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# Employment Discrimination

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# Employment Discrimination

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Perhaps the most surprising development during the 1994 survey period is what did not happen, as opposed to what did happen.[1] The anticipated stampede of decisions under the Americans With Disabilities Act of 1990[2] (the "ADA"), has not yet happened, at least at the circuit court of appeals level. Not a single ADA case was handed down by the Eleventh Circuit during the survey period. Since, at last count, there were over 30,000 ADA charges pending[3] at the administrative charge

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1. This Article will cover significant cases in the area of employment discrimination law decided by the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit during calendar year 1994. Cases arising under the following federal statutes are included: Title VII of the Civil Rights Act of 1964, Pub. L. No. 88-352, §§ 701-718, 78 Stat. 253 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)); the Age Discrimination in Employment Act of 1967 ("ADEA"), Pub. L. No. 90-202, §§ 2-15, 81 Stat. 602 (codified as amended at 29 U.S.C. §§ 621-634 (1988)); the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 and scattered sections (Supp. 1992)); the Equal Pay Act of 1963, Pub. L. No. 88-38, § 3, 77 Stat. 56 (codified as amended at 29 U.S.C. § 206(d) (1988)); the Americans With Disabilities Act of 1990 ("ADA"), Pub. L. No. 101-336, §§ 1-108, 104 Stat. 327 (codified as amended at 42 U.S.C. § 12101-12117 (Supp. 1992)); the Rehabilitation Act of 1973, Pub. L. No. 93-112, §§ 2-504, 87 Stat. 357 (codified as amended at 29 U.S.C. §§ 701-796i (1988)); the Civil Rights Act of 1866, Ch. 114, § 16, 16 Stat. 144 (codified as amended at 42 U.S.C. § 1981 (1988)); the Civil Rights Act of 1871, Ch. 22, § 1, 17 Stat. 13 (codified as amended at 42 U.S.C. § 1983 (1988)); and the Immigration Reform and Control Act, Pub. L. No. 99-603, § 274, 100 Stat. 3360 (codified as amended at 8 U.S.C. § 1324 A & B (1986)).

2. 42 U.S.C. §§ 12101-12117 (1990).

3. As of October 1994, a total of 36,604 ADA-related charges had been filed with the EEOC. *See* BNA's Americans With Disabilities Act Manual, Dec. 1994, at 77.

level, this most certainly will change in the very near future. The year 1994 will also be remembered as the year that the United States Supreme Court finally resolved the issue of whether the Civil Rights Act of 1991 is to be retroactively applied.[4] By determining that the statute is not retroactive, the Court restored certainty to an issue which had spawned literally multitudes of conflicting decisions throughout the United States. In another extremely important opinion, the High Court also addressed the "after-acquired evidence" defense, placed considerable limitations on the defense, and thereby reversed what had become a substantial body of authority endorsing the doctrine.[5] Not to be completely outdone, the United States Court of Appeals for the Eleventh Circuit also handed down several significant decisions, especially in the area of consent decrees and affirmative action plans,[6] as well as the parties' respective burdens of proof under the Equal Pay Act.[7]

## I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

### *A. Theories of Liability and Burdens of Proof*

**Disparate Treatment Cases.** Until the Supreme Court's recent decision in *St. Mary's Honor Center v. Hicks*,[8] the analytical framework in the typical disparate treatment case (i.e., those cases where there is no direct evidence of discrimination), had been as constant as the North Star. As provided in the Supreme Court's 1973 decision in *McDonnell Douglas Corp. v. Green*,[9] and reaffirmed in *Texas Department of Community Affairs v. Burdine*,[10] the plaintiff bears the initial burden of establishing a prima facie case of discrimination.[11] If the plaintiff satisfies this initial burden, then the defendant must meet the "exceed-

4. *See* discussion *infra*, Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994); Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994).

5. *See* discussion *infra*, McKennon v. Nashville Banner Publishing Co., 115 S. Ct. 879 (1995).

6. *See* discussion *infra*, Ensley Branch, NAACP v. Seibels, 20 F.3d 1489 (11th Cir. 1994); *In re* Birmingham Reverse Discrimination Emp. Lit., 20 F.3d 1525 (11th Cir. 1994); United States v. City of Miami, 2 F.3d 1497 (11th Cir. 1993); Peightal v. Metropolitan Dade County, 26 F.3d 1545 (11th Cir. 1994).

7. 29 U.S.C. § 206(d) (1988). *See* discussion *infra*, Mulhall v. Advance Security, Inc. 19 F.3d 586 (11th Cir. 1994); Meeks v. Computer Assoc. Int'l, 15 F.3d 1013 (11th Cir. 1994).

8. 113 S. Ct. 2742 (1993).

9. 411 U.S. 792 (1973).

10. 450 U.S. 248 (1981).

11. 411 U.S. at 802; 450 U.S. at 252-53.

ingly light" burden[12] of articulating "some legitimate, nondiscriminatory reason" for its employment decision.[13] It is at this stage of the inquiry that the Supreme Court modified the analytical framework somewhat in *Hicks*. Prior to *Hicks*, if the plaintiff could then establish that the employer's profferred reason was false, or pretextual, then a judgment for the plaintiff was automatic.[14] However, in *Hicks*, the Court ruled that, after the defendant meets its burden of production, the "*McDonnell Douglas* framework—with its presumptions and burdens—is no longer relevant."[15] Instead, the Court continued, the "sole inquiry" at that point becomes whether the plaintiff has established that the defendant "intentionally discriminated" against the plaintiff for an "impermissible reason."[16]

Although the *Hicks* standard has been criticized in some circles as unduly favoring employers in the face of long-established precedent, the *Hicks* standard was of no benefit to the employer in *Batey v. Stone*.[17] A race discrimination case alleging the discriminatory failure to promote, the district court in *Batey* granted summary judgment for the employer, the Anniston Army Depot ("ANAD"), located in Anniston, Alabama.[18] Plaintiff, a white female, had worked as a civilian with the Army since 1958, and had worked her way up to Chief of the Production, Planning & Control Division in supply, a GS-12 position she had obtained in October, 1988. She was the first female to hold this position. The other division chiefs within the supply unit were all males. The primary litigation issue concerned the creation of a new position, Acting Director of Supply, a GM-13 position. The creation of this new position allegedly abolished the Deputy Director of Supply position. The new position was awarded to a male, Fred Fomby, the Chief of General Supply, on the theory that the new job description for the Acting Director position had merged the job description of Chief of General Supply (Fomby's position) with that of Deputy Director of Supply (the position allegedly abolished).[19]

On appeal, the Eleventh Circuit reversed, finding that a material issue of fact remained as to whether the promotion decision had been undertaken with discriminatory intent.[20] The court found that, on the

12. Perryman v. Johnson Prods. Co., 698 F.2d 1138, 1142 (11th Cir. 1983).
13. 411 U.S. at 802; 450 U.S. at 253.
14. *See, e.g.*, *McDonnell Douglas*, 411 U.S. at 792.
15. 113 S. Ct. at 2749.
16. *Id.*
17. 24 F.3d 1330 (11th Cir. 1994).
18. *Id.* at 1333.
19. *Id.* at 1331-32.
20. *Id.* at 1333.

basis of the evidence, it was unclear why the Deputy Director position had been merged with General Supply (Fomby's position) rather than Production, Planning & Control (plaintiff's position), since there was evidence in the record that the Chief of Production, Planning & Control was better suited for the new position.[21] In short, the court found that the evidence raised the question as to whether the matrix utilized in filling the new Acting Director position had been "fixed" to select a predetermined candidate, and thereby favor the male (Fomby) over the female (plaintiff).[22]

Summary judgment in favor of the employer did not fair any better upon reaching the Eleventh Circuit in *Turnes v. AmSouth Bank, NA.*[23] However, unlike *Batey*, the court focused its decision upon whether the employer had adequately met its burden of production under the *Burdine* framework.[24] Plaintiff, a black male, had applied for a position as a loan collector at defendant bank. The bank hired several loan collectors, all of whom were white, and all of whom had less collection experience than plaintiff. The bank maintained that it had a policy requiring its employees to have "clear credit." However, no credit check was performed on plaintiff until after he had filed his discrimination charge with the Equal Employment Opportunity Commission ("EEOC"). The credit check revealed that plaintiff had a poor history of paying on a loan and also had overdrawn his checking account on numerous occasions.[25] The district court granted summary judgment in the bank's favor on the basis of this evidence.[26]

On appeal, the Eleventh Circuit reversed, finding that defendant could not rely on the credit history evidence to meet its burden of production, since it had no knowledge of this information at the time it rejected plaintiff's application.[27] Even though the court acknowledged that the employer's intermediate burden was one only of production, not persuasion, the court found that this burden could not be met with a "hypothetical justification for its decision."[28] Accordingly, the court found that plaintiff's prima facie case stood unrebutted.[29] However, the court remanded the case to resolve the issue of whether defendant could meet its burden of establishing a *Mt. Healthy* defense, i.e., whether

21. *Id.* at 1334.
22. *Id.* at 1335-36.
23. 36 F.3d 1057 (11th Cir. 1994).
24. *Id.* at 1061.
25. *Id.* at 1059-60.
26. *Id.* at 1060.
27. *Id.* at 1062.
28. *Id.* at 1061.
29. *Id.* at 1062.

defendant could show that it would not have hired plaintiff even absent its discriminatory motive.[30]

The third typical disparate treatment case during the survey period, *Wilson v. AAA Plumbing Pottery Corp.*,[31] produced a very divided opinion among the panel hearing the case. Plaintiff was a security guard with AAA Plumbing Pottery Corp. Several years after plaintiff was hired, AAA stopped employing security guards, and transferred plaintiff to a full-time janitor position. In 1990, after working as a full-time janitor for approximately five years, AAA fired plaintiff after deciding to contract for its janitorial services. AAA then entered into a one year contract with an African-American owned company to perform its janitorial services after firing plaintiff. After terminating its relationship with the janitorial service, AAA then gave the janitorial job to one of its own employees, a white female.[32] Following a bench trial, the district court found that defendant had not discriminated against plaintiff in abolishing the full-time security guard and janitor position, but found that AAA had discriminated against plaintiff on account of his race by failing to offer him at least a part-time janitorial job at the same rate of pay for which it could have contracted the services.[33] Key to the court's decision was the fact that AAA had accommodated a white supervisor by transferring him to the job of watchman when he could no longer perform his supervisory duties for health reasons.[34] On appeal, the panel majority, in an opinion authored by Circuit Judge Hatchett, found that the district court's decision was not clearly erroneous,[35] assertedly applying the rule announced in *Mitchell v. Worldwide Underwriters Insurance Co.*[36]

In a vigorous dissent, Circuit Judge Edmondson reasoned that the panel majority's opinion struck at the heart of a "core business decision"; that is, whether a business decides to "staff itself with full-time

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30. *Id. See, e.g.*, Joshi v. Florida State Univ. Health Ctr., 763 F.2d 1227, 1236 (11th Cir.), *cert. denied*, 474 U.S. 948 (1985). Interestingly, the court took the position that this was not an after-acquired evidence case. 36 F.3d at 1062 n.9. However, it would appear that the after-acquired evidence defense would be more applicable to this case than the Mt. Healthy mixed-motive defense. As the Supreme Court clarified in McKennon v. Nashville Banner Pub. Co., 115 S. Ct. 879 (1995), discussed *infra*, the Mt. Healthy mixed-motive defense, contrary to the after-acquired evidence defense, by definition, implies that the employer had knowledge of the legitimate reasons justifying, in part, its employment decision, at the time that the decision was made.

31. 34 F.3d 1024 (11th Cir. 1994).

32. *Id.* at 1026.

33. *Id.* at 1027.

34. *Id.*

35. *Id.* at 1029.

36. 967 F.2d 565 (11th Cir. 1992) (a reduction in force case under the ADEA).

employees, part-time employees, independent contractors or some mix . . . ."[37] The dissent was critical of the district court and the panel majority for seemingly requiring, as a matter of law, that the employer create a new part-time janitor position as an accommodation to the terminated employee.[38] The dissent concluded that: "[t]he district court and this court seem to think that Title VII requires employers to offer minority employees an opportunity to 'match' an outside independent contractor's price for the work, before the employer may contract the job out lawfully. This law is new to me."[39] Clearly, the dissent would have reversed the district court's judgment, a decision which the authors wholeheartedly concur with.

**Sexual Harassment.** One case addressing the volatile issue of sexual harassment reached the court of appeals during the survey period. In *Virgo v. Riviera Beach Associates, Ltd.*,[40] plaintiff was employed as the general manager of the Sheraton Ocean Inn, located on the east coast of Florida, north of Miami. The Sheraton was owned by Riviera Beach Associates, a limited partnership, and managed by Sterling Group, who directly employed plaintiff. Plaintiff alleged that her superior, the president of Sterling Group, touched her sexually and told her that she would have to engage in sexual intercourse with him or else he would give her bad performance reviews. Plaintiff eventually succumbed to this pressure and engaged in sexual intercourse with her superior on four occasions.[41] After resigning, plaintiff brought a Title VII action for quid pro quo sexual harassment and also alleged several common law tort claims.[42] After a trial, the jury awarded plaintiff $1,081,605 in damages and the district court subsequently awarded an additional $420,670 in damages (including back pay and front pay).[43]

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37. 34 F.3d at 1029 (Edmondson, J., dissenting).

38. *Id.* at 1030.

39. *Id.*

40. 30 F.3d 1350 (11th Cir. 1994).

41. *Id.* at 1353-54.

42. *Id.* at 1354. In the typical quid pro quo sexual harassment case, the sexual harassment is directly or indirectly tied to a tangible job condition (i.e., discharge, failure to get a promotion, failure to get a raise) on the part of the affected employee. *See, e.g.*, Steele v. Offshore Shipbuilding, Inc., 867 F.2d 1311, 1315 (11th Cir. 1989). This is to be distinguished from hostile environment sexual harassment which occurs when an employer's conduct "'has the purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive environment.'" Meritor Sav. Bank, FSB v. Vinson, 477 U.S. 57, 65 (1986) (quoting 29 C.F.R. § 1604.11(a)(3)).

43. 30 F.3d at 1354.

In affirming this decision on appeal, the Eleventh Circuit considered a hodgepodge of issues raised by defendants.[44] Initially, defendants questioned the court's jurisdiction, asserting that neither Riviera Beach nor Sterling Group had a sufficient number of employees to meet the statutory definition of "employer."[45] The district court found that the two entities were joint employers, and that together they had employed the requisite fifteen employees.[46] On appeal, the Eleventh Circuit found that the district court had correctly applied the joint employer test utilized under the National Labor Relations Act,[47] as expressed in *NLRB v. Browning-Ferris Industries*.[48] Focusing on the management agreement with Sterling Group, and the fact that, under the agreement, Riviera Beach retained significant control over the day-to-day operation of the hotel, including labor policies and decisions, the appellate court concluded that the evidence was sufficient to sustain the joint employer finding.[49] Defendants also attacked on appeal the sufficiency of the evidence for quid pro quo sexual harassment. Initially, the court considered whether there was sufficient evidence to find Riviera Beach liable for the conduct of Sterling Group's president, by again focusing on the management agreement.[50] The appellate court determined that the agreement clearly established Sterling Group as an agent of Riviera Beach, and hence, liable for the actions of its agent's president.[51] With respect to the sufficiency of the evidence, the court had little trouble in sustaining the jury's verdict, especially since the alleged sexual harasser had not even testified at the trial to rebut plaintiff's testimony.[52] Finally, the court affirmed as not clearly erroneous the district court's factual finding that plaintiff was constructively discharged.[53]

**Pregnancy Discrimination.** Two cases during the survey period addressed the Pregnancy Discrimination Act ("PDA"),[54] with opposite results, and seemingly inconsistent conclusions. The first case, *Byrd v.*

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44. *Id.* at 1364-65.
45. *Id.* at 1359.
46. *Id.*
47. 29 U.S.C. §§ 151-169 (1988).
48. 30 F.3d at 1359 (citing NLRB v. Browing-Ferris Indus., 691 F.2d 1117 (3d Cir. 1982)).
49. *Id.* at 1360.
50. *Id.*
51. *Id.* at 1362.
52. *Id.* at 1362-63.
53. *Id.* at 1363.
54. 42 U.S.C. § 2000e(k) (1988).

*Lakeshore Hospital*,[55] involved a receptionist/secretary who was terminated by her employer, a hospital, during her pregnancy for allegedly excessive absenteeism. Within approximately two months of becoming pregnant, plaintiff missed ten scattered days of work because of pregnancy-related illnesses and near-miscarriages. It was undisputed that she had accumulated sufficient sick leave to cover the absences.[56] After a bench trial, the district court ruled for defendant since plaintiff had not established that non-pregnant workers with similar absentee records were treated more favorably than plaintiff.[57]

On appeal, the Eleventh Circuit held that the district court's findings mandated a conclusion that the PDA had been violated as a matter of law.[58] According to the court of appeals, the finding that plaintiff had been discharged for using the hospital sick leave policy for her pregnancy-related condition, in and of itself, amounted to a finding of pregnancy discrimination.[59] The court reasoned that the "only logical inference" that could be drawn was that the hospital customarily followed its own policy.[60] Otherwise, according to the court, a presumption would result that the hospital routinely discharged its employees for utilizing their allotted sick leave time.[61] The court found that it was the employer's burden to establish "this unusual scenario."[62] The court concluded that: "[t]he effect of our decision today is simple: it is a violation of the PDA for an employer to deny a pregnant employee the benefits commonly afforded temporarily disabled workers in similar positions, or to discharge a pregnant employee for using those benefits."[63]

Approximately one month later, the Eleventh Circuit handed down *Armstrong v. Flowers Hospital, Inc.*[64] In that case, plaintiff worked as a home health care nurse for a hospital in Dothan, Alabama. After being assigned a patient who was HIV-positive, plaintiff, who was pregnant, became very alarmed because she was afraid that the HIV-positive patient would put her fetus at risk. The hospital had a clearly established policy that refusing to treat a patient constituted grounds for termination. When plaintiff refused to treat the HIV-positive patient, she was terminated (after declining the opportunity to resign). Prior to

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55. 30 F.3d 1380 (11th Cir. 1994).
56. *Id.* at 1380-81.
57. *Id.* at 1381.
58. *Id.* at 1383-84.
59. *Id.* at 1383.
60. *Id.*
61. *Id.*
62. *Id.*
63. *Id.* at 1383-84.
64. 33 F.3d 1308 (11th Cir. 1994).

plaintiff's termination, another nurse (who was not pregnant) also had been asked to resign because she had refused to treat an HIV-positive patient.[65] The district court granted defendant's motion for summary judgment.[66]

On appeal, the Eleventh Circuit considered the case both under a disparate treatment analysis and a disparate impact analysis.[67] Under the *McDonnell Douglas/Burdine* analysis, the court of appeals agreed that plaintiff had not established a prima facie case of disparate treatment, since she had failed to establish that the hospital's policy (termination for refusing to treat a patient) was applied inconsistently among the nurses.[68] The court of appeals also agreed that no prima facie case of disparate impact had been established since plaintiff failed to establish that the hospital's policy disproportionately impacted pregnant employees.[69] The evidence revealed that only two employees had been terminated under the policy, one pregnant (plaintiff) and one non-pregnant.[70]

Plaintiff also argued on appeal that the Supreme Court's decision in *UAW v. Johnson Controls, Inc.*,[71] required that an employer make alternative work available for a pregnant employee who is concerned about the health of her fetus.[72] Rejecting this contention, the court concluded that *Johnson Controls'* prohibition on an employer deciding what course of action is best for a pregnant employee does not include a requirement that the employer make alternative work available.[73] The court emphasized that the legislative history of the PDA made it clear that employers do not need to extend any benefits to pregnant women that they do not already provide to other disabled employees.[74] The court concluded: "While the PDA requires the employer to ignore the pregnancy, the employer need not ignore absences, unless the employer likewise ignores the absences of nonpregnant employees."[75]

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65. *Id.* at 1309-11.
66. *Id.* at 1312.
67. *Id.* at 1312-18. The plaintiff's burden of proof in the typical disparate impact case is provided in section 703(k) of Title VII, 42 U.S.C. § 2000e-2(k).
68. 33 F.3d at 1314.
69. *Id.* at 1315.
70. *Id.*
71. 499 U.S. 187 (1991).
72. 33 F.3d at 1316.
73. *Id.*
74. *Id.* at 1317.
75. *Id.*

This portion of the opinion is difficult to reconcile with *Byrd*.[76] Concluding that Title VII does not require employers to treat their employees "with kindness," the court of appeals agreed that plaintiff had not established a prima facie case of discrimination.[77]

**Religious and National Origin Discrimination.** In *Beadle v. Hillsborough County Sheriff's Department*,[78] the Eleventh Circuit was confronted with an employer's duty under Title VII to reasonably accommodate an employee's religious practices.[79] Plaintiff, a Seventh-Day Adventist, worked as a correctional officer for the Hillsborough County prison. He was terminated when, after being scheduled to work a Friday evening shift, he left his post early in order to observe his sabbath (a period lasting from sundown Friday to sundown Saturday).[80] The district court entered judgment in favor of the Sheriff's Department.[81]

On appeal, the Eleventh Circuit agreed that the employer had made sufficient attempts to accommodate plaintiff's religious beliefs.[82] Although the Sheriff's Department declined to grant plaintiff permanent days off on his sabbath, it allowed him the freedom to arrange for shift swaps with other employees, provided him with a roster sheet, and also allowed him to advertise his need for swaps at roll call and on the Department bulletin board.[83] While the court acknowledged that an employer has a duty to accommodate an employee's religious practices, it also noted that an employee has a duty to "make a good faith attempt to accommodate his religious needs through means offered by the employer."[84] Since plaintiff failed to meet this duty by abandoning his shift, the court affirmed the district court's decision.[85]

The issue of national origin discrimination under Title VII was addressed by the Eleventh Circuit in *Green v. School Board of Hillsborough County*.[86] Plaintiff, a female of East Indian descent, was born and

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76. Indeed, the cases appear to be in direct conflict on this point. *Byrd* appears to hold that it is a violation of the PDA to discharge a pregnant employee for absenteeism, regardless of the employer's practice with respect to nonpregnant employees.

77. 33 F.3d at 1317.

78. 29 F.3d 589 (11th Cir. 1994).

79. *Id.* at 591.

80. *Id.* at 590.

81. *Id.*

82. *Id.* at 592.

83. *Id.* at 593.

84. *Id.*

85. *Id.* at 593-94.

86. 25 F.3d 974 (11th Cir. 1994).

raised in Georgetown, Guyana, in South America. She was employed by the defendant School Board as a substitute food service worker. Plaintiff expressed an interest in being considered for a full-time food service assistant position. Instead, the School Board selected another substitute, Ann Rodriguez. Upon learning of this decision, plaintiff confronted her supervisor and engaged in a heated argument, during which her supervisor allegedly referred to plaintiff as a "Cuban refugee."[87] The district court denied defendant's motion for involuntary dismissal pursuant to Rule 41(b) of the Federal Rules of Civil Procedure.[88] In a bench trial of plaintiff's subsequent Title VII action, alleging that the School Board failed to hire plaintiff for the full-time position because of her national origin, the district court ruled that the School Board's reasons for not hiring plaintiff were pretextual and in violation of Title VII. However, plaintiff was only awarded one dollar in nominal damages.[89]

On appeal, the Eleventh Circuit found that the district court erred in failing to grant the School Board's Rule 41(b) motion to dismiss.[90] The court concluded that plaintiff had not established a prima facie case under *McDonnell Douglas* since there was no evidence in the record to establish the color or national origin of the individual (Ann Rodriguez) selected over plaintiff for the full-time food service position.[91] Ironically, the only mention in the record of Rodriguez' nationality was during closing argument when, in response to a question from the court, defendant's counsel noted that Rodriguez was white, had married someone named Rodriguez, and that she was "sort of an American Heinz 57, not a Hispanic by any measure."[92] However, the court found that this statement could not be relied upon by plaintiff as evidence.[93]

### *B. Procedural and Evidentiary Matters*

**Class Actions.** Title VII class actions are on the verge of following the same path as that which befell the dinosaur; that is, total extinction, and significant only for historians to debate and discuss. A few vestiges of this past era remain. One such vestige is the Eleventh Circuit's

87. *Id.* at 976.
88. *Id.* at 977.
89. *Id.*
90. *Id.* at 980.
91. *Id.* at 978.
92. *Id.* at 979.
93. *Id.*

decision in *Griffin v. Singletary*,[94] which began as an "across-the-board" Title VII class action against the Florida Department of Corrections in 1979. At issue in the most recent appeal to the Eleventh Circuit was the application of the so-called "piggyback rule."[95] This rule allows class members to assert a claim in a Title VII class action despite not having exhausted their administrative remedy before the EEOC, as long as a representative class member has filed a timely charge and obtained the statutory notice of right-to-sue.[96] In this sense, the non-filing class members are allowed to "piggyback" onto the charge filed by the class representative. In an earlier decision, the Eleventh Circuit had vacated the district court order certifying the original class.[97] Thereafter, some of the members of the original class filed a second class action, challenging defendant's requirement that all applicants pass a written examination as a condition of being hired.[98] The district court granted summary judgment for defendants on the ground that no plaintiff had filed a timely charge of discrimination with the EEOC.[99]

On appeal, the principal issue was whether the latest group of plaintiffs could take advantage of the EEOC charge filed by the class representative in the original *Griffin* class (that subsequently was vacated).[100] The Eleventh Circuit ruled that they could piggyback their individual claims, but not any class claims.[101] As for the class claims, the court found that plaintiffs could not "piggyback one class action onto another," resulting in "endless rounds of litigation . . . over the adequacy of successive named plaintiffs to serve as class representatives."[102] The court noted that the *Griffin* litigation had been pending for fifteen years, and the court had no intention of making a ruling that would prolong it "even further."[103] As for plaintiffs' individual claims, however, the court found that the piggyback rule did apply as long as the prior class action was pending.[104] Since defendants had been put on notice during the prior action that their written examination was being challenged, the court found that the charge-filing period for the new plaintiffs was tolled from the time that the original *Griffin* action

94. 17 F.3d 356 (11th Cir. 1994).
95. *Id.* at 359-60.
96. *Id.* at 360.
97. *Id.* at 358. *See* Griffin v. Dugger, 823 F.2d 1476, 1494 (11th Cir. 1987).
98. 17 F.3d at 358-59.
99. *Id.* at 359.
100. *Id.*
101. *Id.* at 360-61.
102. *Id.* at 359 (citation omitted).
103. *Id.*
104. *Id.* at 360.

was filed until the time of the Eleventh Circuit's prior opinion vacating the class certification order.[105] The court remanded the action for a determination of whether, in light of the court's opinion, the individual plaintiffs had filed timely charges.[106]

**Pre-Suit Arbitration.** In *Kidd v. Equitable Life Assurance Society*,[107] the Eleventh Circuit rendered an additional endorsement for *Gilmer*[108]—style arbitration. Plaintiffs were former securities sales agents with Equitable. Both had signed applications with the National Association of Securities Dealers ("NASD"). Plaintiffs brought an action under Title VII alleging discrimination on account of race in various respects.[109] The district court denied defendant's motion to compel arbitration.[110] On appeal, the Eleventh Circuit reversed, broadly interpreting the arbitration clause in the NASD Code, and reiterating the federal policy favoring arbitration as a means of resolving employment disputes.[111]

**Administrative Prerequisites to Suit.** Two cases during the survey period addressed the administrative prerequisites that a plaintiff must meet prior to bringing an action under Title VII. The more significant of the two cases, *Sims v. Trus Joist MacMillan*,[112] has the potential to all but eliminate the administrative exhaustion requirement. Shortly after his discharge by defendant, plaintiff filed a charge with the EEOC alleging discrimination on account of race and retaliation in violation of Title VII. Contemporaneously, plaintiff requested that the EEOC issue a right-to-sue notice. Eleven days after the filing of the charge, the District Director of the EEOC issued the right-to-sue notice, certifying that his office could not complete its processing of the charge within 180 days.[113] The district court dismissed the action for lack of jurisdiction, holding that the EEOC had exclusive jurisdiction during the 180 day period following the filing of the charge.[114]

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105. *Id.* at 361.
106. *Id.*
107. 32 F.3d 516 (11th Cir. 1994).
108. Ironically, even though this case is a clear endorsement of *Gilmer*-style arbitration in the employment context, there is no mention of the Supreme Court's decision in Gilmer v. Interstate/Johnson Lane Corp., 111 S. Ct. 1647 (1991) in the court's opinion.
109. 32 F.3d at 517-18.
110. *Id.* at 518.
111. *Id.* at 520.
112. 22 F.3d 1059 (11th Cir. 1994).
113. *Id.* at 1060.
114. *Id.*

On appeal, the Eleventh Circuit found that the district court erred in viewing the administrative prerequisites as jurisdictional requirements, reiterating its past holdings that the prerequisites, instead, should be viewed as conditions precedent.[115] With respect to the early issuance of the right-to-sue notice, the court followed the decisions from the Second[116] and Ninth Circuits[117] in ruling that the notices had been properly issued.[118] The court noted that there was nothing on the face of the statute which prohibited the Commission from issuing right-to-sue notices before the expiration of 180 days, and further commented that it was "pointless" for plaintiff to have to "stand by and mark time until the 180-day period expires."[119] Although the court concluded with a statement that its decision was not allowing plaintiffs to circumvent the administrative exhaustion requirement,[120] that result appears to be precisely what this opinion allows.

In the second administrative prerequisite case, *Thomas v. Kroger Co.*,[121] the Eleventh Circuit reaffirmed the long-established principle that a plaintiff must file a charge with the EEOC before filing a Title VII action.[122] Since it was undisputed that plaintiff had never filed a charge, the court affirmed the district court's summary judgment in favor of defendant.[123] Accordingly, although the administrative exhaustion requirement may be a meaningless jesture in most cases in light of *Sims*, the Eleventh Circuit still will not allow a plaintiff to ignore the requirement altogether.

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115. *Id.* at 1063. *See also* Fouche v. Jekyll Island-State Park Authority, 713 F.2d 1518, 1524 (11th Cir. 1983); Jackson v. Seaboard Coast Line R.R., 678 F.2d 992, 1010 (11th Cir. 1982).

116. *See* Weise v. Syracuse Univ., 522 F.2d 397 (2d Cir. 1975).

117. *See* Brown v. Puget Sound Elec. Apprenticeship & Training Trust, 732 F.2d 726 (9th Cir. 1984), *cert. denied*, 469 U.S. 1108 (1985); Saulsbury v. Wismer & Becker, Inc., 644 F.2d 1251 (9th Cir. 1981).

118. 22 F.3d at 1061.

119. *Id.* The conclusion that Section 706(f)(1) of Title VII does not prohibit the issuance of a right-to-sue notice before the expiration of 180 days is contrary to the interpretation of the statute by other courts. *See, e.g.*, Henschke v. New York Hosp.-Cornell Medical Ctr., 821 F. Supp. 166 (S.D.N.Y. 1993). However, early issuance of the right-to-sue notice is also allowed pursuant to the EEOC's procedural regulations. *See* 29 CFR § 1601.28(a)(2).

120. 22 F.3d at 1063.

121. 24 F.3d 147 (11th Cir. 1994).

122. *Id.* at 149-50.

123. *Id.*

## II. AGE DISCRIMINATION IN EMPLOYMENT ACT

### A. *Coverage Under the Act*

Only four significant Age Discrimination in Employment Act ("ADEA") cases were reported during the survey period. Each case was decided on summary judgment. However, the court reversed each case on appeal, indicating the increasing difficulty district courts are having successfully applying summary judgment in age discrimination cases.

*Daughtrey v. Honeywell, Inc.*[124] concerned the scope of the term "employee" for coverage purposes under the ADEA. The appellate court focused on the proper test for determining who qualifies as an "employee" (as opposed to an independent contractor) for ADEA purposes.[125]

Honeywell employed Daughtrey pursuant to a consultant agreement to perform computer programming services in exchange for an hourly wage.[126] Under the terms of the consulting agreement, Daughtrey was labelled "an independent contractor."[127] The agreement further provided that she "shall be free to exercise discretion and independent judgment as to the methods and means of performance of the services connected with the assignments made" to her by Honeywell.[128] According to the agreement, Daughtrey was not an employee of Honeywell and was not entitled to any of the usual benefits and privileges of employment with Honeywell.[129] Additionally, during the latter years of the relationship, a separate company served as "paymaster" for Honeywell with respect to its consultant workers, such as Daughtrey.[130] Daughtrey, however, previously had been a regular Honeywell employee for several years prior to entering into the consulting relationship.[131] Following a layoff, she entered the purported consulting relationship with her former employer.[132] Daughtrey served as a consultant to Honeywell from 1986 until January 29, 1988, when she, along with ten to eleven other consultants, were terminated.[133] Thereafter, she initiated an action against Honeywell inter alia

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124. 3 F.3d 1488 (11th Cir. 1993).
125. *Id.* at 1492.
126. *Id.* at 1490.
127. *Id.*
128. *Id.*
129. *Id.*
130. *Id.*
131. *Id.*
132. *Id.*
133. *Id.*

under the ADEA.[134] The district court granted summary judgment in favor of Honeywell and against Daughtrey on her ADEA claim, concluding that, under the agreement, she was an independent contractor and as such could not maintain an employment discrimination action under the Act.[135] The district court correctly reasoned that an independent contractor was not entitled to maintain a claim under the ADEA because the Act only prohibits age discrimination by an "employer."[136] Since Honeywell qualified as a contractor, not an employer of the plaintiff, no relief was available to her under the Act.[137] However, the court of appeals reversed and remanded the case for further proceedings upon finding that the district court failed to undertake a thorough analysis of all the factors relevant to this determination.[138]

The court of appeals noted that the federal circuits generally have adopted a hybrid approach to distinguish between an "employee" and an "independent contractor" for a variety of anti-discrimination purposes.[139] However, at least one federal circuit questioned the continued vitality of the hybrid approach in light of the Supreme Court's decision in *Nationwide Mutual Insurance Co. v. Darden*.[140] In light of *Darden*, the Second Circuit Court of Appeals concluded that the traditional agency test must be applied in the ADEA context.[141] The Eleventh Circuit, however, declined to decide which test to apply in ADEA cases.[142] Instead, the Eleventh Circuit in *Daughtrey* concluded that, under either test, the question presented is a factual one, not appropriate for disposition on summary judgment.[143] Upon examination of the facts in *Daughtrey*, the appellate court determined that a disputed issue of fact existed regarding the degree of control exercised by Honeywell over the manner in which Daughtrey performed her services according

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134. *Id.* at 1490-91.

135. *Id.* at 1491.

136. *Id.* The ADEA defines "employee" as "an individual employed by any employer" and provides no guidance as to the scope of this term. 29 U.S.C. § 630(f).

137. 3 F.3d at 1495. The ADEA does not provide relief for discrimination against an independent contractor. *See, e.g.*, Oestman v. National Farmers Union Ins. Co., 958 F.2d 303 (10th Cir. 1992); Garrett v. Phillips Mills, Inc., 721 F.2d 979 (4th Cir. 1983); EEOC v. Zippo Mfg. Co., 713 F.2d 32 (3d Cir. 1983).

138. 3 F.3d at 1496.

139. *Id.* at 1495.

140. 503 U.S. 318 (1992). Absent legislative guidance within federal discrimination laws, the courts have applied tests developed for different purposes to the employee-independent contractor determination in the employment discrimination context. *See infra*, 3 F.3d at 1495-96.

141. 3 F.3d at 1495-96 (citing Frankel v. Bally, Inc., 987 F.2d 86, 90 (2d Cir. 1993)).

142. *Id.* at 1496.

143. *Id.*

to the consulting agreement.[144] Therefore, the court remanded the case to the district court with instructions to determine Honeywell's authority over the manner and means by which Daughtrey discharged her duties under the consultant agreement.[145]

Unfortunately, the opinion in *Daughtrey* did not resolve the issue of which is the proper test in the Eleventh Circuit—the agency or hybrid analysis. The decision provides the district courts with little guidance when analyzing whether an individual qualifies as an "employee" or an "independent contractor." This distinction is important since the ADEA does not provide relief for discrimination against an independent contractor.[146] The Supreme Court in *Darden*[147] stated that the traditional common law analysis should be undertaken. However, the Eleventh Circuit has adopted the hybrid approach.[148] "The hybrid approach . . . adheres to the common law test, tempered by a consideration of the 'economic realities' of the hired party's dependence on the hiring party."[149] It, therefore, remains unclear how the district court should proceed on remand and it is entirely possible that *Daughtrey* will have to make yet another trip back up on appeal concerning this question.

### *B. Theories of Liability and Burdens of Proof*

**Retaliation.** *Hairston v. Gainesville Sun Publishing Co.*,[150] concerned retaliation for filing an ADEA charge. The court of appeals reversed the district court's grant of summary judgment, finding that Hairston had set forth a prima facie case of retaliation discrimination sufficient to withstand summary judgment.[151]

Hairston worked for a number of years as manager of the sports department at the Gainesville Sun newspaper.[152] In February 1987, the newspaper hired a new publisher and made other changes in

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144. *Id.*
145. *Id.*
146. *See supra* note 137.
147. 112 S. Ct. at 1346. At least in the view of the Second Circuit, *Darden* requires that the common law definition of "employee" govern the scope of the ADEA as well as ERISA. 986 F.2d at 90.
148. Cobb v. Sun Papers, Inc., 673 F.2d 337, 340-41 (11th Cir.), *cert. denied*, 459 U.S. 874 (1982).
149. 3 F.3d at 1495 (citation omitted).
150. 9 F.3d 913 (11th Cir. 1993).
151. *Id.* at 920.
152. *Id.* at 916.

management.[153] Hairston apparently fell from grace with the newspaper's new editorial staff and, as a result, his duties pertaining to management of the sports department were reduced and subsequently assigned to a much younger employee.[154] Hairston also began receiving critical reviews and marginal performance evaluations for the first time in his career after the change in management.[155] He began to suspect that his low appraisals were age discrimination rather than fair evaluations of his job performance and he began to articulate his suspicions in this regard.[156] On October 27, 1989, he filed an age discrimination charge against the newspaper.[157]

Around the same time, Hairston began reporting on a National Collegiate Athletic Association investigation of the University of Florida basketball program.[158] During the course of coverage of that investigation, Hairston solicited support from then Florida Basketball Coach Norm Sloan concerning his age discrimination complaint against the newspaper.[159] Upon learning of these activities by Hairston, the newspaper took further disciplinary action against him in the belief that his conduct violated journalistic ethics and created a conflict of interest.[160] Although Hairston disagreed, he was suspended without pay for thirty days as a result of this controversy.[161] Subsequent to the suspension, Hairston was discharged from employment with the newspaper for another incident of alleged misconduct and this law suit ensued.[162]

The district court granted summary judgment for the newspaper after reviewing the facts of the case and determined that Hairston failed to establish a prima facie case of either retaliatory suspension or retaliato-

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153. *Id.*

154. *Id.*

155. *Id.*

156. *Id.*

157. *Id.* at 917. Hairston claimed that he had been "functionally demoted, harassed and denied wage increases because of his age." *Id.*

158. *Id.*

159. *Id.* It is unclear what relevant input Coach Sloan may have had on this subject.

160. *Id.*

161. *Id.* Hairston thereafter filed a new charge of age discrimination. He alleged that his suspension was retaliation for his having filed his original charges of age discrimination. *Id.*

162. *Id.* at 918. The termination incident involved another act of perceived insubordination concerning Hairston's reporting of interviews with Louisana State University basketball coach Dale Brown, who had also agree to testify on Hairston's behalf with respect to his age discrimination claims. *Id.* at 917-18. Again, it is unclear from the record what relevant information Coach Brown possessed on this subject.

ry discharge.[163] The court of appeals reversed and found that the district court had improperly allocated the respective burdens of the parties in the summary judgment context and that Hairston had indeed established both prima facie cases sufficient to withstand summary judgment.[164]

The Eleventh Circuit disagreed with the district court finding that Hairston failed to satisfy the third prong of the *Doyal v. Marsh*[165] test requiring a "causal link" between his protected statements and the adverse employment actions taken against him.[166] The Eleventh Circuit reasoned that the strict proof of causation required under *Doyal v. Marsh* does not properly apply at the summary judgment phase of litigation.[167] Instructing that the *Doyal* standard is more appropriately applied at the trial phase, the court of appeals held that a plaintiff's burden of establishing a causal link sufficient to survive a motion for summary judgment is less exacting than that required by *Doyal* to withstand a motion for directed verdict at the close of plaintiff's case.[168] At the summary judgment phase, the court must review all of the evidence in the light most favorable to the plaintiff and resolve all inferences in his favor.[169] Consequently, for summary judgment purposes, according to this panel, mere knowledge of an employer that protected activity has occurred is sufficient to establish a prima facie case for a retaliation claim, if adverse action thereafter follows.[170]

**Discharge.** In *Corbin v. Southland International Trucks*,[171] the Eleventh Circuit again reversed the district court's grant of summary

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163. *Id.*

164. *Id.* at 921. Burden shifting represents a substantial problem for the district courts on appeal.

165. 777 F.2d 1526 (11th Cir. 1985).

166. 9 F.3d at 920. There was no dispute on appeal that Hairston had satisfied the first two elements of both his retaliatory suspension and retaliatory discharge claims. The district court found troublesome the causal link between protected statements and adverse employment actions. *Id.*

167. *Id.*

168. *Id.*

169. *Id.* at 918. *See* Welch v. Celotex Corp., 951 F.2d 1235, 1237 (11th Cir. 1992); Rollins v. TechSOUTH, Inc., 833 F.2d 1525, 1528 (11th Cir. 1987).

170. 9 F.3d at 920.

> [T]his Court finds that the record, at the very least, establishes that Appellee was aware of Appellant's protected activities at the time the adverse employment action took place. This Court further finds that the record may support the proposition that the protected expression and the adverse employment actions were not wholly unrelated.

*Id.*

171. 25 F.3d 1545 (11th Cir. 1994).

judgment in an ADEA case.[172] Corbin was a fifty-eight-year old mechanic who had been employed by Southland for approximately five years at the time of his discharge.[173] He was terminated, according to his employer, because of his uncooperative attitude regarding the implementation of a new production system.[174] Corbin contended that the proffered reason for his termination was actually a pretext for age discrimination.[175] The district court concluded that Corbin failed to establish a prima facie case of age discrimination because of his lack of proof that he had been replaced by someone younger and the reason offered by his employer for his termination was a pretext for age discrimination.[176] On review, the court of appeals concluded that Corbin had presented sufficient evidence below to rebut the inference that he had been discharged because of his poor attitude.[177] He established a prima facie case, the court explained, by merely showing that he had been replaced by someone five years younger than him, thus creating a sufficient factual question to withstand summary judgment.[178]

This case illustrates the increasing trend toward rewriting the prima facie case requirements in ADEA actions. It is no longer a requirement for a prima facie case to show that a protected employee was replaced by someone outside the protected age group.[179] It is now sufficient, at least for summary judgment purposes, to simply show that the protected employee was replaced by someone younger, even though that younger person may also be a member of the protected age group.[180]

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172. *Id.* at 1546-47.

173. *Id.* at 1547.

174. *Id.* During a series of meetings with the supervisor concerning the group production system, the supervisor noted that Corbin had a "general bad attitude towards management and the work place . . . ." *Id.*

175. *Id.* at 1546.

176. *Id.* at 1548.

177. *Id.* at 1549.

178. *Id.* at 1550.

179. *See, e.g.*, Alphin v. Sears, Roebuck & Co., 940 F.2d 1497, 1501 (11th Cir. 1991).

180. 25 F.3d at 1549. *See* Carter v. City of Miami, 870 F.2d 578, 583 (11th Cir. 1989) (49-year old plaintiff whose replacement was 46 years old established prima facie case of age discrimination); Goldstein v. Manhattan Industries, Inc., 758 F.2d 1435, 1444 (11th Cir.), *cert. denied*, 474 U.S. 1005 (1985) (60-year old plaintiff whose replacement was 46 years old established prima facie case of age discrimination). "Unlike race discrimination cases where membership within a protected group is measured dichotomously, membership is a matter of degree with age discrimination." Baker v. Sears, Roebuck & Co., 903 F.2d 1515, 1519 (11th Cir. 1990).

### C. *Procedural Matters*

**Timely Charge.** Another ADEA summary judgment was reversed in *Sturniolo v. Sheaffer, Eaton, Inc.*[181] *Sturniolo* presented the court with a tolling issue.[182] The court of appeals determined that the 180-day period for filing an ADEA charge should be equitably tolled under the particular facts of this case.[183] Sturniolo's employment was terminated in October 1990 as part of a reduction in force and reorganization of Sheaffer, Eaton's regional sales force.[184] At the time of his layoff, plaintiff was told that his former position was to be abolished.[185] Some months later, Sturniolo learned that Sheaffer hired a younger person to perform essentially the same regional sales job previously occupied by Sturniolo.[186] He thereafter initiated a claim of age discrimination.[187] The district court granted summary judgment for Sheaffer, Eaton, finding that Sterniolo had failed to file his administrative charge of age discrimination within the 180 day period as required under the Act.[188] Since he failed to file an administrative charge within the time limitation, his civil action could not be entertained by the court.[189] According to the district court, Sterniolo had 180 days from the date he first learned of his impending termination within which to file his administrative charge and as such, his lawsuit was untimely.[190] Sterniolo contended that he missed this deadline because he did not learn until later of the existence of his younger replacement and at that point he had reason to suspect that he had been the victim of unlawful age discrimination.[191] The court of appeals reversed, concluding that Sturniolo did not have any reason to doubt the reasons for his

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181. 15 F.3d 1023 (11th Cir. 1994).

182. Tolling is an equitable concept whereby a claimant's delay in filing an administrative charge of discrmination is excused. Most courts have held that the administrative charge filing requirement is akin to a statute of limitations which can be tolled for equitable reasons. *See* Coke v. General Adjustment Bureau, Inc., 640 F.2d 584, 595 (5th Cir. 1981) (en banc). The charge filing period for an ADEA charge is subject to equitable modification. Cocke v. Merrill Lynch & Co., Inc., 817 F.2d 1559, 1561 (11th Cir. 1987).

183. 15 F.3d at 1026.

184. *Id.* at 1025.

185. *Id.*

186. *Id.* An individual employed by Sheaffer, Eaton apparently began representing herself as Sturniolo's replacement in December 1990 or early 1991. *Id.*

187. *Id.* at 1024.

188. *Id.*

189. *Id.*

190. *Id.*

191. *Id.* at 1025-26.

termination until several months thereafter when he confirmed that a younger individual had been hired to replace him.[192]

The court of appeals concluded that it was not apparent to Sturniolo that he had been the victim of age discrimination until he learned of this fact in late 1990 or early 1991.[193] Consequently, the court reasoned, the 180-day period did not begin running until he received that information.[194] The case was remanded for further proceedings consistent with the court of appeals' decision.[195]

## III. REMEDIES UNDER TITLE VII AND THE ADEA

### *A. Consent Decrees and Affirmative Action Plans*

Consent decree litigation seems to have a life of its own. Four cases during the survey period addressed this very complex and troublesome area: two cases involving consent decrees and affirmative action plans adopted for the City of Birmingham, and two additional cases involving similar plans adopted for the City of Miami. The Birmingham litigation was the oldest of the group, having originated over twenty years ago, but the Miami litigation was not far behind, having begun over fifteen years ago.

The first Birmingham case, *Ensley Branch, N.A.A.C.P. v. Seibels*,[196] involved proceedings to modify two consent decrees which had been negotiated a number of years ago to remedy perceived discriminatory hiring and promotion practices for the City of Birmingham and various related agencies. Both the United States and a group of male, non-black city employees moved to modify the decrees in various respects, and both were appealing the district court's decision, contending that the lower court did not go far enough in modifying the decrees. The Eleventh Circuit agreed that the decrees were unconstitutional, as to both the race and gender classifications, and remanded the action for additional potential modifications consistent with the opinion.[197]

Applying a strict scrutiny analysis to the race-conscious provisions of the decree, the court concluded that the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*,[198] mandated the finding that parts of

192. *Id.* at 1026.
193. *Id.*
194. *Id.* (relying upon Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876 (5th Cir), *cert. denied*, 502 U.S. 868 (1991)).
195. *Id.*
196. 20 F.3d 1489 (11th Cir. 1994).
197. *Id.* at 1493.
198. 488 U.S. 469 (1989).

the decree were unconstitutional under the Equal Protection Clause. With respect to *Croson's* "compelling government interest requirement," the court concluded that there needed to be a "strong basis in evidence" that past racially discriminatory practices had occurred and that affirmative action was required as a remedy.[199] Although the court agreed that such strong evidence had been demonstrated with respect to the City's police and fire departments, no such showing, according to the court, had been made as to any other City departments. On remand, the district court was instructed to make appropriate findings as to these other departments, and if the requisite strong evidence of discrimination could not be established, the district court was instructed to "forthwith terminate" the affirmative action provision for these departments.[200]

The court of appeals also found the consent decrees lacking with respect to the second *Croson* requirement that the affirmative action relief be "narrowly tailored" to serve the compelling interest in ending discrimination.[201] The court found that both the long-term goals and the annual goals set forth in the decrees were "fundamentally flawed," in that they were designed to create "parity" between the "racial composition of the labor pool" and the racial composition of each job position.[202] According to the court, the Constitution does not guarantee racial parity; it only forbids racial discrimination. The court of appeals was also troubled by the fact that the decrees allowed the City to indefinitely continue its racially discriminatory selection procedures, and then cure the resulting discriminatory impact with "race-conscious affirmative action."[203] The court mandated that such "institutionized discrimination" should not be tolerated.[204] The court of appeals concluded:

> We cannot allow stop-gap remedies to turn into permanent palliatives. Therefore, the district court is directed to order the City and the Board to develop race-neutral selection procedures forthwith, not at the casual pace the Board has passed off as progress for thirteen years. The Board's decree is not a security blanket to be clung to, but a badge of shame, a monument to the Board's past and present failure to treat all candidates in a fair and non-discriminatory manner. Federal

199. 20 F.3d at 1505.
200. *Id.* at 1509.
201. *Id.*
202. *Id.* at 1510-11.
203. *Id.* at 1512.
204. *Id.*

> judicial oversight should provide public employers no refuge from their responsibilities.[205]

Employing an "intermediate scrutiny" analysis, the court reached a similar result with respect to the gender-conscious provisions of the decrees. Accordingly, the court remanded the consent decrees to the district court for further modifications consistent with the appellate court's decision.

Closely related to the *Ensley Branch* litigation is *In re Birmingham Reverse Discrimination Employment Litigation*.[206] This case also addressed a consent decree for the City of Birmingham, but was more narrowly focused, addressing the decree governing promotions within the City's Fire Department.[207] Plaintiffs comprised a group of non-black male firefighters who brought suit against the City challenging the consent decree under both Title VII and the Equal Protection Clause.[208] The district court, despite having already experienced an Eleventh Circuit remand as to the same decree in a prior opinion,[209] ruled that the consent decree violated neither Title VII nor the Equal Protection Clause.[210]

On this latest trip to the court of appeals, the Eleventh Circuit disagreed on both counts.[211] With respect to Title VII, the court analyzed the decree under the two part test established by the Supreme Court in *Johnson v. Transportation Agency*.[212] The first prong of the *Johnson* test asks whether the affirmative action requirements of the plan are justified by the manifest racial imbalance in the job category in question, and the second prong asks whether the remedial provisions of the decree unnecessarily trammel the rights of non-black employees.[213] Although the court agreed that there was a sufficient showing of a manifest imbalance in the job category in question (fire lieutenant), the court also found that the plan unnecessarily trammeled the rights of non-black firefighters.[214] The court reached this conclusion because the decree arbitrarily selected a fifty percent promotion quota mandating that fifty percent of the promotions to fire lieutenant for an indefinite

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205. *Id.* at 1518.
206. 20 F.3d 1525 (11th Cir. 1994).
207. *Id.* at 1530-31.
208. *Id.* at 1530.
209. *In re* Birmingham Reverse Discrimination Emp. Lit., 833 F.2d 1492 (11th Cir. 1987), *aff'd sub nom.*, Martin v. Wilks, 490 U.S. 755 (1989).
210. 20 F.3d at 1534.
211. *Id.* at 1549-50.
212. 480 U.S. 616 (1987).
213. 20 F.3d at 1537.
214. *Id.* at 1540-41.

period of time had to be black.[215] The court stated that: "[i]n our view, the City decree fails under Title VII because the indefinitely-lasting, arbitrarily-selected fifty percent figure for annual black promotions to fire lieutenant unnecessarily trammels the rights of non-black firefighters by unduly restricting their promotional opportunities through establishment of an arbitrary fixed quota."[216] The court applied a strict scrutiny analysis in reaching a similar result with respect to the decrees under the Equal Protection Clause.[217] The court, while acknowledging that there was a compelling governmental interest in ending the prior discriminatory practices within the Fire Department, nonetheless found that the City's rigid fifty percent promotion quota was not narrowly tailored to remedy past discrimination.[218] According to the court, the City's approach, "while administratively convenient," amounted to nothing more than "perpetuation of discrimination by government."[219] The action was remanded for "appropriate relief" consistent with the court's opinion.[220]

Similarily, a consent decree governing promotions within the Fire Department was at issue before the court in *United States v. City of Miami*.[221] This decree was entered into over fifteen years ago, with the purpose of ending the effects of past discriminatory practices on the basis of sex, race, and ethnic origin within the City of Miami's Fire Department. This latest proceeding began when the International Association of Firefighters, Local 587, on behalf of its members, filed a motion to dissolve or modify the decree, alleging that it had served its purpose.[222] The district court denied the Union's motion.[223] In light of the Supreme Court's intervening decisions in *Rufo v. Inmates of Suffolk County Jail*[224] and *Board of Education v. Dowell*,[225] the Eleventh Circuit vacated the district court's decision, and remanded the case for reconsideration.[226] Although the consent decrees at issue in these cases involved unconstitutional jail conditions and desegregation of a school district, respectively, the Eleventh Circuit held that the principles

215. *Id.* at 1542.
216. *Id.*
217. *Id.* at 1544.
218. *Id.* at 1545.
219. *Id.* at 1548.
220. *Id.* at 1550.
221. 2 F.3d 1497 (11th Cir. 1993).
222. *Id.* at 1499-1502.
223. *Id.* at 1502.
224. 502 U.S. 367 (1992).
225. 498 U.S. 237 (1991).
226. 2 F.3d at 1503-05 (citing *Rufo*, 502 U.S. 367; *Dowell*, 498 U.S. 237).

in these cases are applicable to requests to modify or terminate consent decrees in the employment discrimination context.[227] On remand, the court directed the district court to determine whether the decree's "basic purpose" (defined as eliminating the effects of past discrimination, as opposed to achieving workforce parity) had been achieved.[228] If so, according to the court of appeals, the consent decree was to be terminated.[229] Even if the decree was not terminated, the court also directed the district court to examine the decree's promotion goals, and consider modification of the goals, if necessary.[230] In reviewing the goals, the court of appeals found that the proper way to determine whether a workforce imbalance existed was to compare the minority workforce of the position in question to the "*qualified* minority population in the relevant labor market."[231]

An affirmative action plan in yet another fire department was before the court in *Peightal v. Metropolitan Dade County*.[232] Plaintiff brought an individual reverse discrimination claim, attacking Metro Dade's affirmative action plan under both Title VII and the Equal Protection Clause. Plaintiff had applied for an entry level firefighter position. As part of the application process, he took the firefighter examination, and earned a score that ranked him number 28 out of 2,188 persons passing the test. However, several miniorities who scored lower than plaintiff on the exam, were hired instead of plaintiff pursuant to the affirmative action plan.[233] In an earlier appeal, the Eleventh Circuit affirmed the district court's finding that the plan did not violate Title VII.[234] However, the case had been remanded for reconsideration of the constitutional claim in light of the Supreme Court's decision in *City of Richmond v. J.A. Croson Co.*[235] On remand, the district court upheld the plan a second time, even under *Croson's* strict scrutiny analysis.[236]

On its second trip to the court of appeals, the plan was upheld once again, this time under the Equal Protection Clause.[237] The court initially had little trouble in agreeing that the County demonstrated a

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227. *Id.* at 1505.
228. *Id.* at 1508.
229. *Id.*
230. *Id.*
231. *Id.* at 1509 (emphasis added).
232. 26 F.3d 1545 (11th Cir. 1994).
233. *Id.* at 1548.
234. *See* Peightal v. Metropolitan Dade Co., 940 F.2d 1394 (11th Cir. 1991), *cert. denied*, 502 U.S. 1073 (1992).
235. 940 F.2d at 1411 (citing *Croson*, 480 U.S. at 469).
236. 26 F.3d at 1552.
237. *Id.*

compelling state interest in ending past discrimination.[238] Indeed, the County presented evidence from a statistics expert establishing that the difference between the expected and actual percentage of Hispanics within the Fire Department, in comparison to the relevant labor market (determined in this case to be the general population between the ages of eighteen and fifty-five within the geographic boundaries of Dade County) was 17.6 standard deviations.[239] According to the expert testimony, there was only one chance in one billion cases that this disparity would have occurred by chance, and this evidence was totally unrebutted.[240] The court also found that the plan was sufficiently narrowly tailored to accomplish its remedial purpose.[241] Contrary to the Birmingham plan discussed above, the court found that the goals under the Metro Dade plan were sufficiently flexible, instead of "fixed quotas", and that the plan was of limited duration (including a provision that it would terminate when it achieved its seventy percent hiring goal).[242] Accordingly, the court of appeals agreed that Metro Dade's affirmative action plan passed constitutional muster.[243]

### *B. Attorney Fees*

In *Cullens v. Georgia Department of Transportation*,[244] the Eleventh Circuit considered the proper calculation of an attorney fees award in an employment discrimination suit pursuant to Section 706(k) of Title VII.[245] In the underlying action alleging racial discrimination in hiring, promotions, and job assignments, plaintiffs prevailed to a limited extent on their individual claims, but were denied relief altogether with respect to their class claims. Assertedly employing the "lodestar" method of computing fees as provided in *Hensley v. Eckerhart*,[246] the district had awarded attorney fees in the amount of $36,471.[247] The lower court arrived at this figure by computing an initial lodestar of $57,307, determined by multiplying the reasonable hourly rate in the area where the case was filed—found to be $100 per hour—times the reasonable number of hours spent on the litigation—found to be 573.045

238. *Id.* at 1557.
239. *Id.* at 1556.
240. *Id.*
241. *Id.* at 1559.
242. *Id.*
243. *Id.* at 1562.
244. 29 F.3d 1489 (11th Cir. 1994).
245. *Id.* at 1491.
246. 461 U.S. 424 (1983).
247. 29 F.3d at 1491.

hours.[248] The district court then reduced the lodestar to $12,157, determined by calculating the "present value of plaintiffs' recovery," and then "trebling this figure" to arrive at $36,471.[249] Without expressing an opinion as to whether the amount of fees calculated by the district court was erroneous, the Eleventh Circuit nonetheless disapproved of the lower court's method of calculation.[250] The court rejected the "proportionality of damages" as a proper basis for the award, as well as the use of a multiplier.[251] Characterizing the district court's method as a "cash register approach," the appellate court remanded the case for a recalculation of the fees award "stripped of proportionality of damages to award."[252]

### C. *After-Acquired Evidence*

In *Wallace v. Dunn Construction Co.*,[253] the Eleventh Circuit set the stage for a major decision on the after-acquired evidence doctrine, by vacating its prior panel decision[254] and by deciding to rehear the case en banc.[255] However, the Supreme Court, not to be surpassed, stole the Eleventh Circuit's thunder with its decision in *McKennon v. Nashville Banner Publishing Co.*[256] In a unanimous opinion, the Court ruled that after-acquired evidence could not be utilized to avoid liability altogether in an action under the ADEA.[257] In so ruling, the Court expressly overruled the Tenth Circuit's decision in *Summers v. State Farm Mutual Automobile Insurance Co.*,[258] and a considerable body of case law developed following *Summers*.[259] However, in a ruling very close to the Eleventh Circuit's prior panel decision in *Wallace*, the Court also ruled that after-acquired evidence could have a direct bearing on a plaintiff's remedy.[260] The Court concluded that, as a general rule,

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248. *Id.* at 1492.
249. *Id.*
250. *Id.* at 1492-93.
251. *Id.* at 1492.
252. *Id.* at 1493-94.
253. 32 F.3d 1489 (11th Cir. 1994) (en banc).
254. *See* Wallace v. Dunn Construction Co., 968 F.2d 1174 (11th Cir. 1992).
255. 32 F.3d at 1490.
256. 115 S. Ct. 879 (1995).
257. *Id.* at 886.
258. 864 F.2d 700 (10th Cir. 1988).
259. *See, e.g.*, Welch v. Liberty Machine Works, Inc., 23 F.3d 1403 (8th Cir. 1994); O'Driscoll v. Hercules, Inc., 12 F.3d 176 (10th Cir. 1994); Washington v. Lake County, 969 F.2d 250 (7th Cir. 1992); Johnson v. Honeywell Info. Sys., 955 F.2d 409 (6th Cir. 1992); Smallwood v. United Air Lines, Inc., 728 F.2d 614 (4th Cir.), *cert. denied*, 469 U.S. 832 (1984).
260. 115 S. Ct. at 886.

neither reinstatement nor front pay would be appropriate remedies where after-acquired evidence is established.[261] The Court also ruled that such evidence could be utilized to cut off back pay from the date of discovery of the after-acquired evidence.[262] Finally, the Court adopted the following rule as to what constitutes after-acquired evidence: "[A]n employer . . . must first establish that the wrongdoing was of such severity that the employee in fact would have been terminated on those grounds alone if the employer had known of it at the time of the discharge."[263] Accordingly, after *McKennon*, the after-acquired evidence defense still exists, and still can be utilized to broaden a defendant's scope of inquiry in discovery, but the defense also has been severely limited.

## IV. THE CIVIL RIGHTS ACT OF 1991

### A. *Retroactivity*

In a trilogy of decisions, the United States Supreme Court settled the various retroactivity questions created by unclear drafting in the enactment of the Civil Rights Act of 1991.[264] As a result of the confusion created by the passage of the 1991 Act, civil actions have been clogging the district and circuit courts since the act became law.[265] Final passage of the Act was a textbook example of poor drafting and the uncertainties of relying upon legislative history to attempt to discern Congressional intent.[266]

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261. *Id.*

262. *Id.*

263. *Id.* at 886-87.

264. *See* Landgraf v. USI Film Prods., 114 S. Ct. 1483 (1994); Rivers v. Roadway Express, Inc., 114 S. Ct. 1510 (1994); McKnight v. General Motors Corp., 114 S. Ct. 1826 (1994).

265. The Civil Rights Act of 1991 is in large part a response to a series of decisions by the Supreme Court interpreting the Civil Rights Acts of 1866 and 1964. Section 3(4) expressly identifies as one of the Act's purposes "to respond to recent decisions of the Supreme Court by expanding the scope of relevant civil rights statutes in order to provide adequate protection to victims of discrimination." The Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 and scattered sections (Supp. 1992)).

266. The Court granted certiorari in *Landgraf* in order to decide the question of whether Section 102 of the 1991 Act applies to cases pending when it became law. "Thus, the controlling question is whether the Court of Appeals should have applied the law in effect at the time the discriminatory conduct occurred, or at the time of its decision in July 1992." 114 S. Ct. at 1489. In *Rivers* the Court granted certiorari to decide whether Section 101 of the Act applies to a case that arose before it was enacted. 114 S. Ct. at 1513. The Court was forced to deal with these questions because the 1991 Act did not provide clear

In *Landgraf v. USI Film Products*,[267] and its companion decision, *Rivers v. Roadway Express, Inc.*,[268] the Court concluded that the provisions of the 1991 Act do not apply to Title VII or Section 1981 cases which were pending on appeal when the Act became law.[269] 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.[270] Other provisions of the 1991 Act broadened the scope of Section 1981 causes of action.[271] These companion decisions, *Landgraf* and *Rivers*, determined that the expanded remedies and scope of actions are not available in cases pending upon the date of enactment of the 1991 Act.[272] The Court reached this conclusion notwithstanding language within the Act which stated that it was to become effective "upon enactment."[273] The Court found this "upon enactment" language to be not particularly helpful in resolving the retroactivity question.[274] Instead, it was forced to undertake an exhaustive analysis of the canons of statutory construction and concluded that the presumption against retroactive legislation had not been rebutted with respect to the 1991 Act.[275]

In *McKnight v. General Motors Corp.*,[276] decided one month later, the Court held that an attorney may not be sanctioned for appealing the dismissal of his client's employment discrimination action pending resolution by the Supreme Court of the retroactivity issue created by the Act.[277] In *McKnight* there was controlling circuit precedent on the issue of retroactivity of the 1991 Act.[278] The Seventh Circuit maintained that the relevant provisions were not to be given retroactive

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Congressional intent with respect to the question of its effective date and its impact on cases pending upon its effective date. In 1990 a similar civil rights bill passed both houses, but was vetoed by President Bush, in part because of the bill's "unfair retroactivity rules." *See* 136 Cong. Rec. S165589 (Oct. 24, 1990). There was no similar language concerning retroactivity in the 1991 Act; causing considerable confusion within the judicary and among practitioners as to the proper application of expanded provisions and remedies available under the 1991 Act once it was passed.

267. 114 S. Ct. 1483 (1994).
268. 114 S. Ct. 1510 (1994).
269. *Landgraf*, 114 S. Ct. at 1508.
270. 114 S. Ct. at 1491.
271. *See* 114 S. Ct. at 1489-91.
272. 114 S. Ct. at 1506; 114 S. Ct. at 1519.
273. 114 S. Ct. at 1493 (quoting § 402(a) of the Civil Rights Act of 1994).
274. *Id.*
275. *Id.* at 1494-96.
276. 114 S. Ct. 1826 (1994).
277. *Id.* at 1826.
278. *Id.*

effect.[279] Plaintiff's counsel nonetheless perfected an appeal on the retroactivity issue.[280] The court of appeals dismissed the appeal and imposed monetary sanctions.[281] The Supreme Court reasoned that an appeal, even in the face of conflicting circuit authority, was the only means a plaintiff could use to preserve the retroactivity issue in his case pending resolution of the issue by the Supreme Court.[282] The Supreme Court concluded that plaintiff's position on retroactivity was not frivolous at the time the appeal was taken.[283] Therefore, plaintiff's counsel could not be sanctioned simply for filing the appeal.[284]

## V. EQUAL PAY ACT

Two significant Equal Pay Act cases were decided by the court of appeals during the survey period.[285] Both cases reflect the complexities presented by these types of actions to both the courts and to practitioners. Increasingly, plaintiffs rely on the EPA to prosecute a host of unlawful sex discrimination cases on the basis of disparate pay for similar work.[286] The rapid growth in the number of EPA cases filed and subsequently coming before the court of appeals should be expected to continue as a result of the burden imposed on defendants in such actions and the complexities imposed on all parties to define and locate appropriate comparators.

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279. *Id.* (citing Luddington v. Indiana Bell Tel. Co., 966 F.2d 225 (7th Cir. 1992); Mozee v. American Commercial Marine Serv. Co., 963 F.2d 929 (7th Cir. 1992)).

280. *Id.*

281. *Id.*

282. *Id.* The Court noted that at the time of the appeal, there was no split of authority among the circuits as to the retroactivity of the 1991 Act, but that the district courts were divided on the question. *Id.*

283. *Id.*

284. *Id.*

285. *See* Mulhall v. Advance Sec., Inc., 19 F.3d 586 (11th Cir. 1994); Meeks v. Computer Assoc. Int'l, 15 F.3d 1013 (11th Cir. 1994).

286. The EPA provides in relevant part:

> no employer . . . shall discriminate, within any establishment in which such employees are employed, between employees on the basis of sex by paying wages to employees in such establishment at a rate less than the rate at which he pays wages to employees of the opposite sex in such establishment for equal work in jobs the performance of which requires equal skill, effort, and responsibility and which are performed under similar working conditions, except where such payment is made pursuant to . . . (iv) a differential based on any other factor other than sex . . . .

29 U.S.C. § 206(d).

The case of *Mulhall v. Advanced Security, Inc.*[287] is instructive on both the critical issues of determining the appropriate comparators in EPA cases and explaining the defendant's proof burden at summary judgment in such actions.[288] The district court held that plaintiff failed to establish a prima facie case due to her inability to identify appropriate comparators working at the same establishment who were afforded higher wages than her.[289] The district court reached this decision even though Mulhall identified four different groups of potential comparators for the court to consider.[290] The court only found Group 4 to be properly comparable with plaintiff. However, the district court concluded that defendant established an affirmative defense that a factor other than sex accounted for any pay discrepancy which might have existed with respect to Group 4.[291] The court of appeals reversed and remanded as to both issues.[292]

*Mulhall*, as is the case with all EPA claims, is very factually specific. Advance Security was a wholly-owned subsidiary of Figgie International, Inc. ("Figgie"), who was also a named defendant in the action.[293]

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287. 19 F.3d 586 (11th Cir. 1994).

288. *Id.* The respective burdens of proof in a sex discrimination case brought under the EPA are set forth in Schwartz v. Florida Bd. of Regents, 807 F.2d 901 (11th Cir. 1987). Initially, the burden rests with the plaintiff to show "'that an employer pays different wages to employees of opposite sexes for equal work on jobs the performance of which require equal skill, effort and responsibility.'" *Id.* at 907 (citations omitted). Additionally, a plaintiff must prima facie identify appropriate comparators within the same establishment at which she is working who received a differential in pay. *Id.* Those employees against whom plaintiff compares herself must work within the same establishment. *Id.* The burden then shifts to the defendant to prove that the differential in pay is justified by one of the four statutory exemptions. *Id.* In essence, defendant must show that sex provided no basis for the wage differential. Defendant's burden in this respect has been described as a "heavy one" as the exemptions within the EPA are affirmative defenses. Corning Glass Works v. Brennan, 417 U.S. 188, 196-97 (1974). With respect to summary judgment under the EPA, a defendant's burden after a plaintiff has established her prima facie case is somewhat more exacting than under the various other available anti-discrimination laws. By seeking summary judgment in an EPA claim, defendants also "thrust[s] before the court for scrutiny not only the merits of plaintiff's evidence, but the strength of their own defense." 19 F.3d at 591.

289. 19 F.3d at 589.

290. *Id.* at 588. These four different groups of comparators represented different management employees of Figgie and Advance Security who plaintiff contended performed equal work in jobs the performance of which required equal skill, effort and responsibility and which were performed under similar working conditions, but at different physical locations. *Id.*

291. *Id.* at 595.

292. *Id.* at 600-01.

293. *Id.* at 588.

Plaintiff worked for Advance Security from 1978 until 1991.[294] Initially, she had been employed as a Manager of Services,[295] and then, in 1981, she was promoted to Vice-President, Administration, a position which she occupied until her resignation in 1991.[296] Her extensive responsibilities in that capacity included risk management, personnel, loss prevention, salary administration, workers' compensation, purchasing, litigation, general liability insurance claims, group insurance programs for hourly employees, hourly personnel 401(k) programs, salaried employees' payroll, equal employment opportunity, affirmative action, fidelity insurance claims, contract reviews, insurance certification programs, labor relations, applicant and employee testing programs, licensing, leases, corporation services and staff, and the Department of Defense industrial security program.[297] With respect to government contracts, Mulhall also had operational responsibility and computed short and long term cost forecasting.[298]

Plaintiff was the only female within Figgie with responsibility for a profit center in addition to her other duties as a corporate staff department head.[299] Futhermore, she was the only manager or vice president responsible for a profit center who did not receive bonuses based upon the profitability of the profit center.[300] Based upon all these considerations, Mulhall filed suit after her resignation, contending, *inter alia*, her disparate treatment was on account of her sex and that this treatment violated the EPA.[301]

The district court granted summary judgment in favor of defendants on plaintiff's EPA claim. The court reasoned that plaintiff's Group 1 comparators were not proper because the men in question did not work in the same establishment as plaintiff.[302] Plaintiff's Group 2 and 3 comparators were not proper, according to the district court, because their jobs did not require substantially similar skill, effort and responsibility as compared to plaintiff's job.[303] Although her Group 4 comparators consisted of proper comparators, the district court determined that

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294. *Id.*
295. *Id.*
296. *Id.*
297. *Id.*
298. *Id.*
299. *Id.*
300. *Id.*
301. *Id.* at 589. She also asserted claims against her former employer under Title VII and under state law. The district court's grant of summary judgment in favor of defendants with respect to these claims was affirmed on appeal. *Id.*
302. *Id.* at 591.
303. *Id.* at 592-93.

defendants asserted a legitimate affirmative defense with respect to this group on the grounds that the men comprising the group were paid higher salaries than plaintiff for a reason other than sex.[304] The court of appeals reversed the district court in several respects.[305]

First, the court of appeals reversed the district court with respect to Group 1 comparators by concluding that they were employed within the same establishment as plaintiff although they worked at physically different locations.[306] The court of appeals disagreed with the district court on whether or not, because of centralized control and functional inter-relationship between plaintiff and the comparators in Group 1, a single establishment existed for EPA purposes.[307] For purposes of the EPA, "establishment" is a term of art. It is defined to be "a distinct physical place of business rather than . . . an entire business or 'enterprise' which may include several separate places of business."[308] Here, plaintiff worked at Advance Security's corporate headquarters while the males comprising Group 1 each worked at military sites in different locations.[309] However, the court of appeals found significant the fact that each of the male comparators reported to plaintiff under the organizational structure in effect.[310] From this the court concluded that a reasonable trier of fact could conclude that a single establishment existed for EPA purposes with respect to Group 1.[311]

Second, the appellate court reversed the district court on the ground that the Group 3 comparator performed work which was substantially similar to that performed by plaintiff.[312] With respect to the Group 3 comparator (this group consisted of only one male; defendants' Vice-President, Controller), the court of appeals reversed the district court, finding that a reasonable fact trier could infer, as plaintiff had argued below, that the job she performed was substantially similar to that of the Group 3 comparator.[313]

Finally, with respect to the Group 4 comparators, the appellate court concluded that plaintiff had met her burden of proof.[314] The district court found that plaintiff had established a prima facie case but that

304. *Id.* at 595.
305. *Id.* at 597.
306. *Id.* at 591.
307. *Id.*
308. 29 C.F.R. § 1620.9(a) (1993).
309. 19 F.3d at 591.
310. *Id.* at 592.
311. *Id.*
312. *Id.* at 593.
313. *Id.* at 595.
314. *Id.*

defendants had proved that a factor other than sex justified the pay disparity.[315] Defendants offered proof that the Group 4 comparators were comprised of former principals or owners in businesses purchased by defendant Advance Security, and that their salaries were set as part of the negotiated sale of the businesses in question.[316] Relying on the principle of "red circling", the district court ruled in favor of defendants as to the group 4 comparators based upon this defense.[317] The court of appeals reversed, finding that the principle of "red circling" does not apply to newly-created jobs, such as those implicated by the Group 4 comparators.[318]

In *Meeks v. Computer Associates International*,[319] the court also examined the issue of what constitutes a single establishment for Equal Pay Act purposes.[320] This time, however, even though the court of appeals acknowledged that multiple offices may constitute a single establishment for EPA purposes, it affirmed the district court's decision to limit plaintiff's proffered evidence concerning pay in different offices for substantially similar work.[321] The court cautioned that "we presume that multiple offices are not a 'single establishment' unless unusual circumstances are demonstrated."[322] A level of centralization is necessary to justify treating workers at different locations as working at a single establishment for EPA purposes.[323] Due to decentralized hiring and salary decisions, plaintiff was unable to prove the necessary level of centralization to demonstrate that the multiple offices in question were a single establishment.[324]

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315. *Id.*
316. *Id.*
317. *Id.* "Red circle" describes "certain unusual, higher than normal, wage rates which are maintained for many reasons." Gosa v. Bryce Hosp., 780 F.2d 917, 918 (11th Cir. 1986) (quoting 29 C.F.R. § 800.142).
318. 19 F.3d at 596.
319. 15 F.3d 1013 (11th Cir. 1994).
320. *Id.* at 1017.
321. *Id.* at 1017-18.
322. *Id.* at 1017.
323. *Id.*
324. *Id.*

## VI. CIVIL RIGHTS ACTS OF 1866 AND 1871

### A. *Section 1981*

**National Origin Discrimination.** *Donaire v. NME Hospital, Inc.*[325] resolves a lingering question in this circuit concerning the scope of coverage of national origin discrimination under the Civil War Civil Rights Acts. In a per curiam opinion, the Eleventh Circuit reversed a district court's finding that Filipinos are not a protected class under Section 1981.[326] The district court had so concluded after plaintiff failed to present evidence that Filipinos constituted a protected class under Section 1981.[327] The district court reasoned that there was no such class as "foreign ethnic" or "foreign ancestry" individuals protected under Section 1981.[328] Reversing, the court of appeals concluded that Donaire's complaint satisfied the notice pleading requirements of Section 1981 and the Federal Rules of Civil Procedure when he simply alleged that he was subjected to intentional discrimination because of "ancestry or ethnic characteristics."[329] The court of appeals was, however, able to affirm the district court's grant of summary judgment for the defendants on the merits of the case notwithstanding its mistake with respect to the extent of coverage of national origin discrimination under the Act.[330]

### B. *Section 1983 Cases*

**Back Pay.** *Kendrick v. Jefferson County Board of Education*[331] presented several interesting questions concerning the proper calculation of back pay awards in Section 1983 cases. In the court below, Kendrick won the battle but lost the war. The district court found that she was wrongfully terminated from employment, but denied her any back pay.[332] The court reasoned that her earnings from interim employment, between the time of her termination and the date she prevailed in her law suit, exceeded what she would have earned during that same

325. 27 F.3d 507 (11th Cir. 1994).
326. *Id.* at 509.
327. *Id.*
328. *Id.*
329. *Id.*
330. *Id.* at 510.
331. 13 F.3d 1510 (11th Cir. 1994).
332. *Id.* at 1511.

time period had she not been terminated and remained an employee of the defendant school district.[333] The district court employed an aggregate earnings formula to calculate back pay.[334] On appeal, Kendrick argued that a quarterly earnings formula should have been applied instead.[335] The court of appeals also discussed the question of whether, in such cases, back pay should be calculated on a gross pay or after taxes net pay basis.[336]

With respect to the quarterly/aggregate earnings issue, the court noted that Kendrick's interim earnings had not been uniform.[337] During some quarters her interim earnings exceeded her projected earnings from her old job. During other quarters, however, she earned less. Despite the absence of any authority for so deciding, the panel concluded that a quarterly earnings formula "more faithfully serves the remedial objectives of Section 1983" and "promotes the consistent application of back pay awards rendered under the NLRA, Title VII, and Section 1983."[338]

With respect to the gross pay versus after-taxes net pay issue, the court reasoned that the proper resolution of that question turns on the corresponding issue of whether or not a particular back pay award is subject to any form of federal, state or local taxation.[339] If the award is not taxable, paying damages in terms of gross pay would overcompensate a plaintiff in a Section 1983 action as it would constitute more compensation than she would have received had she not been the victim of unlawful discrimination.[340] If the back pay award is taxable, however, awarding a plaintiff the difference in net earnings or after tax dollars would under-compensate her, as the award would be reduced further in the amount of the taxes on it, leaving her less than whole.[341]

**Attorney Fees Under Section 1988.** *Loranger v. Stierheim*[342] was the only significant attorney fees case reported during the survey period. It presents the question of what amount of detail is required in a lower court's order reducing a prevailing party's fees request so as to

333. *Id.* at 1511-12.
334. *Id.* at 1511.
335. *Id.*
336. *Id.* at 1514.
337. *Id.* at 1512.
338. *Id.* at 1513.
339. *Id.* at 1514.
340. *Id.*
341. *Id.*
342. 10 F.3d 776 (11th Cir. 1994).

allow for review on appeal.[343] The court of appeals remanded for the district court to enter a more precise order concerning the attorney fees awarded in the case.[344] The court instructed that the district court must provide a concise but clear explanation of its reasons for any reduction to a fee award sought by a prevailing plaintiff under Section 1988.[345]

## VII. IMMIGRATION REFORM AND CONTROL ACT

Only one reported decision, *United States of America v. Florida Azalea Specialists*,[346] concerned the Immigration Reform and Control Act. The court of appeals discussed the subpoena power conferred upon an administrative agency under the Act.[347] In terms of the administrative enforcement powers available to federal agencies under the Act, the decision may become a significant one. The court of appeals held that the special counsel of the immigration related unfair employment practices offices has authority under the Act to issue administrative subpoenas during the investigation of charges.[348] The court concluded that the Act authorizes the special counsel to obtain evidence from employers during investigations and that the subpoena power is necessary to fulfill that authorization.[349]

343. *Id.* at 779.
344. *Id.* at 784.
345. *Id.*
346. 19 F.3d 620 (11th Cir. 1994).
347. *Id.* at 622-23.
348. *Id.* at 623.
349. *Id.* at 623-24.