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Labor and Employment

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I. INTRODUCTION

This Article focuses on case law concerning federal laws pertaining to labor and employment. The following is a discussion of those opinions.[1]

II. SUPREME COURT DECISIONS

The Supreme Court of the United States issued two decisions affecting labor and employment laws in 2019.

In *Fort Bend County, Texas v. Davis*,[2] the Court held that Title VII's[3] charge-filing requirement was not a jurisdictional requirement.[4] When a requirement is jurisdictional, it means that Congress specifically targeted it to take away the courts' subject-matter jurisdiction if that particular requirement is not met.[5] Under Title VII, an employee is required to file a charge with the Equal Employment Opportunity

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1. For analysis of labor and employment law during the prior survey period, *see* W. Jonathan Martin II, et. al., *Labor and Employment Law, Eleventh Circuit Survey Law*, 70 MERCER L. REV. 1093 (2019).

2. 139 S. Ct. 1843 (2019).

3. Civil Rights Act of 1964, H.R. 7152, 88th Cong. § 7 (1964), 42 U.S.C. §§ 2000e–2000e-17 (2019).

4. *Davis*, 139 S. Ct. at 1850.

5. *Id.* at 1849.

Commission (EEOC) within 180 days of the date the alleged unlawful employment practice occurred.[6] Here, the Court held that federal courts do not lose jurisdiction over a Title VII civil suit if the employee fails to meet Title VII's charge-filing requirement.[7]

In *Davis*, a former county employee filed a complaint with the County Human Resources Department, alleging that her director had sexually harassed and assaulted her.[8] Davis filed an EEOC charge in March 2011 claiming the same. Davis's supervisor informed her that she was still expected to report for work while her EEOC charge was pending, but Davis told her supervisor that she planned to attend church on a day she was scheduled to work. Her supervisor cautioned her that if she did not report to work, she would be terminated. Davis went to church instead of reporting to work, as requested by her supervisor, and she was subsequently terminated by the county.[9]

Davis then filed civil suit in the United States District Court for the Southern District of Texas in January 2012, alleging both religious discrimination and retaliation for reporting sexual harassment.[10] The district court granted Fort Bend's motion for summary judgment on all claims. On appeal, the Court of Appeals for the Fifth Circuit affirmed as to Davis's retaliation claim but reversed as to her religion-based discrimination claim.[11]

On remand, Fort Bend claimed, for the first time, that the district court did not have jurisdiction over Davis's religion claim because she had not asserted that claim before the EEOC.[12] The district court found that Davis had not met the charge-filing requirement under Title VII, and that because the requirement was jurisdictional, the district court no longer had adjudicatory authority to hear her civil case. The Fifth Circuit reversed, holding that Title VII's charge-filing requirement was not jurisdictional. Instead, the requirement is a procedural prerequisite to a civil suit, and since Fort Bend did not raise this procedural issue until the case was back on remand, it lost the opportunity to use it as a defense.[13]

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6. *Id.* at 1846 (quoting 42 U.S.C. § 2000e–5(e)(1) (2019)).
7. *Id.* at 1850; *see* 42 U.S.C. § 2000e–5(b) (2019).
8. *Davis*, 139 S. Ct. at 1847.
9. *Id.*
10. *Id.* at 1847–48.
11. *Id.* at 1848.
12. *Id.*
13. *Id.*

On appeal, the Supreme Court affirmed the Fifth Circuit's holding that the charge-filing requirement in Title VII is not jurisdictional.[14] Justice Ginsburg, writing for a unanimous Supreme Court, stated that federal courts are granted "jurisdiction over Title VII actions pursuant to 28 U.S.C. § 1331's[15] grant of general federal-question jurisdiction, and Title VII's own jurisdictional provision, 42 U.S.C. § 2000e–5(f)(3) . . . . Separate provisions of Title VII, § 2000e–5(e)(1) and (f)(1), contain the Act's charge-filing requirement."[16] Instead, the charge-filing requirement requires an employee "to submit information to the EEOC and to wait a specified period before commencing a civil action."[17] In other words, the procedural requirements under Title VII are mandatory but not statutorily tied to the jurisdictional prescription found in Title VII.[18]

On April 24, 2019, the Supreme Court held 5–4, in *Lamps Plus, Inc. v. Varela*,[19] that under the Federal Arbitration Act (FAA),[20] an ambiguous agreement cannot provide the necessary contractual basis for compelling class arbitration.[21]

Here, Varela filed state and federal claims on behalf of a putative class of approximately 1,300 fellow employees of Lamps Plus whose tax information had been compromised as a result of a security breach at Lamps Plus. Lamps Plus then moved to compel arbitration on an individual rather than a class-wide basis, and to dismiss the suit—citing the arbitration agreement its employees signed before beginning work with the Company. While the district court granted the motion to compel arbitration and dismissed Varela's claims, it rejected the request to compel individual arbitration and allowed the arbitration to move forward on a class-wide basis. The United States Court of Appeals for the Ninth Circuit affirmed, holding that the arbitration agreement was ambiguous regarding class arbitration. The Ninth Circuit followed California law in construing the ambiguity against the drafter, Lamps Plus, and adopted Varela's interpretation of the agreement which authorized class arbitration.[22]

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14. *Id.* at 1850.
15. 28 U.S.C. § 1331 (2019).
16. *Davis*, 139 S. Ct. at 1850.
17. *Id.* at 1851.
18. *Id.*
19. 139 S. Ct. 1407 (2019).
20. 9 U.S.C. §§ 1–16 (2019).
21. *Lamps Plus*, 139 S. Ct. at 1415.
22. *Id.* at 1412–13.

The Supreme Court reversed.[23] Writing for the 5–4 majority, Chief Justice Roberts stated that "an ambiguous agreement [cannot] provide the necessary 'contractual basis' for compelling class arbitration [under the FAA]."[24] The Court held that because of the marked distinctions between individual and class arbitration, it is not appropriate for courts to infer consent to participate in individual or class arbitration "absent an affirmative 'contractual basis for concluding that the party *agreed* to do so.'"[25] Because of this, "courts may not rely on state contract principles [of ambiguity] to 'reshape traditional individualized arbitration by mandating classwide arbitration procedures without the parties' consent."[26] In relying on this basic contract principle of consent, the Court has put employers and employees on notice that any arbitration agreements entered into need to explicitly state whether they will be conducted on an individual or class-wide basis.[27]

III. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA)[28] prohibits discrimination by employers against qualified disabled individuals.[29] A "disability" under the ADA includes "a physical or mental impairment that substantially limits one or more major life activities . . . a record of such impairment; or [] being regarded as having such an impairment . . . ."[30] Major life activities include, among others, "caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working."[31]

Cases brought under the ADA are examined under a burden-shifting analysis, where the employee must first establish a prima facie case of discrimination.[32] To establish a prima facie case of ADA discrimination, an employee must show "(1) a disability, (2) that she was otherwise qualified to perform the job, and (3) that she was discriminated against

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23. *Id.* at 1419.

24. *Id.* at 1415 (quoting Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp., 559 U.S. 662, 684 (2010)).

25. *Id.* at 1416 (quoting *Stolt-Nielson*, 559 U.S. at 697) (misquoted in original).

26. *Id.* at 1418 (quoting Epic Sys. Corp. v. Lewis, 138 S. Ct. 1612, 1623 (2018)).

27. *See id.* at 1419.

28. 42 U.S.C. §§ 12101–12103, 12111–12113 (2019).

29. 42 U.S.C. § 12102(1) (2019).

30. *Id.*

31. 42 U.S.C. § 12102(2)(A) (2019).

32. Cleveland v. Home Shopping Network, Inc., 369 F.3d 1189, 1193 (11th Cir. 2004).

based upon the disability."[33] Once an employee has made out a prima facie case of discrimination, the burden then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for its actions.[34] If the employer meets this burden, the presumption of

> discrimination disappears, but the plaintiff can still prove discrimination by offering evidence demonstrating that the employer's explanation is pretextual.[35]

In *Equal Employment Opportunity Commission v. STME, LLC*,[36] the United States Court of Appeals for the Eleventh Circuit held that the ADA only protects individuals from "discrimination because of a current, past, or perceived disability—not a potential future disability."[37] Here the employee, Lowe, began working for Massage Envy-South Tampa (Massage Envy) as a massage therapist in January 2012. In September 2014, Lowe requested time off so that she could visit family in Ghana. Her request was initially approved by her manager but was later denied by one of the owners of Massage Envy out of fear that Lowe might contract Ebola by visiting West Africa. Lowe was also threatened termination if she proceeded with her trip. Lowe traveled to Ghana regardless, and was not allowed to work at Massage Envy upon her return.[38]

In November 2014, Lowe filed an EEOC charge alleging that Massage Envy discriminated against her because it "'perceived [her] as disabled or . . . as having [the] potential to become disabled,' in violation of the ADA."[39] The EEOC filed suit on Lowe's behalf, alleging that Ebola constitutes a disability under the ADA, and that Massage Envy discriminated against Lowe by terminating her upon her return from Ghana because it regarded her as disabled.[40] Also, that Massage Envy violated the ADA by terminating Lowe based on its fear of Ebola and "her association with people in Ghana whom Massage Envy believed to be disabled by Ebola."[41] The EEOC later moved to amend its complaint to include an ADA unlawful interference claim. In the new claim, the

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33. *Id.*

34. Collado v. United Parcel Serv., Co., 419 F.3d 1143, 1151 (11th Cir. 2005).

35. Americans with Disabilities Act Practice and Compliance Manual § 7:409 (2019); Raytheon Co. v. Hernandez, 540 U.S. 44, 52 (2003).

36. 938 F.3d 1305 (11th Cir. 2019).

37. *Id.* at 1316; *see* 42 U.S.C. §§ 12102(1), 12102(3)(A) (2019).

38. *STME*, 938 F.3d at 1311.

39. *Id.* at 1312 (brackets in original).

40. *Id.*

41. *Id.*

EEOC alleged that Massage Envy violated Lowe's "right to a reasonable accommodation if Lowe actually developed Ebola; and [] the right to associate with disabled persons, i.e., people in Ghana with Ebola."[42] Massage Envy moved to dismiss the EEOC's amended complaint.[43]

The district court granted Massage Envy's motion to dismiss and denied the EEOC's motion to file a second amended complaint. The court found that the ADA's "regarded as having" language does not apply to instances where the employee is currently healthy, with only the potential to become disabled due to voluntary conduct. The district court also rejected the EEOC's association claim because the EEOC did not allege that Massage Envy had knowledge that anyone associated with Lowe was exposed to or disabled by Ebola at the time she was terminated.[44]

On appeal, the Eleventh Circuit held that the "relevant time period for assessing the existence of a disability, so as to trigger the ADA's protections, is the time of the alleged discriminatory act."[45] Lowe was not disabled, or regarded as disabled by Massage Envy at the time she filed an EEOC charge—or at any time during her employment.[46] The Eleventh Circuit declined to extend the "regarded as having" prong of the disability definition in the ADA to include a "case where an employer perceives a person to be presently healthy with only a potential to become ill and disabled in the future due to the voluntary conduct of overseas travel."[47] The Eleventh Circuit also noted that under Section 12102(3)(A), "an individual meets the requirement of being regarded as disabled only if she was subject to termination 'because of an *actual or perceived* physical or mental impairment.'"[48] The possibility of contracting an illness or disease such as Ebola clearly does not fit under the ADA's definition of disability given this reading.

The Eleventh Circuit also rejected the EEOC's association discrimination claim.[49] In order to make out a prima facie case for association discrimination, an employee must show:

> (1) that she was subjected to an adverse employment action; (2) that she was qualified for the job at that time; (3) that her employer knew at that time that she had a relative [or associate] with a disability;

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42. *Id.* at 1313.
43. *Id.* at 1311–12.
44. *Id.* at 1313.
45. *Id.* at 1314.
46. *Id.*
47. *Id.* at 1315; *see* 42 U.S.C. § 12102(1)(C).
48. *STME*, 938 F.3d at 1316 (quoting § 12102(3)(A)) (emphasis added).
49. *Id.* at 1319.

> and (4) that the adverse employment action occurred under circumstances which raised a reasonable inference that the disability of the relative [or associate] was a determining factor in the employer's decision.[50]

The court held that Lowe failed the third prong of the association discrimination analysis.[51] It was not enough that Massage Envy knew Lowe would associate with her sister in Ghana because her sister was never alleged to have had Ebola, nor was it sufficient that she was traveling to a region of Africa where Ebola was prevalent.[52]

In *Hudson v. Tyson Farms, Inc.*,[53] the court ruled against an employee in holding that an employee's back injury and asthma did not qualify as a disability under the ADA.[54] Hudson began working as a tray packer at Tyson Farms, Inc. (Tyson) in August 2015. After being hired, Hudson listed asthma and back problems on the health assessment provided by Tyson, but did not indicate that she had any work restrictions. Shortly after beginning work, Hudson complained of back pain while working on the factory line, and that the ammonia in the plant aggravated her asthma.[55]

Hudson saw her personal doctor after only a month of working at Tyson. He imposed restrictions limiting her to forty-five minutes of standing every hour. Tyson informed Hudson they would not be able to accommodate these restrictions, so Hudson visited a second doctor to try to get her work restrictions removed. The second doctor determined that Hudson's back was completely healthy with a full range of motion and released her back to work with no restrictions; however, he did suggest that she use floor mats while at work in order to alleviate her back pain. Upon returning to work, Tyson was not able to provide Hudson with a specified floor mat, nor did her manager allow her to leave her line early to use her inhaler. Hudson quit Tyson after only being employed for a month.[56]

Hudson filed suit against Tyson in September 2016, alleging that Tyson forced her to resign after they failed to accommodate her back injury and asthma. The district court granted Tyson's motion for summary judgment, and Hudson appealed.[57] On appeal, the Eleventh

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50. *Id.* (quoting Wascura v. City of S. Miami, 257 F.3d 1238, 1242 (11th Cir. 2001)).
51. *Id.*
52. *Id.*
53. 769 F. App'x 911 (11th Cir. 2019).
54. *Id.* at 915.
55. *Id.* at 913.
56. *Id.* at 913–14.
57. *Id.* at 914.

Circuit determined that Hudson failed to provide Tyson with any proof that she had a medical condition that substantially limited her ability to work.[58] In making this determination, the court focused on the diagnoses of Hudson's doctors regarding her back.[59] The first doctor put work restrictions in place, but made no medical diagnosis of her back, and the second doctor removed the work restrictions and determined her back was normal with a full range of motion. Hudson also failed to show that her asthma affected any of her major life activities.[60]

Further, the Eleventh Circuit held that Tyson did not fail to reasonably accommodate Hudson.[61] Hudson identified her back issues but did not indicate a need for restrictions. Tyson was not aware that Hudson required a reasonable accommodation, despite this, Tyson still allowed Hudson to use floor mats (that she provided) throughout the facility.[62] Therefore, the court reasoned, Tyson's refusal to provide Hudson with a specific floor mat was reasonable because Hudson did not have a known disability or any work restrictions that required the use of a floor mat while at work.[63] Neither did Hudson make a specific accommodation request for her asthma. The only request she made was to her manager asking if she could take a break to use her inhaler. Even if her asthma was considered a disability under the ADA, she never identified an accommodation or failure to accommodate her asthma.[64] Therefore, the court held, Tyson never failed to accommodate Hudson's asthma.[65] Lastly, the court held that Tyson did not constructively discharge Hudson because "Hudson deprived Tyson of the opportunity to engage in the interactive accommodations process [by leaving Tyson]."[66]

In *Connelly v. WellStar Health System, Inc.*,[67] the court held that an employer's reason for terminating an employee—because she reported to work impaired and under the influence of prescription medication—was not pretextual under the ADA.[68] Connelly brought a failure to accommodate under the ADA, discriminatory termination under the

58. *Id.* at 915.
59. *Id.* at 915–16.
60. *Id.* at 915–17.
61. *Id.* at 919.
62. *Id.* at 917.
63. *Id.* at 917–18.
64. *Id.* at 918–19.
65. *Id.* at 918.
66. *Id.* at 919.
67. 758 F. App'x 825 (11th Cir. 2019).
68. *Id.* at 828.

ADA, and retaliation claims under both the ADA and the Family and Medical Leave Act (FMLA),[69] respectively. The district court held that WellStar Health System, Inc. (WellStar) did not fail to accommodate Connelly because she did not request an accommodation.[70] As to the discriminatory termination and retaliation claims, the Eleventh Circuit jumped straight to the legitimate, non-discriminatory reason analysis after assuming (without analysis) that Connelly presented a prima facie case on the claims.[71] The court determined that Connelly failed to show that WellStar's proffered legitimate and non-discriminatory reason for terminating her was pretextual.[72]

WellStar had a company policy that stated an employee may be subject to termination if they "report to work or perform work while impaired due to the influence of a prescribed medication . . . ."[73] The Eleventh Circuit held that the reason for firing Connelly was not pretextual.[74] Connelly did not dispute that she was impaired, or that she previously reported this medication, but she did allege that "because WellStar did not consult a physician to determine whether the unreported drugs *caused* the impairment its proffered reason is pretextual."[75] The court disagreed with this reasoning.[76] It held that even if WellStar was mistaken as to whether Connelly's impairment was a result of the unreported medication, their "honest belief" that she was both "impaired" and taking an unreported prescribed medication—which was a violation of their policy—and grounds for termination.[77]

Also, according to the court, WellStar did not fail to accommodate her disability.[78] Even though there were instances in the past where WellStar allowed Connelly to compose herself after an emotional episode, this did not rise to the level of providing her a disability-specific accommodation under the ADA, largely in part because she never requested such accommodation for her emotional episodes. For this same reason—Connelly did not request an

69. 29 U.S.C. §§ 2601–2654 (2019).
70. *Connelly*, 758 F. App'x at 828.
71. *Id.*
72. *Id.*
73. *Id.* at 829.
74. *Id.*
75. *Id.* at 830 (emphasis in original).
76. *Id.*
77. *Id.*
78. *Id.* at 831.

accommodation—her retaliation claims under both the ADA and FMLA failed.[79]

IV. TITLE VII OF THE CIVIL RIGHTS ACT

Title VII of the Civil Rights Act (Title VII)[80] does not allow employers to discriminate based upon the protected classes of: "race, color, religion, sex, or national origin."[81] This includes limiting, segregating, or classifying employees "in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin."[82] For an employee to prove disparate impact under Title VII, they must demonstrate that the employer used a particular employment practice on the basis of one of the above protected classes, and the employer cannot show that the alleged practice is job related and related with business necessity.[83] In the Eleventh Circuit, for an employee to succeed on a claim for hostile work environment under Title VII, they must prove five elements:

> (1) she belongs to a protected class, (2) she was subjected to unwelcome harassment, (3) the harassment was based on her race, (4) the harassment was sufficiently severe or pervasive to alter the terms of her employment and create a discriminatorily abusive working environment, and (5) the employer is responsible for the environment under a theory of vicarious or direct liability.[84]

In *Nurse v. City of Alpharetta*,[85] the Eleventh Circuit held that an African-American former police officer's Title VII claims for racial discrimination and hostile work environment were not sufficient because he failed to allege that he was subjected to intentional discrimination or that the harassment that occurred was severe and pervasive enough to "alter the conditions of . . . employment and create an abusive working environment."[86] While working as a police officer for the City of Alpharetta (the City), Nurse was accused of sexual assault after giving an intoxicated woman a courtesy ride to her hotel.

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79. *Id.* at 831–32.

80. Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e–2000e-17 (2019).

81. 42 U.S.C. § 2000e-2(a)(1) (2019).

82. 42 U.S.C. § 2000e-2(a)(2) (2019).

83. 42 U.S.C. § 2000e-2(k)(1)(A) (2019).

84. Smelter v. S. Home Care Servs. Inc., 904 F.3d 1276, 1284 (11th Cir. 2018).

85. 775 F. App'x 603 (11th Cir. 2019).

86. *Id.* at 606–07 (quoting Trask v. Sec'y, Dep't of Veterans Affairs, 822 F.3d 1179, 1195 (11th Cir. 2016)).

Nurse was terminated following an internal investigation, and he subsequently filed a racial discrimination charge with the EEOC. In May 2017, Nurse filed suit against the City and five individually named employees of the City, alleging race discrimination and hostile work environment under Title VII. Nurse alleged that he was subject to more severe punishment than his white counterparts in the police department and that the City created a hostile work environment for African-American males through a pattern of harsh discipline. The district court dismissed all the claims for failure to state a claim.[87]

The Eleventh Circuit affirmed this dismissal.[88] Agreeing with the district court, the Eleventh Circuit stated that all of Nurse's pleadings were "framed in a wholly speculative and conclusory way."[89] Because Nurse alleged no facts offering a comparator or any specific facts that rise above speculation, the court held that there was no way to determine which employees were treated differently on the basis of race.[90] The court held that Nurse's hostile work environment claim failed for the same reasons.[91] Even the most specific allegation, the defendants "have created and maintained [a] hostile work environment through a pattern of more severe disciplinary action to African Americans [than] their white counterparts,"[92] did not allow the court to identify who created the hostile work environment, how it was maintained, or who was affected by the hostile work environment.[93]

In *Rodriguez v. Miami Dade Public Housing and Community Development*,[94] the Eleventh Circuit held that reports of general harassment are not enough to support a Title VII claim alone; an employee must specify that the harassment is based on their belonging to a protected class.[95] Rodriguez, a female Cuban employee of Miami Dade County (the County), reported that her supervisor harassed her on several occasions at work about her management style and job performance. While Rodriguez presented facts that showed her supervisor made discriminatory comments concerning her Cuban nationality, she was unable to produce any evidence that those discriminatory comments were reported to anyone before she was

87. *Id.* at 604–06.
88. *Id.* at 608.
89. *Id.* at 606.
90. *Id.*
91. *Id.* at 607.
92. *Id.* (brackets in original).
93. *Id.*
94. 776 F. App'x 625 (11th Cir. 2019).
95. *See id.* at 626.

terminated. Rodriguez sued the County for national origin discrimination and retaliation under Title VII. The district court granted summary judgment in favor of the County.[96]

The Eleventh Circuit affirmed.[97] The court noted that Rodriguez failed to make out a prima facie case for retaliation, which required a showing that: "(1) she engaged in a statutorily protected activity; (2) she suffered a materially adverse action; and (3) there [was] a casual connection between the protected activity and the materially adverse action."[98] Rodriguez's general complaints about her supervisor's "poor treatment of her [were] insufficient to establish that she engaged in protected activity."[99] The court further explained that, "she must have explicitly or implicitly communicated her belief that the employer's practice constituted unlawful employment discrimination."[100] Rodriguez never did so.

In *Heatherly v. University of Alabama Board of Trustees*,[101] the court examined the causation standards for single-motive and mixed-motive discrimination claims under Title VII.[102] Heatherly was employed by the University of Alabama (the University), and she brought suit against the University for sex discrimination under both Title VII and the Equal Pay Act, claiming that her sex was at least a motivating factor in the University paying her less than her male comparators. The district court granted summary judgment to the University.[103]

The Eleventh Circuit affirmed.[104] The court held that in order for a mixed-motive discrimination claim to defeat summary judgment the employee must offer evidence that: "(1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] was *a* motivating factor for the defendant's adverse employment action."[105] The court held that Heatherly met the first prong but failed the second.[106] Heatherly attempted to analogize her case to that of the employee in *Bowen v. Manheim Remarketing, Inc.*[107] In *Bowen*, there was evidence that the employee's managers made

96. *Id.*
97. *Id.* at 626–27.
98. *Id.* at 626.
99. *Id.*
100. *Id.*
101. 778 F. App'x 690 (11th Cir. 2019).
102. *Id.* at 693.
103. *Id.* at 692.
104. *Id.* at 694.
105. *Id.* at 693 (brackets and emphasis in original).
106. *Id.*
107. 882 F.3d 1358 (11th Cir. 2018).

decisions based off of sexual bias and, that they repeatedly were unwilling to treat women as equals in the workplace.[108] The court reasoned that Heatherly failed to offer similar evidence that would make her case comparable to *Bowen*.[109]

The court also rejected expert testimony offered by Heatherly—mainly because the expert relied on faulty assumptions—that suggested there was a systematic pay disparity between men and women at the University, mainly because the expert relied on faulty assumptions.[110] The expert assumed "that an equal pay grade implied comparability,"[111] despite evidence to the contrary being presented. The expert compared Heatherly's pay to different jobs with different responsibilities, and this was not a proper comparison for the purposes of Title VII or the Equal Pay Act.[112] Because Heatherly could not point to similarly situated male comparators within the University as having higher pay than her, the court held there was insufficient evidence to conclude that sex was a motivating factor for her disparate pay.[113]

V. FAMILY AND MEDICAL LEAVE ACT

The Family Leave and Medical Act (FMLA)[114] prohibits employers from interfering with, restraining, or denying the exercise of or the attempt to exercise, any of the rights under the FMLA.[115] The Eleventh Circuit recognizes two claims from aggrieved employees: retaliation and interference claims.[116] Under the FMLA, an employee is entitled to take twelve weeks of leave over a twelve month period for their own serious health condition or the serious health conditions of family members, and be reinstated upon their return from leave.[117] For interference claims, employees must prove that they were denied their benefits under the FMLA.[118] However, the denial of a benefit is not the only way employers can interfere with the right of an employee; an employer may

108. *Id.* at 1363.
109. *Heatherly*, 778 F. App'x at 693.
110. *Id.*
111. *Id.* at 694.
112. *Id.* at 693–94.
113. *Id.* at 694.
114. 29 U.S.C. §§ 2601–2654 (2019).
115. 29 U.S.C. § 2615 (a)(1) (2019).
116. Jones v. Gulf Coast Health Care of Del., LLC, 854 F.3d 1261, 1267 (11th Cir. 2017).
117. *Id.* (citing 29 U.S.C. § 2612(a)(1)(D)).
118. *See id.*

also be responsible for interference where it discourages its employees from using the leave to which they are entitled.[119]

As for retaliation, an employee must prove that the employer "intentionally discriminated against him in the form of an adverse employment action for having exercised an FMLA right."[120] This can be shown either through direct or circumstantial evidence.[121] The courts will apply the three-part burden-shifting analysis outlined in *McDonnell Douglas Corp. v. Green*,[122] where there is only circumstantial evidence.[123] First, the plaintiff must show the three elements of a prima facie case: "(1) [he] engaged in [a] statutorily protected activity[;] (2) [he] suffered an adverse employment action, and (3) the decision was causally related to the protected activity."[124] If the plaintiff can do this, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for the employment decision.[125] If the employer can do that, then the burden shifts back to the plaintiff to show pretext, or that the proffered reason is not true.[126]

In *Smith v. St. Joseph's/Candler Health System, Inc.*,[127] the Eleventh Circuit held that the plaintiff failed to establish that the defendant willfully violated her rights under the FMLA, and therefore was not entitled to the three year statute of limitations provided by the FMLA.[128] Normally, under the FMLA an action may only be brought within two years "after the date of the last event constituting the alleged violation for which the action is brought."[129] However, if an action is "brought for a willful violation of section 105 [29 U.S.C. § 2615] , such action may be brought within 3 years of the date of the last event constituting the alleged violation for which such action is brought."[130]

In the present case, Smith failed to file a claim within the general two-year statute of limitations under FMLA. However, she argued that St. Joseph's/Candler Health System, Inc.'s (St. Joseph's) FMLA violations were willful and her claims should fall within the three-year

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119. *Id.*

120. *Id.* at 1270 (quoting Strickland v. Water Works & Sewer Bd. of City of Birmingham, 239 F.3d 1199, 1207 (11th Cir. 2001)).

121. *Id.*

122. 411 U.S. 792, 802 (1973).

123. *Jones*, 854 F.3d at 1271.

124. *Id.* at 1271.

125. *See id.*

126. *Id.*

127. 770 F. App'x 523 (11th Cir. 2019).

128. *Id.* at 527; *see* 29 U.S.C. § 2617(c) (2019).

129. 29 U.S.C. § 2617(c)(1) (2019).

130. 29 U.S.C. § 2617(c)(2) (2019).

statute of limitations provided by § 2617(c)(2). Smith alleged that St. Joseph's intentionally miscalculated and misled her about her FMLA hours and intentionally disrupted her access to FMLA benefits, and to show this, she introduced a number of employment documents and policies that she believed showed the hospital had miscalculated her available FMLA leave. She alleged that this evidence showed willful conduct.[131] The district court found that Smith's proffered evidence was not enough to enable her claims to fall under the three-year statute of limitations and granted summary judgment for St. Joseph's.[132]

The Eleventh Circuit affirmed, holding that Smith's evidence did not raise a genuine issue of material fact regarding whether St. Joseph's conduct was willful or not.[133] The court noted that while the FMLA does not define "willful," the Supreme Court has defined "willful" in the context of the Fair Labor Standards Act (FLSA)[134] as conduct that was "'voluntary,' 'deliberate,' and 'intentional' . . . [and] not merely negligent."[135] While other circuits had adopted this interpretation of "willful" for FMLA purposes,[136] the court declined to resolve the issue of "willfulness" because Smith had not raised any argument concerning it.[137] Regardless, the court followed the district court's assumption that the FLSA's definition of "willful" "provide[d] the right standard for assessing Smith's FMLA claim."[138] With this standard in mind, the court held that Smith produced no evidence that "St. Joseph's knew or showed reckless disregard as to whether its conduct violated the FMLA,"[139] and as a result, her claim was not eligible for the three-year statute of limitations provided by the FMLA.[140]

In *Shannon v. National Railroad Passenger Corporation*,[141] the court held that an employer did not interfere with an employee's FMLA rights, nor did it retaliate against her for taking FMLA, when the

131. *Smith*, 770 F. App'x at 524–26.

132. *Id.* at 525.

133. *Id.* at 527.

134. 29 U.S.C. §§ 201–219 (2019).

135. *Smith*, 770 F. App'x at 526 (quoting McLaughlin v. Richland Shoe Co., 484 U.S. 128, 133 (1988)).

136. *See* Bass v. Potter, 522 F.3d 1098, 1103–04 (10th Cir. 2008); Hoffman v. Prof'l Med Team, 394 F.3d 414, 417–18 (6th Cir. 2005); Porter v. New York Univ. Sch. of Law, 392 F.3d 530, 531–32 (2d Cir. 2004); Hanger v. Lake County, 390 F.3d 579, 583–84 (8th Cir. 2004); Hillstrom v. Best Western TLC Hotel, 354 F.3d 27, 33–34 (1st Cir. 2003).

137. *Smith*, 770 F. App'x at 527.

138. *Id.*

139. *Id.*

140. *Id.*

141. 774 F. App'x 529 (11th Cir. 2019).

employee was terminated shortly after requesting FMLA leave.[142] Shannon worked for National Railroad Passenger Company, d/b/a Amtrak (Amtrak), for twenty-eight years, and she held multiple positions with Amtrak during that time. Although Shannon received multiple promotions and employee awards at Amtrak, she was the subject of nineteen internal ethics complaints. However, her direct supervisor often gave her positive reviews, and even gave her the highest overall performance rating for 2014.[143]

Beginning in June 2015, Shannon began to take intermittent FMLA leave for a leg injury, and from late-2015 to mid-2016 she was permitted to work on a reduced schedule that included telework three days a week. In 2017, Amtrak underwent another restructuring that saw new managerial positions become available. Shannon applied for one of the newly created managerial positions, but was not selected due to poor interview performance, bad marks from her supervisor, and her alleged union relationships. Her supervisor noted that while she historically was one the better performing managers at Amtrak, she had "been confrontational" and had "not been readily available to assist," in the several years leading up to the 2017 restructuring.[144]

Subsequently, Shannon complained to Amtrak's Equal Employment Opportunity (EEO) officials that she was not being selected for positions on the basis of race and her medical condition. Amtrak began investigating her complaint, but they were unable to complete its investigation because Shannon obtained legal representation and filed an external complaint; as a result, Amtrak ended its investigation per its policy. On May 24, 2017, Amtrak sent Shannon a formal termination letter stating that because her position had been eliminated as a result of the restructuring, her employment with Amtrak would end on June 8, 2017. One day before her employment with Amtrak was to be terminated, Shannon emailed Amtrak requesting FMLA leave based on a doctor letter stating she suffered from "tachycardia, elevated blood pressure, anxiety, and work-related insomnia and depression." Amtrak denied her request on June 23, 2017, because she was no longer employed.[145]

Shannon filed suit, alleging—among other things—that Amtrak interfered with her FMLA rights when it terminated her employment, and that it retaliated against her for taking FMLA leave. The district court found that Shannon failed to establish an FMLA retaliation claim

142. *Id.* at 545.
143. *Id.* at 532.
144. *Id.* at 532–34.
145. *Id.* at 537–38.

because she failed to proffer evidence that any hiring manager, other than her direct supervisor, knew that she had taken FMLA leave in the past and had not demonstrated that the hiring managers' reason for not hiring Shannon was pretextual or motivated by her FMLA activities. The district court also found that Shannon was terminated for purely business reasons, which did not constitute FMLA interference.[146]

The Eleventh Circuit affirmed, holding that Shannon failed to state claims for both retaliation and interference under the FMLA.[147] For the retaliation claim, because there was no direct evidence of retaliatory intent by Amtrak, Shannon's claim was examined under the *McDonnell Douglas* burden-shifting analysis.[148] Here, the court held that Shannon failed to show that Amtrak's decision to terminate her was causally related to her request for FMLA leave, mainly due to the fact that those Amtrak employees in hiring positions were not aware of her FMLA leave.[149]

The court also held that Amtrak did not interfere with Shannon's rights under the FMLA when it terminated her.[150] In order to successfully establish an FMLA interference claim, an employee must demonstrate that: "(1) she was entitled to a benefit under the FMLA; and (2) her employer denied her that benefit."[151] Also, "[i]f the employee shows she was entitled to a benefit, she need only demonstrate by a preponderance of the evidence that she was denied the benefit; the employer's motives are irrelevant."[152] When an interference claim stems from termination of the employee, "an employer may affirmatively defend against the claim by establishing that it would have terminated the employee regardless of her request for or use of FMLA leave."[153] The court continued, "an employer is not liable for failing to reinstate an employee after she has taken FMLA leave if it can show that it refused to reinstate her for a reason unrelated to FMLA leave."[154] For an employer to be held liable for FMLA interference, "the request for leave

146. *Id.* at 538–39.

147. *Id.* at 544–45.

148. *Id.* at 544 (citing Schaaf v. Smithkline Beecham Corp., 602 F.3d 1236, 1243 (11th Cir. 2010)).

149. *Id.*

150. *Id.*

151. *Id.* (citing White v. Beltram Edge Tool Supply, Inc., 789 F.3d 1188, 1191 (11th Cir. 2015)).

152. *Id.* (citing Batson v. Salvation Army, 897 F.3d 1320, 1331 (11th Cir. 2018)).

153. *Id.* at 544–45 (quoting Batson, 897 F.3d at 1331).

154. *Id.* at 545 (citing Krutzig v. Pulte Home Corp., 602 F.3d 1231, 1236 (11th Cir. 2010)).

must have been the proximate cause of the termination."[155] Shannon argued that she was still employed by Amtrak on June 7, 2017, when she requested FMLA leave, even though her position with Amtrak had been eliminated in early 2017 because of restructuring.[156] Therefore, the court held, Shannon's request for FMLA leave came long after the elimination of her position with Amtrak, meaning her termination was due to business concerns and not her FMLA request.[157]

VI. FAIR LABOR STANDARDS ACT

The Fair Labor and Standards Act (FLSA)[158] requires employers to pay covered employees engaged in commerce a minimum of $7.25 for all hours worked.[159] Additionally, if an employee works over forty hours in any workweek, an employer is required to pay that employee overtime at a rate of one and one-half times the employee's regular rate.[160] Employees can be "covered" by the FLSA in one of two ways: enterprise coverage or individual coverage.[161] For enterprise coverage, an employee must work for an employer that has at least two employees and has an annual dollar of sales or business done of at least $500,000.[162] An employee may be covered individually if their work regularly involves them in commerce between the states and they are "engaged in commerce or in the production of goods for commerce."[163]

In *P&K Restaurant Enterprise, LLC v. Jackson*,[164] an employee brought a putative collection action against her employer, the owner of P&K Restaurant Enterprise, LLC (the nightclub), claiming that she was not paid minimum wage under the FLSA.[165] The Eleventh Circuit held that a jury award of liquidated damages was appropriate when the nightclub was unable to demonstrate that its FLSA violations were in good faith or based on grounds that would make it unfair to impose such damages.[166]

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155. *Id.* (citing *Schaaf*, 602 F.3d at 1242).
156. *Id.*
157. *Id.*
158. 29 U.S.C. §§ 201–219 (2019).
159. 29 U.S.C. § 206(a) (2019).
160. 29 U.S.C. § 207(a)(1).
161. 29 U.S.C. § 203(s) (2019).
162. 29 U.S.C. § 203(s)(1).
163. 29 U.S.C. § 203(s)(1)(A).
164. 758 F. App'x 844 (11th Cir. 2019).
165. *Id.* at 846.
166. *Id.* at 849–50.

While employed by the nightclub as a server, Jackson would typically work three to four days a week, and her shifts would last seven and a half hours.[167] The nightclub did not record employee tips, issue pay stubs, provide tax documents for employees, or operate a time clock. Jackson alleged that she was told by her supervisor she would make $25 a night and would get to keep all of her tips. However, she claimed she was never told about tip credit reductions to the minimum wage, was never told tips were going to be counted as wages, and that the nightclub failed to post any FLSA notices regarding minimum wage and tip credit reduction.[168]

In her complaint, Jackson alleged the nightclub failed to pay her minimum wage under the FLSA and failed to pay similarly situated employees the minimum wage under the FLSA. The case went to a jury trial, after which the district court accepted the jury's award of $6,308 in damages in addition to the court adding on $6,308 in liquidated damages and awarded attorney's fees and costs of $118,894.20.[169] On appeal, the nightclub argued the "jury verdict was unsupported by the evidence, that liquidated damages were improper, and that the amount of attorneys' fees was disproportionate to the result in this case."[170] The Eleventh Circuit affirmed, allowing Jackson to keep all forms of damages awarded by the district court.[171]

The court held the nightclub's argument—that the evidence presented by Jackson did not allow for a jury to find that they failed to pay her as a tipped employee under the FLSA—did not have any standing.[172] Under the FLSA, an employer may credit an employee's tips toward the minimum wage requirement of $7.25 an hour.[173] However, if the employer chooses to apply a tip credit to the minimum wage requirement, they must inform the employee of the relevant tip credit provisions under the FLSA.[174] If an employer fails to notify an employee of the relevant FLSA provisions, they are not able to take advantage of the tip credit, even if the employee in question suffered no economic harm as a result.[175] In the present case, the nightclub failed to inform Jackson of the relevant FLSA provisions regarding tip credits,

167. *Id.* at 846.
168. *Id.*
169. *Id.*
170. *Id.* at 846–47.
171. *Id.* at 849.
172. *Id.* at 847.
173. 29 U.S.C. §§ 203(m), 206(a)(1)(C) (2019).
174. 29. U.S.C. § 203(m)(2) (2019).
175. Kubiak v. S.W. Cowboy, Inc., 164 F. Supp. 3d 1344, 1355 (M.D. Fla. 2016).

therefore, according to the court, there was enough evidence for a jury to "conclude[] that [the nightclub] was statutorily ineligible to claim any tip credit."[176]

As for the liquidated damages, the court also rejected the nightclub's argument that its FLSA violations "'[could not] be willful' because Jackson 'was paid more than the minimum wage.'"[177] Per the FLSA, when an employer violates the minimum wage provision, that employer is liable for the affected employee's "unpaid minimum wages, or their unpaid overtime compensation, as the case may be, and in an additional equal amount as liquidated damages."[178] However, any employer may be able to escape paying liquidated damages if it can demonstrate that its FLSA minimum wage violations "'[were] in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act,' then 'the court may, in its sound discretion, award no liquidated damages.'"[179] The burden of proof lies with the employer to demonstrate that its FLSA violation was in good faith and that awarding liquidated damages to an affected employee would be unfair to the employer.[180]

In the present case, the court held that the nightclub operated in such a way that it was blind to its responsibilities under the FLSA because "[the nightclub] kept no payroll records, produced no evidence that it sought or relied upon legal guidance, and did not even track how much money its employees were making in tips."[181] The court held it inconsequential that Jackson did in fact bring home more than the minimum wage, it still failed its duty as a business owner to operate in compliance with the FLSA.[182]

In *Nieman v. National Claims Adjusters, Inc.*,[183] the court used the economic reality inquiry to determine that a property and casualty insurance claims professional was an independent contractor, rather than an employee for purposes of the FLSA.[184] Nieman filed claims against National Claims Adjusters, Inc. (National), alleging National had failed to pay him, and that he was victim of retaliatory discharge in violation of the FLSA. The district court granted National's motion to

176. *Jackson*, 758 F. App'x at 849.
177. *Id.*
178. *Id.* (citing 29 U.S.C. § 216(b) (2019)).
179. *Id.* (citing 29 U.S.C. § 260 (2019)).
180. *Id.* (citing Joiner v. City of Macon, 814 F.2d 1537, 1539 (11th Cir. 1987)).
181. *Id.* at 849–50.
182. *Id.*
183. 775 F. App'x 622 (11th Cir. 2019).
184. *Id.* at 624–25.

dismiss for failure to state a claim, pointing to the fact that Nieman was an independent contractor, not an employee, and therefore was not protected by the FLSA.[185]

The Eleventh Circuit affirmed.[186] The court held the district court was correct in using the economic reality test to determine if Nieman was an employee of National for purposes of the FLSA.[187] The economic reality test is guided by the following factors:

> (1) the nature and degree of the alleged employer's control as to the manner in which the work is to be performed; (2) the alleged employee's opportunity for profit or loss depending upon his managerial skill; (3) the alleged employee's investment in equipment or materials required for his task, or his employment of workers; (4) whether the service rendered requires a special skill; (5) the degree of permanency and duration of the working relationship; [and] (6) the extent to which the service rendered is an integral part of the alleged employer's business.[188]

While these six factors help the court determine independent contractor status, the ultimate question is "whether the individual is 'in business for himself' or is 'dependent upon finding employment in the business of others.'"[189] In applying the above test to Nieman, the court held "the first, third, fourth, and fifth factors favored independent contractor status while the second and sixth factors do not weigh in favor of either."[190]

The first factor favored independent contractor status because National exercised little control over Nieman, "[he] controlled when he started work for National and for how long, how many assignments he took from National . . . when he received those assignments . . . [and] the geographic location within which he took assignments."[191] Such a level of autonomy, the court held, demonstrated Nieman was in business for himself.[192]

The third factor also weighed in favor of independent contractor status.[193] Nieman provided for the majority of his equipment and

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185. *Id.*; *see* 29 U.S.C. § 203(e)(1) (2019).

186. *Nieman*, 775 F. App'x at 625.

187. *Id.* at 624.

188. *Id.* (quoting Scantland v. Jeffry Knight, Inc., 721 F.3d 1308, 1311–12 (11th Cir. 2013)).

189. *Id.*

190. *Id.* at 625.

191. *Id.*

192. *Id.*

193. *Id.*

materials needed for his work, this included "his own home office, a laptop, and iPad for field work and was equipped with a vehicle, ladder, measuring tools, digital voice and photographic equipment . . . ."[194]

The fourth factor favored independent contractor status because Nieman's job as an insurance claims professional required him to obtain a license; meaning his position required a special skill.[195]

Finally the fifth factor weighed in favor of independent contractor status because his work for National was not permanent.[196] Nieman himself acknowledged that he was hired by National as a result of the influx of claims arising out of Hurricane Irma, meaning his job was not intended to be permanent and was limited in duration.[197]

The court held that because "four of the six factors weigh strongly in favor of independent contractor status," Nieman was an independent contractor for purposes of the FLSA and was therefore not entitled to its protections.[198]

VII. NATIONAL LABOR RELATIONS ACT

The National Labor Relations Act (NLRA)[199] was enacted in 1935 to give employees the right to form and join unions, while also requiring employers to engage in the collective bargaining process with the bargaining representative chosen by its employees.[200] The NLRA achieves this by protecting employees' "full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protection."[201] The NLRA is enforced by the National Labor Relations Board (the Board).[202] The Board is comprised of five members nominated by the President and confirmed by the Senate, with its primary responsibilities being to protect employee rights under the NLRA, to prevent unfair labor practices, and to interpret the NLRA.[203] The NLRA and the Board protect not only unionized work forces but also non-unionized employees' rights to self-organize and to bargain collectively through

194. *Id.*
195. *Id.*
196. *Id.*
197. *Id.*
198. *Id.*
199. 29 U.S.C. §§ 151–169 (2019).
200. *See* 29 U.S.C. § 151 (2019).
201. *Id.*
202. 29 U.S.C. § 153 (2019).
203. *Id.*

representatives of their choosing, "and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection . . . ."[204]

In *Security Walls, Inc. v. National Labor Relations Board*,[205] the Eleventh Circuit upheld the National Labor Relations Board's (NLRB) decision that a government security contractor violated the NLRA when it terminated three employees for misconduct under its contract with the Internal Revenue Service (IRS) instead of its own disciplinary policy.[206]

The IRS entered into a security contract with Security Walls, Inc. (Security Walls) to provide protective services for one of its facilities in Austin, Texas. As part of its contract with the IRS, Security Walls agreed to a "Performance Work Statement" (PWS) with the IRS that outlined expected employee conduct and listed conduct that was cause for immediate termination or removal from the Austin facility. At the same time, Security Walls employed guards who were members of a union and maintained its own "Disciplinary Action/Policy Statement" (the Policy Statement) that, according to Security Walls, "superseded all other policies concerning this subject."[207]

In April 2015, Security Walls placed three of its guards on indefinite suspension, citing the guards' violations of the PWS as its reasoning. The union, representing the guards, then filed a grievance over the suspensions, alleging Security Walls failed to follow the Policy Statement it had in place with the guards. Following an internal investigation, Security Walls determined the three guards did in fact violate expected conduct provisions of the PWS and subsequently terminated the three guards' employment. As a result, the union filed a charge alleging Security Walls had committed unfair labor practices under the NLRA, which led to the NLRB General Counsel to issue a complaint against Security Walls.[208] Both the administrative law judge (ALJ) who heard the charge and the NLRB found that Security Walls committed unfair labor practices in violation of the NLRA "when (1) in violation of the Policy Statement's graduated disciplinary protocol, it suspended indefinitely and then discharged the guards and (2) it refused to bargain with the Union following those discharges."[209] Under the NLRA, it is considered an unfair labor practice for an employer to

204. 29 U.S.C. § 157 (2019).
205. 921 F.3d 1053 (11th Cir. 2019).
206. *Id.* at 1060.
207. *Id.* at 1055–56.
208. *Id.* at 1057–58.
209. *Id.* at 1057.

"refuse to bargain collectively with the representatives of his employees."[210] Such refusal includes changing the terms and conditions of a mandatory subject—such as a disciplinary policy or negotiations over termination of employment—without giving the employees' exclusive bargaining representative the chance to bargain for the change.[211] In the eyes of the ALJ and NLRB, Security Walls's imposition of the PWS on the guards without first allowing the guards' union to bargain for a change in disciplinary policy and then refusing to meet with the union following their termination, was a violation of the NLRA.[212] Security Walls then petitioned the Eleventh Circuit for review.[213]

The Eleventh Circuit denied Security Walls's petition to review.[214] The court held that the main issue was whether the PWS compelled Security Walls to terminate the guards despite the existence of the Policy Statement, which would have required more progressive punishment for the guards in question.[215] The court rejected the argument that Security Walls had "no choice" but to punish the guards under the disciplinary provisions contained in the PWS, thereby absolving them of any liability under the NLRA.[216] Instead holding that the PWS was merely a reflection of the agreement between Security Walls and the IRS, "but not necessarily between [Security Walls] and its own employees."[217] The court did note that Security Walls might have voluntarily "subjected itself to two masters—its contractual obligations to the IRS on the one hand and its duties under the NLRA to its employees on the other."[218]

Regardless, the court held that upon further examination of the PWS, it was entirely possible for Security Walls to comply with both the PWS and the Policy Statement without terminating the guards.[219] While the guards might have engaged in conduct that was in violation of the PWS, it was not so egregious to constitute termination under the PWS, nor did the IRS demand the guards be terminated.[220] Therefore,

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210. *Id.* (citing 29 U.S.C. § 158(a)(5) (2019)).

211. *Id.* at 1057*; see* NLRB v. Haberman Constr. Co., 641 F.2d 351, 357 (5th Cir. 1981) (en banc); *see also* Toledo Blade Co., 343 N.L.R.B. 385, 387 (2004).

212. *Security Walls*, 921 F.3d at 1057–58.

213. *Id.* at 1058.

214. *Id.* at 1060.

215. *Id.* at 1058–59.

216. *Id.* at 1059.

217. *Id.*

218. *Id.*

219. *Id.*

220. *See id.* at 1060.

Security Walls was able to perform its contract with the IRS without violating the NLRA by refusing to bargain with the guards' union, and engaged in unfair labor practices in violation of the NLRA by failing to do so.[221]

In *Advanced Masonry Associates, LLC v. National Labor Relations Board*,[222] the Eleventh Circuit declined an employer's petition to review after the NLRB found the employer violated § 8(a)(1)[223] of the NLRA during a union campaign when it threatened employee wages would be reduced if the union won the election.[224] Bricklayers and Allied Craftworkers, Local 8 Southeast (the Union) filed a petition to become the exclusive bargaining representative of Advanced Masonry Associates, LLC (Advanced Masonry),[225] after which Advanced Masonry began aggressively campaigning against union representation.[226]

Following the election, the Union filed charges with the NLRB, alleging that Advanced Masonry conducted unfair labor practices leading up to the election. Following a hearing, an ALJ found two instances where Advanced Masonry threatened it would reduce wages if the Union won the election.[227]

In the first, Richard Karp, an owner of Advanced Masonry, told a group of employees through his translator, Aleksei Feliz, that "they were going to receive a ballot and that the company wanted them to vote in the election."[228] In a response to an employee question about wages, Karp responded, "their wages are decided by the market."[229] The same day, Feliz told a group of employees "to vote against the Union because it was 'taking [their] money.' He said voting for the Union would cause their rates to drop from $22 per hour to $18-and-some-change per hour."[230] Although Feliz denied making this statement, the ALJ credited it to him in light of an employee's testimony to the contrary.[231] The second came when an Advanced Masonry foreman mentioned the Union election to a group of employees at another jobsite, stating the Union "probably wo[uld]n't be good for

221. *Id.*
222. 781 F. App'x 946 (11th Cir. 2019).
223. 29 U.S.C. § 158(a)(1) (2019).
224. *Advanced Masonry*, 781 F. App'x at 960–61.
225. *See* 29 U.S.C. § 159(a) (2019).
226. *Advanced Masonry*, 781 F. App'x at 950.
227. *Id.*
228. *Id.* at 950–51.
229. *Id.* at 951.
230. *Id.*
231. *Id.*

wages."[232] The ALJ found these two instances "'str[uck] to the heart of [the] mason's livelihood' and . . . 'sent a clear message to employees that the Company would reduce wages if the employees selected the Union.'"[233] The NLRB affirmed the ALJ's decision that Advanced Masonry had violated § 8(a)(1) by threatening a drop in employee wages if the Union won the election. Advanced Masonry subsequently filed a petition for review.[234]

When reviewing factual findings made by the NLRB, the Eleventh Circuit uses the substantial evidence standard, meaning the factual record must contain "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."[235] Also, when examining an ALJ's decision, the court is "'bound by an ALJ's credibility determinations' unless they are 'inherently unreasonable or self-contradictory' or 'based on an inadequate reason, or no reason at all.'"[236]

The court held there was substantial evidence to support the NLRB's decision that Advanced Masonry committed unfair labor practices when it threatened employees with a drop in wages should they vote for the Union.[237] The court rejected Advanced Masonry's argument that it should not have credited Feliz with his alleged statements regarding wages because the NLRB relied entirely on an employee's testimony.[238] Advanced Masonry argued that Feliz merely translated Karp's statements to employees and that nothing in the record indicated he was anti-union, however the court held these contentions were not enough to demonstrate that "the Board's credibility determinations were self-contradictory, inherently unreasonable, or based on inadequate reasons."[239] The court also declined to overturn the NLRB's finding that the Advanced Masonry's foreman's statement about wages for the same reason cited with regards to Feliz.[240] The foreman also denied making any statements about wages, however there was employee testimony stating that he did in fact make the statements attributed to him.[241] Because of this, the court was unwilling to hold

232. *Id.*

233. *Id.*

234. *Id.* at 954.

235. *Id.* (quoting NLRB v. Allied Med. Transp., Inc., 805 F.3d 1000, 1005 (11th Cir. 2015) (quotation marks omitted)).

236. *Id.* at 955 (quoting NLRB v. Goya Foods of Fla., 525 F.3d 1117, 1126 (11th Cir. 2008) (quotation marks omitted)).

237. *Id.* at 955.

238. *Id.*

239. *Id.*

240. *Id.* at 956.

241. *Id.*

that the NLRB's decision to credit an employee's testimony over the foreman's testimony was not supported by substantial evidence based on the record.[242]

VIII. AGE DISCRIMINATION IN EMPLOYMENT ACT

In *Jones v. RS & H, Inc.*,[243] the court held that a plaintiff was not able to bring a collective action against his employer for violation of the Age Discrimination in Employment Act (ADEA)[244] because he failed to demonstrate a reasonable basis for a claim of discrimination against a nationwide class.[245] Jones alleged his former employer, RS & H, Inc. (RSH) engaged in age discrimination in violation of the ADEA when he was terminated as part of a reduction of force. RSH maintained a nationwide presence, including a Tampa, Florida office where Jones worked. In June 2015, Jones was among seven RSH employees in the Tampa office chosen to be terminated. Jones was fifty-three at the time and was one of five terminated employees over the age of forty. The decision to terminate those seven employees in the Tampa office was made by the Tampa division manager, aged fifty-one, which was then approved by the regional manager, aged sixty-eight.[246]

Jones alleged that twenty-one out of the twenty-three employees terminated in the reduction in force, including the Tampa office, were over the age of forty. He also claimed that RSH routinely would not allow non-officers to work until retirement, that they fired older employees in favor of younger ones, and that RSH management had made ageist comments. For these reasons, Jones claimed that the reduction in force was merely a pretext for intentional age discrimination and filed a putative collective-action complaint under the ADEA.[247] The district court denied Jones's motion to proceed on behalf of a nationwide class, finding that Jones failed to sufficiently allege that "RSH had a pattern or practice of discriminating against its employees at all locations based on their age."[248]

On appeal, the Eleventh Circuit affirmed.[249] In order for a plaintiff "to bring a collective action under the ADEA on behalf of a class of employees [the plaintiff] must show that the class is 'similarly

242. *Id.*
243. 775 F. App'x 978 (11th Cir. 2019).
244. 29 U.S.C. §§ 621–634 (2019).
245. *Jones*, 775 F. App'x at 983.
246. *Id.* at 980–81.
247. *Id.* at 981.
248. *Id.* at 982.
249. *Id.* at 991.

situated.'"[250] The court explained, "[o]ne way of doing so—though not the only way—is to provide evidence that the class was subject to a 'unified policy, plan, or scheme of discrimination.'"[251] According to the court, Jones failed to establish that any alleged discrimination occurred at a local level and there was no evidence indicative of a company-wide policy or practice of ageism.[252] To support this holding, the court noted that Jones's argument that all the employees RSH terminated in June 2015 were subject to the "same general pattern and practice of discrimination," did not hold water because any alleged ageist comments made by management were "vague anecdotal observations—particularly when viewed against RSH's affidavits stating that the RIF [termination] selections at the Tampa office were made locally by [management], who had no role in the [termination] selections at RSH's other offices."[253] Therefore, the court held the district court did not abuse its discretion when it found that Jones "had not shown a 'reasonable basis' for [his] claim of discrimination against a nationwide class."[254]

IX. CONCLUSION

As this Article demonstrates, the issues arising under labor and employment law are becoming progressively more challenging each year. Regardless of whether a practitioner specializes in state, federal, administrative, or other matters pertaining to labor and employment, it is important to recognize and stay abreast of the ever-evolving trends, policies, cases, and federal guidelines. How the law will evolve, and change, remains to be seen. For now, the cases above give practitioners some guidance for the time being.

250. *Id.* at 982–83 (quoting 29 U.S.C. § 216(b) (2019)).
251. *Id.* at 983 (quoting Grayson v. K Mart Corp., 79 F.3d 1086, 1095 (11th Cir. 1996)).
252. *Id.*
253. *Id.*
254. *Id.*