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John F. Dickinson
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Employment Discrimination

by John F. Dickinson* and F. Damon Kitchen**

The employment law docket of the Eleventh Circuit last year was a reflection of the general state of employment-related litigation in all but one respect. It included a large number of decisions, many of which turned on complicated procedural issues arising out of trial practice before juries. On the other hand, as in previous years the court of appeals published no opinion concerning a disability claim under the Americans With Disabilities Act of 1990.¹ These are sure to come.

Consistent with the tradition of past articles on this topic, this survey does not attempt to include all opinions that touch on employment discrimination practice. Instead, this survey will focus on significant decisions handed down by the United States Supreme Court and the Eleventh Circuit in this area.²

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I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Theories of Liability and Burdens of Proof

1. Disparate Treatment Cases. During the survey period, the Eleventh Circuit addressed several disparate treatment cases, analyzing burdens of proof and production in both direct evidence and circumstantial evidence fact patterns. One such case was *Haynes v. W.C. Caye & Co.*, involving allegations of gender discrimination and age discrimination. In *Haynes*, the president of the defendant corporation created a position within the company to oversee collections. After consulting with a long time employee of the company, the president was referred to plaintiff Haynes, a female, as a potential candidate for the job. However, the president suggested to the employee that he thought it would require a man to do the job. Nonetheless, the president hired plaintiff for the collections position. After a period of time in the new position, the president commented to plaintiff that although he did not think women were competent or tough enough for the position, she might be showing him that she could do it. When Haynes was subsequently removed from the position by the president, she brought suit against the company, alleging that the gender-based comments constituted direct evidence of sex discrimination. After a bench trial, the magistrate judge disagreed, and his report and recommendations concerning plaintiff's failure to ultimately satisfy her burden of proving discriminatory intent were adopted by the district court.

On appeal, the Eleventh Circuit sided with the plaintiff, noting that the president's comments were indistinguishable from the evidence considered by the United States Supreme Court in *Price Waterhouse v. Hopkins* as direct evidence. The court held that a statement that

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3. 52 F.3d 928 (11th Cir. 1995).
4. Id. at 930.
5. Id.
6. Id.
7. Id.
8. Id.
9. Id.
11. 52 F.3d at 930-31.
women in general are simply not competent to do a particular job would appear to be a classic example of direct evidence. Thus, noting that when a plaintiff presents credible, direct evidence of discriminatory motive the burden shifts to the employer to show that the employment decision would have been the same even absent discrimination, the court remanded the case to the magistrate judge to review the evidence once again in light of its findings and holding.

In Walker v. Nationsbank, the Eleventh Circuit considered burden of proof issues involving circumstantial evidence of sex and age discrimination. In that case, Plaintiff Myra Walker was promoted to the position of branch manager of one of the defendant bank’s offices. However, sometime thereafter, Walker began to have alleged performance problems on the job. For example, in one instance, Walker’s supervisor approached her about her alleged failure to carry out certain managerial directives. Later, an audit of Walker’s branch office allegedly revealed several unsatisfactory deficiencies in the bank’s operations. As a result of these performance problems, Walker’s supervisor met with her to discuss setting specific performance goals. Additionally, at a subsequent meeting, Walker was instructed to contact two bank employees about certain matters. A subsequent follow-up audit revealed even more deficiencies at Walker’s branch office, and she was placed on a thirty-day probation. Soon thereafter, the bank terminated Walker for the alleged reasons that she failed to contact the two bank employees as previously instructed (though she misrepresented that she did so), and that she failed to attend a training course scheduled right after she was placed on probation. During the bench trial, at the close of Walker’s case, the district court granted the bank’s motion for directed verdict and entered judgment against Walker.

12. Id. at 931. However, in making this general statement, the court specifically noted that this case did not involve any allegations that gender was a bona fide occupational qualification. Id. at 931 n.7.
13. Id. at 931-32.
14. 53 F.3d 1548 (11th Cir. 1995).
15. Id. at 1551.
16. Id.
17. Id.
18. Id.
19. Id.
20. Id. at 1552.
21. Id.
22. Id.
23. Id. at 1553.
On appeal to the Eleventh Circuit, Walker maintained that the bank's stated justification for her termination was pretextual. She argued that while at the time of her termination she was given the two above-mentioned reasons for her dismissal, at trial the bank contended that the two reasons plus her deficient job performance justified her dismissal. Thus, Walker maintained that this difference in the bases given for her termination suggested that the bank's offered reasons were pretextual and that the jury could have inferred that the real reasons for her termination were her gender and her age.

However, in this case, the Supreme Court's analytical framework in St. Mary's Honor Center v. Hicks was of great benefit to the employer. The appeals court noted that under Hicks, the factfinder's disbelief of the reasons the defendant offers does not compel judgment for the plaintiff. Yet the court also noted that if this belief is accom-
panied by a suspicion of mendacity, then it may, together with the elements of the prima facie case, suffice to show intentional discrimination. Nonetheless, the appeals court concluded that Walker produced no evidence that raised a suspicion of mendacity and therefore did not carry her ultimate burden of proof that the bank intentionally discriminated against her on the basis of her age or sex. Although the court was aware that there may have been some obvious "bad blood" between plaintiff and her supervisor, the court held that such unfortunate personality clashes do not, without more, form the basis of relief under Title VII.

The Eleventh Circuit decision in United States v. Crosby also addressed issues involving circumstantial evidence as proof of discrimination. In that case, the United States Department of Justice brought suit on behalf of a minority, female correctional officer, Sergeant Burbridge, against Columbia County, Georgia, and its sheriff. The suit alleged that defendants unlawfully terminated Burbridge on the basis of her race and gender. The sheriff and the county maintained that Burbridge left town to attend to a personal matter and as a result missed a day of work, even though Burbridge knew she had not been granted leave for that day by her supervisor. Upon realizing that Burbridge did not have permission to miss work, and in light of her position as a shift supervisor, the sheriff felt a need to set an example and enhance discipline. He thus terminated Burbridge on those grounds. However, the United States argued that certain white male employees received less severe sanctions than Burbridge for apparently similar conduct. After a bench trial, the district court ruled in favor of the sheriff and the county, finding no intent to discriminate against Burbridge on the basis of her race and gender.

30. Id.
31. Id. at 1558.
32. Id.
33. 59 F.3d 1133 (11th Cir. 1995).
34. Id. at 1134-35. The United States brought suit, rather than Burbridge herself, because the Equal Employment Opportunity Commission, in issuing a cause determination after investigating Burbridge's charge of discrimination, specifically referred the case to the Department of Justice with a recommendation that a Title VII enforcement action be instituted pursuant to 42 U.S.C. § 2000e-5. 59 F.3d at 1134-35 n.2.
35. 59 F.3d at 1135.
36. Id. at 1134.
37. Id. at 1135-36.
38. Id. at 1135.
39. Id.
On appeal to the Eleventh Circuit, the United States contended that the district court did not properly consider the evidence that certain white male employees received more thorough disciplinary reviews and less severe sanctions than Burbridge.\(^{40}\) It also contended that the evidence did not support the district court's finding that Burbridge received severe treatment because she was a supervisor and because the Sheriff needed to be decisive and effective in enforcing discipline.\(^{41}\) Nonetheless, after reviewing the district court's findings under a "clear error" standard, the appeals court rejected those contentions and held that the district court's findings regarding intentional discrimination were not clearly erroneous.\(^{42}\) In this regard, the court noted the lack of any direct evidence in this case and further noted that none of the purported circumstantial evidence regarding treatment of white male employees offered by plaintiff involved a supervisor who was absent from duty for an entire day knowing that leave had not been granted.\(^{43}\) Consequently, the court concluded that the evidence offered by plaintiff did not so unequivocally support a finding of intentional discrimination in Burbridge's termination as to render the district court's decision clearly erroneous and affirmed the district court's decision.\(^{44}\)

2. Disparate Impact Cases. The Eleventh Circuit entertained only one Title VII disparate impact case during the survey period. *Edwards v. Wallace Community College*\(^{45}\) involved a black word processing specialist who alleged that she was discriminatorily terminated from Wallace Community College Selma ("WCCS") on the basis of her race.\(^{46}\) Edwards sued WCCS and her supervisor, Dr. Robert McConnell, alleging violation of Title VII. She also sued McConnell and three co-employees pursuant to section 1983, alleging that the defendants violated the equal protection clause of the Fourteenth Amendment. The United States District Court for the Southern District of Alabama granted motions for summary judgment filed by WCCS and McConnell concerning Edwards's Title VII disparate impact and disparate treatment theories of recovery.\(^{47}\)

\(^{40}\) *Id.*
\(^{41}\) *Id.* at 1135-36.
\(^{42}\) *Id.* at 1136.
\(^{43}\) *Id.*
\(^{44}\) *Id.*
\(^{45}\) 49 F.3d 1517 (11th Cir. 1995).
\(^{46}\) *Id.* at 1519-20.
\(^{47}\) *Id.* at 1520.
On appeal, the Eleventh Circuit affirmed the district court's order granting summary judgment. The panel held that Edwards's disparate impact claim failed because she did not identify a specific employment practice or test of WCCS used to terminate employees that led to a discriminatory impact on African-Americans and, more specifically, that affected Edwards. Moreover, the Eleventh Circuit determined that Edwards had failed to make the required statistical comparison of the racial composition of persons in the labor pool qualified for the word processing specialist position with those persons actually holding that position, and that she consequently failed to demonstrate that the allegedly discriminatory practice or test was connected to the disparate impact.

The Eleventh Circuit also affirmed the trial court's grant of summary judgment to WCCS and McConnell regarding plaintiff's disparate treatment discriminatory discharge and hostile environment claims, finding that following her termination Edwards had been replaced by a minority, that Edwards had failed to present any evidence that the filling of the vacancy was pretextual, and that the record did not substantiate a hostile work environment claim.

3. Sexual Harassment. The only case addressing the subject of sexual harassment during the survey period presented multiple substantive and procedural issues for the Eleventh Circuit's consideration. In Cross v. Alabama, plaintiffs included seven past and present employees of the Taylor Hardin Secure Medical Facility in Tuscaloosa, Alabama ("Taylor Hardin"), a state institution created by the Alabama Department of Mental Health and Mental Retardation.

Generally, all plaintiffs alleged that the director of Taylor Hardin, Larry Stricklin, created a discriminatorily abusive work environment for female employees through intimidation, ridicule, and insult. For example, at the trial plaintiffs testified that Stricklin was very aggressive towards females, that he would make derogatory remarks to them in front of others, that he yelled and screamed at them, and that

48. Id. at 1520-22.
49. Id. at 1520.
50. Id.
51. Id. at 1522.
52. 49 F.3d 1490 (11th Cir. 1995).
53. Id. at 1494.
54. Id. at 1494-99.
he humiliated them with his remarks and attitude.\textsuperscript{55} One plaintiff testified that Stricklin made derogatory remarks about women, including calling one female employee a "cow,"\textsuperscript{56} and a "butt-head."\textsuperscript{57} According to another plaintiff, Stricklin labeled women as "dumb"\textsuperscript{58} and "stupid."\textsuperscript{59} Stricklin allegedly stated that "women should be barefoot and pregnant."\textsuperscript{60} There was contradictory testimony at trial concerning whether or not plaintiffs complained to the other individual defendants named in plaintiffs' suit, the Commissioner of the Alabama Department of Mental Health and Mental Retardation, J. Michael Horsley, or Associate Commissioner R. Emmett Poundstone, III. Although Horsley and Poundstone testified that no complaints of sexual harassment were ever lodged against Stricklin, three of the plaintiffs testified that they had complained to upper management about Stricklin's harassing behavior. The plaintiffs who testified that they had complained about Stricklin's harassment also testified that upon learning of their complaints Stricklin retaliated against them in various ways, such as calling them into lengthy meetings and ranting and raging at them, and asking for one of the plaintiffs' resignations.\textsuperscript{61} Other plaintiffs testified that they did not complain about Stricklin's behavior for fear of retaliation.\textsuperscript{62}

Plaintiffs filed their lawsuit pursuant to Title VII and section 1983, complaining of sexual harassment and a hostile work environment at Taylor Hardin.\textsuperscript{63} In addition to Taylor Hardin and the individual defendants (who were sued in both their individual and official capacities), plaintiffs sued the State of Alabama. The jury returned a verdict in favor of plaintiffs, and the district court fashioned a remedy for violations of Title VII and section 1983.\textsuperscript{64} The court permanently enjoined the defendants from maintaining a hostile work environment and from otherwise violating Title VII and section 1983.\textsuperscript{65} The court also permanently enjoined Stricklin from retaliating against plaintiffs for their participation in the litigation.\textsuperscript{66} The court permanently

\textsuperscript{55} Id.
\textsuperscript{56} Id. at 1498.
\textsuperscript{57} Id.
\textsuperscript{58} Id. at 1497.
\textsuperscript{59} Id.
\textsuperscript{60} Id. at 1496.
\textsuperscript{61} Id. at 1495.
\textsuperscript{62} Id. at 1496.
\textsuperscript{63} Id. at 1501.
\textsuperscript{64} Id.
\textsuperscript{65} Id.
\textsuperscript{66} Id.
enjoined the defendants from failing to reinstate those plaintiffs who had previously resigned as a result of the harassment and gave those plaintiffs the option of coming back to work at Taylor Hardin or choosing an equivalent position at another state agency. Finally, the court awarded each of the plaintiffs $25,000 in emotional distress damages, $100,000 in punitive damages, ordered backpay to those employees who had resigned, and awarded plaintiffs' attorney fees and costs.

On appeal, the Eleventh Circuit considered a hodgepodge of issues raised by defendants. Issues involving Eleventh Amendment and qualified immunities applicable to the section 1983 claims, the propriety of the jury instructions given by the district court, and administrative prerequisites to suit are addressed elsewhere in this article. The remaining arguments on appeal included: (1) that the district court had misunderstood the legal standards applicable in a hostile work environment case and had confused the jury by questioning Stricklin on whether he considered that his "style may have a different effect on [his] female employees than male employees?" and (2) that the evidence was not sufficient to establish liability pursuant to either Title VII or section 1983.

With respect to the district court's questioning of Stricklin, the court of appeals relied on Henson v. City of Dundee, reasoning that the questioning went to "whether appellants considered whether Stricklin's management style was more offensive to female employees than male employees." According to the Eleventh Circuit, if the conduct was equally offensive to both sexes it would not be based upon sex. With respect to the remaining issue, the court simply concluded that the plaintiffs had presented sufficient evidence for a finding of a hostile work environment of sexual harassment and that Stricklin's codefendants knew or should have known of Stricklin's discriminatory treatment of

67. Id.
68. Id. at 1501-02.
69. See infra Sections VI(A) and I(B).
70. 49 F.3d at 1502-04.
71. 682 F.2d 897 (11th Cir. 1982). In Henson, the Eleventh Circuit adopted the disparate treatment model of proof set forth in McDonnell Douglas v. Green, 411 U.S. 792 (1973) in the context of hostile environment sexual harassment. 682 F.2d at 911. The Eleventh Circuit in Cross determined that the district court had properly instructed the jury utilizing the Henson elements of proof. See Cross v. Alabama, 49 F.3d 1490, 1505 (11th Cir. 1995).
72. 49 F.3d at 1505.
73. Id.
female employees, yet failed to take prompt action to remedy the hostile work environment.\footnote{Id. at 1507.}

4. Religious and National Origin Discrimination. One of the most interesting cases decided by the court of appeals during the survey period, \textit{Beadle v. City of Tampa},\footnote{42 F.3d 633 (11th Cir.), \textit{cert. denied}, 115 S. Ct. 2600 (1995).} addressed issues of religious discrimination and reasonable accommodation. This case involved the same plaintiff appearing in a similar case decided by the Eleventh Circuit during last year's survey period, \textit{Beadle v. Hillsborough County Sheriff's Department}.\footnote{29 F.3d 589 (11th Cir. 1994), \textit{cert. denied}, 115 S. Ct. 2001 (1995).} Plaintiff was a practicing member of the Seventh Day Adventist Church and was prohibited by his religion from performing secular labor from sundown Friday until sundown Saturday.\footnote{Id.} He was accepted for employment by the Tampa Police Department, but the department, although aware of his religious tenets and his pending religious discrimination claim against the Hillsborough County Sheriff's Office, made no promises to him that he would not be required to work on his Sabbath.\footnote{42 F.3d at 634.} Subsequently, as a result of a neutral shift rotation system, plaintiff was required to work on his Sabbath during his training period.\footnote{Id.} Rather than violating his religious tenets, he tendered his resignation to the department, and then brought suit against the department and the City of Tampa, claiming that the Department failed to reasonably accommodate his religious beliefs.\footnote{Id. at 634-35.} After a bench trial the magistrate judge entered a final judgment in favor of the department and the city. The court found that the department met its obligations under Title VII on the grounds that granting plaintiff an exception to the shift rotation system would have resulted in a greater than de minimis cost to the department.\footnote{Id. at 635.}

On appeal, the Eleventh Circuit affirmed the magistrate judge's final judgment in favor of the City of Tampa and the Tampa Police Department.\footnote{Id. at 638.} In their respective supporting arguments, plaintiff maintained that he was constructively discharged because the defendants failed to reasonably accommodate his religious practices, while the city and the
department argued that accommodating Beadle would have created an undue hardship. Relying on the United States Supreme Court case, *Trans World Airlines, Inc. v. Hardison*, the court of appeals stated that requiring the department to grant shift exceptions to its neutral shift rotation system would result in a greater than de minimis cost. In light of Beadle's own admission that certain training and educational experiences would have been lost by his receiving shift exceptions, along with the important public services performed by the department affecting life and property, the court refused to interfere with the department's scheduling and training programs.

A case involving discrimination based on national origin was also addressed by the Eleventh Circuit during the survey period. In *Coutu v. Martin County Board of County Commissioners*, plaintiff Coutu alleged that she was terminated from her position as personnel assistant for Martin County and was not rehired for a vacant executive assistant position on the basis of her national origin, Mexican-American. The county's position was that Coutu's job was eliminated due to budgetary constraints, and for that reason she was terminated. The county also maintained that plaintiff was not hired for the vacant position because another individual with more seniority, more experience with the job in question, and who had a much better working relationship with the person she would be reporting to, was obviously better qualified for the position. The county also noted Coutu's poor work record, such as her inability to complete assigned tasks on schedule. At the end of the jury trial, after presentation of all the evidence, the district court granted a directed verdict in favor of the county.

On appeal, the Eleventh Circuit affirmed the district court's ruling. The court, although it assumed, without finding, that Coutu established

83. Id. at 635-36.
84. 432 U.S. 63 (1977). *Hardison* is the seminal case regarding reasonable accommodation of an employee's religious practices.
85. 42 F.3d at 638.
86. Id. at 637.
87. 47 F.3d 1068 (11th Cir. 1995).
88. Id. at 1069-71.
89. Id. at 1072.
90. Id. at 1072-73.
91. Id. at 1071.
92. Id. at 1070. The district court also granted a directed verdict earlier in the case in favor of another defendant involved with the employment action against Coutu because Coutu failed to file an EEOC charge against him. Coutu did not challenge this ruling on appeal. Id. at 1069.
93. Id. at 1075.
a prima facie case of national origin discrimination, held that she failed to produce any evidence to indicate that the county's legitimate, nondiscriminatory reasons for termination and failing to rehire her were pretextual. Rather, the court held that Coutu's case against the county consisted of nothing more than unsubstantiated allegations of discrimination. In this regard, the court found that Coutu's case against the county was premised on the grounds that she felt overworked and under-appreciated and that her position should not have been eliminated. The court of appeals concluded that if proven such treatment certainly would be unfair, but it did not give rise to a Title VII violation absent additional unlawful, discriminatory conduct, which Coutu failed to prove.

B. Procedural and Evidentiary Matters

1. Jury Instructions. In Cross v. Alabama, the Eleventh Circuit was asked to determine whether or not the district court erred in failing to give two jury instructions requested by defendants. Defendants' requested jury instruction No. 22 provided:

In considering whether Stricklin's superiors knew or should have known of the alleged sexual harassment, you may take into account the fact that the Department had a well defined and publicized policy against sexual harassment as well as a grievance procedure in place for reporting incidents of sexual harassment directly to the office of the associate commissioner or the commissioner. You may also take into account the fact that none of the plaintiffs made a formal grievance complaint under the department's regulations.

Requested jury instruction No. 23 provided:

If you find that the Alabama State Department of Mental Health and Mental Retardation had a clear and express policy against sexual

94. Id. at 1073. However, the court in dicta expressed doubt that Coutu had indeed established a prima facie case of national origin discrimination. Id. For example, in regard to her termination claim, the court felt that Coutu failed to prove that she was replaced by someone outside the protected class, since she was not replaced at all, but rather her position had been eliminated. Id. Moreover, the court thought there was some question as to whether Coutu was even qualified for the vacant Executive Assistant position, which was a critical element of her prima facie case involving her failure to hire allegations. Id.
95. Id.
96. Id. at 1073-74.
97. Id. at 1075.
98. Id.
99. 49 F.3d 1490 (11th Cir. 1995).
100. Id. at 1505 n.2.
harassment, which policy was conveyed to each of the plaintiffs, and
that the Department had an established grievance procedure which
none of the plaintiffs chose to pursue, then you must find for defen-
dants on plaintiffs' claim of sexual harassment under Title VII.101

Obviously, defendants were interested in these instructions because of
defense testimony that plaintiffs had at no time utilized Taylor Hardin's
grievance procedure for reporting sexual harassment.102

The Eleventh Circuit began its analysis by indicating that its review
of jury instructions is limited in scope.103 For example, a lower court's
refusal to give a requested instruction is not error when the substance
of the instruction is covered by a given instruction.104 If a refused
instruction is not covered by another instruction, the appellate court will
first inquire as to whether the requested instruction is a correct
statement of the law, and if so, whether it deals with an issue which is
properly before the jury.105 If both standards are met, the objecting
party must still show prejudicial harm as a result of the instruction not
being given.106

The Eleventh Circuit determined that even though requested jury
instruction No. 22 was a correct statement of the law, defendants failed
to show prejudicial harm resulting from the district court's refusal to
give it.107 According to the panel, it was unnecessary for the district
court to give instruction No. 22 because: (1) the jury had heard
testimony from several plaintiffs admitting that they did not utilize the
grievance procedure for reporting sexual harassment and (2) defendants
argued to the jury that plaintiff's failure to use the policy was important
for determining whether defendants knew or should have known of the
hostile work environment.108 For those who try employment-related
cases, this ruling is problematic because jury instructions given by the
court certainly carry greater weight than argument of counsel.
Moreover, an instruction stating that the jury may take into account
that a complaint was not lodged under a policy certainly has a greater
impact on the jury than testimony heard by the jury that the policy had
not been utilized.
With respect to requested jury instruction No. 23, the Eleventh Circuit ruled that the district court properly denied the instruction because the instruction contained a misstatement of law. The requested instruction posited that the jury must find for the defendants if they concluded that the plaintiffs did not pursue the grievance procedure to complain of sexual harassment. However, this would not be the case if the plaintiffs proved that the employer had actual knowledge of the harassment.

2. Administrative Prerequisites to Suit. Cross v. Alabama also addressed the administrative prerequisites a plaintiff must meet prior to bringing an action under Title VII. Plaintiffs filed their lawsuit on July 8, 1991, but did not file their charges of discrimination with the Equal Employment Opportunity Commission ("EEOC") until July 24, 1991. Plaintiffs subsequently filed an amended complaint on September 18, 1991, after issuance of the notices of right to sue dated September 11, 1991. One of the individual defendants in the case, the Commissioner of the Alabama Department of Mental Health and Mental Retardation, J. Michael Horsley, appealed the finding that he had violated Title VII and argued that the filing of the charge of discrimination against him with the EEOC after the filing of the lawsuit prejudiced his right to utilize the conciliation procedures set forth in Title VII.

The Eleventh Circuit held that since plaintiffs had filed their amended complaint within ninety days of the date the notices of right to sue had been issued, Horsley's argument was without merit. The court failed to address Horsley's conciliation argument and further failed to distinguish its holding in Cross from that in Thomas v. Kroger Co., where it reaffirmed the long established principle that a plaintiff must file a charge with the EEOC before filing a Title VII action.

3. Releases. An additional issue addressed by both the court of appeals and the magistrate judge in Beadle v. City of Tampa, was whether a release signed by Beadle when he resigned waived his right
to sue under Title VII. During Beadle's orientation, he signed a contract that would require him to reimburse the city $12,000 for his training costs if he left the City of Tampa and secured employment with another law enforcement agency within two years after the completion of his training. However, when Beadle submitted his resignation, he signed a document agreeing not to sue the city for any matters related to his former employment in exchange for the city's promise not to pursue reimbursement for his hiring and training. At both trial and on appeal, the defendants argued that this release waived Beadle's right to sue under Title VII. However, both courts rejected the argument that plaintiff knowingly and voluntarily signed the release waiving his Title VII rights, noting that his tenuous financial situation may have affected his ability to consult with an attorney and the short amount of time he spent reviewing the document. Nonetheless, although plaintiff's claims were not barred by the release, this fact had no effect on the final decision in favor of the employer.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. Procedural and Evidentiary Matters

1. Admissibility of EEOC Determination Letter. One of the issues which confronted the Eleventh Circuit in Walker v. NationsBank, was the question of whether an administrative determination letter issued by the Washington, D.C. Office of the EEOC was properly excluded from evidence at trial by the district court. Initially, the Miami District Office of the EEOC issued an administrative determination that it found no evidence of a violation of federal law. However,
Walker appealed this determination to the Washington D.C. Office, which subsequently rendered a determination concluding that reasonable cause existed to believe that a violation of both Title VII and the ADEA had occurred.\textsuperscript{127} Prior to trial, NationsBank filed a motion in limine to exclude the determination letter, contending that the letter was untrustworthy, and that, pursuant to Federal Rule of Evidence 403, any possible probative value the letter may have was outweighed by the prejudice it would cause.\textsuperscript{128} The district court, concluding that the jury might place inappropriate weight upon the findings of the administrative agency and that the jury might be confused by the existence of two contrary determination letters, granted NationsBank's motion.\textsuperscript{129}

Subsequent to a trial wherein NationsBank received a directed verdict, Walker brought an appeal, alleging among other things, that the exclusion of the determination letter was erroneous.\textsuperscript{130} First, the Eleventh Circuit noted that the admissibility of evidence, absent a showing of an abuse of discretion, is committed to the broad discretion of the trial court.\textsuperscript{131} Second, the court of appeals reasoned that while administrative determination letters are routinely admissible in bench trials within this circuit, it has not seen fit to apply the same liberal admissibility standards in jury trials, as juries may accord improper weight to the content of such letters.\textsuperscript{132} Consequently, it affirmed the district court's exclusion of the letter.\textsuperscript{133}

\textbf{2. Timeliness of EEOC Charge.} The most procedurally difficult ADEA case the Eleventh Circuit grappled with during the survey period was \textit{Hargett v. Valley Federal Savings Bank}.\textsuperscript{134} Valley Savings Bank ("Valley Savings") hired Alpha Hargett on June 13, 1990.\textsuperscript{135} Valley Savings hired Hargett because of his experience in the conventional home mortgage market even though that mortgage market had been in

\begin{itemize}
\item \textsuperscript{127} \textit{Id.} at 1552.
\item \textsuperscript{128} \textit{Id.}
\item \textsuperscript{129} \textit{Id.} at 1553.
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.} at 1554.
\item \textsuperscript{132} \textit{Id.} The court, citing \textit{Barfield v. Orange County}, 911 F.2d 644 (11th Cir. 1990), \textit{cert. denied}, 500 U.S. 954 (1991) and \textit{Johnson v. Yellow Freight Sys.}, 734 F.2d 1304 (8th Cir.), \textit{cert. denied}, 469 U.S. 1041 (1984), noted that EEOC determinations are not homogenous products but may vary greatly in factual detail and quality. 53 F.3d at 1554. As such, the court concluded that the potential for unfair prejudice in the minds of the jury was a valid concern for the district court. \textit{Id.}
\item \textsuperscript{133} 53 F.3d at 1554-55.
\item \textsuperscript{134} 60 F.3d 754 (11th Cir. 1995).
\item \textsuperscript{135} \textit{Id.} at 757.
\end{itemize}
a state of depression since 1989. On November 15, 1990, just a few days after his forty-first birthday, and while he was still a probationary employee, Hargett was laid off by Valley Savings. The reason Valley Savings gave Hargett for his layoff was the depressed state of the market. A few months later, in early 1991, Hargett returned to Valley Savings on personal business and discovered that his former job was being performed by a female employee who was thirty-one years of age. On November 15, 1991, one year after his layoff, Hargett filed an EEOC questionnaire representing that Valley Savings had discriminated against him upon the basis of his age. In his charge, Hargett alleged that the last act of discrimination occurred on November 15, 1990, the date of his layoff. On April 15, 1992, Hargett corresponded with Valley Saving's senior vice-president, Frank Donesbach, requesting reinstatement. However, Donesbach notified him, on April 21, 1992, that although Valley Savings was interested in hiring persons with outside loan experience, he was not a candidate for employment. Thereafter, on September 25, 1992, Hargett filed an age discrimination claim pro se in federal district court.

On December 31, 1992, Hargett obtained legal counsel and filed an amended complaint to additionally allege that Valley Savings had discriminated against him by refusing to reinstate him. In this amended complaint Hargett asserted that he had discharged all conditions precedent to the institution of his ADEA action. Valley Savings initially answered Hargett's amended complaint and admitted that Hargett had satisfied all conditions precedent to bringing an ADEA action; however, when Valley Savings discovered that Hargett's EEOC charge was not filed within 180 days of his layoff, Valley Savings filed

136. Id. at 757-58.
137. Id. at 758.
138. Id.
139. Id.
140. Id.
141. Id.
142. Id.
143. Id. At some point prior to filing his civil action, Hargett evidently decided not to pursue the claim for gender discrimination raised in his EEOC charge.
144. Id.
145. Id. Under the ADEA, a claimant must file a charge of discrimination with the EEOC within 180 days of the occurrence of the last discriminatory act, and he must file a civil action within 90 days of receipt of a notice of right to sue. See 29 U.S.C. §§ 626(d)(1) and (e).
a motion for summary judgment and followed with a motion to amend its answer to assert a statute of limitations defense. On July 6, 1993, a pretrial conference was conducted before Judge Blackburn, who entered a pretrial order allowing Valley Savings to assert the defense that Hargett's EEOC charge was untimely. Just one day earlier on July 5, 1993, Hargett filed a second EEOC charge alleging retaliation by Valley Savings. This claim was based upon the May 19, 1993, deposition testimony of Donesbach, who indicated that Hargett was not being considered for reemployment due to his filing of the initial EEOC charge. Curiously, Hargett's counsel did not apprise Judge Blackburn of this newly filed charge, nor did he inform the court that Hargett intended to pursue a claim of retaliation under the ADEA against Valley Savings. Consequently, plaintiff's retaliation claim was not addressed in the judge's pretrial order.

On September 17, 1993, Hargett commenced a separate retaliation suit in district court before Judge Hancock. Thereafter, Hargett moved to consolidate the two ADEA actions. Valley Savings entered its first appearance in the retaliation suit on January 4, 1993, and moved for summary judgment, asserting that both the charge and the law suit were untimely. Judge Blackburn stayed consideration of Hargett's motion for consolidation, which was ultimately treated as moot when Judge Hancock granted Valley Savings's motion for summary judgment on the retaliation claim on February 25, 1994. In his order, Judge Hancock determined that Hargett, as of April 21, 1992 (the date he received the letter from Donesbach declining to reinstate him), was aware of facts sufficient to place him on notice of retaliation, and thus his retaliation charge (filed more than one year later) was untimely. Furthermore, Judge Hancock concluded that Hargett's

146. 60 F.3d at 758. Valley Savings filed its motion for summary judgment on May 17, 1993 and later moved to amend its answer on July 2, 1993. Id.
147. Id. at 758-59.
148. Id. at 759.
149. Id. at 758.
150. Id. at 759.
151. Id.
152. Id. Hargett initially filed a motion for consolidation with Judge Hancock on December 6, 1993; however, on December 7, 1993, the judge denied the motion, ruling that it should have been filed with Judge Blackburn. Id. Consequently, Hargett refiled his motion for consolidation with Judge Blackburn on December 13, 1993. Id.
153. Id.
154. Id.
155. Id. Because the court concluded that Hargett had been apprised of the possibility of retaliation as early as April 21, 1992, it concluded that his filing of an EEOC charge on July 5, 1993, was untimely. Id.
retaliation charge could not draw ancillary jurisdiction from his pending age discrimination case to support a suit for retaliation, as that claim was before Judge Blackburn.\textsuperscript{156}

On March 9, 1994, Hargett attempted to amend his initial ADEA complaint pending before Judge Blackburn to allege a retaliation claim; however, his effort was rejected by the court on March 30, 1994.\textsuperscript{157} In denying Hargett's motion to amend his initial complaint, Judge Blackburn noted that he had failed to raise the issue of retaliation for inclusion in her pretrial order, and furthermore, Hargett's initial age discrimination charge was untimely and therefore could not support his subsequent retaliation charge.\textsuperscript{158} In her March 30, 1994 order, Judge Blackburn granted Valley Saving's pending motion to amend its answer.\textsuperscript{159} Valley Savings thereafter filed its amended answer and Judge Blackburn granted Valley Savings's motion for summary judgment on the grounds: (1) that Hargett had not established a prima facie case of age discrimination and (2) that, in any event, plaintiff's initial charge was untimely, as it had not been filed within 180 days of his layoff on November 15, 1990.\textsuperscript{160}

On appeal, Hargett challenged Judge Blackburn's dismissal of his ADEA layoff and rehire claims as well as Judge Hancock's dismissal of his retaliation claim.\textsuperscript{161} Hargett challenged Judge Blackburn's dismissal of his layoff claim, arguing that the underlying charge had been timely filed.\textsuperscript{162} However, the Eleventh Circuit affirmed the district court's decision as it found that Hargett's initial charge, dated February 11, 1992, was not filed within 180 days of his layoff on November 15, 1990.\textsuperscript{163}

Hargett also challenged Judge Blackburn's dismissal of his rehire claim, arguing that the 180-day period for bringing suit on this claim did not begin to run until he received the April 21, 1992 letter from

\textsuperscript{156} Id.
\textsuperscript{157} Id.
\textsuperscript{158} Id.
\textsuperscript{159} Id. Judge Blackburn apparently granted Valley Savings's motion because it had raised the issue of the timeliness of Hargett's initial ADEA charge prior to the issuance of the pretrial order.
\textsuperscript{160} Id.
\textsuperscript{161} Id. at 759-60.
\textsuperscript{162} Id. at 760.
\textsuperscript{163} Id. The court of appeals noted that at the very latest, Hargett should have been placed upon notice that the layoff was dubious when he discovered, in early 1991, that his position had been filled with a younger person. Id. at 760-61. However, Hargett did not file a charge within 180 days of that discovery, thus his ADEA layoff claim was time-barred. Id.
Hargett asserted that because he first learned that Valley Savings was unlawfully refusing to rehire him two months after the filing of his initial ADEA charge, this claim was clearly not time-barred. On appeal, Valley Savings countered that because Hargett never raised or argued a refusal to rehire claim before the district court, he was barred from doing so on appeal. The Eleventh Circuit concluded that Hargett had sufficiently raised the rehire claim for consideration on appeal, as the claim was contained in his amended complaint. Nevertheless, finding that a claim for discrimination in rehiring must be supported by new and discrete reasons, the court noted that Hargett was relying upon the same reasons used in support of his layoff claim and therefore upheld the dismissal. Moreover, the court noted that Hargett could not predicate a rehire claim upon his previously filed ADEA charge because that charge, as discussed above, was untimely.

On appeal, Hargett also challenged the propriety of Judge Hancock’s dismissal of his ADEA retaliation claim, asserting that the judge had erred in finding that the doctrine of ancillary jurisdiction was inapplicable. The court of appeals agreed with Hancock’s analysis that the district court could not, through exercising the doctrine of ancillary jurisdiction, predicate a civil action for retaliation upon an age discrimination action pending before a different district court judge. However, it concluded that the lower court had erred in ruling that Hargett’s retaliation charge was untimely. According to the court of appeals, Hancock’s determination that Hargett was notified of Valley Savings’s retaliatory intent via Donesbach’s letter dated April 21, 1992, was invalid. According to the court, Hargett’s July 5, 1993 retaliation charge was timely filed, as Hargett was first placed on notice of Valley Savings’s retaliatory intent during Donesbach’s deposition on May

164. Id. at 763.
165. Id.
166. Id.
167. Id. at 764.
169. Id.
170. Id. at 762-63.
171. Id. at 764.
172. Id.
173. Id. at 764-65.
Accordingly, the court of appeals reversed and remanded this issue for further consideration by the district court.

3. **Statute of Limitations.** In *Edwards v. Shalala*, the Eleventh Circuit was confronted with the thorny problem of determining which particular statute of limitations should apply to a claimant's ADEA action against the federal government. In 1985, Edwards, a fifty-year-old accountant in the Health Care Financing Administration ("HCFA") of the federal Department of Health and Human Services ("HHS"), applied for two open HCFA accounting positions. HHS did not choose Edwards to fill either of these positions, but instead selected persons who were both at least ten years younger than Edwards. In July of 1986, Edwards filed a notice of his intent to sue HHS with the EEOC; however, no further legal action was taken. In 1990, Edwards similarly applied for an accounting position which HHS again filled with a younger employee. Edwards directly filed suit in federal district court alleging that HHS discriminated against him based upon his age concerning both the 1986 and 1990 incidents where he applied for, but did not receive, open accounting positions. HHS moved for partial summary judgment, arguing that the 1986 events were time-barred. The district court granted HHS's motion, noting that while the ADEA did not prescribe a statute of limitations for claims brought by federal employees against the federal government, it could apply the statute of limitations contained in section 626(e) of the

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174. *Id.* at 765.
175. *Id.*
176. 64 F.3d 601 (11th Cir. 1995).
177. *Id.* at 602.
178. *Id.* at 603. Edwards had been employed as an accountant with HCFA since 1979. The two accounting positions which he applied for in 1985 were one grade level higher than his grade level. *Id.*
179. *Id.*
180. *Id.* Unlike suits brought against private sector employers or state or local governments, employees bringing suit under the ADEA against the federal government can choose to seek administrative resolution through the EEOC prior to initiating civil litigation, or they can bypass the EEOC and directly file suit in federal court. See 29 U.S.C. §§ 633a(b) and (c) (1988).
181. 64 F.3d at 603.
182. *Id.* Edwards filed suit directly with the district court, pursuant to 29 U.S.C. § 633a(c). See *supra* note 180.
183. *Id.* The litigants settled the dispute over the 1990 incident prior to the Eleventh Circuit's review of this case. *Id.* at 603 n.4.
ADEA. As a result, Edwards's claims, based upon events occurring in 1986, were determined to be time-barred.

Edwards appealed upon the ground that section 626(e) could not provide the applicable limitation period for bringing suit directly against the federal government because section 633a(f) of the ADEA explicitly stated that claims brought against the federal government are independent and unaffected by all other provisions of the ADEA. According to Edwards, the district court should have applied the six-year statute of limitations period for bringing nontort civil actions against the federal government found in 28 U.S.C. § 2401. On appeal, HHS agreed with the district court's analysis that Edwards's claims from 1986 were time-barred. However, HHS argued that the district court should have employed Title VII's thirty day statute of limitations for bringing suit against the federal government instead of section 626(e).

Noting that this was a question of first impression within the circuit, the court of appeals concluded that the district court was correct in finding that Edwards's age discrimination claims based upon events occurring in 1986 were time-barred; however, it agreed with HHS that the applicable statute of limitations to be applied in this context was found in section 2000e-16(c) of Title VII. In reaching this conclusion, the Eleventh Circuit noted that the majority of circuits which have considered this issue have applied the limitations period in Title VII, that the EEOC's current administrative regulation enforcing the ADEA applies this limitations period, and that the first two subsections of section 633a of the ADEA were patterned after similar sections contained in Title VII.

184. 29 U.S.C. § 626(e) (1991). Prior to its amendment in 1991, section 626(e) incorporated by reference the statute of limitations contained in 29 U.S.C. § 255, which provided a two year limitations period for general violations of the ADEA and a three year limitations period for willful violations. Id. The Civil Rights Act of 1991 amended section 626(e) to require a litigant suing a private employer to bring suit within ninety days of receipt of a notice of right to sue from the EEOC. Id.

185. 64 F.3d at 603.

186. Section 633a(f) provides in pertinent part: "Any personnel action of any department, agency, or other entity . . . shall not be subject to, or affected by, any provision of this chapter, other than the provisions of section 631(b) of this title and the provisions of this section." 29 U.S.C. § 633a(f) (1988).

187. 64 F.3d at 603.

188. Id. at 604.

189. Id. (citing 42 U.S.C. § 2000e-16(c)).

190. Id. at 606.

191. Id. (citing Jones v. Runyon, 32 F.3d 1454, 1455 (10th Cir. 1994); Long v. Frank, 22 F.3d 54, 57 (2d Cir. 1994); Lavery v. Marsh, 918 F.2d 1022, 1025 (1st Cir. 1990)).

192. Id. (citing 29 C.F.R. § 1614.408).

193. Id.
The Eleventh Circuit discounted Edwards's claim that 28 U.S.C. § 2401 was the proper limitations period after concluding that applying a statute of general applicability to the ADEA would be contrary to the Supreme Court's holding in *Stevens v. Department of the Treasury*, as other more analogous statutes of limitations existed. Moreover, the Eleventh Circuit noted that it would be inconsistent to suggest that Congress intended to allow a litigant up to six years in which to sue a federal agency when suit against a private employer must be brought within two to three years. Similarly, it rejected the district court's application of section 626(e) due to the express statement contained in section 633a(f) that all ADEA claims brought against the federal government are unaffected by other portions of the ADEA.

4. Amendment of Pleadings. In *Hargett v. Valley Federal Savings Bank*, the Eleventh Circuit also considered the propriety of the district court's denial of Hargett's efforts to amend his answer to assert a claim for retaliation, as well as its grant of authority allowing Valley Savings to amend its answer to assert an affirmative defense regarding the timeliness of Hargett's filing of his initial ADEA charge. Hargett accused Judge Blackburn of abusing her discretion in denying his effort to amend his complaint to add a claim of retaliation after the issuance of her pretrial order.

On appeal, the Eleventh Circuit affirmed the district court's ruling. First, the court noted that Judge Blackburn did not abuse her discretion in refusing to allow an amendment which Hargett failed to make prior to the entry of her pretrial order. Second, the court recognized that under the rationale of *Gupta v. East Texas State University*, a retaliation claim can grow out of an earlier administrative charge properly before a court through the exercise of ancillary jurisdiction. However, no ancillary jurisdiction existed to support

195. 64 F.3d at 605.
196. *Id.*
197. *Id.* at 606.
198. 60 F.3d 754 (11th Cir. 1995).
199. *Id.* at 761.
200. *Id.*
201. *Id.* at 761, 766.
202. *Id.* at 761. The court noted that Hargett was apprised of Valley Savings's retaliatory intent as early as May 19, 1993, yet failed to add this claim to the court's pretrial order of July 7, 1993. *Id.*
203. 654 F.2d 411, 414 (5th Cir. 1981).
204. 60 F.3d at 762 (citing Barrow v. New Orleans Steamship Ass'n, 932 F.2d 473 (5th Cir. 1973); Wentz v. Maryland Casualty Co., 869 F.2d 1153 (8th Cir. 1989)).
such a claim in this case as Hargett's initial ADEA charge had not been timely filed. By contrast, the court of appeals upheld Judge Blackburn's order granting Valley Savings's motion to amend its answer to assert the statute of limitations defense despite Hargett's vehement protestations, as the court found that this defense had been properly raised prior to the entry of her pretrial order.

B. Availability of Jury Trial

In Haynes v. W.C. Caye & Co., the Eleventh Circuit was faced with the question of whether an ADEA claimant had lost her right to a jury trial by allowing her case to be tried before a magistrate judge sitting as the finder of fact. At the time Haynes had filed her civil action, she had requested a trial before a jury in accordance with Federal Rule of Civil Procedure 38. However, due to the fact that plaintiff also brought suit under Title VII, her action was referred to a magistrate judge, pursuant to local rule. Approximately one year after Haynes's civil action had been filed, the parties entered into a joint preliminary statement and scheduling order. Shortly thereafter, the action was tried before a magistrate without a jury present. Haynes interposed no objection concerning the nonjury trial of her age claim until the magistrate issued his report and recommendation. At that juncture, she alleged that she was entitled to a jury trial; however, the district court denied her request.

On appeal, Haynes argued that the local rule was unconstitutional as it improperly delegated her ADEA action to a magistrate judge. The court of appeals refused to address the constitutionality of the local rule.
because Haynes had failed to raise that issue before the district court. The court, with little difficulty, found that although waivers of valid jury demands should not be lightly inferred, there was good reason to conclude that Haynes had waived her right to a jury in this instance. First, she had entered into a scheduling order which contemplated a trial before a magistrate, as opposed to a district court judge. Second, she had participated in a bench trial before a magistrate without objection. According to Federal Rule of Civil Procedure 39, either one of these acts was sufficient to waive an otherwise valid jury trial demand.

III. Remedies Under Title VII and the ADEA

A. Taxability of Awards

In Commissioner v. Schleier, the United States Supreme Court confronted the issue of whether monetary awards recoverable under the ADEA are to be included as gross income for federal income tax purposes. Schleier had been a plaintiff in a class action suit alleging age discrimination against United Airlines ("United"). United and Schleier ultimately entered into a settlement agreement through which Schleier received $445,629 in settlement of his claims. According to

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216. Id. at 929 n.1.
217. Id. at 929-30.
218. Id. at 929.
219. Id.
220. Id. Fed. R. Civ. P. 39 states in pertinent part:
   When trial by jury has been demanded as provided in Rule 38, the action shall be
designated on the docket as a jury action. The trial of all issues so demanded
shall be by jury, unless (1) the parties or their attorneys of record, by written
stipulation filed with the court or by an oral stipulation made in open court and
entered in the record, consent to trial by the court sitting without a jury ....
222. Id. at 2161-62.
223. Id. Plaintiff was terminated when he reached the age of sixty, pursuant to a
United policy. Schleier brought suit in federal district court, where his civil action was
consolidated with other similar suits alleging that United's policy was violative of the
ADEA. Id.
224. Id. at 2162. The consolidated action was tried before a jury which rendered a
determination that United had willfully violated the ADEA. Pursuant to the jury's verdict,
the district court entered a judgment in favor of Schleier and the other plaintiffs. Id.
However, on appeal, the court of appeals reversed the judgment and remanded the
consolidated cases for new trials after it determined that the district court had erroneously
instructed the jury regarding United's bona fide occupational qualification defense, as well
as the role of pretext in evaluating United's claims. Id. See Monroe v. United Air Lines,
736 F.2d 394 (7th Cir. 1983). Evidently determining that discretion is the better part of
the terms of the agreement, half of the settlement amount was attributed to back pay owed to Schleier, while the other half was determined to be a liquidated damage award.\textsuperscript{225} When Schleier filed his federal income tax return, he reported the back pay portion of the settlement award as gross income, but omitted to report the portion designated as liquidated damages.\textsuperscript{226} The Commissioner of Internal Revenue concluded that the liquidated damages were includable as gross income and issued Schleier a deficiency notice.\textsuperscript{227} Schleier instituted proceedings in the tax court claiming not only that his exclusion of the liquidated damages award from gross income was proper, but also that he was entitled to a refund regarding the portion of the settlement he had reported as back pay, as it was also excludable from the definition of gross income.\textsuperscript{228} According to Schleier, the entire settlement amount constituted damages received on account of personal injury or sickness, within the meaning of section 104(a)(2) of the Internal Revenue Code and was therefore excludable from gross income.\textsuperscript{229} The tax court agreed with Schleier's analysis, and ruled that the entire award was not subject to income taxation.\textsuperscript{230} On appeal, the United States Court of Appeals for the Fifth Circuit affirmed the ruling of the tax court.\textsuperscript{231}

Noting that the various courts of appeal had reached inconsistent conclusions with regard to the issue of whether ADEA recoveries are to be included or excluded from gross income, the United States Supreme Court granted \textit{certiorari}.\textsuperscript{232} Justice Stevens, writing for the majority, concluded that ADEA recoveries, whether backpay awards or liquidated damages, were includable as gross income and consequently reversed the decision of the court of appeals.\textsuperscript{233}

In defense of his tax-free awards, Schleier mounted a total of four separate arguments in support of his contention that his settlement valor, Schleier decided to settle his claim with United instead of retrying it. 115 S. Ct. at 2162.

\textsuperscript{225} \textit{Id.} United did not withhold any payroll or income taxes from the portion of this settlement which it attributed to an award of liquidated damages. \textit{Id.} The fact that it did not withhold such amounts is indicative of the parties' apparent belief that such awards were excludable from gross income.

\textsuperscript{226} \textit{Id.}
\textsuperscript{227} \textit{Id.}
\textsuperscript{228} \textit{Id.}
\textsuperscript{229} \textit{Id.}
\textsuperscript{230} \textit{Id.}

\textsuperscript{231} \textit{Id.} The court of appeals relied heavily on United States v. Burke, 504 U.S. 229 (1992) and its progeny in reaching its conclusion that Schleier's settlement award was nontaxable. 115 S. Ct. at 2162.

\textsuperscript{232} 115 S. Ct. at 2163.
\textsuperscript{233} \textit{Id.}
monies were properly excludable from the definition of gross income. First, Schleier contended that his settlement awards fell within the purview of section 104(a)(2) of the Internal Revenue Code's exclusion from the definition of gross income, as they were compensation for injuries or sickness. However, the Court rejected Schleier's contention, as it determined that the settlement monies he received were not "on account of personal injuries or sickness" as required by section 104(a)(2).

The Court noted that unlike the traditional personal injury litigant, whose lost wages and benefits, emotional distress, and pain and suffering actually arise on account of the personal injury which was the subject of the litigation, no portion of Schleier's back wage and emotional distress awards were attributable to an actual injury or sickness; rather, they were provided to him to redress his being subjected to age discrimination.

Second, Schleier argued that even assuming his backpay award was taxable as gross income, his liquidated damage award was excludable under section 104(a)(2) as it was "compensation", as opposed to a penalty or punishment. In an effort to advance this view, Schleier cited the former Supreme Court decisions in Overnight Transportation Co. v. Misse and Brooklyn Savings Bank v. O'Neil in support of the proposition that liquidated damages under the Fair Labor Standards Act of 1938 ("FLSA") have been deemed to be compensatory in purpose and that Congress, being presumably aware of these decisions when it enacted the ADEA, must have at least partially intended liquidated

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234. 26 U.S.C. § 104(a)(2) provides that for any taxable year, gross income does not include "the amount of any damages received (whether by suit or agreement and whether as lump sums or as periodic payments) on account of personal injuries or sickness." 235. 115 S. Ct. at 2163.

236. Id.

237. Id. at 2164. The Court noted that while an automobile accident victim and an ADEA claimant may both suffer lost wages and benefits, there is a direct link between the automobile accident victim and the personal injury he sustained which results in the loss of wages and benefits, whereas no similar connection exists between an ADEA claimant. Id. Although the discrimination may cause a personal injury and a loss of wages, the personal injury is not linked to the loss of wages; hence, any back pay award is not on account of personal injury or sickness within the meaning of section 104(a)(2). Id. In a scathing dissent, however, Justice O'Connor argued that such a comparison regarding the nexus between the personal injuries of an automobile accident victim and an ADEA claimant may both suffer lost wages and benefits, there is a direct link between the automobile accident victim and the personal injury he sustained which results in the loss of wages and benefits, whereas no similar connection exists between an ADEA claimant. Id. Although the discrimination may cause a personal injury and a loss of wages, the personal injury is not linked to the loss of wages; hence, any back pay award is not on account of personal injury or sickness within the meaning of section 104(a)(2). Id. In a scathing dissent, however, Justice O'Connor argued that such a comparison regarding the nexus between the personal injuries of an automobile accident victim and an ADEA claimant and any concomitant loss of wages or benefits each claimant may incur is only relevant if one assumes that there is a difference between the personal injuries suffered for the purpose of applying section 104(a)(2). Id. at 2169 (O'Connor, J., dissenting). In her view, any such distinction is not relevant. Id.

238. 115 S. Ct. at 2164.

239. 316 U.S. 572 (1942).

240. 324 U.S. 697 (1945).
damages under the ADEA to compensate victims of age discrimination. \(^{241}\) However, the Supreme Court noted that in subsequent decisions it had concluded that liquidated damages under the ADEA, unlike similar awards under the FLSA, were deemed to be punitive, as opposed to compensatory, in nature. \(^{242}\)

Third, Schleier contended an action to recover damages under the ADEA was, in essence, an assertion of a tort-type claim, and to the extent that the term "damages" as contained in section 104(a)(2) of the Internal Revenue Code was capable of more than one interpretation, the commission's own treasury regulation removed any doubt that damages based upon tort or tort-type rights were excludable from gross income. \(^{243}\) The Court rejected the notion that an ADEA action was an action which was based upon common law tort theory, but further stated that even if that were the case, Schleier had still proffered no reason for why excluding his proceeds from the settlement from his gross income was proper. \(^{244}\) According to the Court, the regulatory requirement that the award must be received in a tort-type action was not a substitute for the statutory requirement that the recovery be received on account of personal injury or sickness; rather, the regulation merely placed an additional requirement on the existing language of section 104(a)(2). \(^{245}\)

Finally, Schleier argued that pursuant to the Court's earlier decision in \textit{United States v. Burke}, \(^{246}\) the Court was compelled to conclude that ADEA actions were based upon tort-type rights because the ADEA, unlike the pre-1991 version of Title VII, provided for jury trials and liquidated damages. \(^{247}\) While the Court acknowledged that its decision in \textit{Burke} did state that pre-1991 Title VII awards were not excludable by virtue of section 104(a)(2) (since they were not compensatory in

\(^{241}\) 115 S. Ct. at 2164.
\(^{244}\) 115 S. Ct. at 2166.
\(^{245}\) \textit{Id.}
\(^{246}\) 504 U.S. 229 (1992). In \textit{Burke}, the Court determined that pre-1991 Title VII back pay awards were not excludable from gross income because they were not based upon tort-type rights. 115 S. Ct. at 2166. In reaching this conclusion, the Court decided that Title VII recoveries were includable as gross income, partly on the basis that compensatory damages and jury trials, which are common remedies available to tort claimants, were not available. \textit{Id.}
\(^{247}\) \textit{Id.} To the extent Schleier was arguing that liquidated damages are akin to compensatory damages available in tort actions, he was rearguing an issue the Court had definitively rejected in Trans World Air Lines, Inc. v. Thurston, 469 U.S. 111, 613 (1985). 115 S. Ct. at 2161, 2165. See \textit{supra} note 242.
EMPLOYMENT DISCRIMINATION

nature), it noted that the same analysis applied equally to awards of liquidated damages under the ADEA.\textsuperscript{248} Moreover, the Supreme Court determined that Schleier's reading of \textit{Burke} was too expansive.\textsuperscript{249} According to the Court, a party cannot expect to be able to exclude ADEA awards from gross income merely because the underlying action was based upon tort-type rights; rather, a claimant still must show that the damages received are on account of personal injury or sickness, in accordance with the language of section 104(a)(2).\textsuperscript{250}

B. Attorney Fees

In \textit{Walker v. NationsBank},\textsuperscript{251} the Eleventh Circuit was asked to determine whether an award of attorney fees for a prevailing defendant in a Title VII sex discrimination case was appropriately entered by the district court.\textsuperscript{252} Relying upon the standards set forth by the Supreme Court in \textit{Christiansburg Garment Co. v. EEOC},\textsuperscript{253} which have been refined by the Eleventh Circuit in \textit{Sullivan v. School Board of Pinellas County},\textsuperscript{254} the court of appeals ruled that the district court erred in awarding attorney fees to defendant.\textsuperscript{255} The court specifically applied the three factors set forth in \textit{Sullivan} and determined that plaintiff established a prima facie case of discrimination, that there were no references in the record to any settlement negotiations between the parties prior to trial, and that two summary judgment motions were denied prior to trial, one of which was denied only twenty-one days prior to trial.\textsuperscript{256} The court of appeals also found that plaintiff had presented sufficient evidence to merit "careful review" of her claims and, as a result, set aside defendant's fee award.\textsuperscript{257}

\textsuperscript{248} 115 S. Ct. at 2166-67.
\textsuperscript{249} Id. at 2167.
\textsuperscript{250} Id.
\textsuperscript{251} 53 F.3d 1548 (11th Cir. 1995).
\textsuperscript{252} Id. at 1558.
\textsuperscript{253} 434 U.S. 442 (1978).
\textsuperscript{254} 773 F.2d 1188 (11th Cir. 1985). The Eleventh Circuit set forth three factors to be considered in determining whether attorney fees should be awarded to a prevailing defendant: (1) whether the plaintiff established a prima facie case; (2) whether the defendant offered to settle; and (3) whether the trial court dismissed the case prior to trial or held a trial on the merits. Id. at 1189.
\textsuperscript{255} 53 F.3d at 1559.
\textsuperscript{256} Id.
\textsuperscript{257} Id. Judge Cox dissented, reasoning that plaintiff had produced no evidence of discrimination. Id. at 1567 (Cox, J., dissenting).
C. After-Acquired Evidence

In last year's article we reported on *McKennon v. Nashville Banner Publishing Co.*, 258 where a unanimous Supreme Court held that a defendant could not use after-acquired evidence to avoid liability altogether. 259 The Court in *McKennon* also held that the proper boundaries of remedial relief are to be addressed by the trial courts on a case-by-case basis, taking into consideration “extraordinary equitable circumstances that affect the legitimate interests of either party.” 260 Generally, however, neither reinstatement nor front pay would be appropriate remedies where after-acquired evidence is established. 261 *McKennon* involved a wrongful termination claim under the ADEA, and the after-acquired evidence consisted of deposition testimony by the plaintiff that she copied and removed Nashville Banner's confidential documents while she was employed. 262

In *Wallace v. Dunn Construction Co.*, 263 the Eleventh Circuit, sitting en banc, determined that the Supreme Court's holding in *McKennon* applies to cases brought under Title VII and the Equal Pay Act and that the reasoning in *McKennon* also applies with equal force when the after-acquired evidence concerns an employee's fraud in the application process. 264 In the discovery stage of her Equal Pay Act, Title VII sexual harassment, and state law tort action, plaintiff disclosed in her deposition that she pleaded guilty to possession of marijuana and cocaine despite the fact that she answered, “no” to the question, “Have you ever been convicted of a crime?” on her employment application with defendant. 265 Following her deposition, defendant moved for partial summary judgment on the Equal Pay Act and Title VII claims contending, *inter alia*, that the after-acquired evidence presented legitimate, nondiscriminatory reasons which could have been the basis for plaintiff's termination. 266 The district court denied defendant's motion for summary judgment on the ground that the Eleventh Circuit had never held that after-acquired evidence barred recovery in a discrimination case. 267

259. Id. at 886.
260. Id.
261. Id.
262. Id. at 883.
263. 62 F.3d 374 (11th Cir. 1995) (en banc).
264. Id. at 378-79.
265. Id. at 377.
266. Id.
267. Id.
In the case’s first trip to the Eleventh Circuit the court considered the after-acquired evidence issue pursuant to 28 U.S.C. § 1292(b). The court indicated that plaintiff would not be entitled to reinstatement, front pay, or an injunction against further unlawful practices, but that declaratory relief, nominal damages, and attorney fees might be awarded. The panel held that after-acquired evidence “may decrease the amount of the award under traditional attorney fee principles,” and that the backpay period would end “prematurely” if the employer showed it would have discovered the misconduct in the absence of its allegedly unlawful acts and the employee’s lawsuit. The decision was later vacated, however, and the court ordered the case reheard en banc.

The en banc panel set forth some general principles to assist the district court in fashioning a remedy on remand of the federal claims. Initially, the Eleventh Circuit ruled that the after-acquired evidence would be irrelevant to plaintiff’s recovery of unpaid wages or liquidated damages inasmuch as the recovery of unpaid wages or liquidated damages does not extend to the period after termination. On the other hand, such evidence will have the effect of barring reinstatement or front pay because defendant sufficiently demonstrated that it would have terminated plaintiff upon learning that she lied about her drug conviction. With respect to backpay under Title VII and lost wages under the Equal Pay Act, the court ruled that if plaintiff prevails on her claims, the beginning point in the district court’s formulation of a remedy should, according to the Supreme Court’s decision in McKennon, “be calculation of backpay from the date of the unlawful discharge to the date the new information was discovered.”


When a district judge, in making in a civil action an order not otherwise appealable . . . , shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order.

The Court of Appeals which would have jurisdiction of an appeal of such action may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of order . . .

269. 968 F.2d at 1181.

270. Id. at 1182 (citing Texas Teachers Ass’n v. Garland Indep. Sch. Dist., 489 U.S. 782 (1989); Hensley v. Eckerhardt, 461 U.S. 424 (1983)).


272. Wallace, 62 F.3d at 380.

273. Id.

274. Id.
IV. THE CIVIL RIGHTS ACT OF 1991

A. Retroactivity

The Civil Rights Act of 1991 created a right to compensatory and punitive damages for certain Title VII violations and the right to jury trial in the event such damages are sought. Following passage of the 1991 Act there was a substantial dispute among the courts concerning whether its terms were to be retroactively applied to pending litigation. In its 1992 opinion in Baynes v. AT&T Technologies, Inc., the Eleventh Circuit held that the 1991 Act did not apply retroactively. That decision aligned the Eleventh Circuit with the Fifth, Sixth, Seventh, Eighth, and D.C. Circuits on this question. Last year, in a trilogy of decisions, the United States Supreme Court settled the various retroactivity questions by concluding that the expanded remedies and scope of actions were not available in cases pending upon the date of enactment of the 1991 Act.

During the survey period the court of appeals once again addressed the retroactivity issue in the hold-over case of Cross v. Alabama. As set forth earlier in this article, Cross involves sexual harassment claims under Title VII and section 1983. Following a jury finding of liability against the State of Alabama and three officials under both Title VII and section 1983, the district court awarded, inter alia, compensatory and punitive damages. The court did not distinguish whether such damages were levied pursuant to Title VII, section 1983, or both.

On appeal, appellants contended that to the extent the district court awarded compensatory and punitive damages pursuant to Title VII, the award was erroneous as it represented a retroactive application of the

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276. Id.
277. 976 F.2d 1370 (11th Cir. 1992).
278. Id. at 1375.
285. 49 F.3d 1490 (11th Cir. 1995).
286. Id. at 1501-02.
Civil Rights Act of 1991. Of course, the Eleventh Circuit agreed and held that to the extent that the award was grounded in the application of the 1991 Act it was reversed. This did not effect the compensatory and punitive damages assessed against the state and the individuals named in their official capacity.

V. EQUAL PAY ACT

A. Coverage of the Act

In Welch v. Laney, the Eleventh Circuit had occasion to visit the issue of who would be deemed an employer for the purpose of determining official capacity liability under the Equal Pay Act of 1963 ("EPA"). Welch, a female dispatcher employed by the Cullman County Sheriff's Office, alleged that she was discriminated against in violation of the EPA when Sheriff Laney hired a male dispatcher at a salary higher than that she was being paid. Additionally, Welch alleged that when she pointed out this disparity in pay to Sheriff Laney, Deputy Sheriff Pruett, and three Cullman County Commissioners, she was subjected to criticism and adverse treatment.

In her initial complaint, Welch filed suit in the District Court for the Northern District of Alabama, alleging violations of the EPA against Sheriff Laney and Deputy Sheriff Pruett in both their individual and official capacities, as well as against the three county commissioners in their official capacities. Defendants thereafter filed a motion to dismiss Welch's EPA claims, which the district court granted, with the exception of the official capacity EPA claim against Laney. Plaintiff then filed an amended complaint that renewed her official capacity claim against the sheriff. On this occasion, however, Welch named Laney "in his individual capacity as an agent for the Cullman County Sheriff's

287. Id. at 1508.
288. Id.
289. Id.
290. 57 F.3d 1004 (11th Cir. 1995).
291. Id. at 1007.
292. Id.
293. Id.
294. Id.
295. Id. Apparently, the district court concluded that Sheriff Laney was the only defendant capable of being Welch's employer under the EPA, and therefore dismissed her official capacity claims against Deputy Sheriff Pruett and the County Commissioners. Id. at 1010.
296. Id.
Department." The district court, relying upon the caption of the pleading, construed Welch's EPA claim against Laney to be a reassertion of the previously dismissed individual capacity EPA claim and dismissed the claim against Laney.

On appeal, the Eleventh Circuit upheld the district court's dismissal of all of Welch's EPA claims except her official capacity claim against the sheriff. In determining that the dismissal of the official capacity claims brought against Deputy Sheriff Pruett and the three commissioners had been properly dismissed, the court of appeals recognized that none of these individuals was her employer as defined by the EPA. Basing its decision with regard to the commissioners on a decision of the former United States Court of Appeals for the Fifth Circuit, the court of appeals concluded that they did not qualify as Welch's employer because she did not perform work on the premises of the county commission. Similarly, the court of appeals concluded that Deputy Sheriff Pruett could not be Welch's employer, even though she worked upon the premises of the sheriff's department, because he did not have the authority to exercise control over Welch or otherwise alter her conditions of employment.

Finally, the Eleventh Circuit noted that the district court did not err in dismissing the individual capacity EPA claims brought against Laney and Pruett, as neither of them had control over Welch's employment in their individual capacities and thus could not be her employers under the EPA.

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297. Id.
298. Id. The Eleventh Circuit found that the district court erred in placing too much credence in the caption of Welch's amended complaint, as it was clear from the body of that pleading that she was attempting to sue Laney in his official capacity. Id. at 1010-11.
299. Id. at 1011.
300. Id. The court noted that the EPA defines employer as "any person acting directly or indirectly in the interest of an employer in relation to an employee and includ[ing] a public agency ...." Id. (citing 29 U.S.C. § 203(d) (1978)).
301. See Wirtz v. Lone Star Steel Co., 405 F.2d 668 (5th Cir. 1968).
302. 57 F.3d at 1011. According to Wirtz, a determination of employer status was based upon the following factors: (1) whether or not the work was performed on the premises of the alleged employer; (2) the degree of control the alleged employer had over the work of the employee; and (3) whether the alleged employer had the power to hire, fire, or otherwise modify the employment condition of the employee. 405 F.2d at 669-70.
303. 57 F.3d at 1011.
304. Id.
B. Theories of Liability and Burdens of Proof

Irby v. Bittick\(^{306}\) similarly involved a female employee of a sheriff's department in Monroe County, Georgia, who brought suit against both the sheriff and the county contending that she was being paid less for performing the same job functions as two male counterparts.\(^{306}\) Defendants did not dispute that Irby was being paid less than the other two male employees; rather, they contended that the discrepancy in pay was the result of the accidental inclusion of the two male employees' accrued overtime within their base salaries.\(^{307}\)

Both parties submitted motions for summary judgment to the district court concerning whether or not the sheriff and the county had violated EPA.\(^{306}\) The district court granted summary judgment in favor of the defendants.\(^{309}\) On appeal, the Eleventh Circuit had occasion to examine the burden of proof the parties are required to establish in EPA cases.\(^{310}\) The court noted that while Irby had the initial burden of

\(^{305}\) 44 F.3d 949 (11th Cir. 1995).

\(^{306}\) Id. at 952.

\(^{307}\) Id. at 953. It is questionable whether the sheriff's claim that the disparity in pay was due to an inadvertent computational error is true. While both Irby and the two male employees were criminal investigators for the sheriff's department, Irby actually had been hired by the county, whereas the two male employees had initially been city employees assigned to the sheriff's criminal investigation unit pursuant to a contract between the city and the county. \textit{Id.} During the pendency of the contract, the male employees were paid by the city. However, after its expiration, the employees were offered, and accepted, positions with the sheriff's department as criminal investigators. \textit{Id.} In his dissenting opinion Judge Carnes noted that the sheriff admitted in his deposition that the reason the two male employees were paid at a higher rate was because the sheriff did not feel it fair for them to take pay cuts when they accepted the positions with the county. \textit{Id.} at 958 (Carnes, J. dissenting).

\(^{308}\) Id. at 953.

\(^{309}\) Id.

\(^{310}\) Id. at 954. The burden of proof in EPA cases consists of a modified \textit{McDonnell Douglas} burden-shifting analysis. The plaintiff has the initial burden of production of establishing a prima facie case, which can be met if she demonstrates that she is paid a different wage than members of the opposite sex who perform equal work in jobs requiring equal skill, effort and responsibility, and which are performed under similar working conditions. \textit{Id.} (citing 29 U.S.C. § 206(d)(1)). Once the employee establishes a prima facie case, the burden of production shifts to the employer to demonstrate, by a preponderance of the evidence, that the difference in pay is due to either an employer's valid seniority system, an employer's valid merit system, a system which measures earnings by the quantity or quality of production, or some other factor unrelated to the gender of the employee. \textit{Id.} Assuming that the employer can meet its burden of production, the plaintiff bears the burden of persuading the fact finder that the employer's proffered legitimate business reason is pretextual. 44 F.3d at 954 (citing Schwartz v. Florida Bd. of Regents, 954 F.2d 620, 623 (11th Cir. 1991) (per curiam)).
establishing a prima facie case, she was clearly capable of doing so as it was undisputed that she was paid less than the two other male investigators who performed the same job duties under similar working conditions.\textsuperscript{311}

Defendants mounted two arguments in support of the position that the discrepancy in pay was lawful. First, they asserted that any differential in pay was due to a valid seniority system, as transfers among divisions do not constitute promotions or demotions, and only the year in which an employee is hired determines the rate of an employee's pay.\textsuperscript{312} According to the defendant's theory, the two male employees had been working for the sheriff pursuant to the contract between the city and county four years prior to Irby's employment.\textsuperscript{313} However, the court of appeals refused to conclude that a seniority system existed at the sheriff's department as it found that the two male employees were earning more than other investigators hired before them.\textsuperscript{314} Second, the defendants argued that any disparity in pay was based upon the prior salaries of the male employees earned as city employees as well as their years of experience as investigators.\textsuperscript{315} The court noted that, while consideration of an employee's prior salary in itself is insufficient justification for an inequality in pay, it could be considered sufficient when coupled with the defendant's claim that the two male employees possessed greater investigative experience.\textsuperscript{316}

Irby argued that the defendants' proffer that the two male employees were properly paid more due to their experience was pretextual, as other investigators hired by the department were paid less than her two male comparators.\textsuperscript{317} However, the court noted that although these two employees had been hired before Irby's comparators, they nonetheless lacked the same levels of experience.\textsuperscript{318} Finding that Irby had failed to rebut the defendants' legitimate business reason for the difference in pay, it affirmed the district court's award of summary judgment.\textsuperscript{319}

\begin{itemize}
  \item 311. 44 F.3d at 955 n.5.
  \item 312. Id. at 954-55.
  \item 313. Id. at 953, 955. The two male employees began work as investigators for the sheriff in 1983, whereas Irby was made an investigator in 1989. Id. at 952-53.
  \item 314. Id. at 955.
  \item 315. Id.
  \item 316. Id. at 955-56.
  \item 317. Id. at 956 n.15.
  \item 318. Id. at 956-57. Irby argued that if the defendants really valued experience, they would be paying two employees hired in 1979 and 1981 more than the two male investigators hired in 1983. Id. However, the court noted that the two employees hired in 1979 and 1981 did not become investigators until 1989. Id. at 956.
  \item 319. Id. at 957.
\end{itemize}
VI. CIVIL RIGHTS ACT OF 1871

A. Qualified Immunity

In a case of first impression, the Eleventh Circuit in Winfrey v. School Board of Dade County, 320 addressed whether an order granting summary judgment to fewer than all defendants based on qualified immunity is reviewable under the collateral order doctrine found in 28 U.S.C. § 1291. 321 In her six-count complaint Winfrey sued her employer, the School Board of Dade County, as well as the acting superintendent and the assistant superintendent of alternative education, alleging that she had been discriminatorily removed from her position as principal and demoted because of her race and gender. 322 The district court granted summary judgment on the basis of qualified immunity in favor of the acting superintendent and assistant superintendent on all claims against them in their individual capacities. 323

On appeal, the Eleventh Circuit held that while district court orders denying summary judgment based on absolute or qualified immunity are immediately appealable under the collateral order doctrine even though other claims remain to be decided in the district court, the collateral order doctrine does not apply to district court orders granting summary judgment to fewer than all the defendants based on qualified immunity. 324 The court of appeals reasoned that the collateral order doctrine applies to the denial of absolute or qualified immunity because these immunities are designed to protect the defendant from going to trial. 325 While the defendant cannot obtain effective review of an order denying such immunity, the plaintiff can obtain effective review of an order granting such immunity by appellate consideration after final judgment. 326 Accordingly, the Eleventh Circuit dismissed Winfrey's appeal.

320. 59 F.3d 155 (11th Cir. 1995).
321. Id. at 158 (citing Commuter Transp. Sys. v. Hillsborough County Aviation Auth., 801 F.2d 1286 (11th Cir. 1986)). 28 U.S.C. § 1291 (1988) provides in pertinent part: "The courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts ... except where a direct review may be had in the Supreme Court ... ." Under the collateral order doctrine, an interlocutory appeal may be taken under § 1291 if (1) the order is "effectively unreasonable" on appeal after trial; (2) the order conclusively determines the dissipated question; and (3) the order resolves an important issue separate from the merits of the action. 801 F.2d at 1289.
322. 59 F.3d at 157.
323. Id.
324. Id. at 158.
325. Id.
326. Id.
for lack of subject matter jurisdiction since the order granting summary judgment to some of the defendants based on qualified immunity was not a final order under section 1291.327

*Edwards v. Wallace Community College,*328 presented several interesting questions concerning liability of co-employees under section 1983 and the qualified immunity defense available to state actors. As part of her multicount complaint, plaintiff sued three of her coworkers and her supervisor, McConnell, alleging that the defendants violated the equal protection clause of the Fourteenth Amendment by influencing her discriminatory discharge and by creating a hostile workplace.329 The district court granted the defendants' motion for summary judgment and plaintiff appealed.330

On appeal, the Eleventh Circuit held that the defendant/co-employees could not be held liable pursuant to section 1983 because they were without any supervisory authority over plaintiff and therefore they were not acting pursuant to any power they possessed by state authority.331 They were only acting as private individuals.332 The court relied upon the United State Court Of Appeals for the Tenth Circuit's decision in *Woodward v. City of Worland.*333 In *Woodward* the court of appeals held that the mere fact that a defendant is a state employee or that the alleged offending conduct occurred during working hours is not enough to base a conclusion that defendant was acting under color of law.334

With respect to plaintiff's claim against McConnell, the court of appeals agreed with the district court's determination that plaintiff had failed to present any evidence of discriminatory intent by McConnell to prove her disparate treatment claim against him, and therefore McConnell was qualifiably immune from suit.335 The court instructed that while "intent is irrelevant for a qualified immunity inquiry per se . . . it is relevant if intent is an element of the underlying alleged constitutional violation."336

Next, the Eleventh Circuit addressed plaintiff's official capacity claim against McConnell. Again, the court agreed with the district court's

327. *Id.*
328. 49 F.3d 1517 (11th Cir. 1995).
329. *Id.* at 1522.
330. *Id.* at 1520.
331. *Id.* at 1522-23.
332. *Id.* at 1523.
333. *Id.* See *Woodward v. City of Worland,* 977 F.2d 1392 (10th Cir. 1992).
334. 977 F.2d at 1401.
335. 49 F.3d at 1524.
336. *Id.* (citing *Harlow v. Fitzgerald,* 457 U.S. 800, 819 (1982); *Fiorenzo v. Nolan,* 965 F.2d 348, 352 (7th Cir. 1992)).
decision to grant summary judgment because plaintiff had failed to substantiate any violation by McConnell of the equal protection clause with factual evidence.\(^{337}\)

\(^{337}\) *Id.* at 1524 n.9.