Employment Discrimination

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by Peter Reed Corbin*  
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The significant developments during the 1992 survey period in the area of employment discrimination related more closely to statutory changes than to decisions handed down either by the United States Supreme Court or the United States Court of Appeals for the Eleventh Circuit. Of course 1992 will long be remembered as the year that ushered in the much publicized Americans with Disabilities Act ("ADA"), an act that will no doubt become known as the most far-reaching employment legislation of the 1990s. Although no ADA cases have, as yet, progressed to the Eleventh Circuit level, many administrative charges already have been filed under this law, and ADA cases will certainly play a prominent role in future survey articles. Another statutory development was related to the Civil Rights Act of 1991. Almost before the ink was dry on former President Bush's signature on this legislation, numerous district courts, both within and outside of the Eleventh Circuit, began handing down decisions as to whether the provisions of the 1991 Act, including its greatly increased remedies, should apply retroactively to cases pending when the Act went into effect, or to cases filed after the Act went into effect but based upon conduct occurring before the Act went into effect. The numerous district courts that addressed this issue reached widely divergent

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2. As of November 30, 1992, 2,461 administrative charges claiming employment discrimination under Title I of the ADA had been filed with the EEOC.
Almost humanely, the Eleventh Circuit resolved this conflict during the survey period, at least within this Circuit. Hopefully, the Supreme Court will perform the same service for the nation during the 1993 survey period. With respect to purely judicial developments within the survey period, both the Supreme Court and the Eleventh Circuit rendered several significant opinions on a variety of topics, but the overall number of cases decided by both courts during 1992 continued to decline.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Theories of Liability and Burdens of Proof

Disparate Treatment Cases. One area that was left completely untouched by the Civil Rights Act of 1991 is the burden of proof borne by the parties in the typical disparate treatment case. This analytical framework has remained essentially unchanged since the Supreme Court’s 1973 decision in McDonnell Douglas Corp. v. Green. As set forth in McDonnell Douglas, and refined in Texas Department of Community Affairs v. Burdine, the plaintiff bears the initial burden of establishing a prima facie case of discrimination. If the plaintiff meets this initial burden by a


9. 411 U.S. at 802; 450 U.S. at 252-53.
preponderance of the evidence, the "burden of production" shifts to the
defendant to "articulate some legitimate, nondiscriminatory reason" for
the defendant's action.\textsuperscript{10} It is not necessary for the defendant at this stage
actually to convince the trier of fact of its motive; rather, the defendant
must only articulate its proffered reason through "admissible evidence."\textsuperscript{11}
If the defendant meets this "exceedingly light" burden,\textsuperscript{12} the plaintiff
then must prove by a preponderance of the evidence that the defendant's
articulated reason was not the true reason, but was a pretext for
discrimination.\textsuperscript{18}

Since the ultimate issue of discrimination in a disparate treatment case
is essentially a question of fact and, hence, subject to the "clearly erroneous"
standard of review set forth in Rule 52 of the Federal Rules of Civil
Procedure,\textsuperscript{14} it is not surprising that the number of opinions rendered by
the Eleventh Circuit in disparate treatment cases declined significantly in
1992. In fact, only two disparate treatment cases even resulted in an opin-
ion from the court. The first of these was \textit{Billingsley v. Jefferson County}.\textsuperscript{16} In that case, the district court found that four black plaintiffs,
who had been employed as housekeepers at defendant's nursing home fa-
cility, all had been discharged because of their race since defendant had
discriminatorily applied its attendance/absenteeism policy.\textsuperscript{16} On appeal,
the county's principal argument was that the court erroneously found the
county liable because its Commissioner of Health and Human Services,
who supervised the home in question, was black. However, finding that
the "presence of a black man in a supervisory or decision-making position
. . . [could not] shield the county from liability under Title VII,"\textsuperscript{17} the
Eleventh Circuit affirmed the district court's decision as not clearly
erroneous.\textsuperscript{18}

The second case, \textit{Miranda v. B & B Cash Grocery Store, Inc.},\textsuperscript{19} ad-
dressed an issue of first impression within the Eleventh Circuit: What is
the proper model of proof in a gender-based wage discrimination claim
under Title VII? Plaintiff was employed in a buyer position for the de-
fendant supermarket chain.\textsuperscript{20} She brought an action under both Title VII

\begin{footnotes}
10. 411 U.S. at 802; 450 U.S. at 253.  
11. 450 U.S. at 255.  
13. 411 U.S. at 804.  
15. 953 F.2d 1351 (11th Cir. 1992).  
16. \textit{Id.} at 1352.  
17. \textit{Id.} at 1353.  
18. \textit{Id.} at 1355.  
19. 975 F.2d 1518 (11th Cir. 1992).  
20. \textit{Id.} at 1523.
\end{footnotes}
and the Equal Pay Act\(^{21}\) alleging that she had been discriminated against on account of sex in that she was paid substantially less than comparable male buyers. The district court agreed with plaintiff and awarded her back pay in the amount of $52,765.83.\(^{22}\)

On appeal, the Eleventh Circuit initially addressed defendant's argument that Title VII does not encompass a claim for sex-based wage discrimination, and that on the basis of the Bennett Amendment to Title VII,\(^{23}\) her sole remedy was pursuant to the Equal Pay Act.\(^{24}\) However, the court of appeals found that this interpretation of the Act had been expressly rejected by the Supreme Court in County of Washington v. Guenther,\(^{25}\) which, according to the court, had "incorporated into Title VII only the affirmative defense of the Equal Pay Act, not its prohibitory language requiring equal pay for equal work."\(^{26}\) The court then went on to address the issue not resolved by Guenther, that is, whether the proper method for establishing a gender-based wage discrimination claim under Title VII was the traditional Title VII model of proof or the framework developed under the Equal Pay Act.\(^{27}\) The Eleventh Circuit, in disagreement with the Fifth,\(^{28}\) Seventh,\(^{29}\) Eighth,\(^{30}\) and Ninth\(^{31}\) Circuits, opted for the traditional McDonnell-Douglas/Burdine approach.\(^{32}\) The court found that a plaintiff could establish a prima facie case of gender-based wage discrimination by "demonstrating that she is female and that the job she occupied was similar to higher paying jobs occupied by males."\(^{33}\) In applying this model of proof, the court agreed with the district court that plaintiff not only had established a prima facie case but also had estab-

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22. 975 F.2d at 1534.
23. The Bennett Amendment provides:
   it shall be an unlawful employment practice under this subchapter for any employer to differentiate upon the basis of sex in determining the amount of the wages or compensation paid or to be paid to employees of such employer if such differentiation is authorized by the provisions of section 206(d) of title 29 [the affirmative defenses to the Equal Pay Act].
24. 975 F.2d at 1527.
26. 975 F.2d at 1527.
27. Id. at 1527-28.
29. EEOC v. Sears, Roebuck & Co., 839 F.2d 302 (7th Cir. 1988).
31. Foster v. Arcata Assocs., Inc., 772 F.2d 1453 (9th Cir. 1985).
32. 975 F.2d at 1528.
33. Id. at 1529.
lished that defendant’s explanations for the wage disparities were simply a pretext for gender-based discrimination.84

Retaliation. One case during the survey period addressed the issue of retaliation under Section 704(a) of Title VII.85 In Morgan v. City of Jasper,86 the Eleventh Circuit reversed a district court’s finding of retaliation as clearly erroneous.87 The Parks and Recreation Department of the City of Jasper, Alabama hired plaintiff as a secretary. She noted on her employment application that she had left prior employment with K-Mart voluntarily to seek “‘better working hours.’”88 After approximately two and one-half years of employment with defendant, the department relieved plaintiff of most of her duties when it discovered various bookkeeping discrepancies and missing funds in plaintiff’s department. During the course of a subsequent investigation, the police informed plaintiff’s supervisor that plaintiff had falsified her employment application as to the circumstances of her leaving K-Mart, and that K-mart discharged her for violating its bad check policy and for mishandling cash. Defendant then suspended plaintiff. Two days prior to this suspension, plaintiff had filed a charge with the EEOC alleging wage discrimination. Thereafter, plaintiff was indicted, and the court found her guilty of stealing funds from defendant, and sentenced her to five years and payment of restitution to the City of $13,490.76. In these circumstances, the district court ruled that the City had retaliated against plaintiff for filing her discrimination charge, basing its decision largely on the timing between the filing of her charge and her suspension (only two days later).89

On appeal, the Eleventh Circuit applied a version of the McDonnellDouglas/Burdine framework of proof, as adapted to the retaliation setting.90 The court agreed that the evidence of the timing of plaintiff’s suspension was sufficient to establish a prima facie case, but also found that defendant had rebutted this showing by introducing evidence that plain-

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34. Id.
36. 969 F.2d 1542 (11th Cir. 1992).
37. Id. at 1550.
38. Id. at 1546.
39. Id. at 1543-44, 46-47.
40. Id. at 1547. To establish a prima facie case of retaliation, plaintiff has to show that she

“(1) [had] engaged in protected opposition to Title VII discrimination or participated in a Title VII proceeding; (2) was disadvantaged by an action of the employer simultaneously with or subsequent to such opposition or participation; and (3) that there is a causal connection between the protected activity and the adverse employment action.”

Id.
tiff had falsified her employment application. The case then turned to the issue of pretext, at which point the court of appeals disagreed with the district court's analysis. The Eleventh Circuit found that the "overwhelming evidence" was that plaintiff had written a bad check and had been terminated by K-Mart for violating company policy concerning the handling of bad checks. Accordingly, the appellate court concluded that the district court was "plainly erroneous" in finding that plaintiff had met her burden of establishing pretext.

B. Procedural and Evidentiary Matters

Class Actions. The Title VII class action appears to be largely a relic of the past. Two cases during the survey period support this suggestion.

In Jones v. Firestone Tire & Rubber Co., plaintiff sought to represent a class of black Firestone employees who had suffered alleged racial discrimination with respect to promotions. The district court denied class certification. On appeal, the Eleventh Circuit noted that one seeking to represent a class in a Title VII suit must have standing to raise the claims of the class. The court agreed with the district court that plaintiff only had standing to raise claims regarding promotions, transfers, and demotions relating to store manager positions within Firestone's Birmingham market (since Firestone had a policy against transfers to other zones). Given this limitation, the court agreed that plaintiff had failed to meet the numerosity requirement of Rule 23 of the Federal Rules of Civil Procedure.

The class allegations met a similar fate in Washington v. Brown & Williamson Tobacco Corp. This action had been initiated in June of 1980, and plaintiff sought to bring an "across the board" class action challenging virtually all aspects of defendant's employment practices on racial grounds. The Eleventh Circuit noted that when the suit was originally filed, such "across the board" class actions were permitted, but that such actions were precluded by the Supreme Court's intervening decision in General Telephone Co. v. Falcon. The Eleventh Circuit pointed out that the five named plaintiffs had five different types of disparate treatment claims and that the only thing that they had in common with the

41. Id. at 1548.
42. Id. at 1548-49.
43. Id. at 1550.
44. 977 F.2d 527 (11th Cir. 1992).
45. Id. at 530.
46. Id. at 537.
47. 959 F.2d 1566 (11th Cir. 1992).
class was race. Under *Falcon* the court agreed that the district court's
denial of class certification was not an abuse of discretion.44

**Pre-Suit Arbitration.** In *Bender v. A.G. Edwards & Sons, Inc.*,50 the
Eleventh Circuit applied to Title VII claims the Supreme Court's holding
in *Gilmer v. Interstate/Johnson Lane Corp.*,51 (an ADEA case), requiring
arbitration under the Federal Arbitration Act52 as a pre-condition to
suit.53 As in *Gilmer*, plaintiff in this case worked for a stock brokerage
firm, and in her application for registration as a stock broker on the New
York Stock Exchange, agreed to arbitrate all disputes with her em-
ployer.54 It is not yet clear whether, and to what extent, the *Gilmer/
Bender* line of cases will be applied outside of the stock brokerage realm.
It also is not yet clear whether employers will attempt to utilize such ar-
bitration clauses in employment contracts as a possible means of avoiding
the greatly increased remedies available under Title VII as a result of the

**Timeliness of Charge/Complaint.** A necessary condition prece-
dent to the maintenance of a Title VII suit is the filing of a timely admin-
istrative charge with the EEOC.55 In years past, this issue has been a
common subject of dispute, and 1992 proved no exception.

In *Beavers v. American Cast Iron Pipe Co.*,56 plaintiffs brought a dis-
parate impact claim under Title VII, challenging the company's policy of
denying medical and dental insurance to the children of company em-
ployees if those children did not reside full-time with their employee-par-
tent. Plaintiffs made a statistical showing that 397 of the 400 employees
adversely affected by the policy were men. The primary issue was
whether the claim was based upon a timely charge with the EEOC, an
issue which, in turn, was dependent upon whether defendant's policy con-
stituted a "continuing violation" of the Act. It was undisputed that de-
fendant had instituted its policy, and plaintiff had been subject to the
policy, a number of years prior to the filing of plaintiff's charge.57 How-
ever, applying the standard set forth in *Gonzalez v. Firestone Tire &
Rubber Co.*,58 the Eleventh Circuit reversed the district court and found

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49. 959 F.2d at 1571.
50. 971 F.2d 698 (11th Cir. 1992).
53. 971 F.2d at 700.
54. Id. at 699.
56. 975 F.2d 792 (11th Cir. 1992).
57. Id. at 794.
58. 610 F.2d 241 (5th Cir. 1980).
that defendant's policy did constitute a continuing violation of the Act.\textsuperscript{59} The court concluded "... that each week in which divorced men are denied insurance coverage for their nonresident children while similarly situated divorced women, who are apparently far more likely to have custody of their children, receive such coverage constitutes a wrong arguably actionable under Title VII."\textsuperscript{60} The court concluded that plaintiff's EEOC charge was timely as to any application of defendant's policy occurring within 180 days of the filing of the charge.\textsuperscript{61}

Two cases during the survey period addressed the issue of whether the charge filing period should be equitably tolled. In \textit{Pearson v. Macon-Bibb County Hospital Authority},\textsuperscript{62} the Eleventh Circuit reversed a district court's grant of summary judgment in favor of defendants that was based on the ground that plaintiff's charge was untimely filed.\textsuperscript{63} Defendant hospital discharged plaintiff, a nurse, for allegedly violating certain hospital operating room procedures. After investigating the incident in question, defendant gave plaintiff the option of resigning or transferring to another section of the hospital. Plaintiff initially stated that she wished to transfer to another section, but she subsequently declined the particular position that she was offered. Thereafter, she took a medical leave of absence and ultimately was administratively terminated. She then filed her EEOC charge 194 days after her notice of termination.\textsuperscript{64}

On appeal, plaintiff initially argued that the "unlawful employment practice" that triggered the charge filing period was her actual termination date by the hospital (well within the charge filing period), and not the prior notice of this decision. However, the Eleventh Circuit ruled that this argument was untenable in light of the decisions by the Supreme Court in \textit{Delaware State College v. Ricks},\textsuperscript{65} and \textit{Chardon v. Fernandez},\textsuperscript{66} (holding that the charge period is triggered by notice of the discriminatory act, not the point in time when the consequences of the act are realized).\textsuperscript{67} However, in reliance upon the Eleventh Circuit's prior decision in \textit{Cocke v. Merrill Lynch & Co.},\textsuperscript{68} the court of appeals reversed the grant of summary judgment for a determination of whether equitable tolling

\begin{itemize}
\item\textsuperscript{59} 975 F.2d at 799.
\item\textsuperscript{60} \textit{Id.} at 798.
\item\textsuperscript{61} \textit{Id.} at 800.
\item\textsuperscript{62} 952 F.2d 1274 (11th Cir. 1992).
\item\textsuperscript{63} \textit{Id.} at 1282.
\item\textsuperscript{64} \textit{Id.} at 1276-77.
\item\textsuperscript{65} 449 U.S. 250, 259-60 (1980).
\item\textsuperscript{66} 454 U.S. 6, 8 (1981).
\item\textsuperscript{67} 952 F.2d at 1279.
\item\textsuperscript{68} 817 F.2d 1559 (11th Cir. 1987).
\end{itemize}
should apply to defendant’s invitation to plaintiff to seek a transfer as an alternative to termination.69

On the other hand, in Bryant v. Department of Agriculture,70 the Eleventh Circuit declined to apply equitable tolling despite dealing with a pro se plaintiff.71 In December 1987, plaintiff filed a letter requesting the appointment of counsel and a request to proceed in forma pauperis, along with a copy of her EEOC determination. In January 1988, the district court denied the request to proceed in forma pauperis. Plaintiff did not file a formal complaint until over a year later, in January 1989.72 In these circumstances, the Eleventh Circuit had little difficulty in concluding that equitable tolling was not available since “plaintiff's failure to file was caused by plaintiff's own negligence . . . .”73

II. Remedies Under Title VII

A. Reinstatement and Back Pay

The Supreme Court resolved an issue of much practical importance in United States v. Burke.74 At stake was whether a payment received in settlement of a back pay claim under Title VII is excludable from taxable income under Section 104(a)(2) of the Internal Revenue Code as damages “received . . . on account of personal injuries.”75 In resolving a conflict among the circuits, the Court ruled that such settlements are not excludable from gross income and, hence, are fully taxable.76 The principal basis for this ruling was that such awards are much more akin to wage payments than to traditional personal injuries associated with tort-like claims “such as pain and suffering, emotional distress, harm to reputation, or other consequential damages.”77 However, in light of the availability of these types of compensatory damages under the Civil Rights Act of 1991, Title VII plaintiffs may well be able to avoid the painful effects of this ruling by structuring their settlements as compensatory damages for emotional distress instead of back pay.

69. 952 F.2d at 1280.
70. 967 F.2d 501 (11th Cir. 1992).
71. Id. at 503.
72. Id. at 502.
73. Id. at 504. For additional procedural cases during the survey period, see Rebar v. Marsh, 959 F.2d 216 (11th Cir. 1992) (addressing the issue of venue in an age discrimination claim against a government agency); and Hill v. United States Postal Serv., 961 F.2d 153 (11th Cir. 1992) (addressing the relation back rule set forth in Fed. R. Civ. P. 15(c), as amended effective December 1, 1991).
75. Id. at 1876.
76. Id. at 1874.
77. Id. at 1873.
The effect of after-acquired evidence on Title VII damages was at issue in *Wallace v. Dunn Construction Co.* Plaintiff alleged *inter alia*, that she had been discharged discriminatorily in violation of Title VII in retaliation for having lodged various sexual harassment complaints with defendant. During discovery in the case, plaintiff admitted in a deposition that she previously had pled guilty to the crimes of possession of cocaine and marijuana prior to filling out her employment application with defendant. This admission established that she had falsified her employment application, which, under defendant's policies, would have constituted grounds for terminating her employment. The district court declined to entertain any of the after-acquired evidence as a matter of law.

However, in a decision that could have a significant impact upon the scope of both discovery and admissible evidence in Title VII cases, the Eleventh Circuit reversed the district court's disposition of the after-acquired evidence. Although the court declined to follow the Tenth Circuit's decision in *Summers v. State Farm Mutual Automobile Insurance Co.*, (which held that after-acquired evidence constitutes a bar to Title VII liability in appropriate circumstances), the court nonetheless concluded that "after-acquired evidence is relevant to the relief due a successful Title VII plaintiff." The Eleventh Circuit held that in cases in which the defendant can show that the after-acquired evidence would have constituted a legitimate ground for discharge in and of itself, then the plaintiff in such cases is not entitled to reinstatement, front pay, or injunctive relief. With regard to back pay, the court ruled that plaintiff's period of back pay would not terminate prematurely unless defendant could show that it would have discovered the after-acquired evidence prior to what otherwise would be the end of the back pay period. This case has the potential of greatly broadening the scope of discovery, as well as admissible evidence, in Title VII cases, as defendants probe for any evidence in a plaintiff's background that could have led to a hypothetical discharge, regardless of whether the employer had any knowledge of the evidence at the time of discharge or whether it was in any way related to defendant's reasons for effecting plaintiff's discharge.

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78. 968 F.2d 1174 (11th Cir. 1992).
79. Id. at 1176-77.
80. Id. at 1177.
81. Id. at 1185.
82. 864 F.2d 700 (10th Cir. 1988).
83. 968 F.2d at 1181.
84. Id. at 1181-82.
85. Id. at 1182.
B. Attorney Fees

At issue in *Ruffin v. Great Dane Trailers,* was the question of whether a Title VII plaintiff is entitled to an award of attorney fees under Title VII when the plaintiff lost on his claim for damages, but prevailed on his claim for injunctive relief. The district court had denied the request for fees on the ground that plaintiff failed to prevail on any significant issue in the litigation. Relying heavily upon the Supreme Court’s decision in *Texas State Teachers Ass’n v. Garland Independent School District,* the Eleventh Circuit found that plaintiff’s award of injunctive relief, despite losing on the damages issues, was enough of a “significant issue” to qualify plaintiff as a “prevailing party” for the purposes of awarding fees.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Theories of Liability and Burdens of Proof

In *Mitchell v. Worldwide Underwriters Insurance Co.*, the panel announced that a prima facie case of age discrimination in employment is not established under the *McDonnell Douglas* test when a terminated employee shows only that work previously assigned to him is transferred to an independent contractor corporation, even though the independent contractor employs younger individuals to do that work. The panel vacated the district court’s judgment on other grounds and remanded the case. This decision settles in the Eleventh Circuit the question of whether a plaintiff may state a prima facie case in a reduction in force

86. 969 F.2d 989 (11th Cir. 1992).
87. Id. at 990.
89. 969 F.2d at 992. At the time the court handed down its decision, *Farrar v. Hobby,* 113 S. Ct. 566 (1992), was still pending before the Supreme Court. However, the court of appeals noted that its decision would not change even if the Supreme Court decided that nominal damages do not provide a sufficient predicate for an award of attorneys fees under 42 U.S.C. § 1988. Of course, as is reported *infra* notes 190-96, the Supreme Court did not reach this conclusion. 969 F.2d at 994 n.3.
90. 967 F.2d 565 (11th Cir. 1992).
91. The Eleventh Circuit has adopted a variation of the prima facie case requirements set forth for Title VII claims in *McDonnell Douglas Corporation v. Green,* 411 U.S. 792 (1973), for ADEA cases. Plaintiff must show that he (1) is a member of the protected age group, (2) was subject to adverse employment action, (3) was replaced with a person outside of the protected group, and (4) was qualified to do the job. *Carter v. City of Miami,* 870 F.2d 5 (11th Cir. 1989). See also *Verbraeken v. Westinghouse Elec. Corp.,* 881 F.2d 1041, 1045 (11th Cir. 1989), *cert. dismissed,* 493 U.S. 1064 (1990).
92. 967 F.2d at 566.
93. Id. at 568.
context when work previously performed by him is placed with an independent contractor not associated with his former employer.

Mitchell was terminated from employment when his employer decided that it would be more cost effective to eliminate his position and place the work previously performed by him with an outside independent contractor. Mitchell sued, alleging that he had been terminated because of his age. Worldwide Underwriters denied the allegation. Granting summary judgment in Worldwide Underwriters favor, the district court ruled that plaintiff failed to establish a prima facie case since he had not been replaced by an employee outside the protected age group. The panel affirmed this particular finding on appeal. Plaintiff argued that since he was replaced by a corporation under forty years of age, which employed appraisers under forty years of age, he had established a prima facie case of age discrimination in employment. The panel rejected this argument. Without more, these facts were not enough "to give rise to an inference of discrimination."

B. Procedural Matters

Releases. In Gormin v. Brown-Forman Corp., the court considered the unsettled matter of unsupervised releases of potential claims under the Age Discrimination in Employment Act ("ADEA"). Reversing the district court, the panel found that not every unsupervised release of a claim under the ADEA is invalid. Construing for the first time the recent Supreme Court decision touching this subject, Gilmer v. Interstate/Johnson Lane Corp., a panel of the Eleventh Circuit concluded that unsupervised releases of ADEA claims may be valid if they are knowingly and voluntarily made.

In dicta, the Court provided instruction to the lower courts on the correct standard to be applied for assessing the validity of a release in an ADEA case:

The factors considered include the plaintiff's education and business experience, the amount of time he or she has to consider the agreement, the clarity of the agreement, whether the plaintiff consulted an attorney or had a fair opportunity to do so, whether the employer encouraged or

94. Id. at 566.
95. Id. at 567.
96. Id.
97. Id.
98. 963 F.2d 323 (11th Cir. 1992).
99. Id. at 326.
101. 963 F.2d at 326.
discouraged the employee to consult an attorney, and whether the consideration given in exchange for the waiver exceeds the benefits to which the employee was already entitled.\textsuperscript{103}

In \textit{Forbus v. Sears, Roebuck \& Co.},\textsuperscript{104} the Eleventh Circuit ruled that ADEA plaintiffs are not required to return the consideration received in return for a release of a claim as a condition prerequisite to challenging the validity of that release.\textsuperscript{104} The district court had denied Sears' motion for summary judgment on the issue of whether plaintiffs had validly waived suit against Sears under the releases they executed upon their early retirement.\textsuperscript{105} Concluding that this was a question to be decided under federal, not state, law, the court affirmed the lower court in its result.\textsuperscript{106}

Sears had offered some of its employees a severance incentive package after deciding to reduce its workforce in its Birmingham, Alabama distribution center. The severance benefits were more substantial than the benefits that would have been available to those employees had they not elected to accept the special early retirement package. Thereafter, Sears changed its plans for restructuring its workforce in the Birmingham distribution center. Following the announcement of this change in plans, some of those employees renounced the early retirement option and sought back their old positions of employment. Sears responded that there were no jobs available for those who had previously accepted the early retirement option. Plaintiffs then filed charges of age discrimination with the EEOC, alleging that they had been under duress when they accepted the severance package and executed the release required as a condition of receipt of the severance benefits. They also asserted that Sears made misrepresentations to them concerning the package.\textsuperscript{107} Disregarding the contrary conclusion of at least two other federal circuits, the panel determined that the retention of benefits obtained in consideration for a release of claims after learning that the release may be voidable does not constitute a ratification of the release.\textsuperscript{108} Noting that neither of these two federal circuit panels apparently considered a 1968 Supreme Court deci-

\begin{footnotesize}
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\item 102. \textit{Id.} at 327.
\item 103. 958 F.2d 1036 (11th Cir. 1992).
\item 104. \textit{Id.} at 1041.
\item 105. \textit{Id.} at 1038.
\item 106. \textit{Id.} at 1042. The district court below had concluded that Alabama law should decide this question. \textit{Id.} at 1040.
\item 107. \textit{Id.} at 1038.
\item 108. \textit{Id.} at 1041. In O'Shea v. Commercial Credit Corp., 930 F.2d 358, 362-63 (4th Cir.), cert. denied, 112 S. Ct. 177 (1991), and in Grillet v. Sears, Roebuck \& Co., 927 F.2d 217, 220 (5th Cir. 1991), the Fourth and Fifth Circuits determined that a releasor's retention of benefits after learning that a release is voidable constitutes a ratification of the release.
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sion that discussed this issue in the context of the Federal Employers’ Liability Act, the panel determined that the reasoning of the 1968 decision had equal application in an ADEA setting.

Timely Charge. The issues of equitable tolling and revival of claims under the Age Discrimination Claims Assistance Act of 1988 (the “ADCAA”) were considered in another significant decision reached during the survey period. In McBrayer v. City of Marietta, the district court had granted the city’s dispositive motions on two different timeliness grounds. Plaintiffs failed to file discrimination charges with the EEOC within 180 days after the employment practice that they alleged was unlawful occurred and then they failed to bring suit within two years after their causes of action accrued. Plaintiffs, police officers, were attempting to challenge the city’s mandatory age fifty-five retirement policy. They asserted that the city had not given them proper notice of their rights under the ADEA and that, therefore, the 180 day limitations period for filing charges with the EEOC should be equitably tolled. They argued that tolling would render their EEOC charges timely and that thereupon, the ADCAA revived their right to sue, freeing them from the two-year limitation for bringing suit set forth within the ADEA. The court found plaintiffs’ equitable tolling argument unavailing. By so

110. 958 F.2d at 1040.
111. 967 F.2d 546 (11th Cir. 1992).
112. Id. at 547.
113. Id. The ADEA requires that a charge of discrimination be filed with the EEOC “within 180 days after the alleged unlawful practice occurred.” Id. (citing 29 U.S.C. § 626(d)(1) (1988)). The filing of a charge with the EEOC is required before a civil suit may be commenced. The civil suit for a nonwillful violation must be brought within two years after the cause of action accrues. Id. (citing 29 U.S.C. § 626(e) (1988)).
114. Id.
115. Id. Section 627 of the ADEA requires “[e]very employer . . . shall post and keep posted in conspicuous places upon its premises a notice to be prepared or approved by the [EEOC] setting forth information as the Commission deems appropriate to effectuate the purposes of this chapter.” Id. at 547-48 (citing 29 U.S.C. § 627 (1988)). An employer’s failure to post such notices may result in a tolling of the time period in which an employee may file a charge of discrimination. Kazanzas v. Walt Disney World Co., 704 F.2d 1527, 1530 (11th Cir.), cert. denied, 464 U.S. 982 (1983).
116. 967 F.2d at 547-48. The Age Discrimination Claims Assistance Act of 1988, see 29 U.S.C. § 621-634 (1988), was passed by Congress because of a tremendous backlog of age discrimination in employment claims in the EEOC administrative process. Because the EEOC could not timely process claims, aggrieved individuals were losing their right to sue when caught in this backlog. Congress designed the ADCAA to revive age discrimination claims that might otherwise be barred because although timely filed with the EEOC, the EEOC had failed to process them before the running of the two year statute of limitations. See Section 3 of the ADCAA, 29 U.S.C. § 626 (1988).
117. 967 F.2d at 548.
concluding, the panel was able to hold easily that their right to bring suit had not been revived by the ADCAA. The panel acknowledged that the purpose of the ADCAA was only to allow certain ADEA claimants to bring suit under a one time extended limitations period. Since plaintiffs had not filed a timely charge with the EEOC in the first place, they were not entitled to the benefit of the limited extended suit filing period provided for under the ADCAA.

C. Remedies

Lewis v. Federal Prison Industries, Inc. concerned the issue of front pay. Stating that "front pay remains a special remedy, warranted only by egregious circumstances," the Eleventh Circuit held that a plaintiff who is disabled as a result of the discrimination endured may properly be entitled to front pay. This case is also significant because it holds for the first time in this circuit that federal employers may be required to provide relief in the form of front pay to ADEA discriminatees under certain circumstances.

Lewis had been employed for a number of years by Federal Prison Industries at a federal correctional facility in North Florida. His immediate supervisor subjected Lewis to systematic harassment to force him into early retirement. Because of ill effects suffered as a result of this harassment campaign, Lewis underwent psychiatric counselling, and, ultimately, was forced to apply for retirement. Immediately prior to Lewis' filing suit under the ADEA, Federal Division Industries offered him reinstatement to his former position. Upon the advice of his medical doctor and his psychiatrist, Lewis declined the offer of reinstatement. The district court found that Lewis had been constructively discharged, but that he limited his entitlement to back pay when he rejected the offer of rein-

118. Id.
119. Id.
120. Id.
121. 953 F.2d 1277 (11th Cir. 1992).
122. Id. at 1279. Front pay is an alternative to the preferred remedy of reinstatement of an aggrieved employee under the federal employment discrimination laws. See O'Donnell v. Georgia Osteopathic Hosp., Inc., 748 F.2d 1543, 1551 (11th Cir. 1984).
123. 953 F.2d at 1281.
124. Id. at 1286.
125. Id. at 1287.
126. Id. at 1278.
127. Id.
128. Id.
129. Id.
130. Id.
statement. 131 Lewis appealed, asserting that he had reasonably rejected that offer for medical reasons. 132 His psychiatrist previously testified that Lewis' decision to reject the reinstatement offer was "... 'a very good, sound, healthy decision'" 133 and that Lewis' health would have suffered if he returned to the workplace, even if no additional discrimination occurred. 134 This evidence was uncontroverted. 135 Relying on Ninth Circuit precedent, 136 the Eleventh Circuit held that when medical evidence shows that a claimant might suffer as a result of a return to the workplace, then front pay may be a proper make whole remedy. 137 This decision underscores the need for independent mental examination of plaintiffs asserting mental anguish and emotional distress claims as part of the relief they are seeking. 138 Since Lewis' psychiatrist's testimony was not controverted or rebutted, it was accepted and used by the court to justify the relief awarded. 139

Judge Tjoflat dissented from the portion of the decision awarding front pay in the case of federal employees. 140 In his dissent, Judge Tjoflat noted that Congress had specifically established a "'separate and discrete'" 141 remedial scheme for claims arising in federal employment under the ADEA. 142 In his opinion, while those discrete remedies might not have been adequate in this particular case, he found no support for a front pay award against a federal employer in either the legislative history behind or the specific language within the ADEA. 143

IV. THE CIVIL RIGHTS ACT OF 1991

Although heralded as a substantial rewriting of Supreme Court case law, which would unleash the flood gates of employment litigation, the Civil Rights Act's river of litigation stayed safely within its banks during

131. Id. at 1279. An employment discrimination plaintiff has the obligation to mitigate his or her damages, generally by seeking and accepting comparable employment following his or her allegedly unlawful discharge. Ford Motor Co. v. EEOC, 458 U.S. 219, 248 (1982).
132. 953 F.2d at 1279.
133. Id. at 1280.
134. Id.
135. Id. at 1281.
137. 953 F.2d at 1281.
138. Such examinations may be undertaken by stipulation or under court order provided for in Rule 35 of the Federal Rules of Civil Procedure.
139. 953 F.2d at 1281.
140. Id. at 1282 (Tjoflat, J., dissenting).
141. Id. at 1283.
142. Id.
143. Id. at 1284-86.
the survey period.\textsuperscript{144} In fact, only one noteworthy case arising under the 1991 Act was reported during the period.

In the district courts, retroactivity and its application to the different provisions of the 1991 Act, as stated previously, has been vigorously litigated. Only one such case reached the court of appeal, however. In \textit{Baynes v. AT&T Technologies, Inc.},\textsuperscript{145} the Eleventh Circuit held that the 1991 Act does not apply retroactively.\textsuperscript{146} Proceeding \textit{pro se}, Baynes sued AT&T under a variety of state and federal legal theories. Only two of her claims, both brought under Title VII, survived summary judgment. Baynes then lost both claims during a bench trial and appealed. Baynes asserted that her Section 1981 claims should be reinstated as a result of the intervening enactment of the 1991 Act.\textsuperscript{147} Avoiding a potential new tributary to the litigation river presented by the Supreme Court's two divergent lines of authority dealing with retroactive application of statutory reform,\textsuperscript{148} the court panel decided that under either analysis, the result is the same; the 1991 Act applies only prospectively.\textsuperscript{149} The panel decision aligns the Eleventh Circuit with the Fifth,\textsuperscript{150} Sixth,\textsuperscript{151} Seventh,\textsuperscript{152} Eighth\textsuperscript{153} and D.C.\textsuperscript{154} Circuits on this question.\textsuperscript{155} The court's thorough analysis of the retroactivity issue in the context of Baynes' appeal indicates to us that this decision settles in this circuit all but the most creative retroactivity arguments that might be put forth.

\begin{footnotesize}
\begin{enumerate}
\item \textsuperscript{145} 976 F.2d 1370 (11th Cir. 1992).
\item \textsuperscript{146} \textit{Id.} at 1375.
\item \textsuperscript{147} \textit{Id.} at 1372.
\item \textsuperscript{149} 976 F.2d at 1373.
\item \textsuperscript{150} Johnson v. Uncle Ben's, Inc., 965 F.2d 1363 (5th Cir. 1992).
\item \textsuperscript{151} Vogel v. City of Cincinnati, 959 F.2d 594 (6th Cir. 1992).
\item \textsuperscript{152} Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992).
\item \textsuperscript{153} Fray v. Omaha World Herald Co., 960 F.2d 1370 (8th Cir. 1992).
\item \textsuperscript{154} Gersman v. Group Health Ass'n., 975 F.2d 886 (D.C. Cir. 1992).
\item \textsuperscript{155} \textit{But see} Davis v. City & County of San Francisco, 976 F.2d 1536 (9th Cir. 1992). The Equal Employment Opportunity Commission has also concluded that the 1991 Act does not apply retroactively to conduct occurring before the Act's effective date. 1991 WL 323429 (E.E.O.C.).
\end{enumerate}
\end{footnotesize}
V. Disability Discrimination—The Americans With Disabilities Act and The Rehabilitation Act of 1973

This section of the annual survey article will be expanded in future years to address ADA employment-related decisions. Since the employment title only went into effect on January 26, 1992, no ADA appeals have yet reached the Eleventh Circuit Court of Appeals.

The only interesting reported Rehabilitation Act case during the survey period decides when a plaintiff may proceed under a fictitious name with a Rehabilitation Act claim. In Doe v. Frank, an alcoholic wanted to protect his identity. The district court denied his motion to proceed under a fictitious name. In an interlocutory appeal, the court of appeals affirmed. While acknowledging that judicial proceedings are generally matters of public record and that the Federal Rules of Civil Procedure require a complainant to include the names of all parties in the complaint, the court announced that in certain limited circumstances anonymity may be warranted:

A plaintiff should be permitted to proceed anonymously only in those exceptional cases involving matters of a highly sensitive and personal nature, real danger of physical harm, or where the injury litigated against would be incurred as a result of the disclosure of the plaintiff's identity. The risk that a plaintiff may suffer some embarrassment is not enough.

The stigma involved in disclosure must overcome the presumption of openness in judicial proceedings.

VI. Equal Pay Act

Three noteworthy Equal Pay Act decisions were reported during the survey period. In the first, Beavers v. American Cast Iron Pipe Co., employees challenged their employer’s longstanding policy of denying medical and dental insurance coverage to the children of its employees

157. 951 F.2d 320 (11th Cir. 1992).
158. Id. at 322. There is no specific provision under either federal law or the Federal Rules of Civil Procedure that allow for such a motion. However, some courts have permitted plaintiffs to proceed anonymously in certain cases. See, e.g., Doe v. Colautti, 592 F.2d 704 (3d Cir. 1979) (mental illness); Doe v. Commonwealth’s Attorney for Richmond, 403 F. Supp. 1199 (E.D. Va. 1975), aff’d, 425 U.S. 901 (1976) (homosexuality); Doe v. McConn, 489 F. Supp. 76 (S.D. Tx. 1980) (transsexuality).
159. 951 F.2d at 322.
160. Id. at 324.
161. Id.
162. 975 F.2d 792 (11th Cir. 1992).
who did not live with their employee-parent. Plaintiffs brought claims under both Title VII and the Equal Pay Act. The district court granted summary judgment in favor of American Cast Iron on the individual Equal Pay Act claims because plaintiffs failed to establish prima facie cases. The court of appeals affirmed this finding. Noting that the scope of the Equal Pay Act is much more limited than Title VII, the court held that the Equal Pay Act only applies when members of one sex are being paid less than members of the opposite sex for "equal work." Since none of the male plaintiffs had demonstrated that they were paid less than female employees performing the same work, they failed to establish a prima facie case under the Equal Pay Act.

In Randolph Central School District v. Aldrich, the Supreme Court denied a writ of certiorari in an Equal Pay Act appeal. Justice White, along with the Chief Justice and Justice O'Connor, dissented. The dissenters acknowledged the significance of a conflict among the circuits regarding the interpretation of the respective burdens of proof when an employer seeks to establish the "factor other than sex" defense to an Equal Pay Act claim. In the Second Circuit, an employer cannot meet its burden of proving this defense by merely asserting use of a gender neutral classification system. In the Eighth Circuit, the court has ruled that a compensation system that determines salaries on the basis of objective criteria related to duty is permissible under the Equal Pay Act. Wanting to resolve this split, the three dissenters would have granted certiorari in this appeal to reach that question.

In Miranda v. B&B Cash Grocery Store, Inc., the district court granted defendant's motion for summary judgment, concluding that plaintiff had not established a prima facie case under the Equal Pay Act. The court of appeals reversed, ruling that a plaintiff need not prove that a job held by a comparator is identical to establish a prima facie case.
facie claim. A plaintiff must only demonstrate that the "skill, effort and responsibility required in the performance of the jobs are 'substantially equal'" to meet her threshold burden.

VII. CIVIL RIGHTS ACTS OF 1866 AND 1871

A. Post-Patterson Cases—Section 1981

While there were a wave of post-Patterson cases reported during the 1991 survey period, only one such case reached the Eleventh Circuit this year. In Pearson v. Macon-Bibb County Hospital Authority, the court affirmed the district court's grant of summary judgment on appellant's Section 1981 claim, relying on Patterson. Following her administrative termination from the Medical Center of Central Georgia, Pearson sued the Hospital Authority and others under a hodge podge of legal theories. The district court granted summary judgment in favor of all defendants on all theories, deciding that Pearson's Section 1981 claims were without merit. Finding that Patterson disposed of her Section 1981 claims by rendering discriminatory discharges no longer cognizable under Section 1981, the court of appeals affirmed this portion of the district court's ruling without reaching the merits of Pearson's claims.

B. Section 1983 Cases

Res Judicata. Manning v. City of Auburn, presented the court with an interesting res judicata issue resulting from an earlier class action lawsuit. Previously, the city, along with some of its officials, was subject to a class action lawsuit brought on behalf of its fire department employees. That lawsuit alleged that a continuing pattern and practice of discrimination in the fire department had resulted from a former fire chief's favoritism toward certain individuals, including Manning. The class plaintiffs claimed that they had been deprived of equal protection and due process as a result of this favoritism. After the class was certified, all members (including Manning) were notified of the pendency of the class

176. Id. at 1534.
177. Id. at 1533.
179. 952 F.2d 1274 (11th Cir. 1992).
180. Id. at 1277-78. Patterson was subsequently reversed by Congress through its passage of the 1991 Act. See § 101 of the Civil Rights Act of 1991.
181. 952 F.2d at 1277.
182. Id.
183. Id. at 1278.
184. 953 F.2d 1355 (11th Cir. 1992).
lawsuit and given an opportunity to opt out of the class. Manning did not opt out of the class and also elected not to participate in discovery in that suit. She subsequently was dismissed with prejudice from the class suit along with all other employees who did not participate in discovery. Thereafter, she filed her own discrimination suit, claiming that she had been the victim of discrimination on the basis of her sex and age after the former chief was replaced. The district court concluded that the orders and the final judgment in the earlier class action lawsuit barred Manning from asserting her subsequent claims against the city and dismissed her cause of action with prejudice. She appealed and the appellate court reversed the district court’s decision.

Concluding that Manning had no claim when the class suit was first filed, the court of appeals ruled that she, therefore, could not be barred from later bringing claims that arose after her dismissal from that suit:

We do not believe that the res judicata preclusion of claims that “could have been brought” in earlier litigation includes claims which arise after the original pleading is filed in the earlier litigation. Instead, we believe that, for res judicata purposes, claims that “could have been brought” are claims in existence at the time the original complaint is filed or claims actually asserted by supplemental pleadings or otherwise in the earlier action. Our decision avoids the “potentially unworkable requirement that every claim arising prior to entry of a final decree must be brought into the pending litigation or lost.”

Attorney Fees Under Section 1988. The only noteworthy fees case pursuant to Section 1988 reported during the survey period came from the Supreme Court. In Farrar v. Hobby, the Court held that a plaintiff receiving even only nominal damages can still be a prevailing party for purposes of a fees award under Section 1988. The Court reasoned that a judgment for damages in any amount modifies a defendant’s behavior toward a plaintiff by forcing the defendant to pay an amount of money he otherwise would not pay. Thus, even the nominally-prevail-
ing plaintiff is a prevailing party. The Court stated that the inquiry should not turn on the magnitude of the relief obtained, but rather on the propriety of a fees award. Affirming the continuing vitality of the factors it first announced in *Hensley v. Eckerhart*, the Supreme Court stated that those factors require courts to consider the degree of success obtained in determining the reasonableness of a fee award in any case subject to Section 1988.

193. Id. at 573.
194. Id. at 574.
196. 113 S. Ct. at 574.