Employment Discrimination

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The field of employment discrimination law was alive and well in the Eleventh Circuit during the 2000 survey period. Indeed, the area is not even showing any signs of slowing down. The case receiving the most press was the Supreme Court's decision in *Reeves v. Sanderson Plumbing Products, Inc.*, which, although an age discrimination action, will have a large impact on whether cases reach a jury in all areas of employment discrimination law. The Eleventh Circuit also handed down a number of notable decisions, particularly in the area of sexual harassment, the disparate impact theory of liability, and the scope of Title VII's retaliation provision.
I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Jurisdiction and Coverage Under the Act

1. Preemption. In Dickerson v. Alachua County Commission, the Eleventh Circuit considered an issue of first impression of whether a Title VII claim preempts a conspiracy claim pursuant to 42 U.S.C. § 1985(3) when the same conduct underlies both claims. Plaintiff worked as a corrections officer at the Alachua County Corrections Center in Alachua County, Florida. The county conducted an internal investigation following an inmate’s escape from the facility. As a result of this investigation, plaintiff and six other officers were disciplined. Plaintiff was demoted from lieutenant to sergeant. Plaintiff then brought an action pursuant to both Title VII and the conspiracy provisions of Section 1985(3), alleging that his demotion resulted from a conspiracy among Caucasian jail officers, who allegedly wanted to shift the blame for the highly publicized escape to plaintiff and other African-American officers on his shift. Following a jury trial, the jury ruled for the county with respect to plaintiff’s Title VII race discrimination claim, but the jury entered a verdict in favor of plaintiff in the amount of $50,000 for his Section 1985(3) conspiracy claim.

On appeal, the Eleventh Circuit considered for the first time whether a conspiracy claim pursuant to Section 1985(3) was preempted by a companion Title VII claim. The court of appeals was greatly influenced by its prior decision in Johnson v. City of Fort Lauderdale, which held that Title VII does not preempt claims pursuant to Section 1983 even when based upon the same conduct. In Johnson the court noted Congress intended Section 1983 to be “a parallel remedy for unconstitutional employment discrimination.” Finding “no principled basis to distinguish between §1983 and §1985(3),” the court of appeals held that Section 1985(3), like Section 1983, is not preempted by Title VII.

3. 200 F.3d 761 (11th Cir. 2000).
4. Id. at 765.
5. Id.
6. Id. at 765-67.
7. 148 F.3d 1228 (11th Cir. 1998).
8. Id. at 1229-31.
9. 200 F.3d at 766 (citing Johnson, 148 F.3d at 1229-31).
10. Id.
11. Id. at 766-67.
2. Ministerial Exception. In *Gellington v. Christian Methodist Episcopal Church, Inc.*, the Eleventh Circuit addressed the ministerial exception to Title VII. Plaintiff was an ordained minister in the Christian Methodist Episcopal Church. While assigned to a church in Mobile, Alabama, one of plaintiff's coworkers confided in him that her immediate supervisor had made sexual advances toward her. Plaintiff aided the coworker in preparing an official complaint to the church elders. Shortly thereafter, plaintiff was reassigned to a church over eight hundred miles away at a substantial reduction in salary. Rather than accept the reassignment, plaintiff resigned and brought a Title VII action alleging that the church had retaliated against him and constructively discharged him for aiding the coworker in her sexual harassment complaint. The district court granted summary judgment, relying upon the ministerial exception to Title VII created by the former Fifth Circuit in its 1972 decision in *McClure v. Salvation Army.*

On appeal, plaintiff argued that the ministerial exception was no longer viable in light of the Supreme Court's intervening decision in *Employment Division, Department of Human Resources of Oregon v. Smith.* Specifically, plaintiff argued that, under *Smith*, "religious beliefs do not excuse compliance with a generally applicable law," and accordingly, defendant church could not evade its obligations under Title VII "simply because it is a religious organization." However, the Eleventh Circuit noted that two other circuits, the Fifth and D.C. Circuits, concluded that the ministerial exception survived the decision in *Smith.* Agreeing with the Fifth and D.C. Circuits, the Eleventh Circuit held that "the exception only continues a long-standing tradition that churches are to be free from government interference in matters of church governance and administration."
B. Theories of Liability and Burdens of Proof

1. Disparate Treatment. In the typical disparate treatment case under Title VII, the plaintiff proceeds under one of two basic models of proof: (1) direct evidence of discriminatory intent or (2) the familiar *McDonnell Douglas* circumstantial evidence model. Unlike last year's survey period, there were no direct evidence cases during this survey period. Rather, the court struggled with applying the Supreme Court's decision in *Reeves* in the context of the typical *McDonnell Douglas* circumstantial evidence case.

In two cases, *Reeves* directly affected the court's outcome and resulted in sending cases back for trial that previously had ended in summary judgment for the defendant. In the first case, *Hinson v. Clinch County Board of Education*, plaintiff was the principal at a high school in Clinch County, Georgia. She was the first female high school principal hired in the county since 1950. However, a sequence of disagreements began to occur between plaintiff and members of the School Board. Plaintiff had a number of intense conversations with one member of the School Board regarding the Board member's son, who was a student at plaintiff's high school. Another source of friction was a second Board member's habit of referring to plaintiff as "Kay Baby," over plaintiff's objection. One member of the School Board, after successfully running for election, symbolically "buried" plaintiff in front of the local courthouse to celebrate his victory. Thereafter, the School Board voted to remove plaintiff as principal and transfer her to a county-wide administrative position. Plaintiff objected to this transfer because she suspected that it was a "make-work position designed to facilitate her removal as principal" and because it involved a significant cut in pay. The School

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23. *See* McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973). Under this model the plaintiff bears the initial burden of establishing a prima facie case of discrimination. If the plaintiff satisfies this initial burden, then the defendant must come forward with admissible evidence articulating a legitimate, nondiscriminatory reason for its employment decision. If the defendant satisfies this burden, the plaintiff then must establish that the employer's proffered reason is false or pretextual and that intentional discrimination was the real reason for the adverse employment decision. *Id.* at 802-05; Texas Dep't of Community Affairs v. Burdine, 450 U.S. 248, 252-56 (1981); St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 505-12 (1993); Reeves v. Sanderson Plumbing Prods., Inc., 530 U.S. 133, 142-48 (2000).


25. 231 F.3d 821 (11th Cir. 2000).

26. *Id.* at 824.
Board then voted to transfer her to a full-time teaching position at another school with no cut in pay. The Board asserted that it removed her as principal because of "basic disagreements" with her approach to administration of the high school. She was replaced by a male who had served under plaintiff as vice-principal, who had less experience as a principal, and who held fewer advanced degrees than plaintiff. Plaintiff brought a Title VII action challenging her removal as principal. The district court granted summary judgment for defendant.27

On appeal, the Eleventh Circuit initially focused on whether plaintiff had suffered an adverse employment action.28 Citing its prior decision in Doe v. DeKalb County School District,29 the court noted that a transfer to a different position can be considered adverse if it involves "a reduction in pay, prestige or responsibility."30 Finding that a reasonable factfinder could conclude that plaintiff suffered a loss of prestige and responsibility by being transferred to either the administrative position or the teaching position, the court of appeals concluded that the district court erred in finding as a matter of law that plaintiff had not suffered an adverse employment action.31 Further, under Reeves, the court concluded there was ample evidence to warrant sending the case to the jury on the issue of whether the School Board's asserted reasons for removing plaintiff as principal were pretextual.32 Accordingly, the grant of summary judgment was reversed, and the action was remanded for trial.33

In the second case, Durley v. APAC, Inc.,34 plaintiff had been employed with defendant APAC since 1983 and had performed various clerical functions that included considerable accounting functions and purchasing responsibilities. In 1994, the position of purchasing agent became available. Plaintiff applied for the position, having previously performed many of the job functions and having served as acting purchasing agent on various occasions. There was no job description for this position. At the same time, defendant decided to close its fabrication workshop. Jeff Warnock, a male, worked in the fabrication workshop. Defendant decided to consolidate Warnock's fabrication workshop position with the purchasing agent position and hired

27. Id. at 824-26.
28. Id. at 827.
29. 145 F.3d 1441 (11th Cir. 1998).
30. 231 F.3d at 829.
31. Id. at 830.
32. Id. at 831-32.
33. Id. at 833.
34. 236 F.3d 651 (11th Cir. 2000).
Warnock to be the new purchasing agent. Warnock had no prior office or purchasing experience and had not even graduated from high school. Plaintiff filed an EEOC charge, alleging that defendant failed to promote her on account of her sex. While the charge was pending and at the EEOC's request, defendant created a job description for the new purchasing agent position that emphasized the warehouse and fabrication skills that Warnock possessed, rather than the administrative duties that previously had been the primary responsibility of the job when performed by its predecessor. In plaintiff's subsequent Title VII action, the district court granted summary judgment for defendant.\(^{35}\)

On appeal, the Eleventh Circuit addressed whether plaintiff presented sufficient evidence of pretext to create a question of fact for the jury.\(^{36}\) Under the *Reeves* standard, the court of appeals noted that defendant subsequently created a job description that emphasized Warnock's warehouse and fabrication skills and that Warnock completely lacked any administrative or purchasing experience.\(^{37}\) This evidence, coupled with plaintiff's substantial prior experience in the job, was considered by the court of appeals to be more than sufficient to create an issue of material fact for a jury.\(^{38}\)

However, in three other cases, even the decision in *Reeves* could not rescue the plaintiff. In the first case, *Abel v. Dubberly*,\(^ {39}\) plaintiff worked as a library associate at the Atlanta-Fulton County Public Library. Plaintiff was the first white female to be hired at the branch where she worked (South Fulton Branch). From the start, she did not have a good working relationship with her supervisor, an African-American female. Plaintiff borrowed ten dollars from the library's cash register to purchase gasoline for her personal car. She put a signed I.O.U. in the register and replaced the ten dollars on her next day at work. That same day, when questioned about the matter by her supervisor, plaintiff freely admitted taking the money, stating that she thought what she had done was proper. However, the county had a strict policy against personal use of county funds, and plaintiff was fired for misuse of county funds. Plaintiff brought a Title VII action alleging that the I.O.U. incident was a pretext for race discrimination. A jury agreed with her and entered judgment for plaintiff. However, the district court granted defendant's post-trial motion for judgment as a matter of law, pursuant to Rule 50(b) of the Federal Rules of Civil

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35. *Id.* at 654-55.
36. *Id.* at 655-56.
37. *Id.* at 657.
38. *Id.*
39. 210 F.3d 1334 (11th Cir. 2000).
Procedure, and entered judgment for defendant. On appeal, the Eleventh Circuit found its prior decision in Jones v. Gerwens controlled. Because plaintiff did not present any evidence showing that she was similarly situated to any other employee who was differently disciplined, the court of appeals agreed with the district court that plaintiff had not presented a sufficient case of disparate treatment to go to the jury and affirmed the district court's grant of judgment as a matter of law.

A similar fate befell plaintiff in Rice-Lamar v. City of Fort Lauderdale. Plaintiff, an African-American female, was hired as an affirmative-action specialist by the city of Fort Lauderdale. Plaintiff presented an affirmative-action report at a department meeting that included a considerable amount of personal commentary such as the following: "We are still a City plagued with racism, glass ceilings for women and brick walls for people of color, a tolerance for perceptions of unfairness and a proverbial silence about it all." Plaintiff's superiors, including the city manager, directed plaintiff to remove her personal commentary from the report and to draft an amended report that focused on statistical data in the work force. Plaintiff submitted an amended report but refused to delete her personal comments. Without approval, plaintiff proceeded to distribute her report to the City's department heads. Plaintiff was discharged for insubordination. In her subsequent Title VII action alleging that her discharge was on account of her race, the district court granted defendant's motion for summary judgment. On appeal, citing Reeves, the Eleventh Circuit agreed that there was no genuine issue of material fact as to whether the city's stated reason for discharging plaintiff was a pretext for discrimination. Rather, the undisputed evidence confirmed that plaintiff was discharged "due to her insistence on including her own conclusions in the Affirmative Action Reports against her supervisors' wishes."
Finally, in *Lee v. GTE Florida, Inc.*, plaintiff worked as an engineer for GTE's real estate division in Tampa, Florida. In 1994, plaintiff's job was eliminated as the result of a reduction in force. Six other employees in the same position also lost their jobs. Under GTE's policies, plaintiff had the opportunity to apply for other positions within GTE. She applied for the position of manager of real estate services. Plaintiff was interviewed for the position, but a male employee, who was considered more qualified, was selected for the position. Plaintiff brought an action pursuant to Title VII, alleging that the failure to promote her was on account of her sex. At trial, the jury entered a verdict for plaintiff in the amount of $216,000. The district court subsequently added an award of front pay in the amount of $98,647 and attorney fees and costs in the amount of $100,000. On appeal, the Eleventh Circuit noted that, in a failure to promote case, a plaintiff cannot establish pretext by simply establishing that she was "better qualified" than the individual selected; rather, it is necessary to show "not merely that the defendant's employment decisions were mistaken but that they were in fact motivated by sex." In this case, the court of appeals found that there was not even a sufficient showing that plaintiff was the more qualified candidate. As noted by the court, defendant submitted evidence that it selected the male applicant because he was better qualified with respect to three of the four criteria listed for the position: He had more managerial experience; he had more strategic planning experience; and he had the equivalent of an engineering degree from Virginia Polytechnic Institute. Accordingly, the court of appeals found that there was insufficient evidence to create a genuine issue of fact on the issue of pretext, and the judgment for plaintiff was reversed, with instructions to enter judgment for defendant.

2. Disparate Impact. There was only one disparate impact case during the survey period, but the case was a significant one. In *EEOC v. Joe's Stone Crab, Inc.*, the Eleventh Circuit engaged in a lengthy and extensive analysis of the disparate impact theory of liability. The court of appeals labeled this action as the "paradigmatic 'hard' case" and noted that it had "labored for many months to reach the right result."
Defendant, Joe's Stone Crab, Inc., is a longtime, well-known, family-owned seafood restaurant located in Miami Beach, Florida. The case involved the position of food server. The evidence revealed that from 1986 to 1990, Joe's hired 108 male food servers and zero female food servers. From 1991 to 1995, after an EEOC charge was filed, Joe's hired 88 food servers, of which nineteen, or approximately 21.7%, were female. Joe's hired its new food servers in October of each year. It rarely had to advertise. Rather, it conducted what was known as a "roll call," which was widely known in the area and attracted numerous applicants for a limited number of positions. Each applicant completed an application and went through an interview with a maitre d'. Hiring decisions were made on the basis of four subjective factors: appearance, articulation, attitude, and experience. The EEOC brought an action under Title VII alleging both disparate treatment and disparate impact discrimination. After a bench trial, the district court summarily found that the EEOC had not established intentional discrimination under a disparate treatment theory, but the court entered judgment for the EEOC with respect to its disparate impact claim.\(^57\)

On appeal, the Eleventh Circuit reiterated the following three elements that a plaintiff must prove in a disparate impact case:

\[\text{[F]irst, that there is a significant statistical disparity between the proportion of women in the available labor pool and the proportion of women hired; second, that there is a specific, facially-neutral, employment practice which is the alleged cause of the disparity; and finally, and most critically in this case, that a causal nexus exists between the specific employment practice identified and the statistical disparity shown.}\(^58\)

However, despite the large statistical disparity in this case, the court of appeals found that neither the district court's findings nor the evidence in the record could support a legal conclusion that any specific "facially-neutral employment practice" at Joe's could be "causally connected" to the statistical disparity in the case.\(^59\) The district court (and the EEOC) identified two neutral employment practices: (1) Joe's "word of mouth recruiting" and (2) Joe's "undirected and undisciplined delegation of hiring authority to subordinate staff."\(^60\) However, according to the court of appeals, there was no evidence that either one of these identified practices caused any disparity between the percentage of women making

\(^{57}\) Id. at 1268-73.

\(^{58}\) Id. at 1274 (emphasis omitted).

\(^{59}\) Id. at 1274, 1279.

\(^{60}\) Id. at 1278.
up the qualified labor pool and the percentage of women that Joe's actually hired as servers.\textsuperscript{61}

The Eleventh Circuit focused on the district court's finding that the disparity had been caused by "Joe's reputation as a discriminator against women," which assertedly caused women not to appear at the annual "roll call" and therefore not to apply at Joe's.\textsuperscript{62} However, the court of appeals found this analysis "both problematic and inadequate."\textsuperscript{63} Initially, the court of appeals noted that reputation is not "a specific act or a practice" but is "far more amorphous."\textsuperscript{64} The court also pointed out that reputation, in and of itself, had never been used as the basis for a disparate impact finding of liability.\textsuperscript{65} Further, the court of appeals found that there was no evidence or logical connection between either of the identified neutral hiring practices at Joe's and Joe's "reputation as a discriminator."\textsuperscript{66} Finally, the court observed that the district court had admitted the reputation evidence not for the truth of the matter asserted, but merely to show the state of mind of the women who had failed to apply at Joe's.\textsuperscript{67} The court of appeals also pointed out that the district court's findings and the evidence in the case may well support a finding of intentional hiring discrimination and disparate treatment.\textsuperscript{68} However, because the district court specifically (but summarily) found that the EEOC had not sustained its burden of proof on this theory, the Eleventh Circuit vacated the judgment based upon a disparate impact theory and remanded the case to the district court for further proceedings utilizing a disparate treatment analysis.\textsuperscript{69}

3. Sexual Harassment. The Eleventh Circuit was particularly active in the difficult area of sexual harassment during the survey period. Perhaps the most significant case handed down by the court, at least for employers, was \textit{Madray v. Publix Supermarkets, Inc.}\textsuperscript{70} Plaintiffs were two female employees who worked at a Publix store in Okeechobee, Florida. The alleged harasser was the store manager, who, in the name of promoting a "family atmosphere" at the store, had a practice of hugging and patting his employees. Plaintiffs first com-

\textsuperscript{61} Id. at 1279.
\textsuperscript{62} Id. at 1280.
\textsuperscript{63} Id.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id. at 1281.
\textsuperscript{67} Id.
\textsuperscript{68} Id.
\textsuperscript{69} Id. at 1287.
\textsuperscript{70} 208 F.3d 1290 (11th Cir. 2000).
plained informally to three mid-level managers at the store. However, they did not file a formal complaint with the district manager until approximately six months later. The district manager immediately conducted an investigation that resulted in the store manager receiving a written warning, being demoted to assistant manager, and being transferred to another store. Neither plaintiff had any contact with the manager after the filing of their internal complaint. Publix had promulgated a sexual harassment policy that was disseminated to all employees in its employee handbook. Under the terms of the policy, employees submitting sexual harassment complaints were required to submit the complaint to either the store manager, the district manager, or a divisional personnel manager. Plaintiffs filed an action pursuant to Title VII alleging hostile work environment sexual harassment. The district court granted summary judgment in favor of Publix. On appeal, the Eleventh Circuit focused on whether defendant had sufficiently established the affirmative defense set forth by the Supreme Court in Faragher v. City of Boca Raton and Burlington Industries v. Ellerth. With respect to the first element of the defense, that the employer "exercised reasonable care to prevent ... any sexually harassing behavior," the court had little difficulty finding that Publix had "promulgated and effectively disseminated" its sexual harassment policy and complaint procedures. The court of appeals also found that the complaint procedures were adequate because they provided an alternative avenue of lodging a complaint with an official other than the offending supervisor. The second element of the defense, that the employer established "reasonable care to correct promptly the sexual harassment," required more discussion and addressed the issue of when Publix had notice of the harassing behavior. Plaintiffs argued that Publix had notice when they complained informally to the mid-level managers. However, the court of appeals focused on the language of defendant's policy, which required sexual harassment complaints be lodged at the level of store manager or above. On the basis of this policy language, the court concluded that Publix did not have notice of the harassing behavior as a result of the complaints to the mid-level
Because it was not in dispute that Publix had promptly remedied the harassment after plaintiffs filed their formal complaint, the Eleventh Circuit found that defendant had exercised reasonable care in promptly correcting the harassing behavior. Accordingly, summary judgment for defendant was affirmed.

This case, no doubt, will have a large impact on the drafting of employers' sexual harassment policies. Many policies allow employees initially to file a sexual harassment complaint with their immediate supervisor. In light of Madray, however, any employer using language to this effect in its policy should consider revising the policy consistent with the court's opinion.

Although the employer's policy was the savior in Madray, the employer's policy was the death knell in Breda v. Wolf Camera & Video. Plaintiff worked as a sales associate at defendant's store in Savannah, Georgia. She alleged that she was subjected to a continuous pattern of sexual harassment by a coworker that began shortly after she was hired. Plaintiff also alleged that she repeatedly complained about the harassing behavior to defendant's store manager. After resigning a number of months later, plaintiff brought a Title VII action alleging hostile work environment sexual harassment. The district court granted summary judgment for defendant.

On appeal, the primary issue was whether plaintiff had established that defendant had sufficient notice of the harassing behavior. In resolving this issue, the court of appeals again focused on the specific language of defendant's sexual harassment policy. This policy clearly stated that any employee who either was subjected to harassment or who witnessed harassment "must immediately notify his or her manager." In this respect, the Eleventh Circuit held: "When an employer has a policy for reporting harassment that is clear and published to its employees, and an employee follows that policy, the employer's notice of the harassment is established by the terms of the policy." Because defendant's own policy clearly spelled out that an employee was to report any harassment to his or her manager and because plaintiff alleged that she had done so in this case, the court of

79. Id.
80. Id.
81. Id. at 1302-03.
82. 222 F.3d 886 (11th Cir. 2000).
83. Id. at 888.
84. Id. at 889-90.
85. Id. at 889.
86. Id.
appeals concluded that summary judgment had been inappropriately entered and reversed the district court’s ruling. 87

In two sexual harassment cases during the survey period, the Eleventh Circuit struggled with the application of its prior en banc decision in Mendoza v. Borden, Inc., 88 reported in last year’s survey edition. 89 In doing so, the court reached opposite results. In the first case, Gupta v. Florida Board of Regents, 90 plaintiff, a citizen of India, worked as an assistant professor of economics at Florida Atlantic University. She alleged a pattern of sexually harassing behavior by another economics professor at the University that can be summarized as follows: The professor “looked [plaintiff] up and down” when he first met her; he called plaintiff at her home at night on numerous occasions; he asked plaintiff to have lunch with him; he once stared at plaintiff’s legs when she wore a skirt above her knee; he once commented to her, “you’re looking very beautiful”; and on one occasion in his office, the professor rolled his chair over to plaintiff and briefly placed his hand on plaintiff’s thigh. After a jury trial on plaintiff’s resulting Title VII action, a jury found for plaintiff in the amount of $45,000. 91 On appeal, the Eleventh Circuit found that no reasonable person would have considered most of the professor’s alleged actions to be of a sexual nature. 92 In this respect, the court of appeals concluded:

A man can compliment a woman’s looks (or a woman compliment a man’s looks) on one or several occasions, by telling her that she is looking “very beautiful,” or words to that effect, without fear of being found guilty of sexual harassment for having done so. Words complimenting appearance may merely state the obvious, or they may be hopelessly hyperbolic. Not uncommonly such words show a flirtatious purpose, but flirtation is not sexual harassment. 93

Applying its standard in Mendoza, the court of appeals found that there was simply insufficient evidence to support the jury’s verdict finding defendant liable for hostile work environment sexual harassment and reversed in favor of defendant. 94

87. Id. at 890.
88. 195 F.3d 1238 (11th Cir. 1999) (en banc).
89. See Corbin & Duvall, supra note 24, at 1127-28.
90. 212 F.3d 571 (11th Cir. 2000).
91. Id. at 578-82.
92. Id. at 583.
93. Id. at 584.
94. Id. at 586.
In the second case, *Johnson v. Booker T. Washington Broadcasting Service, Inc.*,\(^9\) plaintiff was hired as a cohost of the morning show at defendant's radio station in Birmingham, Alabama. From the start, plaintiff did not hit it off well with her cohost on the morning program, who also was the program director and plaintiff's supervisor. When the ratings for the morning show declined, plaintiff was transferred to a mid-day program. When defendant subsequently changed plaintiff's shift to a late night program and cut her pay, plaintiff resigned. At her exit interview, plaintiff alleged for the first time that she had been subjected to a pattern of sexual harassment by the program director and her cohost on the original morning show. Plaintiff brought an action under Title VII alleging sexual harassment, which resulted in the district court's granting summary judgment in favor of defendant.\(^9\) On appeal, the Eleventh Circuit distinguished both *Mendoza* and *Gupta*, finding that these cases involved "fewer instances of less objectionable conduct over longer periods of time."\(^9\) Finding that the pattern of conduct in the case was closer to the "continuous barrage of sexual harassment"\(^9\) found in its prior decision in *Dees v. Johnson Controls World Services, Inc.*,\(^9\) the court of appeals reversed and remanded the case for further proceedings.\(^9\)

Finally, in *Succar v. Dade County School Board*,\(^1\) the Eleventh Circuit considered the issue of whether sexual harassment inflicted upon a plaintiff by a co-worker with whom the plaintiff previously had a consensual sexual relationship was actionable under Title VII.\(^1\) Plaintiff, a male teacher, engaged in a consensual sexual relationship with a fellow female teacher. Before the relationship ended, the female teacher made threatening overtures to plaintiff's wife and son. The relationship ended shortly thereafter and soon became very acrimonious, with various incidents of verbal and physical harassment and attempts to embarrass plaintiff. In the resulting court action, the district court concluded that plaintiff had not established an actionable, hostile work environment claim and granted summary judgment for defendant.\(^1\) On appeal, the Eleventh Circuit agreed, finding that the female teacher's harassment of plaintiff "was motivated not by his male gender, but

95. 234 F.3d 501 (11th Cir. 2000).
96. *Id.* at 505-06.
97. *Id.* at 509.
98. *Id.*
99. 168 F.3d 417 (11th Cir. 1999).
100. 234 F.3d at 513.
101. 229 F.3d 1343 (11th Cir. 2000).
102. *Id.* at 1344.
103. *Id.*
rather by [her] contempt for [plaintiff] following their failed relationship; [plaintiff's] gender was merely coincidental.104

4. Retaliation. In what no doubt will be the Eleventh Circuit's most controversial decision during the survey period, the Eleventh Circuit, in EEOC v. Total System Services, Inc.,105 considered the proper scope of the retaliation provision set forth in Section 704(a) of Title VII.106 Defendant conducted an internal investigation with respect to a sexual harassment complaint filed against one of its male supervisors. Eight of defendant's female employees were interviewed, including Lindy Wright Warren. At the conclusion of the investigation, the supervisor was fired. Thereafter, however, defendant's senior vice president of human resources, a female, became convinced that Warren had lied during the investigation. Warren subsequently was fired for lying. The EEOC filed suit on Warren's behalf, alleging that Warren was fired in retaliation for participating in the employer's internal investigation of the sexual harassment complaint. The district court granted summary judgment, finding that Warren had not engaged in a statutorily protected activity.107

On appeal, the Eleventh Circuit closely examined the statutory language of the retaliation provision in Section 704(a) of Title VII.108 As to the "participation clause," the court of appeals agreed that Warren's taking part in defendant's internal investigation did not constitute protected activity under the statute because no formal EEOC complaint had been filed.109 The court concluded: "So, at a minimum, some employee must file a charge with the EEOC (or its designated representative) or otherwise instigate proceedings under the statute for the conduct to come under the participation clause."110 The court of appeals also found that Warren's conduct did not fall within the "opposition clause."111 The court concluded that, even if Warren's false

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104. Id. at 1345.
105. 221 F.3d 1171 (11th Cir. 2000).
106. Id. at 1172-73. Section 704(a) of Title VII provides in pertinent part that an employer may not retaliate against an employee because the employee "has opposed any practice made an unlawful employment practice by this subchapter" (the opposition clause) or because the employee "has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter" (the participation clause). 42 U.S.C. § 2000e-3(a).
107. 221 F.3d at 1173.
108. Id. at 1174.
109. Id.
110. Id. at 1174 n.2.
111. Id. at 1175.
statements were considered protected, defendant had asserted legitimate grounds for Warren's discharge, and the EEOC had presented no evidence that this asserted reason (submitting a false statement) was pretextual.\textsuperscript{112} The court of appeals concluded that, in circumstances when the employer has "good reason to believe" that one of its employees has given a "knowingly false statement" in the context of an internal investigation, "the law will not protect the employee's job."\textsuperscript{113}

This case will have a potentially large impact on the scope of retaliation claims under Title VII because allegations of retaliation in the context of an internal employer investigation have become commonplace. Only time will tell whether the other circuits, and perhaps ultimately the Supreme Court, will adopt the rather narrow interpretation of the retaliation provision adopted by the Eleventh Circuit.

5. Pregnancy Discrimination. In Armindo v. Padlocker, Inc.,\textsuperscript{114} the Eleventh Circuit considered the issue of whether an employer violates the Pregnancy Discrimination Act ("PDA"),\textsuperscript{115} for terminating an employee for excessive absences, when the majority of the absences were caused by the employee's pregnancy.\textsuperscript{116} Plaintiff was terminated from her clerical position after three months of probationary employment, assertedly because of poor attendance during the probationary period. She had been absent for six days during this period, five of which were related to her pregnancy. On nine other occasions, she had either arrived late or left early, in part due to her pregnancy. The district court granted summary judgment to defendant with respect to plaintiff's Title VII claim, finding that plaintiff did not establish that she was treated any differently from similarly situated nonpregnant employees.\textsuperscript{117} In agreeing with the district court, the Eleventh Circuit held that the PDA "does not require favorable treatment" and that the PDA "is not violated by an employer who fires a pregnant employee for excessive absences, unless the employer overlooks the comparable absences of non-pregnant employees."\textsuperscript{118}

\textsuperscript{112} Id.
\textsuperscript{113} Id. at 1176.
\textsuperscript{114} 209 F.3d 1319 (11th Cir. 2000).
\textsuperscript{115} 42 U.S.C. § 2000e(k).
\textsuperscript{116} 209 F.3d at 1320.
\textsuperscript{117} Id. at 1321.
\textsuperscript{118} Id. at 1321-22.
C. Procedural Matters

1. Timely Charge. One of the administrative prerequisites to suit under Title VII is that a plaintiff must file a timely charge of discrimination with the EEOC, within 180 days of the alleged unlawful practice. In Stewart v. Booker T. Washington Insurance, the issue was whether plaintiff's EEOC charge was timely filed. Plaintiff worked as an accountant for defendant broadcasting company, which owned two radio stations. In May 1997, defendant announced that its primary assets would be sold. After the consummation of this sale, plaintiff's employment was terminated on November 21, 1997. She filed a charge of discrimination on February 13, 1998. However, the district court, in granting summary judgment for defendant, found that plaintiff had received notice of her termination in May 1997, thereby rendering her discrimination charge untimely. On appeal, the Eleventh Circuit reversed, finding that there was a material issue of disputed fact over when plaintiff received notice of her termination. The court of appeals noted plaintiff's sworn deposition testimony that she did not learn that she was going to be terminated until November 1997, and stated that the district court improperly discredited this testimony at the summary judgment stage under Rule 56. The Eleventh Circuit concluded: "Quite simply, the 180-day charge filing period does not run until the plaintiff is told that she is actually being terminated, not that she might be terminated if future contingencies occur."

2. Class Actions. Plaintiffs continued to have difficulty during the survey period certifying class actions in the Eleventh Circuit pursuant to Rule 23 of the Federal Rules of Civil Procedure. The latest example of this trend is Carter v. West Publishing Co. Plaintiffs were eight former and current female employees of West Publishing Company. They filed a sex discrimination action pursuant to Title VII alleging that West had denied female employees the opportunity to purchase stock

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119. In so-called deferral states, where there is a state agency enforcing a state employment discrimination law, the charge-filing period is extended to 300 days. See 42 U.S.C. § 2000e-5(f)(1).
120. 232 F.3d 844 (11th Cir. 2000).
121. Id. at 846.
122. Id. at 846-48.
123. Id. at 850-51.
124. Id. at 848.
125. Id. at 849 (emphasis omitted).
126. 225 F.3d 1258 (11th Cir. 2000).
pursuant to an employee stock program. The district court certified a class action, but the Eleventh Circuit granted a permissive appeal of the district court's class certification decision.\footnote{127} On appeal, the court of appeals noted that plaintiffs asserting Title VII class actions must not only meet the requirements of Rule 23, but must also establish that the named plaintiff has standing to bring the claim.\footnote{128} In addressing the standing issue, the court focused on the "single-filing rule,"\footnote{129} which requires that, as long as one named plaintiff timely files an EEOC charge, the charge-filing prerequisite is deemed to have been met for all plaintiffs and class members. The resolution of this issue, in turn, was found to be dependent upon whether plaintiffs could establish a continuing violation of the Act because it was undisputed that the earliest EEOC charge had been filed more than 180 days from the date in August 1994, when West stopped offering employees the opportunity to purchase company stock.\footnote{130} However, the Eleventh Circuit found that, at most, plaintiffs had established a one-time violation and not a continuing violation.\footnote{131} The court concluded: "Plaintiffs assert a single discriminatory act—West's discriminatory employee stock program—followed by neutral, nondiscriminatory consequences—payment of dividends."\footnote{132} Having concluded that there was no continuing violation of Title VII, the Eleventh Circuit then concluded that plaintiffs did not have standing to represent the class and that the district court had erred in certifying the class.\footnote{133}

3. Arbitration. One case during the survey period addressed Gilmer-type arbitration as a form of alternative dispute resolution. In Brown v. ITT Consumer Financial Corp.,\footnote{134} plaintiff worked as a consumer loan collection agent for defendant until his termination in 1993. When hired, plaintiff executed a written employment agreement

\footnotesize{\begin{itemize}
\item \footnote{127} Id. at 1260-61.
\item \footnote{128} Id. at 1262-63. Rule 23 of the Federal Rules of Civil Procedure contains the following prerequisites to maintenance of a class action:
\begin{enumerate}
\item (T)he class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.
\end{enumerate}
FED. R. CIV. P. 23.
\item \footnote{129} 225 F.3d at 1263.
\item \footnote{130} Id. at 1263-65.
\item \footnote{131} Id. at 1265.
\item \footnote{132} Id.
\item \footnote{133} Id. at 1266-67.
\item \footnote{134} 211 F.3d 1217 (11th Cir. 2000).
\end{itemize}
that contained the following broad arbitration provision: "[The parties] agree that any dispute between them or claim by either against the other or any agent or affiliate of the other shall be resolved by binding arbitration under the Code of Procedure of the National Arbitration Forum."\(^{136}\)

Plaintiff filed a Title VII action alleging discrimination on account of race and retaliation with respect to his termination. The district court granted defendant's motion to compel arbitration. The arbitrator also ruled against plaintiff after an arbitration hearing. On appeal, plaintiff argued that the arbitration clause was void for vagueness and that the district court erred in compelling arbitration.\(^{136}\) The Eleventh Circuit, unimpressed with this argument, found that the arbitration clause was "brief, unequivocal and all-encompassing" and that "[a]n arbitration agreement is not vague solely because it includes the universe of the parties' potential claims against each other."\(^{137}\) Plaintiff also argued that the arbitration clause was void because the National Arbitration Forum had dissolved since the contract had been entered. Finding no evidence that the particular arbitration forum was an integral part of the agreement to arbitrate, the court of appeals summarily rejected this argument and affirmed the district court's decision.\(^{138}\)

D. Remedies Under Title VII

1. Punitive Damages/Statutory Cap/Flat Pay. The Eleventh Circuit considered one significant damages case during the survey period. In *EEOC v. W. & O., Inc.*,\(^{139}\) the court of appeals addressed the issue of punitive damages and the statutory cap under Title VII, as well as the issue of front pay. The EEOC, as plaintiff, brought an action pursuant to the Pregnancy Discrimination Act on behalf of three employees who worked as waitresses for defendant motel. After a jury trial, the jury found for each of the three employees, awarding back pay and punitive damages in the amount of $350,000 for one employee and $200,000 each for the additional two employees.\(^{140}\) After the trial, the district court reduced the punitive damages award to $100,000 per employee.
employee, in accordance with the Title VII statutory cap, and also awarded one of the employees front pay (in an amount of $924.27 every three months) for a period of three years.

On appeal, the primary issue with respect to the punitive damages award was the application of the Title VII statutory cap. Defendant argued that the cap limited the total amount of damages that could be awarded to all three employees combined, whereas the EEOC argued that each employee could be awarded damages up to the statutory cap. Examining both the statutory language and the legislative history of the Civil Rights Act of 1991 and also giving deference to the EEOC's Enforcement Guidance on the subject, the Eleventh Circuit concluded that "each aggrieved employee" could receive "up to the statutory cap without filing a separate suit or intervening in the EEOC's suit." With respect to the issue of front pay, the Eleventh Circuit held that "front pay retains its equitable nature under Title VII after passage of the Civil Rights Act of 1991." According to the court of appeals, the district court had not erred in deciding this issue itself instead of submitting it to the jury. However, the court also found "problematic" the district court's failure to "offer any explanation" for its award of front pay. Accordingly, the front pay award was vacated and remanded to the district court so it could "carefully articulate" whether reinstatement was viable in lieu of front pay.

2. Consent Decrees. Two cases during the survey period addressed the issue of consent decrees, with both cases arising out of the same long-standing race discrimination class action. In *Reynolds v. Roberts* ("Reynolds I") plaintiffs originally brought suit in 1985 against the Alabama Department of Transportation, alleging system-wide race discrimination. The district court, in 1986, certified three separate plaintiff classes: (1) one class consisting of black applicants for employment; (2) a second class comprised of permanent employees under

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141. The statutory cap is a sliding scale limiting the total amount of compensatory and punitive damages in a Title VII action, ranging from $50,000 to $300,000, based upon the size of the employer. For employers with more than 100 but fewer than 201 employees (as was the employer in this case), the statutory cap is $100,000.
142. 213 F.3d at 609.
143. Id. at 610.
144. Id. at 614.
145. Id. at 619.
146. Id.
147. Id.
148. Id.
149. 202 F.3d 1303 (11th Cir. 2000).
defendant's merit system; and (3) a third class employed by defendant as temporary, or nonmerit, employees. After lengthy negotiations and proceedings over a period of several years, the parties finally worked out a partial consent decree ("Consent Decree I") that was submitted to and approved by the district court in 1994. Various parts of Consent Decree I created new procedures for things such as the rotation of job duties, recruitment, and training. Relevant to this case, the decree also contained a provision addressing proceedings with respect to individual claims of race discrimination, in the event the parties could not come to an agreement voluntarily. When voluntary negotiations were unproductive, plaintiffs filed a "Motion to Set Hearing to Determine Method of Back-Pay Calculations." At the commencement of the hearing on plaintiffs' motion, the district court, over defendant's objection, announced as a threshold issue from the bench that "Consent Decree I had established 'class-wide liability' against the Department on the claims of the individual members of each of the three plaintiff classes." At the conclusion of these proceedings, the district court entered judgment for plaintiffs in the amount of $34,732,487, representing $17,450,077 in back pay and $17,282,410 in interest.

On appeal, the Eleventh Circuit engaged in an extensive and lengthy review of the provisions of Consent Decree I and could find no support in the decree or evidence in the record that supported the district court's conclusion that the decree somehow had acted as "an admission, and therefore adjudication" that defendant was liable with respect to every member of all three classes. Accordingly, the court of appeals vacated the judgment for back pay and remanded the case for further proceedings. In the process, the court delivered the following uncomplimentary observation:

With the exception of the prospective injunctive relief Consent Decree I has provided, the paths the parties have followed in litigating this case have led to nothing but the expenditure of time and considerable resources. For the most part, counsel have simply engaged in shadow boxing—all at the expense of the taxpayers of the State of Alabama and other litigants whose cases are awaiting the district court's attention.

150. Id. at 1306.
151. Id. at 1309.
152. Id. at 1310.
153. Id. at 1311.
154. Id. at 1318.
155. Id. at 1318-19.
156. Id. at 1319.
Summarizing the status of the case on remand, the court of appeals characterized the prospective injunctive relief of Consent Decree I as "undisturbed" and stated that the decree had not yet adjudicated defendant "guilty of anything." On remand, in order to obtain individual relief, the individual class members actually had to prove (satisfying the McDonnell Douglas test) that they had been discriminated against.

Less than two months later, a different aspect of the Reynolds class action made its way to the Eleventh Circuit. In Reynolds v. Roberts, the issue before the court involved a grievance procedure that had been created as a part of Consent Decree I; that is, if an individual employee felt that he or she had been discriminated against in any respect, the employee had the right to file an internal grievance to air the complaint. The procedure was race-neutral and consisted of four steps, culminating in impartial arbitration if the matter could not be resolved. In 1996, three white employees of the Department of Transportation filed grievances alleging that they had been assigned duties outside of their classification and sought back pay relief and provisional appointments. The EEO monitor established under the grievance procedure considered the grievances and recommended back pay and provisional appointments for all three grievants. Shortly thereafter, counsel for the three plaintiff classes filed a motion with the district court seeking a temporary restraining order and preliminary injunction to prohibit defendant from implementing the grievance resolutions. After initially granting a TRO, the district court conducted a hearing and entered a preliminary injunction granting plaintiffs' motion and prohibiting implementation of the grievance resolutions.

On appeal, the Eleventh Circuit issued an opinion that can only be described as a clear rebuke and admonishment to both plaintiffs' counsel and the district court. In vacating the judgment entering the injunction, the court of appeals reiterated that consent decrees are to be enforced through the court's civil contempt power and through a motion to the court to issue an order to show cause why a defendant should not be held in contempt and sanctioned for violating a specific provision of the consent decree. In this case, as noted by the court of appeals, this procedure had not been followed because it was obvious that the white

157. Id.
158. Id.
159. 207 F.3d 1288 (11th Cir. 2000).
160. Id. at 1292-97.
161. Id. at 1298.
grievants had not violated the consent decree in any respect or injured any member of the plaintiff class in any way. The court characterized the actions of plaintiffs' counsel as an abuse of the judicial process and an abuse that was "as gross as any we have encountered." The Eleventh Circuit then delivered the ultimate insult by remanding the case for the purpose of considering why plaintiffs' counsel should not be sanctioned pursuant to 28 U.S.C. § 1927. The court further instructed the chief judge of the Middle District of Alabama to assign the case to a different district judge for consideration of the sanctions issue.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Theories of Liability and Burdens of Proof

Perhaps the most significant employment discrimination decision rendered during the survey period was that of the United States Supreme Court in Reeves v. Sanderson Plumbing Products, Inc. An ADEA case, Reeves will have far reaching implications for the burden of proof allocation in litigation construing all federal employment legislation.

Reeves brought an action against his former employer alleging that Sanderson Plumbing violated the Age Discrimination in Employment Act when it terminated his employment. The trial court submitted the case to the jury, which rendered a judgment in favor of Reeves. The Fifth Circuit reversed, holding that, although a reasonable jury could have found that Sanderson Plumbing's explanation for Reeves' termination was pretextual, this showing, standing alone, was insufficient to sustain the jury's finding of liability. The court of appeals directed a judgment in favor of Sanderson Plumbing. The United States Supreme Court reversed, holding that the Fifth Circuit erred in overruling the trial court because Reeves established a prima facie case, introduced sufficient evidence for the jury to reject Sanderson Plumbing's explanation, and produced additional evidence of age-based animus.

162. Id. at 1299-1300.
163. Id. at 1299.
164. Id. at 1301-02.
165. Id. at 1302.
166. 530 U.S. 133 (2000).
167. Id. at 138.
168. Id. at 139.
169. Id.
170. Id. at 140.
171. Id. at 153-54.
The decision in Reeves had been closely watched by employment lawyers, and its impact is still being decided.

Several of the Eleventh Circuit cases from this survey period wrestled with the correct application of Reeves. For instance, Chapman v. AI Transport\footnote{229 F.3d 1012 (11th Cir. 2000).} provided the Eleventh Circuit with an opportunity to address an issue that frequently arises in job discrimination cases: an employer's use of subjective criteria to justify an adverse employment action. Chapman had been demoted, transferred, and subsequently terminated from employment with AI during a company-wide restructuring.\footnote{Id. at 1018.} The principal issue presented in the appeal was the use of a subjective job interview to pass over Chapman for a transfer position, a decision that subsequently led to his termination from employment with defendant.\footnote{Id. at 1016.}

Chapman presented the court of appeals with the first opportunity to apply Reeves in a subjective context. The panel concluded the Eleventh Circuit's earlier precedent in Combs v. Plantation Patterns, Meadowcraft\footnote{106 F.3d 1519 (11th Cir. 1997).} had been effectively modified by the Supreme Court's decision in Reeves.\footnote{229 F.3d at 1025 n.11.} In Combs the Eleventh Circuit held that a judgment as a matter of law was unavailable to an employer once a plaintiff offered sufficient evidence of pretext as to each of the employer's proffered reasons.\footnote{106 F.3d at 1541-43.} In Chapman the court announced a modified standard for summary judgment in these sorts of cases for the Circuit:

As we have just explained, Reeves tells us judgment as a matter of law will sometimes be available to an employer in such a case . . . and, because the "standard for granting summary judgment mirrors the standard for granting judgment as a matter of law, such that the inquiry under each is the same," . . . the same is true of summary judgment.\footnote{229 F.3d at 1025 n.11 (quoting Reeves, 530 U.S. at 150).}

The court also noted that Reeves did not affect the Eleventh Circuit's view of its proper role in reviewing an employer's reasons for its employment decisions:

We have recognized previously and reiterate today that: federal courts "do not sit as a super-personnel department that reexamines an entity's business decisions. No matter how medieval a firm's practices,
EMPLOYMENT DISCRIMINATION

no matter how high-handed its decisional process, no matter how mistaken the firm's managers, the ADEA does not interfere. Rather our inquiry is limited to whether the employer gave an honest explanation of its behavior. 179

Lewis v. Young Men's Christian Ass'n 180 decided whether the Price Waterhouse defense remains available in ADEA claims. 181 Plaintiff claimed that she had been turned down for employment at a branch of the YMCA in retaliation for her having filed an ADEA suit against another branch after she had been fired for misconduct. 182 Defendant presented evidence below in support of summary judgment establishing that it would have turned plaintiff down for employment at the second branch because of her previous misconduct. 183 The panel concluded that the Price Waterhouse defense remains viable in ADEA actions notwithstanding passage of the Civil Rights Act of 1991. 184 The panel determined that Congress failed specifically to include the ADEA within the scope of the provision overruling the Price Waterhouse defense in the Title VII context. 185

B. Procedural Matters

1. Sovereign Immunity. Another significant Supreme Court decision during this survey period involved state sovereign immunity. In Kimel v. Florida Board of Regents, 186 the United States Supreme Court concluded that the ADEA was not a valid exercise of Congress' power, and thus, the purported abrogation of the states' sovereign immunity in the ADEA was invalid. 187 Kimel continues the long line

179. Id. at 1030 (quoting Elrod v. Sears, Roebuck & Co., 939 F.2d 1466, 1470 (11th Cir. 1991) (quoting Meching v. Sears, Roebuck & Co., 864 F.2d 1359, 1365 (7th Cir. 1988))).

180. 208 F.3d 1303 (11th Cir. 2000).

181. Id. at 1303-04. The decision of the United States Supreme Court in Price Waterhouse v. Hopkins, 490 U.S. 228 (1989), was superseded by 42 U.S.C. § 2000e-5(g)(2)(B), as enacted by § 107(b) of the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071, 1075 (1991). In Price Waterhouse, the Supreme Court held that an employer would not be liable for sex discrimination under Title VII if it could prove by a preponderance of the evidence that it would have made the same disputed employment decision even in the absence of the alleged discrimination. 490 U.S. at 258. In 1991, Congress enacted the Civil Rights Act of 1991 in part to overrule a variety of earlier Supreme Court employment decisions.

182. 208 F.3d at 1303-04.

183. Id. at 1304.

184. Id. at 1304-05.

185. Id. at 1305.


187. Id. at 67.
of Supreme Court decisions limiting Congress' powers and strengthening states' rights.\textsuperscript{188}

2. Right to Sue. Santini \textit{v. Cleveland Clinic, Florida}\textsuperscript{189} presented the court with a timeliness question. The district court found that Santini's various federal claims were time barred because she failed to file her civil complaint within ninety days of her receipt of a notice of right to sue from the United States EEOC. Santini's attorney had received an undated dismissal and notice of right to sue from the EEOC and requested that the EEOC issue a dated notice. The EEOC complied with the request, and thereafter, plaintiff filed suit based upon the dated notice. Defendant moved for summary judgment, contending that the original notice was the one that started the ninety-day clock ticking. The district court agreed and granted summary judgment because the claim was untimely filed more than ninety days after plaintiff received the first, undated notice.\textsuperscript{190} The Eleventh Circuit affirmed and found that the EEOC had issued the second notice merely to correct a technical defect in the first notice, the lack of a date.\textsuperscript{191} Because the issuance of the dated notice was, therefore, immaterial to the timeliness issue, the district court was correct in finding that Santini's claims were time barred as a result of his lawyer's insistence on a dated notice.\textsuperscript{192}

3. Front Pay. Munoz \textit{v. Oceanside Resorts, Inc.}\textsuperscript{193} presented for the first time in the circuit a fact pattern in which an employer demonstrates that it lawfully eliminated an age discrimination plaintiff's former position, notwithstanding the age discrimination litigation, which precludes an award of front pay.\textsuperscript{194} Defendant contended that front pay was inappropriate because plaintiff's position would have been eliminated.\textsuperscript{195} However, defendant failed to demonstrate sufficiently in the trial court that, even though his position had been eliminated, he

\begin{footnotes}
\footnote{188}{See, e.g., Seminole Tribe of Fla. \textit{v. Florida}, 517 U.S. 44 (1996).}
\footnote{189}{232 F.3d 823 (11th Cir. 2000).}
\footnote{190}{\textit{Id.} at 824-25.}
\footnote{191}{\textit{Id.} at 825.}
\footnote{192}{\textit{Id.}}
\footnote{193}{223 F.3d 1340 (11th Cir. 2000).}
\footnote{194}{\textit{Id.} at 1343.}
\footnote{195}{Elimination of a plaintiff's former position prior to trial may preclude the receipt of front pay. Nord \textit{v. United States Steel Corp.}, 758 F.2d 1462, 1473 n.11 (11th Cir. 1985). "Awarding front pay to a plaintiff who ultimately would have been terminated confers windfall upon that plaintiff and contravenes the remedial purpose of the ADEA." \textit{Munoz}, 223 F.3d at 1350.}
\end{footnotes}
would not have been able to move to some other available job on defendant's resort property.\footnote{196}

4. Res Judicata. The interesting issues on appeal in\textit{O'Connor v. PCA Family Health Plan, Inc.}\footnote{197} concerned res judicata. The district court concluded that its earlier grant of summary judgment against plaintiff with respect to her Family and Medical Leave Act\footnote{198} claim in an early suit had res judicata effect on a variety of discrimination claims she later attempted to raise in a second suit.\footnote{199} Relying on\textit{Pleming v. Universal-Rundle Corp.},\footnote{200} plaintiff argued on appeal that, because the EEOC had not yet issued a right to sue notice to her at the time she commenced the earlier FMLA suit, she remained free to bring the second employment discrimination suit at a later date.\footnote{201} The panel distinguished\textit{Pleming} on its facts: “The cornerstone of\textit{Pleming}’s holding, however, was that the circumstances giving rise to the allegations of the second suit occurred after she filed the first suit; in other words, the claims brought in each suit were premised on entirely different instances of alleged discrimination.”\footnote{202} The court determined that the facts giving rise to O’Connor’s employment claims stemmed from the same nucleus of facts that earlier gave rise to her FMLA claim.\footnote{203}

III. AMERICANS WITH DISABILITIES ACT

A. Theories of Liability and Burdens of Proof

\textit{Jang v. United Technologies Corp.}\footnote{204} also concerned application of the doctrine of res judicata in the employment litigation but in an ADA context. Jang had earlier filed suit against United Technologies under the ADA. That suit had been dismissed because the EEOC had not yet issued a notice of right to sue. Upon finally receiving his right to sue notice, Jang then filed a second suit, which was identical in critical respects to the first suit.\footnote{205} Concluding that the dismissal of the first suit in the district court was a judgment on the merits, the court of

\begin{itemize}
\item \textit{Id. at 1350-51.}
\item \textit{200 F.3d 1349 (11th Cir. 2000).}
\item \textit{29 U.S.C. §§ 2601-2654 (1994).}
\item \textit{200 F.3d at 1355.}
\item \textit{142 F.3d 1354, 1357-59 (11th Cir. 1998).}
\item \textit{200 F.3d at 1355-56.}
\item \textit{Id. at 1355 (emphasis in original).}
\item \textit{Id. at 1355-56.}
\item \textit{206 F.3d 1147 (11th Cir. 2000).}
\item \textit{Id. at 1148.}
\end{itemize}
appeals affirmed. The trial court was correct to apply traditional res judicata doctrine, determining that the parties in the two actions were identical and the causes of action were the same.

*Earl v. Mervyns, Inc.* concerned the two definitional terms within the ADA that have presented the most problems for practitioners: essential functions of the job and reasonable accommodation. Earl, who suffered from obsessive compulsive disorder, was continually late for work as a result of the behaviors required of him by the disorder. Following several warnings and probationary steps occasioned by her tardiness, she was ultimately terminated from employment due to further reoccurrences. The court of appeals determined that Earl's attendance problems rendered her unable to perform the essential functions of her job. Because of the nature of her job (Earl was a store area coordinator in a retail department store, a position that required her timely attendance), the court next determined that Earl was unable to identify any reasonable accommodation that would allow her to perform those essential job functions. The court of appeals affirmed the district court's grant of summary judgment.

*Cash v. Smith* presented the equally difficult and fact sensitive question of when a physical impairment rises to the level of a disability under the ADA. Cash, who suffered from a remarkable variety of medical disorders, began missing work after she was diagnosed with a seizure disorder and diabetes. Because of her various health problems, she completely exhausted all sick and vacation time. Because of her long history of absenteeism, Cash was not hired into a position of employment she sought after the employer restructured its operations. Cash thereafter sued, claiming disability discrimination. The court concluded that despite all of her various ailments, Cash was not disabled.

206. *Id.* at 1149.
207. *Id.*
208. 207 F.3d 1361 (11th Cir. 2000).
209. *Id.* at 1365. "Reasonable accommodation" is defined within the ADA at 42 U.S.C. § 12111(8). "Essential functions" is defined within the regulations at 29 C.F.R. § 1630.2(n)(2)(i). However, to a large extent, the definitions are without illumination.
210. 207 F.3d at 1363-65.
211. *Id.* at 1367.
212. *Id.* at 1366.
213. *Id.* at 1368.
214. 231 F.3d 1301 (11th Cir. 2000).
215. *Id.* at 1303.
216. *Id.* Among her various medical problems, Cash had over the years of her employment with defendant Alabama Power been diagnosed with mitral valve prolapse, migraine headaches, depression, high blood pressure, and a brain tumor. *Id.*
217. *Id.* at 1303-04.
for purposes of the ADA.\textsuperscript{218} Agreeing with the trial court, the panel held that Cash failed to show that she was substantially limited in any major life activity, and therefore, Cash did not enjoy job protection under the ADA.\textsuperscript{219}

To the same effect, in \textit{Durley v. APAC, Inc.},\textsuperscript{220} another ADA plaintiff failed to demonstrate that she was limited in a major life activity. Plaintiff's own testimony on the issue in the trial court indicated that although her health condition was aggravated by work-related stress, she always remained able to perform the job in question and that she always got her work done notwithstanding her health condition.\textsuperscript{221} Summary judgment on the ADA claims was therefore appropriate.\textsuperscript{222}

\textit{Chanda v. Engelhard/ICC}\textsuperscript{223} focused on the substantial limitation aspect of the ADA's definitional morass. Chanda suffered from tendonitis and claimed this condition rendered him disabled for purposes of the ADA.\textsuperscript{224} Relying and building upon its earlier ruling in \textit{Hilburn v. Murata Electronics North America, Inc.},\textsuperscript{225} the appeals court concluded that a diminished activity tolerance from normal daily activities does not constitute a disability under the ADA.\textsuperscript{226} While acknowledging the condition of tendonitis can constitute a physical impairment under the right set of factual circumstances, the court concluded that here it did not.\textsuperscript{227} The court noted that plaintiff's own deposition testimony and that of his doctors failed to establish a genuine issue as to any substantial limitation in plaintiff's case.\textsuperscript{228}

Finally, \textit{Maynard v. Pneumatic Products Corp.}\textsuperscript{229} presented the question of whether a back injury substantially limited a plaintiff's major life activity of walking.\textsuperscript{230} Because plaintiff failed to demonstrate that his ability to walk was limited as compared to the average person in the general population, he did not make a prima facie case.\textsuperscript{231}

\begin{itemize}
\item \textsuperscript{218} \textit{Id.} at 1304.
\item \textsuperscript{219} \textit{Id.} at 1306.
\item \textsuperscript{220} 236 F.3d 651 (11th Cir. 2000).
\item \textsuperscript{221} \textit{Id.} at 657.
\item \textsuperscript{222} \textit{Id.} at 685.
\item \textsuperscript{223} 234 F.3d 1219 (11th Cir. 2000).
\item \textsuperscript{224} \textit{Id.} at 1221.
\item \textsuperscript{225} 181 F.3d 1220 (11th Cir. 1999).
\item \textsuperscript{226} 234 F.3d at 1222-23.
\item \textsuperscript{227} \textit{Id.}
\item \textsuperscript{228} \textit{Id.} at 1223.
\item \textsuperscript{229} 233 F.3d 1344 (11th Cir. 2000).
\item \textsuperscript{230} \textit{Id.} at 1347.
\item \textsuperscript{231} \textit{Id.} at 1349. This decision is potentially significant for what it now requires of plaintiffs to establish a prima facie case of disability discrimination. "The simple proposition we clarify today—that plaintiffs must present comparator evidence to
B. Coverage

*Shields v. BellSouth Advertising & Publishing Co.*\textsuperscript{232} presented the issue of collateral estoppel, a variant of res judicata discussed above.\textsuperscript{233} Plaintiff previously brought a state unemployment benefits claim against BellSouth in the Georgia courts. The state court determined in the course of that proceeding there was no evidence that plaintiff had been fired from his employment because of his claimed disability. Shields thereafter commenced suit against BellSouth in federal court, alleging that the termination of his employment was a violation of the ADA. Based on the prior state court finding, the district court dismissed the suit under the doctrine of collateral estoppel.\textsuperscript{234} The Eleventh Circuit certified to the Georgia Supreme Court the state law question of whether collateral estoppel under Georgia law would bar the second suit.\textsuperscript{235}

*Davis v. Florida Power & Light Co.*\textsuperscript{236} presented the question of whether or not a plaintiff who is unable to work overtime is a qualified individual with a disability.\textsuperscript{237} On appeal, the Eleventh Circuit agreed with the district court that mandatory overtime was an essential function of plaintiff's job position.\textsuperscript{238} Because Davis claimed below that his back injury prevented him from working overtime, the trial court properly granted summary judgment in favor of defendant.\textsuperscript{239}

IV. CIVIL RIGHTS ACTS OF 1866

A. Section 1981

As discussed above in Part I.B.1., *Rice-Lamar v. City of Fort Lauderdale*\textsuperscript{240} is a factually interesting case involving Fort Lauderdale's former affirmative action specialist who was fired after she refused to remove personal commentary from a report she wrote in her official capacity. Despite having been instructed by her supervisor to remove the personal commentary, Rice-Lamar caused the report to be published containing the commentary that supervisors found to be objectionable.

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\textsuperscript{232} 228 F.3d 1284 (11th Cir. 2000).
\textsuperscript{233} Id. at 1288.
\textsuperscript{234} Id. at 1285-86.
\textsuperscript{235} Id.
\textsuperscript{236} 205 F.3d 1301 (11th Cir. 2000).
\textsuperscript{237} Id. at 1302.
\textsuperscript{238} Id. at 1305.
\textsuperscript{239} Id.
\textsuperscript{240} 232 F.3d 836 (11th Cir. 2000).
She was thereafter discharged from employment for refusing to follow her supervisor's instruction. 244

Although the subject matter of the dispute between [Rice-Lamar] and her supervisors involved race and gender discrimination, the City's actions with respect to [Rice-Lamar] herself were not due to her race or gender. Rather, they were due to her insistence on including her own conclusions in the Affirmative Action Reports against her supervisor's wishes. 245

Rice-Lamar's claim failed most notably because she was unable to present any evidence indicating that other insubordinate employees were treated more favorably than she had been. 246

The significant issue on appeal in Koch v. Rugg 247 concerned qualified immunity presented in the context of the termination of a Jewish professor from the faculty at Kennesaw State University, "a component of the University System of Georgia." 248 In an informative opinion that extensively discussed the variations of types of available qualified immunities, the panel concluded that the denial of qualified immunity is a purely legal question when it concerns only the application of established legal principles to a given set of facts. 249 In these sorts of cases, the Eleventh Circuit concluded that it has no jurisdiction. 250

Perhaps the most potentially significant public sector Section 1981 case reported during the survey period is the case of Butts v. County of Volusia. 251 The court concluded in Butts that Section 1983 constitutes the exclusive remedy against the states and their political subdivisions for claims arising under the various Civil Rights Acts. 252 Before this decision, Section 1981 claims were frequently pleaded in the same suit as alternative theories of potential liability to Section 1983 actions against public employers. 253 If Butts is not reversed by the United States Supreme Court, the decision will eliminate this practice in the

241. Id. at 838.
242. Id. at 843 (bracketed information in original).
243. Id.
244. 221 F.3d 1283 (11th Cir. 2000).
245. Id. at 1285.
246. Id. at 1296.
247. Id. at 1298.
248. 222 F.3d 891 (11th Cir. 2000).
249. Id. at 894.
circuit, potentially uncomplicating employment litigation, at least to a degree.

Reynolds v. Roberts,251 a class action, came before the court on two separate appeals heard during the survey period.252 In Reynolds I253 appellants challenged a judgment of the district court awarding back pay to members of one of the employee groups seeking relief for racial discrimination in the class action. Both parties entered into a race-neutral consent decree providing for prospective relief relating to job qualifications and promotion criteria. Based upon the consent decree entered, the district court subsequently entered a judgment awarding the members of one of the plaintiff employee groups back pay plus interest on their claims of racial discrimination.254 The lower court's determination in Reynolds I was vacated because, in the opinion of the court of appeals, the consent decree had not been an admission of liability that would have entitled the plaintiff subclass to back pay relief.255

In Reynolds II256 plaintiffs (a different group from plaintiffs in Reynolds I) separately appealed from orders of the district court prohibiting them from availing themselves of a court-ordered race-neutral grievance procedure. In the opinion of the district court, this use of the grievance procedure would have violated the earlier consent decree.257 Concluding in this appeal that the terms of the consent decree at issue were unambiguous, the court of appeals held that the district court had no basis for rewriting the consent decree so that its revised complaint procedures would be only available to African-American members of the class.258

B. Section 1983

Maggio v. Sipple259 was before the court of appeals as a result of the denial of a motion to dismiss on qualified immunity grounds in the trial court.260 The court of appeals reversed the decision of the trial court in this regard, finding that no constitutional violation had been stated
in the suit as no public concern had been shown.\textsuperscript{261} Even assuming that Maggio had alleged a First Amendment violation, the panel concluded that the individual defendants were entitled to qualified immunity because Maggio failed to show that a reasonable person in defendants' position would have been on notice that their actions violated clearly established law.\textsuperscript{262}

\textit{Oladeinde v. City of Birmingham}\textsuperscript{263} concerned a former police chief and a former police captain appealing from a denial of their motion for judgment as a matter of law on qualified immunity grounds. Defendants contended they were entitled to qualified immunity because they had not violated clearly established law.\textsuperscript{264} On appeal, the Eleventh Circuit agreed.\textsuperscript{265} The court concluded that plaintiffs' speech was not protected under the facts of the case because of the overriding interest of the police department in maintaining order and loyalty within the department.\textsuperscript{266}

\textit{Stanley v. City of Dalton}\textsuperscript{267} also concerned the proper application of qualified immunity in an employment setting. The district court denied defendant's motion for summary judgment based on qualified immunity in a wrongful termination case.\textsuperscript{268} On appeal, the court found that the termination in question was objectively reasonable, and, as such, defendants were entitled to qualified immunity.\textsuperscript{269} The record undisputedly established that defendants were motivated in part by plaintiff's misconduct.\textsuperscript{270}

\textit{Cotton v. Jackson}\textsuperscript{271} concerned the availability of state remedies and their impact on a Section 1983 action. Summary judgment in favor of plaintiff in the trial court was reversed on appeal.\textsuperscript{272} The panel concluded that, because there were appeals procedures available to plaintiff under state law, a Section 1983 action did not lie.\textsuperscript{273} Plaintiff
was not deprived of his procedural due process rights because of the availability of the state remedies.\textsuperscript{274}

\textit{Patrick v. Floyd Medical Center}\textsuperscript{275} was a state action case decided during the survey period. The district court's grant of summary judgment was affirmed on appeal because Patrick failed to establish state action to support a Section 1983 claim.\textsuperscript{276} The Hospital Authority of Floyd County was a public hospital authority under Georgia law. It entered into a management agreement with a private entity to manage and operate its hospital. While the authority maintained some control over the financial activities of the hospital, it relinquished all human resource activities to the private authority under the agreement.\textsuperscript{277} Under these facts, the court of appeals concluded that the private authority could not be said to be a state actor for Section 1983 purposes.\textsuperscript{278}

\textit{Thigpen v. Bibb County}\textsuperscript{279} concerned the issue of whether plaintiffs' Section 1983 claim was barred because they had failed to plead a corresponding Title VII claim, an issue of first impression in the circuit.\textsuperscript{280} The panel had little difficulty rejecting the Fourth Circuit's reasoning, concluding that, because plaintiffs' claims here implicated equal protection claims, they stood on different footing than did the claims before the Fourth Circuit in the case relied upon by the district court.\textsuperscript{281}

\textit{Abel v. Dubberly}\textsuperscript{282} presented the court of appeals with a reverse discrimination claim. Plaintiff appealed the grant of a renewed motion

\begin{footnotesize}
\begin{enumerate}
\item[274.] Id. at 1333.
\item[275.] 201 F.3d 1313 (11th Cir. 2000).
\item[276.] Id. at 1317.
\item[277.] Id. at 1314.
\item[278.] Id. at 1316.
\item[279.] 223 F.3d 1231 (11th Cir. 2000).
\item[280.] Id. at 1237. In misplaced reliance on authority from the Fourth Circuit, the trial court concluded that, because of the passage of the Civil Rights Act of 1991, Section 1983 plaintiffs asserting equal protection claims must also assert a companion Title VII claim. See Hughes v. Bedsole, 48 F.3d 1376, 1383 n.6 (4th Cir. 1995).
\item[281.] 223 F.3d at 1238. The Fourth Circuit was relying on the United States Supreme Court's decision in \textit{Great American Federal Savings & Loan Ass'n v. Novotny}, 442 U.S. 366 (1979), in which the Court stated that Section 1985(3) "may not be invoked to redress violations of Title VII." Id. at 378.
\item[282.] 210 F.3d 1334 (11th Cir. 2000).
\end{enumerate}
\end{footnotesize}
for judgment as a matter of law as to her claims for employment discrimination. She had been the only Caucasian assigned to a branch library and was terminated from employment for borrowing cash from the library's petty cash fund. She alleged that the reason for her firing was pretextual and that race was the real reason for her termination. She argued that an African-American employee had also taken money from the petty cash fund but was not similarly disciplined. Finding that no other employee had actually confessed to taking funds from the library, the court affirmed.

The court reasoned that no other employee's situation was comparable to plaintiff's and that she had failed to make out a case of disparate treatment.

C. Section 1985

McAndrew v. Lockheed Martin Corp. addressed the novel issue of application of the intracorporate conspiracy doctrine in the Section 1985 context. The court concluded in the appeal that the doctrine does not bar a plaintiff's civil claim when the plaintiff is alleging a criminal, as opposed to civil, conspiracy. In the opinion of the panel, the "discreet" question presented in the appeal was the applicability of the doctrine to Section 1985 claims when it is alleged that a conspiracy exists among corporate officers in the corporation itself to deter by force, intimidation, or threat, testimony in a United States court. When the allegations describe criminal conduct, the panel concluded that the intracorporate conspiracy doctrine does not apply. Conversely, the doctrine remains vital when no criminal conspiracy is alleged.

In Dickerson v. Alachua County Commission, the court determined that Title VII of the Civil Rights Act of 1964 does not preempt Section 1985 claims. However, defendants prevailed in the ap-
Because defendant county and its employees were considered a single entity, the intracorporate conspiracy doctrine prevented Section 1985 liability in the case.296

V. CONCLUSION

Employment law cases continue to constitute a significant portion of the docket of the court of appeals. The cases coming before the court of appeals continue to present some of the more important employment law questions.

295. Id. at 770.
296. Id.