Employment Discrimination

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The 1999 survey period was another active year for employment discrimination litigation in the Eleventh Circuit and before the United States Supreme Court. In addition to the many cases decided by the Eleventh Circuit, the Supreme Court rendered several key decisions defining the scope of the Americans with Disabilities Act and redefining the concept of sovereign immunity. The Court also set standards for punitive damages awards under Title VII. Each of these decisions are discussed in detail below.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Jurisdiction

Since its inception in 1964, Title VII has never applied to small employers. Indeed, it excludes from the definition of “employer” those

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employers with fewer than fifteen employees. In *Scarfo v. Ginsberg*, the issue before the Eleventh Circuit was the following: in situations in which there is a dispute over whether a defendant meets the definition of “employer” under Title VII, is this a question to be resolved by the jury or by the court? Defendants were several corporations, all owned or partially owned by the same individual. None of these corporations individually employed the requisite fifteen employees, but if all the corporations were grouped together as a single employer, clearly Title VII would apply. Even though the facts were disputed as to whether the various corporations were so interrelated as to constitute a single employer, the district court made factual findings on this issue because it related to subject matter jurisdiction. Finding that defendants did not constitute a single employer, the district court dismissed for lack of jurisdiction. In a split decision, the Eleventh Circuit affirmed and held that the issue of whether defendants constituted an employer within the definition of Title VII was a “threshold jurisdictional issue.” The court further found that when faced with factual disputes concerning the issue of subject matter jurisdiction, it was proper for the district court, rather than the jury, to weigh the evidence and serve as the factfinder.

B. Theories of Liability and Burdens of Proof

1. Direct Evidence. 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. In two cases decided during the survey period, the Eleventh Circuit grappled with the issue of what constitutes direct evidence of discrimination. Interestingly, although the

2. 42 U.S.C.A. § 2000e(b) (“The term 'employer' means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year . . . .”).
3. 175 F.3d 957 (11th Cir. 1999).
4. Id. at 959-60.
5. Id. at 961.
6. Id.
7. 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 Dept 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).
intent was to settle a confusing area of the law, the court ended up merely confusing the issue even more.

In the first case, Schoenfeld v. Babbitt, plaintiff brought claims of race and gender discrimination against the United States Department of Interior, Fish and Wildlife Service relating to the Service's refusal to hire plaintiff for a biologist position. The district court granted summary judgment for the Service on both claims. On appeal the Eleventh Circuit addressed whether plaintiff had presented direct evidence of discrimination. The court found that direct evidence of discrimination is evidence that, "if believed," proves the issue of discrimination "without inference or presumption." Relying on its prior decision in Carter v. City of Miami, the court concluded that direct evidence was composed of "only the most blatant remarks, whose intent could be nothing other than to discriminate on the basis of some impermissible factor." The alleged direct evidence consisted of three different statements made by persons involved in the hiring process. The Eleventh Circuit agreed that "[a]lthough these statements suggest discrimination, they are not the type of 'blatant remarks' from which discrimination can be found without the aid of an inference." However, because the court also found that plaintiff had presented sufficient circumstantial evidence of gender discrimination to create a disputed issue of material fact, it remanded that portion of the case for trial.

In Wright v. Southland Corp., the Eleventh Circuit adopted a different definition of direct evidence of discrimination. Plaintiff brought claims under both the ADEA and Title VII, alleging that he was discharged because of his age and was retaliated against for filing an EEOC charge. The district court granted summary judgment for defendant on both claims. On appeal, in a lengthy and scholarly opinion authored by Judge Tjoflat, the court attempted to clarify the definition of direct evidence (an issue that the court noted had "baffled

8. 168 F.3d 1257 (11th Cir. 1999).
9. Id. at 1260-64.
10. Id. at 1266 (quoting Burrell v. Board of Trustees of Ga. Military College, 125 F.3d 1390, 1393 (11th Cir. 1997)).
11. 870 F.2d 578 (11th Cir. 1989).
12. 168 F.3d at 1266 (quoting Carter, 870 F.2d at 582).
13. Id.
14. Id. at 1267.
15. Id. at 1270-71.
16. 187 F.3d 1287 (11th Cir. 1999).
17. Id. at 1289.
courts and commentators for some time”), but the end result is that
the issue is now confused even more. The court referred to the definition
of direct evidence from Schoenfeld as the “dictionary definition” of direct
evidence. However, the court adopted an entirely different definition
that it labeled the “preponderance definition” of direct evidence.
Under this definition, direct evidence is evidence “from which a
reasonable trier of fact could find, more probably than not, a causal link
between an adverse employment action and a protected personal
characteristic.” This is a much lower threshold than the “blatant
remark” type of direct evidence required in Schoenfeld and, indeed,
would mean that the vast majority of employment discrimination suits
involve direct evidence of discrimination. Interestingly, however,
although the other judges on the panel in Wright concurred in the result
(finding that there was sufficient disputed evidence to warrant reversal
of summary judgment), both judges expressly stated that they did not
join Judge Tjoflat’s opinion. Accordingly, it is questionable as to
what, if any, precedential value this case has.

2. Sexual Harrassment. Two cases decided during the survey
period addressed the ever-troublesome issue of sexual harassment in the
workplace. The first case, Dees v. Johnson Controls World Services,
Inc., addressed the issue of whether defendant took adequate remedi-
mal measures in response to a complaint of sexual harassment. Plaintiff
was employed as an office coordinator within defendant’s fire depart-
ment. Defendant had a contract with the United States Navy to provide
fire protection, security, and related services to the submarine base
located at Kings Bay, Georgia. Over a period of three years, plaintiff
was subjected to a continuous barrage of sexual harassment by the fire
chief and assistant chief. The harassment took a variety of forms,
including sexually explicit stories, jokes, comments about body parts,
and physical harassment. Plaintiff finally lodged a formal complaint
with the Human Resources Department, which, after an ensuing
investigation, resulted in plaintiff being transferred to a new position
with no loss in salary or benefits and both harassers being fired. In
response to plaintiff’s subsequent sexual harassment action under Title
VII, the district court granted summary judgment, finding that

18. Id. at 1288.
19. Id. at 1294.
20. Id.
21. Id. at 1298.
22. Id. at 1306 (Cox, J., specially concurring); id. (Hull, J., specially concurring).
23. 168 F.3d 417 (11th Cir. 1999).
defendant was not liable because it had taken prompt remedial action. On appeal, however, the Eleventh Circuit focused on evidence that defendant had notice of the harassing conduct well before plaintiff's formal complaint and had taken no action (such as a comment from a Human Resources employee that the alleged harassers were "up to their old tricks again" and that the same type of complaints involving the same individuals had been investigated several years earlier). Finding the issue of prior notice to be a disputed issue of material fact, the Eleventh Circuit reversed and remanded the case for further proceedings.

In the second case, *Mendoza v. Borden, Inc.*, the Eleventh Circuit, in an en banc decision, addressed the level of proof necessary to support a claim for sexual harassment based on a hostile environment. The district court granted defendant's Rule 50(b) motion for judgment as a matter of law. Referring to the Supreme Court's decision in *Harris v. Forklift Systems, Inc.*, the court noted that hostile environment claims include both a subjective and an objective component. With respect to the objective component, the court identified the following four factors that the Supreme Court said should be considered in determining whether the harassment was sufficiently pervasive to alter an employee's terms or conditions of employment: "(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance."

The court found factors two, three, and four to be completely absent. The court also found that factor one was for the most part lacking. The court summarized the evidence as follows:

1. one instance in which [the harasser] said to [plaintiff] "I'm getting fired up";
2. one occasion in which [the harasser] rubbed his hip against [plaintiff's] hip while touching her shoulder and smiling;
3. 

24. *Id.* at 418-21.
25. *Id.* at 422-23.
26. *Id.* at 423.
27. 195 F.3d 1238 (11th Cir. 1999) (en banc). The panel decision, reported at 158 F.3d 1171 (11th Cir. 1998), was discussed in last year's survey article. See Peter Reed Corbin & Richard L. Ruth, *Employment Discrimination*, 50 MERCER L. REV. 969, 982 (1999).
28. 195 F.3d at 1241.
30. 195 F.3d at 1246.
31. *Id.*
32. *Id.* at 1247-51.
33. *Id.* at 1249.
two instances in which [the harasser] made a sniffing sound while looking at [plaintiff's] groin area and one instance of sniffing without looking at her groin; and (4) [the harasser's] "constant" following and staring at [plaintiff] in a "very obvious fashion."34

The court noted that other circuits had found that more severe harassing conduct failed to meet the threshold of what was considered sufficiently severe or pervasive to alter the terms or conditions of employment.35 Thus, the court agreed that the district court had properly entered judgment as a matter of law.36

In a stinging and emotional dissent, Judge Tjoflat (joined by three other judges) criticized the majority opinion as a "model of how not to reason in hostile environment sexual harassment cases."37 Exemplary of Judge Tjoflat's theme is the following:

It is a mystery to me how the court could find that the sniffing sounds, in particular, "are hardly . . . humiliating." The majority brushes over this piece of evidence lightly, but one wonders what response, if not humiliation mixed with indignation, would be appropriate for a situation in which a woman's supervisor at work feels the need to stare at her groin while making sniffing sounds.38

Judge Tjoflat concluded that such conduct was not just "uncivil," and "may be illegal," but that "at the very least," plaintiff should have been able to present her claim to a jury.39

3. Retaliation. In Sullivan v. National Railroad Passenger Corp.,40 plaintiff sued Amtrak under Title VII, claiming both sexual harassment and retaliation stemming from an incident in which he alleged that his supervisor sexually propositioned him in a hotel parking garage. Plaintiff also alleged that, after complaining about the harassment, Amtrak retaliated against him by eliminating his position and failing to rehire him in other management positions. At trial the jury entered a defense verdict on the sexual harassment claim but awarded plaintiff fifty thousand dollars in compensatory damages on his retaliation claim.41 On appeal, however, the Eleventh Circuit re-
The court found that Amtrak had presented legitimate reasons for its actions (plaintiff's job was eliminated as part of a nationwide restructuring) and that with this showing, any presumption of retaliation disappeared. The court concluded that the evidence was "far too speculative to support the jury's conclusion" that plaintiff had been retaliated against.

C. Employer Defenses

1. Mixed-Motives Defense. The availability of the mixed-motives defense was before the court in Pulliam v. Tallapoosa County Jail. Plaintiff brought an action under Title VII, alleging that the county had unlawfully terminated him in retaliation for filing a prior EEOC complaint. At the close of the evidence, the district court submitted several special interrogatories to the jury, including the following: "Do you find, by preponderance of the evidence, that the defendant would have made the same decision to terminate the plaintiff's employment notwithstanding the fact that he filed a charge of race discrimination and retaliation?"

After the jury answered "yes" to this interrogatory, the district court entered judgment for defendant. On appeal the Eleventh Circuit, citing the Supreme Court's decision in Price Waterhouse v. Hopkins, found that in an employment discrimination or retaliation case, even after the plaintiff produces evidence that the defendant was partially motivated in making an adverse employment decision by an impermissible consideration, "the defendant can [still] prevail if it can prove by a preponderance of the evidence that it would have made the same decision even in the absence of the discriminatory consideration." The court agreed that because sufficient evidence had been presented

42. Id. at 1057.
43. Id. at 1061.
44. Id.
45. 185 F.3d 1182 (11th Cir. 1999).
46. Id. at 1183.
47. Id. at 1184.
48. Id.
49. 490 U.S. 228, 258 (1989) (plurality opinion).
50. 185 F.3d at 1184. Interestingly, the court did not mention the Civil Rights Act of 1991, which partly overruled Price Waterhouse. After the 1991 Act, an employer establishing the mixed-motives defense can avoid liability for monetary damages (not including attorney fees) and reinstatement but cannot avoid a finding of liability altogether. See 42 U.S.C.A. § 2000e-5(g)(2)(B).
supporting the instruction, the district court had not erred in giving it.\textsuperscript{51} Further, even though defendant had not raised the mixed-motives defense in its answer, it had not waived the defense because it was found to have been sufficiently asserted before the close of the evidence.\textsuperscript{52}

2. Collateral Estoppel. In \textit{Maniccia v. Brown},\textsuperscript{53} the Eleventh Circuit considered the preclusive effect of findings in a prior administrative hearing. Plaintiff was employed as a deputy sheriff for Santa Rosa County, Florida. She was fired for (1) obtaining confidential driver's license information from the Florida Crime Information Computer ("FCIC") for an acquaintance who then used the information for a private corporation; (2) transporting an unauthorized passenger in her patrol car without requesting authorization; and (3) lying about both offenses. She appealed her termination to the Santa Rosa County Civil Service Board. Following a hearing at which plaintiff was represented by counsel, the Civil Service Board found that plaintiff had committed the charged offenses and that the county had just cause to terminate her. She then filed a petition for writ of certiorari with the circuit court, but the court denied the petition. In her subsequent Title VII action alleging that she was discriminated against because of her sex, the district court granted summary judgment for defendant, finding that plaintiff was estopped from arguing that she did not violate county policies or lie, in view of the findings in the administrative and state court proceedings.\textsuperscript{54} On appeal the Eleventh Circuit agreed.\textsuperscript{55} Citing the Supreme Court's decision in \textit{Kremer v. Chemical Construction Corp.},\textsuperscript{56} the court found that "[a] state court's decision upholding an administrative body's finding has preclusive effect in a subsequent federal court proceeding if: (1) the courts of that state would be bound by the decision; and (2) the state proceedings that produced the decision comported with the requirements of due process."\textsuperscript{57} The court then found that "Florida courts recognize the preclusive effect of state court decisions upholding administrative determinations."\textsuperscript{58} The court also found that plaintiff had adequate due process because she was repre-

\textsuperscript{51} 185 F.3d at 1189.
\textsuperscript{52} Id. at 1187.
\textsuperscript{53} 171 F.3d 1364 (11th Cir. 1999).
\textsuperscript{54} Id. at 1366-67.
\textsuperscript{55} Id. at 1366.
\textsuperscript{56} 456 U.S. 461 (1982).
\textsuperscript{57} 171 F.3d at 1368.
\textsuperscript{58} Id. (citing School Bd. of Seminole County v. Unemployment Appeals Comm'n, 522 So. 2d 556, 556-57 (Fla. Dist. Ct. App. 1988)).
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sentenced by counsel both before the Civil Service Board and in state court. Finding no other evidence that plaintiff was treated differently than similarly situated males, the Eleventh Circuit affirmed.

3. Sovereign Immunity. The Supreme Court's decision in *Seminole Tribe of Florida v. Florida* has spawned a sequence of Eleventh Amendment challenges to virtually every statute governing the arena of employment discrimination. Whether the Eleventh Amendment bars disparate impact claims against states under Title VII was the issue before the court in *In re Employment Discrimination Litigation Against the State of Alabama*. This action involved several race discrimination cases against the State of Alabama that were consolidated by the district court, all of which were asserting various types of disparate impact claims. The district court denied defendants' motion to dismiss on Eleventh Amendment grounds but allowed defendants to appeal the decision by issuing an appropriate order under Rule 54(b) of the Federal Rules of Civil Procedure. On appeal the Eleventh Circuit found that "under *Seminole Tribe v. Florida*, Congress may abrogate a state's sovereign immunity, but it can only do so if: (a) Congress 'unequivocally expressed its intent to abrogate the immunity,' through 'a clear legislative statement;' and (b) Congress has acted 'pursuant to a valid exercise of power.'"

As to the first prong, the Eleventh Circuit, relying on the "clear precedential guidance" provided by the Supreme Court's decision in *Fitzpatrick v. Bitzer*, had little difficulty "in concluding that Congress unequivocally expressed its intent to abrogate the states' Eleventh Amendment immunity when it amended Title VII [in 1972] to cover state and local governments." The court also had little difficulty with the second prong of the *Seminole Tribe* test. Finding that the disparate impact provisions of Title VII were closely aligned with constitutional equal protection analysis, the court "conclude[d] that in enacting the disparate impact provisions of Title VII, ... Congress has acted

59. *Id.*
60. *Id.* at 1370.
62. 198 F.3d 1305 (11th Cir. 1999). In *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999), the Eleventh Circuit found that the Eleventh Amendment did not bar a national origin claim against the Alabama Department of Public Safety brought under Title VI of the Civil Rights Act of 1964. *Id.* at 511.
63. 198 F.3d at 1309-10.
64. *Id.* at 1316 (quoting *Seminole Tribe*, 517 U.S. at 55) (citation omitted).
66. 198 F.3d at 1317.
pursuant to a valid exercise of its Fourteenth Amendment enforcement power.\(^{67}\)

\section*{D. Remedies}

1. Punitive Damages. In a case of monumental importance to all employment discrimination litigation, the Supreme Court in \textit{Kolstad v. American Dental Ass'n},\(^{68}\) addressed the showing required for a plaintiff to obtain punitive damages under Title VII. Although this case was brought under Title VII action, it will undoubtedly be used in future cases brought under the ADA and other employment discrimination statutes. When Congress, in the Civil Rights Act of 1991, added punitive damages as one of the available remedies under Title VII, it provided that punitive damages could be obtained when the defendant was shown to have acted "with malice or with reckless indifference to the federally protected rights."\(^{69}\) The issue before the Court in \textit{Kolstad} was whether, to be subject to punitive damages, it also had to be shown that defendants had engaged in independent, egregious conduct.\(^{70}\) The Court noted that evidence of such egregious conduct would no doubt be a part of most plaintiffs' evidence in establishing the required state of mind (acting with malice or with reckless indifference) but declined to require an independent showing of egregious conduct to obtain punitive damages.\(^{71}\) However, the Court did add an important defense for employers with respect to punitive damage claims. The Court held that in addition to the required state of mind showing, a plaintiff also must impute liability for punitive damages to the employer under principles of agency.\(^{72}\) The Court concluded,

Recognizing Title VII as an effort to promote prevention as well as remediation, and observing the very principles underlying the Restatements' strict limits on vicarious liability for punitive damages, we agree that, in the punitive damages context, an employer may not be vicariously liable for the discriminatory employment decisions of managerial agents where these decisions are contrary to the employer's good-faith efforts to comply with Title VII.\(^{73}\)

\begin{footnotes}
67. \textit{Id.} at 1324.
68. 119 S. Ct. 2118 (1999).
70. 119 S. Ct. at 2124.
71. \textit{Id.}
72. \textit{Id.} at 2126.
73. \textit{Id.} at 2129 (internal quotation marks omitted).
\end{footnotes}
In the wake of this holding, all employers would be well advised to review their policies prohibiting discrimination, disseminate those policies, and provide training programs to implement and teach those policies to establish a clear record of their good-faith efforts at compliance with Title VII and to avoid potential punitive damages liability in future employment discrimination litigation.

2. Compensatory Damages. In *West v. Gibson*, the Supreme Court was presented with the relatively narrow question of whether the EEOC possesses the legal authority under Title VII to award compensatory damages in discrimination cases involving federal government agencies. The Seventh Circuit ruled that the EEOC does not have this authority, thus creating a split among the circuits. Examining the "language, purposes, and history" of both the 1972 amendments to Title VII (which extended the Act's coverage to the federal government), as well as the 1991 amendments to Title VII (which added compensatory damages to the available remedies), the Supreme Court, in a five-to-four decision, concluded that the EEOC does have the authority to award compensatory damages against federal agencies.

3. Consent Decree. In *United States v. City of Miami*, the Eleventh Circuit addressed the latest chapter in consent decree litigation involving the City of Miami Police Department that has been occurring since 1977. This latest proceeding involved two civil contempt actions against the City of Miami for reverse race discrimination in its promotion practices involving promotions to a lieutenant position and to a sergeant position. Both positions were awarded to black candidates pursuant to the consent decree. The district court found that the city violated the consent decree by engaging in reverse race discrimination and held the city in civil contempt. The district court also awarded broad "make-whole" relief to all twenty-three lieutenant candidates and all twelve sergeant candidates who were vying for the promotions. On appeal the only issue was whether the district court's broad remedial relief constituted an abuse of discretion. In reviewing the evidence, the

75. See *Gibson v. Brown*, 137 F.3d 992, 996 (7th Cir. 1998); see also *Crawford v. Babbitt*, 148 F.3d 1318, 1324 (11th Cir. 1998) (discussed in Corbin & Ruth, *supra* note 27, at 986). *But see Fitzgerald v. Secretary, United States Dep't of Veterans Affairs*, 121 F.3d 203, 207 (5th Cir. 1997).
76. 119 S. Ct. at 1909-12.
77. 195 F.3d 1292 (11th Cir. 1999).
78. *Id.* at 1294.
Eleventh Circuit concluded that, although twenty-three lieutenant candidates and twelve sergeant candidates were bypassed for promotion, it was almost impossible to determine which of the twenty-three candidates would have been awarded the one lieutenant promotion and which of the twelve sergeant candidates would have been awarded the one sergeant promotion.\textsuperscript{79} Accordingly, the court found the district court's remedy to be "overly broad" because it had "treated each bypassed candidate as if he had a one hundred percent probability of receiving a promotion."\textsuperscript{80} The court determined that the officers should all receive a pro rata division of the value of each promotion.\textsuperscript{81} Therefore, the twelve sergeant candidates were allowed to share, on a pro rata basis, the value of the sergeant promotion, and the twenty-three lieutenant candidates were allowed to share, on a pro rata basis, the value of the lieutenant promotion.\textsuperscript{82} The case was remanded for further proceedings so that the revised remedy could be carried out.\textsuperscript{83}

II. AGE DISCRIMINATION IN EMPLOYMENT ACT OF 1967

A. Theories of Liability and Burdens of Proof

As could reasonably be anticipated, the confusion between the burden of proof and the burden of production of evidence that the Supreme Court created in \textit{St. Mary's Honor Center v. Hicks}\textsuperscript{84} continued to spawn most of the employment discrimination appeals reported during the survey period. The bulk of these cases concerned the proper allocation of the burden of proof among the parties in age discrimination litigation.\textsuperscript{85}

In \textit{Damon v. Fleming Supermarkets of Florida, Inc.},\textsuperscript{86} a grant of summary judgment for defendant on plaintiff's ADEA claim was overturned on appeal.\textsuperscript{87} As with most burden-of-proof cases, the Eleventh Circuit struggled to make sense of the distinction between evidence of the prima facie case and evidence of pretext in the wake of

\textsuperscript{79} \textit{Id.} at 1301-02.
\textsuperscript{80} \textit{Id.} at 1300.
\textsuperscript{81} \textit{Id.}
\textsuperscript{82} \textit{Id.}
\textsuperscript{83} \textit{Id.} at 1302.
\textsuperscript{84} 509 U.S. 502 (1993).
\textsuperscript{85} The Supreme Court may eliminate much of this confusion when it decides \textit{Reeves v. Sanderson Plumbing Products, Inc.} (No. 99-536), which was argued on March 21, 2000. \textit{Reeves} may provide the trial courts with clearer direction on the correct standards for applying Rules 50 and 56.
\textsuperscript{86} 196 F.3d 1354 (11th Cir. 1999).
\textsuperscript{87} \textit{Id.} at 1366.
Plaintiffs had been store managers at two stores acquired by Fleming. Slightly more than a year after the acquisition, plaintiffs and several other older, more experienced managers were terminated or demoted and replaced by men who were younger and less experienced. Subsequently, both plaintiffs were terminated.

The district court concluded that each plaintiff had failed to set forth a prima facie case and that each had also failed to establish that the nondiscriminatory reasons Fleming offered for their terminations were pretexts for unlawful discrimination. While agreeing with the district court that neither plaintiff had offered any direct evidence of discrimination, the Eleventh Circuit concluded that each had established a prima facie case of age discrimination based on circumstantial evidence. To establish a circumstantial case, plaintiffs must

initially satisfy a four-part prima facie requirement: (1) that she was a member of the protected group of persons between the ages of forty and seventy; (2) that she was subject to adverse employment actions; (3) that a substantially younger person filled the position that she sought or from which she was discharged; and (4) that she was qualified to do the job for which she was rejected.

The district court found that one plaintiff, Kanafani, had failed to establish a prima facie case based on circumstantial evidence because his replacement was thirty-seven years of age, while Kanafani was only forty-two. The district court reasoned that this five-year age difference was not sufficient to establish a prima facie case based on circumstantial evidence. Relying on early authority holding that a three-year age difference was sufficient to establish such a prima facie case, the Eleventh Circuit reversed as to Kanafani. Additionally, the district court concluded that neither plaintiff had satisfied the fourth element—that they were qualified to do the job for which they were rejected. Again, the Eleventh Circuit was able to plumb the record

88. Id. at 1358-62. One commentator has argued that Hicks has changed the equation in disparate treatment cases. See Deborah C. Malamud, The Last Minuet: Disparate Treatment After Hicks, 93 Mich. L. Rev. 2229 (1995).
89. 196 F.3d at 1358. There were two plaintiffs, Kanafani and Damon. Kanafani was terminated for allegedly using profane language in the presence of customers, and Damon was terminated for poor job performance. Id.
90. Id.
91. Id. at 1358-59.
92. Id. at 1359 (citing Turlington v. Atlanta Gas Light Co., 135 F.3d 1428, 1432 (11th Cir. 1998)).
93. Id. at 1360.
94. Id.
95. Id.
and infer from plaintiffs' long tenures in the positions they occupied prior to being terminated that they were indeed qualified for those jobs.96

As to the evidence of pretext, the Eleventh Circuit was again able to discern from the record that plaintiffs had rebutted the nondiscriminatory reasons proffered by Fleming for their discharges.97 Fleming had offered legitimate, nondiscriminatory reasons for terminating both plaintiffs (Kanafani had shouted vulgarities in front of customers, and Damon was terminated for poor job performance).98

Therefore, Appellants bore the burden of offering enough probative evidence so that a reasonable jury might conclude that Fleming's reasons for termination were a pretext for age discrimination. In the summary judgment context, we conduct this inquiry by determining whether a jury "could reasonably infer discrimination if the facts presented [by Appellants] remain unrebutted . . . ." After a painstaking review of the entire record, we find that Appellants have made this requisite showing.99

Because material facts remained in dispute, summary judgment was precluded.100

Mitchell v. USBI Co.101 presented the Eleventh Circuit with another issue regarding the burden of proof. In a per curiam opinion, the court affirmed the grant of summary judgment in favor of defendant because plaintiff failed to rebut the employer's proffered legitimate, nondiscriminatory reason for the adverse employment action.102 The district court concluded that plaintiff had not introduced any evidence to demonstrate that the employer's proffered reason for its decision was pretextual, and the Eleventh Circuit agreed.103

The fifty-seven-year-old Mitchell had been terminated as part of a reduction in force.104 In granting summary judgment for the employer, the district court concluded that "USBI had engaged in a detailed
process of identifying candidates for layoff and explained why Mitchell could not replace 20 less senior employees, with each written justification citing his lack of specific qualifications. Mitchell put forth several alternative arguments why USBI's proffered reason for not allowing him to bump less senior employees—that he was not qualified for any of their positions—was pretextual. None of his arguments prevailed.

Mitchell's most interesting assertion was that "comments by various USBI employees demonstrate[d] a corporate culture conducive to age discrimination." None of the individuals alleged to have made the questionable statements were decision makers with respect to the termination of Mitchell's employment. The court reaffirmed the rule that "comments by non-decision makers do not raise an inference of discrimination, especially if those statements are ambiguous."

In Beaver v. Rayonier, Inc., the Eleventh Circuit affirmed on appeal a jury verdict for plaintiff. The court was asked to find that the district court erred in denying defendant's motion for judgment as a matter of law. The court concluded that this argument had been raised too late to be successful on appeal:

Because Rayonier failed to persuade the district court to dismiss the action for lack of a prima facie case and proceeded to put on evidence of a non-discriminatory reason—i.e., an economically induced RIF [(reduction in force)]—for terminating Beaver, Rayonier's attempt to persuade us to revisit whether Beaver established a prima facie case is foreclosed by binding precedent.

"When the defendant fails to persuade the district court to dismiss the action for lack of a prima facie case" and then puts forth evidence as to the reason for the adverse employment action, "the factfinder must then decide whether the [action] was discriminatory and the question of whether plaintiff has made out a prima facie case is no longer relevant."

105. Id.
106. Id. at 1354-56.
107. Id. at 1355.
108. Id.
109. Id.
110. 200 F.3d 723 (11th Cir. 1999).
111. Id. at 725.
112. Id.
113. Id. at 727.
114. Id. (internal quotation marks omitted).
B. Procedural Matters

In last year's Article,116 we reported on the Eleventh Circuit's decision in *Kimel v. Florida Board of Regents.*116 In 1999 the sovereign immunity question presented in *Kimel* was argued before the United States Supreme Court. In a five-to-four decision, the Supreme Court affirmed that the ADEA does not abrogate the sovereign immunity of the states.117 In what is becoming an increasingly long line of sovereign immunity decisions expanding on the Court's far-reaching decision in *Seminole Tribe of Florida v. Florida,*118 the Court concluded in *Kimel* that the substantive requirements imposed on states and local governments by the ADEA are disproportionate to any unconstitutional conduct that could conceivably be targeted by the Act.119 The Court held that Congress did not have proper constitutional authority to abrogate the states' immunity to age discrimination claims.120

Based upon *Seminole Tribe,* the Eleventh Circuit determined that there were two requirements that had to be met before Congress could properly abrogate the states' Eleventh Amendment immunity.121 First, there had to be a clear legislative statement of congressional intent to abrogate the immunity, and second, Congress must have done so under proper constitutional authority.122 The Eleventh Circuit concluded that the first requirement had not been met because the court found "[n]o unequivocal expression of an intent to abrogate immunity" in the ADEA.123 The Supreme Court agreed with that result, but not with the Eleventh Circuit's rationale. The Supreme Court had no difficulty finding that the ADEA contained a clear statement of congressional intent to abrogate.124 However, applying the "congruence and proportionality test,"125 the Court concluded that the ADEA is not appropriate legislation under the Fourteenth Amendment.126 The Court

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116. 139 F.3d 1426 (11th Cir. 1998).
117. 120 S. Ct. 631, 650 (2000).
119. 120 S. Ct. at 645.
120. Id. at 650.
121. 139 F.3d at 1429. The Eleventh Amendment generally prohibits suits against a state or its agencies in federal court. U.S. CONST. amend. XI.
122. 139 F.3d at 1430.
123. Id.
124. 120 S. Ct. at 634.
126. 120 S. Ct. at 637.
observed that “Congress' 1974 extension of the Act to the States was an unwarranted response to a perhaps inconsequential problem. Congress never identified any pattern of age discrimination by the States, much less any discrimination whatsoever that rose to the level of constitutional violation.”

C. Attorney Fees

In Nance v. Maxwell Federal Credit Union, the Eleventh Circuit determined that a plaintiff who succeeds on the merits of an ADEA claim but fails to prove injury based upon such discriminatory conduct, is not a prevailing party for purposes of an award of attorney fees. Nance had been a branch manager for Maxwell. Her job performance proved to be unsatisfactory, and Nance was informed that she either had to accept a demotion or resign and receive severance pay. Rather than accept either alternative, however, Nance elected to take a leave of absence. She never returned to work or communicated her intentions to Maxwell. Maxwell continued Nance on full salary and benefits for a time and then placed her on unpaid leave. For some reason (perhaps as presuit strategy), Maxwell changed its mind and asked Nance to return to her branch manager position as soon as possible. The offer was repeatedly communicated to Nance over several months until her position was filled. Nance was informed that if she ever wished to return, Maxwell would place her in a comparable position. Nance responded by filing suit. A jury returned a verdict for Nance, finding that Maxwell had discriminated against her on the basis of her age. Based upon the verdict, the district court awarded front pay, back pay, and attorney fees. Maxwell appealed, contending that because Nance was unable to show any injury as a matter of law, she was not entitled to any front pay or back pay. The Eleventh Circuit agreed.

The ADEA does not contain fee-shifting language. However, the court concluded that an ADEA plaintiff must “prevail” to be entitled to attorney fees. To prevail the plaintiff must obtain an enforceable

127. Id. at 648-49.
128. 186 F.3d 1338 (11th Cir. 1999).
129. Id. at 1339.
130. Id. at 1339-40.
131. Id. at 1342.
133. 186 F.3d at 1343; see also Salvatori v. Westinghouse Elec. Corp., 190 F.3d 1244, 1245 (11th Cir. 1999) (per curiam).
judgment against the defendant.\textsuperscript{134} Nance failed to prove injury at trial because Maxwell had not taken any adverse employment action against her and because she failed to seek any damages other than front pay and back pay.\textsuperscript{135} Because she had not been the victim of any adverse employment action based upon her age, the court vacated the district court's award of front pay and back pay.\textsuperscript{136} As a result, plaintiff had not obtained an enforceable judgment and thus had not prevailed as that term is used in other civil rights contexts: "Because [the court] vacated the plaintiff's damages awarded, there [was] nothing in the judgment that [could] be enforced."\textsuperscript{137}

III. AMERICANS WITH DISABILITIES ACT OF 1990

A. \textit{Theories of Liability and Burdens of Proof}

During the survey period, the Eleventh Circuit reported two noteworthy cases regarding burdens of proof under the ADA. In \textit{Hilburn v. Murata Electronics North America, Inc.},\textsuperscript{138} summary judgment for the employer was again the issue. The district court granted summary judgment for defendant, and Hilburn appealed. On appeal Hilburn argued that Murata had failed to promote her, failed to transfer her, wrongfully terminated her employment, and declined to rehire her because of her disability and the disabilities of certain members of her family. The district court concluded that Hilburn was not qualified for the position that she sought through rehire because of her undisputed record of excessive absences from work occasioned by her and her family's health problems during her initial course of employment by Murata. The district court also concluded that Hilburn had failed to demonstrate a factual issue as to whether she, her son, or her husband was disabled within the meaning of the ADA.\textsuperscript{139} On appeal the Eleventh Circuit agreed with the district court, concluding that Hilburn had failed to demonstrate that her heart condition rendered her disabled.\textsuperscript{140}

The most interesting aspect of Hilburn's case was her associational discrimination claims. Hilburn asserted that Murata had also discrimi-

\textsuperscript{134} \textit{186 F.3d} at 1343 (citing Farrar v. Hobby, 506 U.S. 103, 111 (1992)).
\textsuperscript{135} \textit{id.} at 1342. The court noted that Nance could have been entitled to other forms of damages but those claims had not been raised in the district court. \textit{id.} at 1342 n.9.
\textsuperscript{136} \textit{id.} at 1342.
\textsuperscript{137} \textit{id.} at 1343.
\textsuperscript{138} \textit{181 F.3d} 1220 (11th Cir. 1999).
\textsuperscript{139} \textit{id.} at 1230.
\textsuperscript{140} \textit{id.} at 1225-30.
nated against her because of her association with both her son (who had a history of cancer and suffered from a hearing loss and a learning impairment) and with her husband (who suffered from acute pancreatitis and diabetes). The Eleventh Circuit agreed with the district court that plaintiff failed to establish a prima facie case of association discrimination. Because Hilburn failed to meet Murata’s attendance requirements while employed, the court concluded that she was not qualified for the new job at the time she applied for rehire and that, therefore, her associational claims also failed. "Additionally, the Hartog case is instructive because it recognized the ADA distinction that ‘[i]f [a non-disabled employee] violates a neutral employer policy concerning attendance or tardiness, he or she may be dismissed even if the reason for the absence or tardiness is to care for the [disabled associate].’"

Griffin v. GTE Florida, Inc. also concerned a grant of summary judgment for a defendant-employer. Griffin brought a retaliation claim under the ADA against his former employer. The district court granted GTE’s motion for summary judgment, finding that Griffin had failed to establish a prima facie case of retaliation. The Eleventh Circuit affirmed. "To establish a prima facie case of retaliation, a plaintiff must show: (1) statutorily protected expression; (2) adverse employment action; and (3) a causal link between the protected expression and the adverse action." Griffin alleged that GTE had retaliated against him for filing charges of disability and age discrimination by constructively discharging him from employment. The court concluded that Griffin had failed to establish a causal connection between his discharge

141. Id. at 1230.
142. Id. at 1230-31.
In order to establish a prima facie case under this “association discrimination” theory, Hilburn must establish the following elements: (1) she was subjected to an adverse employment action, (2) she was qualified for the job at that time, (3) she was known by Murata at the time to have a relative with a disability, and (4) the adverse employment action occurred under circumstances which raised a reasonable inference that the disability of the relative was a determining factor in Murata’s decision.

Id. (citing Hartog v. Wasatch Academy, 129 F.3d 1076, 1085 (10th Cir. 1997)).
143. Id.
144. Id. at 1231 (quoting Hartog, 129 F.3d at 1083) (alterations in original).
145. 182 F.3d 1279 (11th Cir. 1999) (per curiam).
146. Id. at 1281.
147. Id. at 1284.
148. Id. at 1281 (quoting Stewart v. Happy Herman’s Cheshire Bridge, Inc., 117 F.3d 1278, 1287 (11th Cir. 1997)).
149. Id. at 1282.
and the protected conduct and, therefore, failed to establish a prima face case of retaliation.\textsuperscript{150} Griffin failed to adduce any evidence indicating that the harassment he complained of worsened after he complained about it.\textsuperscript{151}

\textbf{B. Coverage}

The Supreme Court decided five cases during the survey period that concerned the scope of the ADA. In the first, \textit{Cleveland v. Policy Management Systems Corp.},\textsuperscript{152} the Court ruled that a plaintiff's receipt of Social Security disability insurance benefits does not (standing alone) estop her from maintaining an employment discrimination claim under the ADA.\textsuperscript{153} In \textit{Olmstead v. L.C. ex rel. Zimring},\textsuperscript{154} the Court concluded that the ADA requires the states to provide mentally-disabled persons with community-based, rather than institution-based, treatment.\textsuperscript{155}

The Court's decisions in \textit{Albertsons, Inc. v. Kirkingburg},\textsuperscript{156} \textit{Sutton v. United Air Lines, Inc.},\textsuperscript{157} and \textit{Murphy v. United Parcel Service, Inc.}\textsuperscript{158} are also important in understanding the scope of the ADA. In \textit{Kirkingburg} the Court concluded that employers may rely on basic safety standards even though those standards may tend to exclude individuals with disabilities.\textsuperscript{159} \textit{Sutton} and \textit{Murphy} both addressed the meaning of the term "disability" within the context of the ADA. In \textit{Sutton} the Court held that pilots with correctable vision are not disabled,\textsuperscript{160} and in \textit{Murphy} the Court held that individuals with high blood pressure treatable with medication are likewise not disabled.\textsuperscript{161}

\textbf{C. Sovereign Immunity}

In a case of first impression, \textit{Florida Paraplegic Ass'n v. Miccosukee Tribe of Indians of Florida},\textsuperscript{162} the Eleventh Circuit was asked to decide

\textsuperscript{150} Id. at 1283.
\textsuperscript{151} Id. Indeed, the court determined that the offending supervisor made efforts to better his behavior after learning of Griffin's complaints. Id. at 1284.
\textsuperscript{152} 526 U.S. 795 (1999).
\textsuperscript{153} Id. at 797-98.
\textsuperscript{154} 119 S. Ct. 2176 (1999).
\textsuperscript{155} Id. at 2178.
\textsuperscript{156} 119 S. Ct. 2162 (1999).
\textsuperscript{157} 119 S. Ct. 2139 (1999).
\textsuperscript{158} 119 S. Ct. 2133 (1999).
\textsuperscript{159} 119 S. Ct. at 2173-74.
\textsuperscript{160} 119 S. Ct. at 2143.
\textsuperscript{161} 119 S. Ct. at 2137.
\textsuperscript{162} 166 F.3d 1126 (11th Cir. 1999).
whether Title III of the ADA creates a private cause of action against Indian tribes that fail to comply with the public accommodations provisions of the ADA. The court concluded that Congress had not abrogated tribal sovereign immunity with respect to the ADA so as to allow private suits against Indian tribes.

Plaintiffs, who were disability rights activists, filed suit against the Miccosukee Tribe, alleging that the Tribe's bingo and gaming facility was not accessible to the disabled. The court noted that “as Indian tribes . . . become more integrated into the mainstream,” the notions of Indian sovereignty become more difficult to maintain. "Indian sovereignty has deep historical roots, however, and the presumption that tribes should not be subjected to lawsuits in state or federal court remains as strong today as ever."

Garrett v. University of Alabama at Birmingham Board of Trustees presented another immunity question. The case involved two consolidated appeals challenging grants of summary judgment on sovereign immunity grounds. In an extensive decision buttressed by its earlier decision in Kimel, the court concluded that the states are not immune from suit under either the ADA or Section 504 of the Rehabilitation Act of 1973. Unlike in Kimel, here the court determined that both parts of the Seminole Tribe test were met by congressional enactment of the ADA.

D. Preemption

Doe v. Stincer presented the Eleventh Circuit with the question of whether federally-authorized protection and advocacy organizations have standing to challenge state laws limiting access to mental health records. Doe had initially sued the Florida Attorney General, a hospital,
and two psychiatrists, claiming that their refusal to provide her with access to her mental health medical records violated the ADA and that a Florida statute permitting them to do so was preempted by the ADA. Doe was subsequently joined in the suit by the Advocacy Center, which is “a federally-authorized protection and advocacy organization established under the Protection and Advocacy for Mentally Ill Individuals Act (“PAMII”), 42 U.S.C. Section 10801, and the Protection and Advocacy of Individual Rights Act (“PAIR”), 29 U.S.C. Section 794e.” The district court found the Florida law to be preempted by the ADA and enjoined the statute. The Attorney General appealed, contending that the Advocacy Center did not have standing to sue. Finding that the record did not support the Center’s standing, the Eleventh Circuit vacated the injunction and remanded the case to the district court to afford the Center an opportunity to establish standing. The court indicated that the Center would be able to establish standing but that it simply had failed to do so below.

E. Procedure

Again, a plaintiff was appealing a grant of summary judgment for his former employer in Zillyette v. Capital One Financial Corp. The district court granted Capital One’s motion for summary judgment, holding that Zillyette’s cause of action was time-barred because he failed to file suit within ninety days of the EEOC’s issuance of a right-to-sue letter. In fact, the ninety-day period had already run when the postal service first attempted to deliver the right-to-sue letter to plaintiff. While acknowledging that timeliness issues are subject to case-by-case review, the Eleventh Circuit concluded that under the circumstances presented, the district court was correct in ruling that the ninety-day filing period had expired before plaintiff brought suit and that, therefore, Zillyette’s claim was time-barred.

Zillyette, proceeding pro se, failed to retrieve timely a certified letter from the EEOC after being notified at least twice by the United States
Postal Service that a letter from the EEOC was at the post office.\textsuperscript{182} Because the notification clearly indicated that the certified letter was from the EEOC, the court concluded that Zillyette "had the de minimus responsibility to retrieve the letter in a timely manner or provide a reasonable explanation as to why this was not done. To hold otherwise would permit him simply to defer the retrieval of the letter and thus to manipulate the 90-day time limit."\textsuperscript{183}

\section*{F. Reasonable Accommodation}

Summary judgment for the defendant-employer in a reasonable-accommodation dispute was at issue in \textit{Gaston v. Bellingrath Gardens \& Home, Inc.}\textsuperscript{184} Gaston had failed to request a reasonable accommodation after being informed that new job requirements, which she was unable to fulfill without that accommodation, were being imposed on her position. When informed of the new job requirements, Gaston told her supervisor only that she could not meet those requirements and then resigned without any further explanation. Gaston did not request any form of reasonable accommodation.\textsuperscript{185} The Eleventh Circuit affirmed the district court's grant of summary judgment for the employer, concluding that plaintiff's failure to demand a reasonable accommodation after being shown the new job requirements precluded her disability discrimination claim.\textsuperscript{186}

\section*{G. Medical Examinations}

In another instructive decision, \textit{Watson v. City of Miami Beach},\textsuperscript{187} the district court granted summary judgment for the employer in a dispute involving the permissible scope of medical examinations under the ADA. Watson had been a Miami Beach police officer for a number of years. He refused to participate in a mandatory, department-wide testing program for tuberculosis because the examination required him to disclose his HIV/AIDS status. When Watson became rude and unreasonable with the medical staff over the examination and the related mandatory disclosure, he was thought to be acting irrationally and was ordered to undergo a fitness for duty evaluation. Watson

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{182} \textit{Id.} at 1339.
\item \textsuperscript{183} \textit{Id.} at 1341.
\item \textsuperscript{184} 167 F.3d 1361 (11th Cir. 1999).
\item \textsuperscript{185} \textit{Id.} at 1362.
\item \textsuperscript{186} \textit{Id.} at 1364.
\item \textsuperscript{187} 177 F.3d 932 (11th Cir. 1999).
\end{itemize}
\end{footnotesize}
thereafter sued, alleging that both the fitness for duty and the tuberculosis examinations were prohibited medical inquiries under the ADA.\textsuperscript{188}

The ADA provides that

\begin{quote}
[a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.\textsuperscript{189}
\end{quote}

The district court found both examinations to be job-related and consistent with business necessity and therefore granted summary judgment for the City.\textsuperscript{190} The Eleventh Circuit affirmed, because in the context of law-enforcement employment, such tests are job-related.\textsuperscript{191}

\textbf{H. Presuit Arbitration}

\textit{Weaver v. Florida Power & Light Co.}\textsuperscript{192} concerned the ability to arbitrate ADA claims. Weaver sued Florida Power & Light ("FPL"), claiming sex and handicap discrimination. Prior to bringing suit, however, she had filed grievances under the collective bargaining agreement in effect between her union and her employer. The district court dismissed certain claims on the merits. The Eleventh Circuit affirmed that decision on appeal. As to Weaver's remaining claims, FPL moved the district court to enjoin the arbitration principally on the grounds of res judicata. Concluding that an injunction was necessary to protect the integrity of its judgment, the district court enjoined plaintiff and her union from proceeding with the arbitration.\textsuperscript{193}

The Eleventh Circuit reversed, concluding that the district court abused its discretion by enjoining the arbitration proceedings because FPL had an adequate remedy at law.\textsuperscript{194} FPL had principally contended on appeal that "the remedy available through arbitration [was] not adequate because pursuing such a remedy would force it to undergo expensive and time-consuming adversarial proceedings that could be avoided by the issuance of an injunction."\textsuperscript{195} The court reasoned that FPL could have made its res judicata arguments "before the arbitrators

\begin{thebibliography}{9}
\bibitem{188} Id. at 934.
\bibitem{189} 42 U.S.C. § 12112(d)(4)(A).
\bibitem{190} 177 F.3d at 934.
\bibitem{191} Id. at 935.
\bibitem{192} 172 F.3d 771 (11th Cir. 1999).
\bibitem{193} Id. at 772-73.
\bibitem{194} Id. at 775.
\bibitem{195} Id. at 774.
\end{thebibliography}
I. Attorney Fees

Not surprisingly, a number of ADA cases involving attorney fees reached the Eleventh Circuit during the survey period. In Bruce v. City of Gainesville, the court adopted the Christiansburg test as the proper standard to be applied in assessing attorney fees under the ADA. Interestingly, although the district court had applied Christiansburg and awarded the City of Gainesville attorney fees as a prevailing party under that test, the Eleventh Circuit reversed in a split decision. In his dissent, Senior Circuit Judge Magill was convinced that plaintiff had failed to establish the fundamental elements required to make out a prima facie case and that his claims were, therefore, lacking in arguable merit so as to be groundless and without foundation.

Barnes v. Broward County Sheriff's Office presented another permutation of the interesting question of what constitutes a prevailing party for purposes of an award of attorney fees. While losing on most of his ADA and ADEA claims, Barnes had successfully challenged the county's use of pre-employment psychological testing. The district court concluded that the examination process used by Broward County was impermissible under the ADA and permanently enjoined the county from continuing to conduct pre-employment psychological or physical examinations. Plaintiff subsequently moved for an award of attorney fees as a prevailing party as to that issue. The Eleventh Circuit framed the question on appeal as "whether a plaintiff who seeks and obtains injunctive relief pursuant to the [ADA] is entitled to attorney's fees when that relief does not benefit the plaintiff directly." The court then answered the question in the negative:

Despite the fact that the court granted injunctive relief with respect to the County's use of pre-employment psychological testing, there is

196. Id. at 774-75.
197. 177 F.3d 949 (11th Cir. 1999).
199. 177 F.3d at 952.
200. Id.
201. Id. at 953 (Magill, J., dissenting).
202. 190 F.3d 1274 (11th Cir. 1999).
203. Id. at 1276.
204. Id. at 1275-76 (citation omitted).
neither evidence that this change in policy affected the relationship
between Barnes and the County at the time judgment was rendered,
nor any indication that Barnes directly benefitted from the injunction.
As alluded to by the Supreme Court in Hewitt, the fact that Barnes
conceivably could benefit from the court's order prohibiting the
referenced examinations if he ever chose in the future to re-apply to
the sheriff's office for a job is not adequate to render him a prevailing
party with respect to this litigation. 206

IV. CIVIL RIGHTS ACT OF 1866 AND 1871

A. Section 1981

Mabra v. United Food & Commercial Workers Local Union No.
1996206 addressed the availability of the mixed-motives defense in
cases involving Section 1981 claims. The Eleventh Circuit concluded
that the 1991 amendments to Title VII, which limited the impact of the
mixed-motives defense, do not apply to Section 1981. 207 The court
reasoned (1) that the 1991 amendments added two provisions to Title
VII but that these provisions did not affect Section 1981, and (2) that the
portion of the 1991 amendments that amended Section 1981 did not
mention the mixed-motives defense. 208

Some of Macon, Georgia's dirty political business reached the Eleventh
Circuit during the survey period. In Bishop v. Avera, 209 the court
concluded that Macon's police chief was entitled to qualified immunity
in a reverse discrimination suit filed against him by his former deputy
chief. 210 The former deputy chief, who is white, sued the police chief,
the city, and the mayor, claiming that he was unlawfully demoted and
replaced with a less-qualified black deputy chief to fulfill a campaign
promise made by the mayor during an election. Avera argued that
because the deputy chief was an at-will employee, he did not have a
contractual employment relationship and, therefore, could not sustain a
claim under Section 1981. 211 While acknowledging that there is case
law supporting both sides of the question, the court concluded there was

205. Id. at 1278.
206. 176 F.3d 1357 (11th Cir. 1999).
207. Id. at 1358.
208. Id. at 1357-58.
209. 177 F.3d 1233 (11th Cir. 1999).
210. Id. at 1236.
211. Id. at 1234-35. Section 1981 provides a cause of action for racial discrimination
in the making and enforcing of contracts. See Patterson v. McLean Credit Union, 491 U.S.
164, 176-78 (1989).
neither controlling Eleventh Circuit nor Supreme Court precedent on point: "Considering the confusion in the law on this issue at the time of Avera's actions, we cannot say that his conduct was clearly unlawful in light of the preexisting law governing claims under Section 1981."212

In Ferrill v. The Parker Group, Inc.,213 the Eleventh Circuit declined to adopt a bona fide occupational qualification ("BFOQ") defense based on race in Section 1981 actions.214 The court affirmed that the BFOQ and business necessity defenses are not available to defendants accused of intentional racial discrimination in violation of Section 1981.216

B. Section 1983

Macuba v. Deboer216 presented both absolute and qualified immunity questions on appeal. Macuba had alleged that Charlotte County, Florida and two of its county commissioners had abolished his position by reorganizing county administrative departments and by denying him another position because of his whistle blowing and free speech activities. The two county commissioners moved for summary judgment on the claims against them in their individual capacities, contending they were immune from suit under the doctrines of absolute and qualified immunity. The district court denied their motion, and they brought an interlocutory appeal.217

The Eleventh Circuit determined that Macuba's claims were based upon two events:

The first event was the abolition of Macuba's position as License Inspector in the Building Department. Macuba contend[ed] that the Board of Commissioners abolished this position because [defendants] wanted to punish him; the need to reorganize the land use departments was simply a pretext. The second event was the county's refusal to hire Macuba for either of two newly-created positions for which he applied.218

The court ruled that the county commissioners were entitled to absolute immunity with respect to the reorganization event and to qualified

\[\text{References}\]

212. 177 F.3d at 1236.
213. 168 F.3d 468 (11th Cir. 1999).
214. Id. at 475. Arguably, the Seventh Circuit created a limited racial BFOQ defense in Wittmer v. Peters, 87 F.3d 916, 918-21 (7th Cir. 1996).
215. 168 F.3d at 474.
216. 193 F.3d 1316 (11th Cir. 1999).
218. 193 F.3d at 1320.
immunity with respect to the refusal to hire event.\textsuperscript{219} County commissions, like other local legislative bodies, enjoy absolute immunity when exercising functions within the "sphere of legitimate legislative activity."\textsuperscript{220} The court observed that the reorganization of the administrative departments of a county government is a function squarely within that sphere.\textsuperscript{221}

With respect to the failure to hire event, the court concluded that Macuba had failed to show that the county commissioners had anything at all to do with the decision not to hire him.\textsuperscript{222} Observing that under the county charter, commissioners are prohibited from interfering with employees supervised by the county administrator, the court determined that Macuba had produced no evidence to indicate that the commissioners had ever contacted the decision maker or in any way attempted to influence the decision making process.\textsuperscript{223}

The court's extensive discussion of the proper consideration of hearsay statements in passing on motions for summary judgment is worthy of study. The court observed that "[s]ome courts, including our own, appear to have restated the general rule to hold that a district court may consider a hearsay statement in passing on a motion for summary judgment if the statement could be reduced to admissible evidence at trial or reduced to admissible form."\textsuperscript{224} Finding that the district court, in denying the county commissioners' qualified immunity defense, had relied upon inadmissible hearsay statements that could never be reduced to admissible evidence at trial or reduced to admissible form, the court reversed with instructions to the district court that it should enter judgment for defendants in their individual capacities on plaintiff's First Amendment claim.\textsuperscript{225}

\textsuperscript{219} Id. at 1321, 1325.
\textsuperscript{220} Id. at 1320 (quoting Bogan v. Scott-Harris, 523 U.S. 44, 54 (1998)) (internal quotation marks omitted).
\textsuperscript{221} Id. at 1321. To the extent that the commissioners were absolutely immune for their reorganization decisions, the motives underlying their decisions were irrelevant. Id.
\textsuperscript{222} Id.
\textsuperscript{223} Id. at 1322.
\textsuperscript{224} Id. at 1323 (internal quotation marks omitted).
\textsuperscript{225} Id. at 1325.