in the company whenever it was faced with a potential lawsuit.[102] In fact, Bradley acknowledged that he had received about a dozen such notices during the time he was employed by Pfizer.[103]

III. AMERICANS WITH DISABILITY ACT

While there was a noticeable uptick in Americans With Disability Act (ADA)[104] cases on appeal during the survey period, they still constituted only a small portion of the employment discrimination cases reaching the Eleventh Circuit. Only two decisions during the survey period are worthy of note.

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94. *Id.* at 873 (citing Morrison v. Booth, 763 F.2d 1366, 1374 (11th Cir. 1985)).
95. *Id.* at 874.
96. *Id.*
97. 440 F. App'x 805 (11th Cir. 2011).
98. Legal holds or litigation holds are directives from employers to employees to either retain or turn over to the employer items of potential evidence when a claim arises that could result in litigation.
99. 440 F. App'x at 809.
100. *Id.*
101. *Id.* at 806.
102. *Id.* at 809.
103. *Id.*
104. 42 U.S.C. §§ 12101-12213 (2006 & Supp. IV 2010).

A. What Constitutes a Qualified Individual with a Disability?

Cremeens v. City of Montgomery[105] presented a panel with a fitness for duty question. Cremeens had formerly been a fire investigator with the City of Montgomery. The district court determined that fire fighting was an essential function of the fire investigator position and that the physical fitness requirements for fire investigators were job related or consistent with business necessity.[106] The panel affirmed, finding that Cremeens-proposed accommodation "–to work as a [f]ire [i]nvestigator without being required to fight fires–[was] not reasonable because it would require the City to eliminate an essential job function from the [f]ire [i]nvestigator position, which the ADA does not require it to do."[107] The court went on to hold that the physical fitness requirement for fire investigators was job related and consistent with business necessity.[108]

B. What Constitutes an Adverse Employment Action?

Tarmas v. Secretary of the Navy[109] provides some further instruction on what constitutes an actionable adverse employment action. The district court granted summary judgment in favor of the Secretary on Tarmas's discrimination and retaliation claims. Tarmas cited several employer actions as the basis of his claims. These included a callout requirement, a denial of a leave request, and a letter of caution he received from his employer.[110] The court concluded that none of these actions caused serious or material changes to Tarmas's working conditions and thus were not adverse employment actions.[111] In support of his retaliation claim, Tarmas referred only to an email he received citing his poor job performance on a particular occasion.[112]

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105. 427 F. App'x 855 (11th Cir. 2011).

106. *Id.* at 856. Discrimination under the ADA includes an employer's use of qualification standards or employment tests that tend to screen out those individuals with disabilitites, "unless the standard, test or other selection criteria, as used by the covered entity, is shown to be job-related for the position in question and is consistent with business necessity." *Id.* at 858; 42 U.S.C. § 12112(b)(6).

107. *Cremeens*, 427 F. App'x at 858.

108. *Id.*

109. 433 F. App'x 754 (11th Cir. 2011).

110. *Id.* at 758.

111. *Id.* at 762.

112. *See id.* at 757.

Again, the Court concluded that this was not a materially adverse action.[113]

IV. REHABILITATION ACT

Morales v. Georgia Department of Human Resources[114] was the only noteworthy case arising under the Rehabilitation Act[115] decided during the survey period. Morales, a former employee of the State of Georgia, sued her former employer under the Rehabilitation Act.[116] She was not a federal employee. The district court dismissed Morales's wrongful termination claim under the Rehabilitation Act on the ground that she had failed to exhaust her administrative remedies before commencing her civil action.[117] However, the Eleventh Circuit held that the district court erred by dismissing her claim on that basis, noting that while "[p]rivate actions against federal government employers under the [Rehabilitation] Act . . . must satisfy the requirement of exhaustion of administrative remedies in the manner prescribed . . . an action against a non-federal employer under the Rehabilitation Act does not require exhaustion of administrative remedies."[118] The court of appeals was nonetheless able to affirm the district court's grant of summary judgment on other grounds.[119]

V. SECTION 1981

A. Direct Evidence

Ash v. Tyson Foods, Inc. (*Ash V*)[120] again commanded the attention of the Eleventh Circuit during the survey period. The last opinion issued in this case, *Ash IV*,[121] was rendered in 2010.[122] After the *Ash IV* opinion was issued, one of the parties filed a

113. *Id.* at 763.
114. 446 F. App'x 179 (11th Cir. 2011).
115. 5 U.S.C. §§ 8101-8193 (2006 & Supp. IV 2010).
116. *Morales*, 446 F. App'x at 180.
117. *Id.* at 180-81.
118. *Id.* at 181 (second alteration in original) (citations and internal quotation marks omitted).
119. *Id.*
120. 664 F.3d 883 (11th Cir. 2011).
121. Ash v. Tyson Foods, Inc. (*Ash IV*), 392 F. App'x 817 (11th Cir. 2010).
122. *Ash*, 774 F.3d at 886.

petition for rehearing *en banc,* which was subsequently granted.[123] The court vacated its earlier *Ash IV* opinion in favor of the new opinion rendered during this survey period.[124]

One issue in the latest proceeding concerned the sufficiency of the evidence introduced at trial of the plaintiffs' failure to promote discrimination claims.[125] In part, the evidence presented to the jury below was testimony that on two occasions the decision maker used the word "boy" when referring to African-American male employees.[126] Tyson argued that the evidence presented, including the use of that term, was still insufficient to support the jury's finding of discrimination as to one of the plaintiffs, Hithon.[127] In a lengthy analysis, the court rejected the argument:

> Instead, we consider all of the evidence cumulatively, viewing it in the light most favorable to Hithon, to determine whether it is enough for a reasonable jury to have found that Tyson discriminated against Hithon based on race by promoting Dade to the shift manager position. As we have discussed, there was enough evidence for a reasonable jury to have found pretextual Tyson's proferred race-neutral reason of wanting a shift manager who had not been in management at the failing plaint; to have found that there was a written job requirement of three to five years experience in the poultry business, which Hithon met but Dade did not; to have found that there was also an unwritten job requirement of experience in first and second processing, which Hithon met but Dade did not; and to have found that Hatley, the decision maker, used the word "boy" in a racially demeaning way to refer to Hithon and another African-American male employee on two occasions just before the decision was made.
>
> In light of all of the evidence, we cannot say that "the facts and inferences point overwhelmingly in favor of one party, such that reasonable people could not arrive at a contrary verdict."[128]

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123. *Id.* at 887.
124. *Id.*
125. *Id.*
126. *Id.* at 888 (internal quotation marks omitted).
127. *Id.* at 892.
128. *Id.* at 897-98 (quoting Goldsmith v. Bagby Elevator Co., 513 F.3d 1261, 1275 (11th Cir. 2008)).

B. Prima Facie Case

1. Sometimes No Comparator is Needed. As discussed earlier in this Article, in *Smith v. Lockheed-Martin Corp.*,[129] the district court granted summary judgment to Lockheed-Martin due to Smith's failure to identify a similarly situated black supervisor comparator.[130] Vacating and remanding, the court reinstated both Smith's Title VII[131] and Section 1981[132] claims.[133]

2. And Sometimes You Do. In *Summers v. City of Dothan*,[134] the plaintiff, a former police officer, was terminated from employment after she was found to have committed two major offenses of noncompliance with police regulations.[135] The court concluded that her comparators were improper because the decision makers did not know about them when they disciplined the plaintiff.[136]

3. The Comparators Must be Different. In the final interesting comparator case, *Edmond v. University of Miami*,[137] the plaintiff tried to prove his case by pointing to the behavior of individuals who shared his race and national origin.[138] The court of appeals concluded that Edmond had "failed to identify an appropriate similarly situated individual"; specifically,

> Edmond identifies only one such person who he argues is such a similarly situated individual. Yet this individual, although employed in the same job as was Edmond, also shares his race and national origin. She is thus not "outside of his classification" for purposes of establishing the *prima facie* case.[139]

Summary judgment was affirmed.[140]

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129. 644 F.3d 1321 (11th Cir. 2011).
130. *Id.* at 1326.
131. 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2010).
132. 42 U.S.C. § 1981 (2006).
133. *Lockheed-Martin*, 644 F.3d at 1347.
134. 444 F. App'x 346 (11th Cir. 2011).
135. *Id.* at 348.
136. *Id.* at 350.
137. 441 F. App'x 721 (11th Cir. 2011).
138. *Id.* at 722.
139. *Id.* at 724.
140. *Id.* at 725-26.

C. Adverse Employment Action

Blue v. Dunn Construction Co.[141] presented the question of whether a delayed promotion constitutes an adverse employment action.[142] Affirming the district court, the Eleventh Circuit concluded that, under the facts of this particular case, it did not.[143] While recognizing that this precise question has not yet been decided in this circuit, the court stated as follows: "We have determined that an 'adverse employment action' includes 'termination, failure to hire, or demotion'" and that "[a]n employer's conduct falling short of those actions 'must, in some substantial way, alter the employee's compensation, terms, conditions, or privileges of employment, deprive him or her of employment opportunities, or adversely affect his or her status as an employee.'"[144] The court also noted that "[w]ith regard to the level of substantiality required, the plaintiff must demonstrate that he 'suffered a *serious and material* change in the terms, conditions, or privileges of employment.'"[145]

Because the employer did not have a company policy about the length of the evaluation period prior to promotion, the court concluded that Blue was unable to show an unreasonable delay in promoting him based on a deviation from company policy.[146] The panel found that Blue was an acting foreman for only a few months longer than two white acting foremen.[147] Summary judgment was affirmed.[148]

VI. SECTION 1983

A. First Amendment

The United States Supreme Court decision in *Borough of Duryea v. Guarnieri*[149] vacated a First Amendment Petition Clause[150]

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141. 453 F. App'x 881 (11th Cir. 2011).
142. *Id.* at 882-83.
143. *Id.* at 886.
144. *Id.* at 884 (quoting Crawford v. Carroll, 529 F.3d 961, 970 (11th Cir. 2008)).
145. *Id.* (quoting Crawford v. Carroll, 529 F.3d 961, 970-71 (11th Cir. 2008)).
146. *Id.* at 884-85.
147. *Id.* at 884.
148. *Id.* at 886.
149. 131 S. Ct. 2488 (2011).
150. U.S. CONST. amend I.

claim brought pursuant to § 1983[151] by the plaintiff.[152] Expanding on principles first announced in *Garcetti v. Ceballos*,[153] the Supreme Court concluded that a government employer's alleged retaliatory actions against an employee do not give rise to Petition Clause liability unless the employee's petition relates to a matter of public concern.[154] Holding that the United States Court of Appeals for the Third Circuit erroneously concluded that the matter of public concern test does not apply in Petition Clause cases, the Court reversed and remanded for further proceeding.[155]

B. Transgender Discrimination

In *Glenn v. Brumby*,[156] perhaps the most controversial decision rendered during the survey period, the Eleventh Circuit affirmed a gender discrimination ruling in favor of a transgendered individual.[157] Glenn was born a male. Since puberty, Glenn had felt that she was a woman.[158] In 2005, she was diagnosed with gender identity disorder and "began to take steps to transition from male to female under the supervision of health care providers."[159] This process included living outside of the workplace as a woman, a prerequisite to sex assignment surgery.[160] In October 2005, the Georgia General Assembly's Office of Legislative Council hired Glenn for an editor position. In 2006, Glenn informed her direct supervisor that she was in the process of becoming a woman. For Halloween in 2006 Office of Legislative Council employees were permitted to come to work wearing costumes, and Glenn came to work dressed as a woman. When Brumby, the head of the Office of Legislative Council, saw Glenn, he told her that her appearance was not appropriate and dismissed her for the day. Following this incident, Brumby met with Glenn's supervisor to discuss Glenn's appearance on

151. 42 U.S.C. § 1983 (2006).
152. *Duryea*, 131 S. Ct. at 2501.
153. 547 U.S. 410 (2006).
154. *Guarnieri*, 131 S. Ct. at 2501.
155. *Id.*
156. 663 F.3d 1312 (11th Cir. 2011).
157. *Id.* at 1321.
158. *Id.* at 1314.
159. *Id.*
160. *Id.*

Halloween and was informed that Glenn intended to undergo gender transition.[161]

In the fall of 2007, Glenn informed her supervisor that she was changing her legal name and would begin coming to work as a woman.[162] The supervisor notified Brumby who thereupon terminated Glenn's employment.[163] Brumby stated that "Glenn's intended gender transition was inappropriate, that it would be disruptive, that some people would view it as a moral issue, and that it would make Glenn's coworkers uncomfortable."[164] Glenn sued Brumby alleging discrimination under the Equal Protection Clause.[165] Both parties moved for summary judgment.[166] The district court granted summary judgment to Glenn on her sex discrimination claim and granted summary judgment to Brumby on Glenn's medical discrimination claim. Both sides appealed.[167] Affirming the district court's grant of summary judgment in favor of Glenn, the Eleventh Circuit opined that there was no need to address Glenn's cross appeal because she was already provided with all the relief she sought.[168] The court reasoned that

> [a]ll persons, whether transgender or not, are protected from discrimination on the basis of gender stereotype. For example, courts have held that plaintiffs cannot be discriminated against for wearing jewelry that is considered too effeminate, carrying a serving tray too gracefully, or taking too active a role in child-rearing. An individual cannot be punished because of his or her perceived gender-nonconformity. Because these protections are afforded to everyone, they cannot be denied to a transgender individual. The nature of the discrimination is the same; it may differ in degree but not in kind, and discrimination on this basis is a form of sex-based discrimination that is subject to heightened scrutiny under the Equal Protection Clause. Ever since the Supreme Court began to apply heightened scrutiny to sex-based classifications, its consistent purpose has been to eliminate discrimination on the basis of gender stereotypes.[169]

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161. *Id.*
162. *Id.*
163. *Id.*
164. *Id.* (internal quotation marks omitted).
165. *Id.*; U.S. CONST. amend. XIV, § 1.
166. *Glenn*, 663 F.3d at 1314.
167. *Id.* at 1314-15.
168. *Id.* at 1321.
169. *Id.* at 1318-19 (footnotes omitted).

To that end, the court rejected Brumby's claim that he fired Glenn because he was concerned the other women in the office might object to Glenn's restroom use.[170] The court held that terminating of a transgendered public employee violated the Fourteenth Amendment's prohibition of sex-based discrimination if the basis for termination is due to gender stereotyping that is not substantially related to a significant government interest.[171] Notably, the court stated in dicta that a similar rationale could apply in the private employment context because Title VII[172] also prohibits discrimination against individuals who fail to conform to socially prescribed gender roles.[173] This ruling appears to open the door for Title VII expansion.

C. Punitive Damages

In *Sepulveda v. Burnside*,[174] the Eleventh Circuit vacated and remanded the district court's denial of the a defendant's motion to set aside or reduce a punitive damages award.[175] The plaintiff, a former prison inmate, sued multiple defendants, including a detention officer, alleging First[176] and Eighth Amendment[177] violations.[178] A jury found in favor of the inmate. It awarded one dollar in compensatory damages and $999,999 in punitive damages.[179] The court's discussion concerning the proper due process analysis of a punitive damage award is instructive for purposes of § 1983 jurisprudence generally.

VII. CONCLUSION

The 2011 survey year again presented some noteworthy and factually interesting employment discrimination cases for decision by the United States Court of Appeals for the Eleventh Circuit and the United States Supreme Court. Unpublished decisions continue to be guideposts for judicial disposition in the Circuit. The immediate availability of unpublished decisions,

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170. *Id.* at 1321.
171. *Id.*
172. 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. IV 2010).
173. *Glenn*, 663 F.3d at 1316.
174. 432 F. App'x 860 (11th Cir. 2011).
175. *Id.* at 867.
176. U.S. CONST. amend. I.
177. U.S. CONST. amend. VIII.
178. *Sepulveda*, 432 F. App'x at 861.
179. *Id.*

alongside published ones, due to the evolution of electronic reporting is a new source of guidance for practioners.