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Employment Discrimination

by Richard L. Ruth*

The 1996 survey period presented a rather unique year for the Eleventh Circuit in the employment discrimination arena.¹ For example, the long anticipated wave of Americans with Disabilities Act ("ADA") litigation finally reached shore. In a different twist, employers fared better than in past years on summary judgment appeals. Finally, the first reported retaliation case in the Eleventh Circuit arising under the Employee Retirement Income Security Act ("ERISA") was decided. In all, as the following discussion will amply illustrate, it was a very busy year for employment law in the Eleventh Circuit, with significantly more noteworthy cases on appeal.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. *Theories of Liability and Burdens of Proof*

1. **Disparate Treatment Cases.** In *Mayfield v. Patterson Pump Co.*,² the court analyzed a typical race disparate treatment case. In that

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1. This Article will cover significant cases in the area of employment discrimination law decided by the United States Court of Appeals for the Eleventh Circuit during the calendar year 1996. Cases arising under the following federal statutes are included: Title VII of the Civil Rights Act of 1964 §§ 701-718 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1988)); the Age Discrimination in Employment Act of 1967 ("ADEA") §§ 2-15 (codified as amended at 29 U.S.C. §§ 621-634 (1988)); the Civil Rights Act of 1991 (codified as amended at 42 U.S.C. §§ 2000e-2000e-17, and scattered section (Supp. 1992)); the Americans with Disabilities Act of 1990 ("ADA") §§ 1-108 (codified as amended at 42 U.S.C. § 12101-12117 (Supp. 1992)); the Civil Rights Act of 1866 (codified as amended at 42 U.S.C. § 1981 (1988)); and the Employee Retirement Income Security Act of 1974 ("ERISA") (codified as amended at 29 U.S.C. §§ 1001-1461 (1988)).

2. 101 F.3d 1371 (11th Cir. 1996).

case, an employee brought a Title VII race discrimination action against his former employer, alleging that his employer terminated him as a result of racial animus. The district court granted summary judgment in favor of defendant-employer, and plaintiff appealed.³

On appeal, defendant did not dispute that plaintiff could establish a prima facie case of racial discrimination. However, defendant did contend that plaintiff was terminated for legitimate nondiscriminatory reasons. In particular, defendant alleged that plaintiff was terminated because of an unexcused absence, lying about his whereabouts on that unexcused absence, approving for shipment to customers a nonconforming product, and failing to complete an assigned job. As a result of these workplace infractions, defendant contended that termination was appropriate. Plaintiff, on the other hand, produced evidence of isolated incidents in which racial epithets were used by co-employees and one of defendant's supervisors. However, none of these racial incidents and epithets were connected with the supervisor who terminated plaintiff. In fact, at his deposition, plaintiff expressly stated that the supervisor "who terminated him was not racist and did not evaluate him on the basis of race."⁴

In light of the evidence introduced at the summary judgment stage, the court concluded that defendant met its burden to produce legitimate nondiscriminatory reasons for the employment actions taken against plaintiff.⁵ Furthermore, the court held that plaintiff wholly failed to offer evidence to establish that defendant's explanation for plaintiff's discharge was a pretext for discrimination, and plaintiff himself refuted any suggestion that the supervisor's terminating him was motivated by race.⁶ For those reasons, the court held that the district court properly granted defendant's motion for summary judgment and affirmed the judgment of the district court.⁷

In *Trotter v. Board of Trustees*,⁸ the court was called upon to examine racial discrimination in an unequal salary context. In that case, plaintiffs had been employed in a hospital maintained by defendant. Plaintiffs were both African-American. Subsequently, a white individual was hired in the unit at a much higher salary than plaintiffs, even though he had less experience than plaintiffs. When plaintiffs complained to the hospital about the salary disparity, the hospital investi-

3. *Id.* at 1372.

4. *Id.* at 1372-75.

5. *Id.* at 1375.

6. *Id.* at 1376-77.

7. *Id.* at 1378.

8. 91 F.3d 1449 (11th Cir. 1996).

gated and found that the white individual's salary was in error, and that he should not have been given a higher salary than plaintiffs.⁹ Nonetheless, before the hospital concluded its investigation, plaintiffs filed a complaint with the Equal Employment Opportunity Commission ("EEOC"). After acknowledging its error, the hospital offered to pay plaintiffs the difference between their salaries and the white individual's salary, but plaintiffs refused the offer. Nevertheless, after a new compensation system was implemented, the hospital paid plaintiffs a lump sum equal to the difference between their salary and the white individual's salary.¹⁰ The plaintiffs eventually brought suit against defendant in the United States District Court, alleging sex and race discrimination in violation of Title VII, Section 1981, and the Equal Pay Act. Only plaintiffs' race discrimination claim was tried before a jury. "At the conclusion of the evidence, but before the case was given to the jury for deliberation, the district court granted the [defendant's] motion for judgment as a matter of law," and plaintiffs then appealed that ruling.¹¹

On appeal, plaintiffs first contended that they presented direct evidence of discrimination which precluded summary judgment for defendant. They had indeed presented evidence that a head nurse in their unit had once explained to a doctor that she had left the emergency room, where she had worked as a nurse, because she did not like taking orders from an African-American person.¹² Furthermore, plaintiffs alleged that on another occasion the head nurse attempted to discharge a patient who was causing problems for a white employee.¹³ However, despite this evidence, the court noted that the head nurse was not involved in the challenged salary decision, and thus any statements of discriminatory intent attributable to her could not constitute direct evidence of discrimination.¹⁴ In fact, the court noted that a new individual had taken over the head nursing duties in plaintiffs' unit, while the head nurse in question was preparing to set up another unit in the hospital.¹⁵ Moreover, the court noted that the prospective salary of the white employee was discussed only with the human resources specialist at the hospital, and not with any head nurse.¹⁶ Therefore,

9. *Id.* at 1451.

10. *Id.* at 1452.

11. *Id.*

12. *Id.* at 1452-53.

13. *Id.*

14. *Id.* at 1453-54.

15. *Id.* at 1454.

16. *Id.*

the court concluded that there was no direct evidence of discriminatory intent that demonstrated the salary decision was racially motivated.¹⁷

The court proceeded to analyze plaintiffs' case under a circumstantial evidence framework.¹⁸ The court noted that defendant did not argue that plaintiffs failed to present a prima facie case of racial discrimination.¹⁹ Therefore, the court directly proceeded to address "whether the [defendant] had satisfied its burden to produce evidence to rebut that presumption."²⁰ In this regard, the defendant presented extensive testimony establishing that the white employee was paid a higher salary purely by mistake, due in part to the inexperience of the human resource specialist issuing the salary, and the workload of the human resources department at the time.²¹ Indeed, the court took note of a conversation between the human resource specialist and the white employee in which the white employee stated he would not work for less than the disputed salary amount.²² Furthermore, the court noted with significance that the human resources specialist did not even know the race of the plaintiffs when making the challenged salary decision.²³

The court then proceeded to address whether plaintiffs met their ultimate burden of proving by a preponderance of the evidence that the salary decision was motivated by intentional discrimination.²⁴ In this regard, the court concluded that there was simply no evidence presented by plaintiffs that any decisionmaker at the hospital connected with the salary decision at issue was motivated by racial animus, and thus held that plaintiffs did not carry their ultimate burden of persuasion.²⁵ For those reasons, the judgment of the district court was affirmed.²⁶

In *Pritchard v. Southern Co. Services*,²⁷ the court reviewed the district court's entrance of summary judgment for the defendant-employer on a Title VII gender discrimination claim. In that case, plaintiff was an electrical engineer hired by defendant to perform nuclear engineering work. Plaintiff suffered from severe depression related to the nuclear work, and her doctor stated that while she could work, she could not do so in the nuclear field. However, the employer

17. *Id.*

18. *Id.* at 1454-58.

19. *Id.* at 1455.

20. *Id.*

21. *Id.* at 1456.

22. *Id.*

23. *Id.*

24. *Id.* at 1457.

25. *Id.* at 1457-58.

26. *Id.* at 1458.

27. 92 F.3d 1130 (11th Cir.), amended by 102 F.3d 1118 (11th Cir. 1996).

did not transfer her, contending that all of its engineers needed to have the flexibility to perform nuclear-related work and that it would have been her responsibility to apply for any nonengineering job. In addition to her primary claim under the ADA, plaintiff also brought a secondary Title VII gender discrimination claim against her employer. In essence, plaintiff presented evidence that she had heard of a male employee who she believed was transferred to a non-nuclear position, unlike plaintiff. However, she did not know for certain why he had been transferred, but she surmised it was related to the stress of nuclear work.²⁸ Moreover, all of her information about that employee came from conversations with co-workers.²⁹

In rejecting plaintiff's Title VII gender discrimination claim, the court noted that all of plaintiff's statements in her deposition used to support her response to defendant's motion for summary judgment constituted inadmissible hearsay.³⁰ Because plaintiff presented absolutely no conflicting evidence that could be reduced to admissible form at trial, she failed to demonstrate that the employer's nondiscriminatory reason for discharge was pretextual, and the court affirmed the district court's entrance of summary judgment for the employer on plaintiff's Title VII gender discrimination claim.³¹

In *Harris v. Shelby County Board of Education*,³² the Eleventh Circuit analyzed, in part, an employee's race discrimination claim against a defendant school board. In that case, plaintiff applied for principalship at a high school and alleged that the defendant discriminated against him by failing to select him for that principalship because of his race. Plaintiff brought suit, in part under Title VII, seeking declaratory and injunctive relief, back pay, and other employment benefits. Subsequently, the district court entered summary judgment in favor of defendant, and plaintiff appealed.³³

On appeal, the court reversed the grant of summary judgment in favor of defendant on plaintiff's Title VII claim.³⁴ The court noted that plaintiff had presented evidence to support his allegation that the decisionmaker in this case intentionally discriminated against him because of his race.³⁵ On the other hand, the court also noted that the

28. 92 F.3d at 1131-35.

29. *Id.*

30. *Id.* at 1135.

31. *Id.*

32. 99 F.3d 1078 (11th Cir. 1996).

33. *Id.* at 1080-81.

34. *Id.* at 1085.

35. *Id.* at 1081.

person who was hired for the principalship in place of plaintiff was much more qualified than plaintiff.³⁶ The district court had found that although the plaintiff had established a prima facie case of race discrimination, he failed to offer sufficient evidence that the legitimate nondiscriminatory reasons for the defendant's hiring of the replacement were merely a pretext for discrimination, in light of the replacement's qualifications.³⁷ The court concluded that from the facts presented on the summary judgment record, it was clear that the other individual's qualifications were sufficiently superior to those of plaintiff and that no juror could reasonably conclude that defendant would not have made the same decision absent discriminatory intent.³⁸ However, the court noted that such a defense, that the defendant would have made the same hiring decision even in the absence of any discriminatory intent, did not constitute a complete avoidance of liability under Title VII because of the changes brought by the Civil Rights Act of 1991.³⁹ The court, after analyzing the evidence, found sufficient evidence of discriminatory intent to raise genuine issues of material fact.⁴⁰ Consequently, as to plaintiff's Title VII claims, the court vacated the district court's entrance of summary judgment in favor of defendant and remanded the case for further proceedings on the Title VII claim.⁴¹

In *Forehand v. Florida State Hospital*,⁴² a number of African-American state hospital employees brought a Title VII race discrimination suit against their defendant-employer. The original plaintiff in the eventual class action alleged that the defendant discriminated against her in a promotion decision when the job at issue was given to a white woman. The original plaintiff later "amended her EEOC complaint to state that the discrimination against her was part of a pattern and practice of racially discriminatory recruitment, hiring, job assignments, promotions, demotions, terminations, lay-offs, reprimands, seniority, and affirmative action programs at the Hospital."⁴³ Although the EEOC concluded that the hospital's decision to promote the other candidate selected was based on nondiscriminatory criteria, the original plaintiff still filed a Title VII employment discrimination action against her employer. Later, she was joined by twelve additional plaintiffs who were all initially certified into a plaintiff class. In a subsequent bench trial

36. *Id.* at 1085.

37. *Id.* at 1083-84.

38. *Id.* at 1085.

39. *Id.* at 1084-85.

40. *Id.* at 1084.

41. *Id.* at 1085.

42. 89 F.3d 1562 (11th Cir. 1996).

43. *Id.* at 1564-65.

before a special master, statistical evidence was presented to support plaintiffs' pattern and practice claim of racial discrimination, and defendant offered statistical evidence to refute that claim as well. After the bench trial, in his report, the special master adopted defendant's statistical evidence in lieu of plaintiffs' statistical evidence, and the district court agreed with those findings. Thus, plaintiffs appealed that decision.⁴⁴

On appeal, the court noted that "the statistical evidence in this case was used to determine whether there existed a disparity between the percentage of black employees eligible for promotion and the percentage of blacks promoted."⁴⁵ Defendant's "statistical evidence showed no pattern and practice of discrimination . . . while the [plaintiffs'] statistical evidence showed some evidence of such a pattern and practice, i.e., the percentage of blacks eligible for promotion exceeded the percentage actually promoted."⁴⁶ The court explained that this disparity between the parties' statistical conclusions arose from the unique promotion decision-making process at defendant hospital.⁴⁷

Over the ten-year period at issue in this case, seventy-five percent of "promotions" came from a process that was noncompetitive. Noncompetitive promotions did not require an application and selection process, but rather, were often merely an administrative reclassification of jobs which involved some increase in pay. By contrast, twenty-five percent of promotions resulted from a process that was competitive. These promotions required an application and selection process. The percentage of blacks who applied for competitive promotions was greater than the percentage of blacks in the Hospital's workforce in general.⁴⁸

In analyzing the issue, the court stated that "[i]deally, to determine whether there existed a disparity between the percentage of eligible blacks and those promoted, . . . the percentage of blacks seeking competitive promotions [should be compared] to the percentage competitively promoted and, independently, compare the percentage of blacks in the workforce to the percentage granted noncompetitive promotions."⁴⁹ While the court noted that defendant "did, in fact, undertake such [] analysis and found approximate parity in the percentages, [n]either party placed primary reliance on [such a]

44. *Id.* at 1565-73.

45. *Id.* at 1572.

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

methodology.⁵⁰ Instead, the court noted that both parties "attempted to compare the percentage of all black employees promoted (including both competitive and noncompetitive promotions) to the percentage in the pool from which promotions were granted."⁵¹ Furthermore, the court recognized that "the parties disagreed [] on the data [that would] be used as the benchmark, i.e., the pool from which promotions were granted. [Plaintiffs] chose as their pool the percentage of blacks who applied for competitive promotions," or an "applicant flow" benchmark.⁵² "To this applicant flow benchmark, [plaintiffs] compared the percentage of blacks in the 'at issue' jobs, i.e., the percentage granted both competitive and noncompetitive promotions."⁵³ The court reasoned that this methodology drastically skewed plaintiffs' results.⁵⁴ The court stated that "[b]ecause the percentage of blacks was greater in the applicant pool than in the Hospital workforce, the applicant flow benchmark would tend to overstate any underrepresentation of blacks in the 'at issue' jobs."⁵⁵

By contrast, the court noted that defendant hospital "chose as its benchmark the percentage of black employees within each job category at the Hospital," or a "workforce" benchmark.⁵⁶ "By use of the workforce benchmark, the Hospital compared the percentage of blacks in the workforce to the percentage of blacks granted both competitive and noncompetitive promotions."⁵⁷ Yet, the court noted, "[b]ecause the percentage of blacks in the Hospital workforce was less than the percentage of black applicants for competitive jobs, the workforce benchmark potentially understated discrimination with respect to competitive promotions."⁵⁸ Thus, the court reasoned that "the workforce benchmark also skewed the statistical results, although not as badly as did the applicant flow benchmark because . . . seventy-five percent of promotions were non-competitive."⁵⁹

In summary, the court concluded that "both [plaintiffs'] applicant flow benchmark and [defendants'] workforce benchmark skewed the results of their statistical analyses: the applicant flow benchmark overstated any disparity while the workforce benchmark understated any dispari-

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* at 1573.

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*

ty."⁶⁰ Nonetheless, the court determined that because "seventy-five percent of promotions were non-competitive, the distorting effect of the [plaintiffs'] applicant flow benchmark was much greater than the distorting effect of the [defendants'] workforce benchmark."⁶¹ Thus, the court affirmed the judgment of the district court with respect to plaintiffs' pattern and practice race discrimination claim, holding that it was not clearly erroneous for the special master and district court to reject the applicant flow benchmark.⁶²

In *Caban-Wheeler v. Elsea*,⁶³ the Eleventh Circuit paid visit to a case that it had previously addressed in 1990.⁶⁴ Plaintiff was fired by defendant-employer, a county health department. Thereafter, she brought Title VII and Section 1983 claims against defendant for race discrimination, for national origin discrimination, and for violation of her due process rights. The district court initially ruled for defendants on all claims, and plaintiff appealed. The Eleventh Circuit, in its earlier decision, reversed and remanded, holding that the "discriminatory circumstances presented in the case demanded a retrial and re-examination of all issues."⁶⁵ On remand, plaintiff tried her Section 1983 claim before a jury; afterward, the Title VII claim was tried before the district court judge. Although the judge found for defendants on the Title VII claim, the jury found for plaintiff on the Section 1983 due process claim and awarded punitive damages. The court later ordered that one dollar in nominal damages be added to the Section 1983 verdict. After the trial, defendants appealed on several grounds, and plaintiff cross-appealed, raising various issues.⁶⁶

As to her Title VII claim, plaintiff argued "that the District Court improperly discounted her direct evidence of discrimination."⁶⁷ Plaintiff testified at trial that one of the decisionmakers as to her employment told her that he wanted a black person in plaintiff's job.⁶⁸ However, "the district court did not credit this testimony for two reasons: (1) the [decisionmaker] denied the allegation, and (2) the allegation was absent from [plaintiff's] charge of discrimination filed with the [EEOC]."⁶⁹ Holding that the district court was in the best position to evaluate the

60. *Id.*

61. *Id.*

62. *Id.*

63. 71 F.3d 837 (11th Cir. 1996).

64. *Caban-Wheeler v. Elsea*, 904 F.2d 1459 (11th Cir. 1990).

65. 71 F.3d at 840 (quoting *Caban-Wheeler*, 904 F.3d at 1558).

66. *Id.*

67. *Id.* at 842.

68. *Id.* at 843.

69. *Id.*

credibility of the witnesses, the Eleventh Circuit felt compelled to conclude that the district court's decision not to credit plaintiff's testimony about the decisionmaker was not clearly erroneous.⁷⁰ Thus, because "that was the only direct evidence of discrimination" proffered by plaintiff, the court ruled that "the District Court did not err in not shifting the burden of proof to the defendants to show that the same decision would have been made in the absence of discrimination."⁷¹

Plaintiff also argued on appeal that the district court did not comply with the court's decision resulting from the first appeal in the case.⁷² Nonetheless, the Eleventh Circuit held that the district court properly addressed in its findings of fact each of the issues raised in the first appeal.⁷³ The court stated that "just because the court ruled against [plaintiff] after considering those issues does not mean that it violated [the Eleventh Circuit's prior] mandate."⁷⁴

Finally, as to plaintiff's Title VII claim, plaintiff argued "that the District Court was bound by any determinations the jury made when deciding the Section 1983 claim, and that the court did not properly abide by the jury findings when deciding" against her on the Title VII claim.⁷⁵ "Specifically, [plaintiff] argue[d] that the jury awarded punitive damages for her procedural due process claim, and so must have found malicious intent," thereby supporting her Title VII claim.⁷⁶ However, the court, while noting that "the judge in this case, when deciding the Title VII claim, was bound by the jury's findings on the Section 1983 due process claims," found that "the judge's findings on the Title VII claim did not directly conflict with the jury's findings on the procedural due process claim."⁷⁷ Indeed, the court determined that "the jury may have found that the defendants acted recklessly in regard to [plaintiff's] procedural due process rights, but did not intentionally discriminate based on her race, sex, or national origin" in violation of Title VII.⁷⁸ Thus, the court held that a favorable jury verdict in plaintiff's favor under Section 1983 did not compel a judge's verdict in plaintiff's favor under Title VII.⁷⁹

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 843-44.

75. *Id.* at 844.

76. *Id.*

77. *Id.*

78. *Id.*

79. *Id.*

In *Jameson v. Arrow Co.*,⁸⁰ the Eleventh Circuit was faced, in part, with race discrimination issues arising out of a reduction in force ("RIF"). Plaintiff was terminated by defendant employer, as part of a reduction in force. After plaintiff's termination, defendant hired a black woman as human resources trainee, an entry-level position for which plaintiff was fully qualified. Plaintiff, after filing a charge of race discrimination with the EEOC, brought suit against defendant contending that it discriminated against her on the basis of race by expressly directing that a black female be hired to assume the entry-level job for which plaintiff was qualified at the time of her discharge. The district court, on defendant's motion for summary judgment, found that although plaintiff established a prima facie case of race discrimination, she failed to show that defendant's proffered legitimate, nondiscriminatory reasons for not hiring her for the position were pretextual. Thus, the district court granted defendant's motion for summary judgment on plaintiff's race discrimination claim, and plaintiff appealed.⁸¹

On appeal, the Eleventh Circuit reversed the district court's entrance of summary judgment in favor of defendant on plaintiff's race discrimination claim.⁸² Specifically, the court noted that "the explanations [given by defendant, and] relied on by the district court were based upon underlying issues of material fact that remained in dispute, and that the court not only improperly weighed the evidence submitted by each party, but also credited one version of events in granting summary judgment."⁸³ First, the district court relied on defendant's explanation that it "had no consistent policy of transferring employees who had been terminated."⁸⁴ However, a former employee relations manager for defendant testified that defendant had "mov[ed] people around' during the RIF, and had transferred at least one plant manager to a personnel position."⁸⁵ Second, the district court credited defendant's explanation in support of its motion that it "had a policy of not transferring workers into positions that effectively would be demotions"⁸⁶ Yet plaintiff had presented evidence that even though defendant "posited that the entry level position for which [the black woman] was hired would have been a demotion, [the] director of Human Resources [for defendant] stated that this position was created to 'grow and develop into a position

80. 75 F.3d 1528 (11th Cir. 1996).

81. *Id.* at 1530-31.

82. *Id.* at 1534.

83. *Id.* at 1533.

84. *Id.*

85. *Id.* (brackets in original).

86. *Id.*

of increased responsibility."⁸⁷ Finally, plaintiff and defendant disputed where the position was to be geographically located. Thus, in contrast to the district court, the appellate court concluded that the evidence presented by plaintiff was "more than merely speculative, and thus she had satisfied her burden to produce sufficient evidence from which a rational inference of . . . race discrimination could be drawn."⁸⁸ The court noted that although "a trier of fact could infer that there was no intent to discriminate" against plaintiff, a jury could also infer that defendant "deliberately refused to transfer or rehire [plaintiff] for jobs for which she was qualified at the time of her discharge because of her . . . race."⁸⁹ Consequently, the court held that it remained "the province of the finder of fact to decide which inference should be drawn," and that "[t]he district court expanded its review of the record evidence beyond that which was permitted at the summary judgment stage."⁹⁰ Therefore, the district court's entrance of summary judgment in favor of defendant on plaintiff's race discrimination claim was reversed, and the case was remanded for further proceedings.⁹¹

2. Sexual Harassment. In *Kilgore v. Thompson & Brock Management, Inc.*,⁹² the court analyzed corporate liability for hostile work environment sexual harassment. Defendant managed pizza restaurants and plaintiffs were employees at one of the restaurants subject to the management contract. Plaintiffs claimed that they were sexually harassed by a pizza delivery driver working for the restaurant and asserted that they complained of this harassment to the manager of the restaurant. Subsequently, plaintiffs left a message with defendant's vice-president. After receiving that notice, defendant began an immediate investigation of the alleged sexual harassment and failed to find any support for the allegations. Notably, plaintiffs had all voluntarily resigned and refused to meet with defendant's officials during the investigation.⁹³

After plaintiffs filed suit, the district court granted the employer's motion for summary judgment.⁹⁴ In affirming the district court's grant of summary judgment in favor of defendant, the Eleventh Circuit noted that defendant could be indirectly liable under Title VII for the co-

87. *Id.* at 1533-34.

88. *Id.* at 1534.

89. *Id.*

90. *Id.*

91. *Id.*

92. 93 F.3d 752 (11th Cir. 1996).

93. *Id.* at 753-54.

94. *Id.* at 753.

employee's alleged misconduct only if it failed to take prompt remedial action after receiving notice of the alleged harassment.⁹⁵ In this case, the court agreed that plaintiffs' first complaint to the manager of the restaurant did not constitute a complaint to higher management in light of the chain of hierarchy that existed within defendant's organization.⁹⁶ Furthermore, the court noted that the evidence showed that defendant took prompt remedial action after receiving notice of plaintiffs' alleged sexual harassment.⁹⁷ Consequently, the court held that defendant was not liable for the alleged misconduct of the co-employee.⁹⁸ Furthermore, the court also ruled that plaintiffs' constructive discharge claims were properly dismissed because constructive discharge would generally not be found if the employer is not given sufficient time to remedy the situation.⁹⁹ Therefore, the court affirmed the district court's decision to grant summary judgment for defendant on all claims.¹⁰⁰

In *Splunge v. Shoney's, Inc.*,¹⁰¹ the court was called upon once again to analyze corporate liability for sexual harassment committed by front-line supervisors and co-employees. In that case, plaintiffs allegedly were subjected to extensive sexual harassment by defendant-restaurant's supervisors and co-employees, including sexual advances and being shown sexually explicit videotapes and photographs. Defendant did not contest that the environment in which each plaintiff worked was hostile by Title VII standards, but instead contended that whatever environment existed, it could not be held liable for damages because it took immediate action after higher management became aware of the hostile situation. After trial, the district court entered judgment for plaintiffs on their hostile environment claims and defendant-employer appealed.¹⁰²

On appeal, the Eleventh Circuit affirmed the judgment of the district court pertaining to defendant's hostile environment liability.¹⁰³ The court noted that "[t]he hostile environment in this case was so pervasive, and managers at the restaurant were so inextricably intertwined in this environment, that higher management could be deemed by a jury to have constructive knowledge" of the hostile environment.¹⁰⁴ The court

95. *Id.*

96. *Id.* at 754.

97. *Id.*

98. *Id.*

99. *Id.*

100. *Id.* at 755.

101. 97 F.3d 488 (11th Cir. 1996).

102. *Id.* at 489-90.

103. *Id.* at 490.

104. *Id.*

expressly stated that the evidence of harassment was "extremely extensive, and that so many employees were involved indicate[d] that the events at [the restaurant] were not cloaked in secrecy."¹⁰⁵ Therefore, the court held that "the district court's conclusion that the evidence was enough to show that [defendant's] higher management had constructive knowledge was not error."¹⁰⁶ Furthermore, the court explained that defendant could not complain about its lack of notice at the time the hostile environment existed because a "reasonable jury could have found that the [defendant's] sexual harassment policy was never communicated to Plaintiffs."¹⁰⁷ In fact, plaintiffs had alleged that there was no sexual harassment policy posted to provide plaintiffs with guidance on how to contact upper-level managers when a sexual harassment situation existed.¹⁰⁸

However, on appeal, defendant-employer preserved at least a minor victory. Despite finding defendant liable for the existence of a hostile environment, the court concluded that the employer did not act with malice or recklessness necessary to be liable for punitive damages.¹⁰⁹ The court noted that the record failed to show that any "member of the [defendant's] management higher up the corporate hierarchy than the harassing employees themselves acted with [a] state of mind" of malice or recklessness.¹¹⁰ Thus, the court expressed that the defendant's "mere constructive knowledge of the harassment could not support punitive damages."¹¹¹ As a rule, the court stated that the definitions of malice and recklessness, to impute punitive damages to a defendant, "do not reach an employer with only constructive knowledge, at least when that constructive knowledge flows from negligence, as opposed to willful blindness."¹¹² In this case, the court ruled that "no evidence showed [that defendant] failed to become aware of the hostile environment because of any established policy of willful blindness."¹¹³ Rather, the court noted that defendant "had a general policy against sexual harassment and did investigate the complaints it received."¹¹⁴ Finally, the court "decline[d] to hold that . . . the state of mind of the harassing employees count[ed] as the state of mind of [the defendant] employer for

105. *Id.*

106. *Id.*

107. *Id.*

108. *Id.*

109. *Id.* at 491.

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.*

114. *Id.*

punitive damages purposes."¹¹⁵ Consequently, the court affirmed the district court's entrance of summary judgment in favor of plaintiffs on the issue of liability for the hostile environment, but reversed the district court's grant of punitive damages against defendant-employer.¹¹⁶

B. Procedural and Evidentiary Matters

1. **Summary Judgment Procedure.** In *Vining v. Runyon*,¹¹⁷ the Eleventh Circuit was called upon to review the propriety of the district court's grant of summary judgment to defendant in a Title VII racial discrimination and retaliation case. In that case, plaintiff had "moved to compel the production of the personnel records of four white former co-workers who, like himself, had either absence or tardiness problems."¹¹⁸ Subsequently, after defendant had moved for summary judgment, plaintiff "again moved to compel the production of [those records], and also requested the production of his own personnel file. The district court ordered that all of these personnel files be produced for an in camera review . . ., noting that the files 'were important for purposes of comparison to [plaintiff's] case.'¹¹⁹ Yet "[a]fter reviewing the evidence contained in these files, the district court granted [defendant's] motion for summary judgment and subsequently denied [plaintiff's] motion to compel as moot."¹²⁰ In fact, "[i]n its order granting summary judgment, the district court noted that the decision was made 'after reviewing [the] evidence [contained in the personnel files], and considering the briefs filed by the parties.'¹²¹ Moreover, the district court found that plaintiff was not similarly situated to white employees who had been retained, referencing personnel records subject to the in camera inspection.¹²²

On appeal, the court held that it was improper for the judge to rely on the in camera submission when ruling on defendant's motion for summary judgment.¹²³ Rather, the court held that

[a]lthough a judge freely may use in camera, ex parte examination of evidence to prevent the discovery or use of evidence, consideration of

115. *Id.*

116. *Id.* at 489.

117. 99 F.3d 1056 (11th Cir. 1996).

118. *Id.* at 1057.

119. *Id.*

120. *Id.*

121. *Id.* (brackets in original).

122. *Id.*

123. *Id.* at 1058.

in camera submissions to determine the merits of litigation is allowable only when the submissions involved compelling national security concerns or the statute granting the cause of action specifically provides for in camera resolution of the dispute.¹²⁴

Because neither of those two exceptions applied to the instant case, the court concluded that the district court erred in using the information obtained from the in camera examination of the personnel files.¹²⁵ Further, the court held that it was error for the district court to decide the summary judgment motion before ruling on an outstanding motion to compel.¹²⁶ Thus, the district court's order granting defendant's motion for summary judgment was vacated, and the case was remanded by the court for reconsideration of the summary judgment issue and the motion to compel.¹²⁷

2. Class Actions. In *Forehand v. Florida State Hospital*,¹²⁸ the Eleventh Circuit addressed an issue regarding a district court's decision to decertify a discrimination class ten years after the Title VII race discrimination case was filed. In that case, the original plaintiff had filed a Title VII employment discrimination action in 1983. In the final complaint, plaintiff was joined by twelve additional plaintiffs.¹²⁹ Thus, in 1985, the district court certified the plaintiff class. In 1986, a bench trial was held before a special master. Almost four years later, the special master recommended that the district court enter judgment in favor of defendants. Two years after that, the district court entered judgment in favor of defendants and held, in part, that the class had been improperly certified and, therefore, decertified the class. After this ruling, plaintiffs appealed the district court's decision to decertify the class ten years after the case was filed.¹³⁰

On appeal, the plaintiffs "urge[d] that the district court's decertification decision was especially inappropriate because the case was filed ten years earlier and had already gone to trial."¹³¹ Yet the court noted that "[a] district court may alter or amend a certification order any time before its decision on the merits."¹³² Although the court noted that "a class decertification order entered ten years after commencement of the

124. *Id.* at 1057.

125. *Id.* at 1057-58.

126. *Id.* at 1058.

127. *Id.*

128. 89 F.3d 1562 (11th Cir. 1996).

129. *Id.* at 1565.

130. *Id.* at 1566.

131. *Id.*

132. *Id.*

action is unusual and perhaps disfavored," the court found no abuse of discretion by the district court in this case.¹³³ Rather, the court concluded that the district court's reasoning that the class failed to conform to applicable legal requirements was correct and supported by the record.¹³⁴ Accordingly, the Eleventh Circuit adopted the district court's reasoning and affirmed the order decertifying the class.¹³⁵

3. Sanctions. In *Turner v. Sungard Business Systems, Inc.*,¹³⁶ the court addressed an interesting issue regarding sanctions under Rule 11 of the Federal Rules of Civil Procedure. In that case, plaintiff brought a racial discrimination action against his employer under Title VII. Plaintiff had alleged that the employer denied him a promotion and instead filled the vacant position with a white employee.¹³⁷

Subsequent to the filing of the action, plaintiff's original counsel withdrew from the case. Eventually, substitute counsel filed a notice of appearance in the action and continued to prosecute plaintiff's action. Later, defendant filed a motion for summary judgment, and plaintiff neither responded to the motion nor appeared at oral argument. Thus, the district court granted the employer's summary judgment motion on the ground that plaintiff had made out no prima facie case of race discrimination.¹³⁸

After prevailing on its motion for summary judgment, defendant-employer then moved for sanctions. The district court awarded sanctions against plaintiff and the substitute counsel for prosecuting a frivolous action, but did not award sanctions against the original counsel, finding that the original counsel had made some investigation of plaintiff's claim and withdrew when he learned that plaintiff's claim was meritless. Plaintiff and plaintiff's substitute counsel appealed the district court's order on several grounds.¹³⁹

First, plaintiff's substitute counsel argued that it signed no document, such as a pleading or motion, sufficient to invoke Rule 11. Rather, substitute counsel argued that the only paper he signed and submitted to the court was a notice of appearance, which alone could not subject him to sanctions under Rule 11.¹⁴⁰ However, the Eleventh Circuit rejected such an argument, finding that Rule 11 applies to all papers,

133. *Id.*

134. *Id.* at 1566-67.

135. *Id.*

136. 91 F.3d 1418 (11th Cir. 1996).

137. *Id.* at 1420.

138. *Id.*

139. *Id.* at 1420-21.

140. *Id.* at 1421.

including notices of appearance, filed in a suit.¹⁴¹ In fact, the court expressly noted that “[b]y appearing in the case, [substitute counsel] affirmed to the court that the case had arguable merit.”¹⁴² In essence, the court explained, it was as if substitute counsel had refiled the complaint.¹⁴³

Second, plaintiff and his substitute counsel argued that because sanctions were not imposed on the original counsel, they could not be imposed on plaintiff and his substitute counsel. “In essence, appellants argued that because the complaint was not sufficiently frivolous to subject [the original counsel] to sanctions, [appellants] could not be subject to sanctions.”¹⁴⁴ However, the Eleventh Circuit rejected this argument as well, finding that substitute counsel knew from the moment he began representing plaintiff that his claim was meritless.¹⁴⁵ Thus, the court concluded “[t]hat [merely because] the contentions contained in the complaint were not frivolous at the time it was filed [did] not prevent the district court from sanctioning [plaintiff and his substitute counsel] for continued advocacy of them after it should have been clear that those contentions were no longer tenable.”¹⁴⁶ Consequently, the court found that the lower court’s award of sanctions against plaintiff and plaintiff’s counsel was proper.¹⁴⁷

4. Pre-suit Arbitration. In *Cheney v. Anchor Glass Container Corp.*,¹⁴⁸ the Eleventh Circuit addressed the doctrine of excusable neglect in the context of arbitration prior to a discrimination suit. In that case, plaintiff brought an employment discrimination action against defendant-employer. The district court referred the case to pre-suit arbitration. The arbitration panel found in favor of defendant-employer, but through miscommunication, plaintiff’s attorneys did not file a request for trial de novo within thirty days as required by the district court’s local rules. Consequently, the clerk of the district court entered judgment for defendant in accordance with the arbitration panel’s decision. Plaintiff then appealed the district court’s denial to set aside the judgment.¹⁴⁹

141. *Id.*

142. *Id.*

143. *Id.*

144. *Id.* at 1421-22.

145. *Id.* at 1422.

146. *Id.*

147. *Id.*

148. 71 F.3d 848 (11th Cir. 1996).

149. *Id.* at 849.

On appeal, the court analyzed whether plaintiff's counsel's failure to file a request for trial de novo was due to excusable neglect. In consideration of the issue, the court noted that the lack of prejudice to defendant-employer was key.¹⁵⁰ The court noted that plaintiff filed a request for trial de novo only six days late, and the defendant produced no evidence to indicate that it was "lulled or otherwise prejudiced by the untimely filing."¹⁵¹ Rather, the evidence showed that settlement discussions and discovery continued because "both parties expected to continue litigating regardless of the arbitration panel's decision."¹⁵² Therefore, the untimely filing of a request for trial de novo was ruled to be a result of excusable neglect, the district court's entrance of judgment in favor of the employer was overturned, and the case was remanded for further litigation.¹⁵³

5. Releases. In *Puentes v. United Parcel Service, Inc.*,¹⁵⁴ the Eleventh Circuit examined issues pertaining to knowing and voluntary waivers of employment discrimination claims through releases in exchange for severance packages. In that case, plaintiffs were terminated from their employment with defendant and at the time of the terminations "were offered substantial severance packages and the ability to 'resign for personal reasons.'"¹⁵⁵ However, these packages and the resignation characterization were only available on the condition that plaintiffs "execute unambiguous releases waiving all employment discrimination claims arising out of their terminations. Both plaintiffs agreed to execute the releases."¹⁵⁶ However, "[t]hereafter, the plaintiffs filed this lawsuit against [defendant] alleging that they were unlawfully terminated as a result of employment discrimination 'on the basis of national origin and/or race,' as part of [defendant-employer's] ongoing pattern of terminating management-level Hispanic employees and replacing them with non-Hispanics."¹⁵⁷ Defendant moved for summary judgment, arguing that plaintiffs' claims were barred because they had knowingly and voluntarily executed the releases concerning such employment discrimination claims.¹⁵⁸ The district court granted

150. *Id.* at 850.

151. *Id.*

152. *Id.*

153. *Id.*

154. 86 F.3d 196 (11th Cir. 1996).

155. *Id.* at 197.

156. *Id.*

157. *Id.*

158. *Id.*

the employer's motion for summary judgment, and plaintiffs appealed that order.¹⁵⁹

On appeal, the Eleventh Circuit reversed, holding that there was a "question of material fact regarding whether the plaintiffs were given adequate time to review the releases before executing them."¹⁶⁰ As a preliminary matter, the court noted that the waiver of employment discrimination remedial rights must be closely scrutinized.¹⁶¹ Therefore, the court stated that when "determining whether a release was knowingly and voluntarily executed, courts look to the totality of the circumstances," including "plaintiff's education and business experience; the amount of time the plaintiff considered the agreement before signing it; . . . plaintiff's opportunity to consult with an attorney; the employer's encouragement or discouragement of consultation with an attorney; and the consideration given in exchange for the waiver."¹⁶²

In this case, plaintiffs' principal assertions concerning the releases were that "they were not given adequate time to consider the agreement, and that they were not given a fair opportunity to consult an attorney."¹⁶³ Plaintiffs contended that they were only given twenty-four hours to decide whether to sign the releases and that they understood that the offer would not be valid longer than that. The court concluded that "absent some reason for urgency, twenty-four hours is too short a period" of time.¹⁶⁴ Moreover, the court noted that it was "undisputed that neither plaintiff consulted with an attorney before signing the releases, and a twenty-four hour time limitation . . . substantially impeded their ability to do so."¹⁶⁵

The court also significantly noted that "plaintiffs had no role in deciding the terms of the releases[, as] [n]one of the terms of the release[s] were negotiated."¹⁶⁶ Rather, the court recognized that plaintiffs were simply handed a printed form.¹⁶⁷ The court also expressed concern that one plaintiff "requested to take a copy of the release form home overnight to think about it, and was told that he could not take the form out of the [employer's] office, because it was [the employer's] document and [] property."¹⁶⁸ The court admonished that

159. *Id.* at 197-98.

160. *Id.* at 198.

161. *Id.*

162. *Id.*

163. *Id.*

164. *Id.* at 199.

165. *Id.*

166. *Id.*

167. *Id.*

168. *Id.*

"there is no good reason why [the employer] could not have provided [the employee] a copy of the release form that it was asking him to voluntarily and knowingly sign."¹⁶⁹ The court concluded that the employer's refusal to provide a copy of the release, "like a twenty-four hour time constraint, could have been motivated by a desire to impede the [plaintiffs'] ability to consult with an attorney."¹⁷⁰ Consequently, the court held that a reasonable fact finder could have found that plaintiffs did not knowingly and voluntarily execute the releases, and accordingly, the issue could not be resolved by summary judgment.¹⁷¹ Thus, the judgment of the district court was reversed, and the case was remanded for further litigation proceedings.¹⁷²

6. Administrative Prerequisites to Suit. In *Forehand v. Florida State Hospital*,¹⁷³ the court analyzed the concept of a right-to-sue letter as a jurisdictional or statutory prerequisite to suit and analyzed the doctrine of equitable modification. In that case, as discussed earlier in this Article, plaintiffs all found themselves decertified from an original class action. Some of the class plaintiffs had failed to satisfy all conditions precedent to suit themselves or relied on the original plaintiff's charge under the single filing rule. The district court found that the nonfiling plaintiffs' claims were so different from the original plaintiff's promotion claim that they could not be permitted to rely on the original plaintiff's charge of discrimination. In addition, the district court held that certain plaintiffs had failed to exhaust their administrative remedies before commencing suit in federal court and, thus, dismissed their claims. Plaintiffs then appealed.¹⁷⁴

On appeal, the Eleventh Circuit noted that certain plaintiffs filed suit before receiving their right-to-sue letters from the EEOC.¹⁷⁵ Therefore, those plaintiffs were required to depend upon the doctrine of equitable modification to support their claim. The district court had held that these plaintiffs "were not entitled to [] equitable modification because they filed suit and requested their notice of their right to sue long before the 180-day statutory period had elapsed."¹⁷⁶ The district court had also found it significant that the EEOC only issued the letters after plaintiffs' attorneys sent a specific request to the EEOC requesting a

169. *Id.*

170. *Id.*

171. *Id.* at 199-200.

172. *Id.* at 200.

173. 89 F.3d 1562 (11th Cir. 1996).

174. *Id.* at 1565-68.

175. *Id.* at 1568.

176. *Id.*

right-to-sue letter. The district court reasoned that these plaintiffs "deliberately frustrated the EEOC investigation and conciliation process by requesting their right-to-sue letters prior to the expiration of the 180-day period."¹⁷⁷

Relying on previous cases, the court held "that receipt of a right-to-sue letter is not a jurisdictional prerequisite to suit, but rather, is a statutory precondition which is subject to equitable modification."¹⁷⁸ On the one hand, the court concluded "that there is no per se rule that receipt of a right-to-sue letter during pendency of the suit always satisfies the exhaustion requirement."¹⁷⁹ Thus, the court agreed "with the district court's general proposition that if a claimant attempts to frustrate investigation or conciliation by the EEOC, equitable modification of the exhaustion rule may be inappropriate."¹⁸⁰ In fact, the Eleventh Circuit noted that "the district court properly applied this rule to [one plaintiff whose] failure to cooperate with the EEOC disentitled her to equitable modification," in light of the fact that the EEOC dismissed her claim for such lack of cooperation.¹⁸¹ Nonetheless, with respect to the other applicable plaintiffs, the Eleventh Circuit disagreed with the district court, in part due to intervening case law.¹⁸² The court noted that "the EEOC regulations expressly contemplate that a plaintiff may make an early request for a right-to-sue letter, and that the EEOC may issue the letter upon determining that it is probable that it will be unable to complete its administrative processing within the 180-day [conciliation] period."¹⁸³ Thus, the court held that "[a] plaintiff should be free to make an early request for a right-to-sue letter upon the assumption that the EEOC will perform as contemplated in the regulations by issuing the letter only if it is probable that it will be unable to complete the administrative processing within 180 days."¹⁸⁴ Thus, being "uncertain as to whether the district court would have reached the same finding in light of the intervening case law," the Eleventh Circuit vacated for further proceedings on the issue of equitable modification.¹⁸⁵

177. *Id.*

178. *Id.* at 1569-70.

179. *Id.* at 1570.

180. *Id.*

181. *Id.*

182. *Id.* See *Cross v. Alabama*, 49 F.3d 1490 (11th Cir. 1995); *Sims v. Trus Joist MacMillan*, 22 F.3d 1059 (11th Cir. 1994).

183. *Forehand*, 89 F.3d at 1570.

184. *Id.* at 1571.

185. *Id.*

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Theories of Liability and Burdens of Proof*

In *Isenbergh v. Knight-Ridder Newspaper Sales, Inc.*,¹⁸⁶ the court was faced with a typical age discrimination discharge case arising under the ADEA. In that case, plaintiff, who was sixty years old, was a manager with defendant-newspaper company. Subsequently, plaintiff's newspaper company merged with another newspaper organization and consolidation of managers in the geographic area was conducted. An interview procedure for various candidates was implemented, and that procedure was not favorable to plaintiff. Plaintiff alleged that his interview lasted only a half-hour, whereas the candidate who was finally selected for retention was given a full hour, as all of the interviews were originally planned to be. Furthermore, plaintiff alleged the atmosphere of his interview was cold, and the supervisor with decision-making authority was on the phone most of the time. Last, but not least, plaintiff pointed to his sales experience at his old newspaper as illustrating his credentials for the position.¹⁸⁷

Defendant, on the other hand, contended that the candidate selected, even though much younger than plaintiff, was much better qualified and suited for the new job than plaintiff. Defendant further contended that all of plaintiff's successes were in the field of sales and not management. Furthermore, defendant pointed to plaintiff's earlier evaluations, evidencing the fact that plaintiff was not a team player. The district court eventually granted defendant-employer's motion for judgment as a matter of law, and plaintiff appealed.¹⁸⁸

On appeal, the Eleventh Circuit first analyzed whether plaintiff had established a *prima facie* case of age discrimination.¹⁸⁹ The court noted that in this merger situation, this case did not fit neatly into a failure to hire mold or a reduction in force mold.¹⁹⁰ Rather, instead of strictly resorting to a concrete *prima facie* case test, the court chose to "examine the facts of the case and decide 'whether the plaintiff has presented sufficient evidence to provide a basis for an inference that age was a factor in the employment decision.'"¹⁹¹ Under such a standard,

186. 97 F.3d 436 (11th Cir. 1996).

187. *Id.* at 438.

188. *Id.* at 438-44.

189. *Id.* at 439.

190. *Id.* at 440.

191. *Id.* (quoting *Pace v. Southern Ry. Sys.*, 701 F.2d 1383, 1387 (11th Cir.), *cert. denied sub nom. Pace v. Southern Ry.*, 464 U.S. 1018 (1983)).

the court concluded that plaintiff presented a prima facie case.¹⁹² The court stated that plaintiff was in a protected age group and was adversely affected by the merging employer's decision to select another candidate who was sixteen years younger than plaintiff.¹⁹³ Finally, the court noted that plaintiff was at some level qualified for the new position.¹⁹⁴ Thus, the court concluded that plaintiff had sufficiently established a prima facie case of age discrimination.¹⁹⁵

The court's next inquiry was whether the defendant-employer had "met its burden of producing evidence of a legitimate, non-discriminatory reasons for offering the job to [the other candidate] rather than to [plaintiff]."¹⁹⁶ In this regard, the court held that the employer did indeed meet "its burden . . . by asserting that [plaintiff] was denied the managerial position because he was the less qualified of two applicants for the same job."¹⁹⁷ Therefore, "having met its burden of production, [the ultimate burden] fell to plaintiff to show that the employer's proffered reason for the adverse employment decision was false and that discrimination was the real reason."¹⁹⁸

In this regard, the court held that plaintiff's "efforts to produce a basis to contradict [the defendant's] non-discriminatory justification [for the employment action did] not suffice to create a jury question on the issue of pretext."¹⁹⁹ After reviewing the evidence, the court concluded that none of the evidence produced by plaintiff provided a basis for contradicting defendant's ultimate justification for the employment decision—that the other candidate was more qualified.²⁰⁰ Therefore, because plaintiff failed to present any evidence to overcome defendant's ultimate reasons for selecting the other applicant, the court affirmed the judgment of the district court in favor of the employer.²⁰¹

However, despite being a routine age discrimination case, the decision contained an exhaustive analysis regarding the effects of the *St. Mary's Honor Center v. Hicks*²⁰² decision on discrimination cases. In fact, the court noted a conflict in the case law of the Eleventh Circuit on this

192. *Id.*

193. *Id.*

194. *Id.*

195. *Id.*

196. *Id.*

197. *Id.*

198. *Id.* at 440-41.

199. *Id.* at 444.

200. *Id.*

201. *Id.* at 445.

202. 509 U.S. 502 (1993).

issue, comparing *Howard v. BP Oil Co.*²⁰³ to *Walker v. Nations-Bank*²⁰⁴ and *Batey v. Stone*.²⁰⁵ On this issue, the court stated that it "believe[d] that *Howard* [was] mistaken when it read [] *Hicks* as controlling kinds of cases that were not before the Supreme Court in *Hicks*."²⁰⁶ The court stated that "*Hicks* only held that a judge may, after bench trial, disbelieve the employer's proffered reason for a hiring decision and yet still grant judgment to the employer."²⁰⁷ However, the court had "no confidence that the *Hicks* decision dictat[ed] to . . . judges . . . that every time the evidentiary record . . . could support a jury's disbelief of the employer's explanation for the [] employment action, no court may grant a motion for judgment as a matter of law to the employer in an employment discrimination case."²⁰⁸ Rather, the court opined that "*Hicks*, taken as a whole, more likely support[ed] a different conclusion: in such circumstances, the watchword would be not 'every time,' but 'sometimes.'"²⁰⁹ Thus, the court concluded that *NationsBank*, not *Howard*, was a more correct statement of the law in the Eleventh Circuit.²¹⁰ Nevertheless, the court concluded that whatever significance *Howard* might have had in the circuit, that decision did not control the instant case because examination of the record indicated that plaintiff "failed in creating an issue of fact about the disbelievability of the [defendant] employer's reasons for the hiring decision."²¹¹

In *Jameson v. Arrow Co.*,²¹² the Eleventh Circuit once again analyzed an age discrimination claim in the context of a reduction in force ("RIF"). In that case, plaintiff was a white female over the age of fifty employed by defendant at one of its plants. Thereafter, defendant implemented a significant RIF, and plaintiff was discharged. Defendant subsequently hired another individual, a twenty-three-year-old woman, as a human resources trainee, which was an entry-level position for which plaintiff was fully qualified.²¹³

Plaintiff subsequently filed a complaint with the EEOC, alleging, in part, that "her termination, coupled with [defendant's] failure to transfer

203. 32 F.3d 520 (11th Cir. 1994).

204. 53 F.3d 1548 (11th Cir. 1995).

205. 24 F.3d 1330 (11th Cir. 1994).

206. *Isenbergh*, 97 F.3d at 442.

207. *Id.* (citing *Hicks*, 509 U.S. at 508-11).

208. *Id.*

209. *Id.*

210. *Id.* at 443.

211. *Id.* at 443-44.

212. 75 F.3d 1528 (11th Cir. 1996).

213. *Id.* at 1530.

or rehire her and its decision to hire" another individual for a position for which she was qualified, "constituted [unlawful] age . . . discrimination in violation of the Age Discrimination in Employment Act."²¹⁴ After a lawsuit was filed, "[t]he district court concluded that [plaintiff] had failed to establish a prima facie case of age discrimination because she had not presented evidence by which a fact finder could infer that [defendant's] failure to transfer or rehire her was motivated by discriminatory animus based upon her age."²¹⁵ Plaintiff then appealed the district court's order granting summary judgment in favor of defendant on her age discrimination claim.²¹⁶

On appeal, plaintiff did "not dispute that the initial termination and consequent elimination of her position resulted from a legitimate RIF, but argue[d] that [defendant's] failure to transfer her or rehire her for numerous positions available at the time of her termination constitute[d] evidence of discriminatory intent."²¹⁷ Plaintiff "emphasize[d] that she specifically expressed to her supervisor her interest in the position of personnel administrator—later filled by a younger woman—but was informed that [defendant] did not plan to fill this position."²¹⁸ Plaintiff further argued "that the facts that [defendant] transferred one younger employee from [her department] and hired several younger individuals for other positions for which she was qualified are evidence that the impermissible factor motivating defendant's decisions [concerning plaintiffs was] to replace older female workers with younger employees."²¹⁹

In analyzing the sufficiency of plaintiff's allegations in the summary judgment context, the court noted "the basic proposition that, when an employer reduces its workforce for economic reasons, it incurs no duty to transfer laid-off employees to other positions within the company."²²⁰ However, on the other hand, the court also noted its reasoning from earlier cases suggesting that "where a job for which the plaintiff is qualified, and for which a plaintiff applies, is available at the time of termination, and the employer offers the job to an individual outside the protected age group, an inference of intentional discrimination is permissible."²²¹ The court took great pains to

214. *Id.* at 1530-31.

215. *Id.* at 1531.

216. *Id.*

217. *Id.* at 1532.

218. *Id.*

219. *Id.*

220. *Id.* (citing *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1083 (11th Cir. 1990)).

221. *Id.*

emphasize that the ADEA does not mandate that employers establish an interdepartmental transfer program during the course of an [sic] RIF, require that "younger employees be fired so that employees in the protected age group can be hired," or impose any added burden on employers to transfer or rehire laid-off workers in a protected age group as a matter of course.²²²

Rather, the court held "that a discharged employee who applies for a job for which she is qualified and which is available at the time of her termination must be considered for that job along with all other candidates, and cannot be denied the position based upon her age."²²³ In this regard, the court held that

[a]n employer's decision to transfer or to hire a younger employee for that available position is sufficient evidence to support an inference of discrimination for the limited purpose of establishing the plaintiff's prima facie case; the employer then may rebut this inference by providing legitimate, non-discriminatory reasons for its decision which the plaintiff, in order to avoid summary judgment, must show to be pretextual.²²⁴

With this analysis in mind, the court concluded that, although the defendant "incurred no absolute duty to hire [plaintiff] into any of [the available] positions, its failure to do so, coupled with its decision to employ younger workers during its RIF, could give rise to a rebuttable inference that it intended to discriminate against [plaintiff] on the basis of age."²²⁵ The court therefore concluded "that the district court erred in its finding that [plaintiff] failed to make out a prima facie case of age discrimination, and thus improperly granted summary judgment [for defendant] on this basis."²²⁶

B. Procedural Matters

1. **Class Actions.** In *Armstrong v. Martin Marietta Corp.*,²²⁷ the court was required to rule on a matter of first impression involving options that age discrimination plaintiffs, "who have been dismissed from class actions after opting-in to the class actions, [have] to protect their right to litigate their claims individually before the statute of

222. *Id.* at 1532-33 (citations omitted).

223. *Id.* at 1533.

224. *Id.*

225. *Id.* at 1532.

226. *Id.*

227. 93 F.3d 1505 (11th Cir. 1996), *reh'g granted*, 107 F.3d 830 (11th Cir. 1997).

limitations runs."²²⁸ In this case, a number of employees joined together to file an age discrimination action under the ADEA against defendant-employer. Subsequent to the filing of the action, the district court dismissed certain employees' claims without prejudice, concluding that they were not similarly situated to the class action plaintiffs.²²⁹ A few months later, the employees whose claims had been dismissed from the class action filed their own ADEA class action against defendant-employer. However, this action had been filed well after the ninety-day period following the district court's order of dismissal. Thereafter, defendant filed a motion for partial summary judgment against most of those plaintiffs on the ground that plaintiffs failed to file their individual lawsuits within ninety days after receiving notice of their dismissal from the original class action. The district court granted the motion for summary judgment.²³⁰

On appeal, "plaintiffs contend[ed] that the ninety-day filing period for bringing an ADEA action in district court remained tolled after their dismissal from the class action because the district court did not enter a final judgment."²³¹ Alternatively, the plaintiffs contended that the Eleventh Circuit "should excuse their failure to file their individual lawsuits within the filing period because they did not receive notice that the ninety-day filing period resumed upon their dismissal from the class action."²³²

Thus, the Eleventh Circuit addressed the issue as to whether "the ninety-day statute of limitations of the ADEA . . . remains tolled when the district court dismisses claimants from the pending class action in an interlocutory order."²³³ In this regard, the court noted that neither the Eleventh Circuit, nor any other circuit, had previously addressed this issue.²³⁴ Indeed, the court expressed that this issue was "of particular importance because at the time of the dismissal claimants cannot appeal the district court's dismissal order as of right because it is not a final judgment."²³⁵

In deciding this issue, the court noted that "[i]n the context of class actions, the 'interlocutory' status of the dismissal order does not negate the fact that the claimants lose their membership in the class ac-

228. 93 F.3d at 1507.

229. *Id.*

230. *Id.*

231. *Id.*

232. *Id.*

233. *Id.* at 1508.

234. *Id.*

235. *Id.*

tion.²³⁶ However, "[t]his loss of membership . . . may only be temporary because the district court may reconsider its dismissal order and vacate the order, or upon final judgment the claimants may appeal their dismissal and the appellate court may reverse the district court's decision."²³⁷ In light of these facts, the court gave three options for plaintiffs who have been dismissed from age discrimination class actions.²³⁸ Plaintiffs may:

(1) within the remaining time before the statute of limitation runs, file an individual lawsuit thereby rendering any appeal of the dismissal from the class action moot; or (2) await final judgment in the class action, appeal from that final judgment, and if not successful file an individual lawsuit within the time that remained at the time of their dismissal; or (3) before the running of the statute of limitations, move for an interlocutory appeal. If the district court certifies the issue for interlocutory appeal, an interlocutory appeal is taken, and the district court is affirmed, tolling of the running of the statute of limitation ceases and the claimant may file an individual lawsuit before the statute of limitations runs. If the district court declines to certify the issue for appeal or an interlocutory appeal is not taken, the claimant may file an individual lawsuit within the time remaining or exercise option 2 and await final judgment.²³⁹

The court felt that this holding promoted economies of justice and avoided needless multiplicity of actions.²⁴⁰

Unfortunately, had the court applied this new rule of law to this case, plaintiffs' actions would have been barred because they filed a lawsuit well outside of the ninety-day window.²⁴¹ Because the court, prior to its holding in this case, was silent on this issue, the court concluded that plaintiffs could continue their individual lawsuits in the case, but could not appeal the dismissal order or the final judgment in the original class action.²⁴² Accordingly, the district court's conclusion of law that plaintiffs' ADEA lawsuits were barred was reversed, and the case was remanded for further proceedings.²⁴³

236. *Id.* at 1509.

237. *Id.*

238. *Id.*

239. *Id.*

240. *Id.*

241. *Id.* at 1510.

242. *Id.*

243. *Id.*

In *Grayson v. K Mart Corp.*,²⁴⁴ the Eleventh Circuit became extensively involved in sophisticated employment discrimination class action litigation gone haywire. In that case, issues were raised regarding two groups of plaintiffs involved in overlapping age discrimination class actions. All plaintiffs were store managers with defendant-corporation and were demoted or terminated by defendant during a period from 1990 to 1992. "Plaintiffs alleged that their demotions or terminations were motivated by age-discrimination in violation of the Age Discrimination in Employment Act."²⁴⁵ The first class action, aptly named the *Grayson* action, was commenced in January 1992. A second action, called the *Helton* action, was commenced in October 1992 before a different district court judge, but in the same district of the federal court. Thereafter, plaintiffs in both cases engaged in parallel discovery. In February 1993, defendant-employer "moved for severance in the *Helton* case under Federal Rule of Civil Procedure 42(b), arguing that the claims of the five plaintiffs in *Helton* were not properly joined under Federal Rule of Civil Procedure 20."²⁴⁶ In March 1993, defendant filed a similar motion in the *Grayson* case. In September 1993, the judge in the *Helton* case rejected defendant's motion for severance. Nonetheless, in February 1994, the judge in *Grayson* granted such motion. In February 1994, plaintiffs in *Helton* filed a motion seeking leave to amend their complaint to allege for the first time an ADEA class action and a motion for leave to amend their complaint to add that the action was brought on behalf of other similarly situated individuals.²⁴⁷ In July 1994, the judge granted plaintiffs' motions in *Helton* to create an opt-in class under 29 U.S.C. § 216(b) and to amend their complaint.²⁴⁸ In August 1994, the judge in *Grayson* "issued a conditional order dismissing without prejudice each of the six severed actions remaining in the *Grayson* case . . . not[ing] that all of the *Grayson* plaintiffs were members of the *Helton* class, and assum[ing] that those plaintiffs would wish to opt-in to the *Helton* case."²⁴⁹ In fact, as a condition to these dismissals, the judge "provided that the six *Grayson* plaintiffs could reopen their cases if they were later excluded from the *Helton* case."²⁵⁰ An interlocutory appeal by defendant followed.²⁵¹

244. 79 F.3d 1086 (11th Cir.), cert. denied sub nom. *Helton v. Kmart Corp.*, 117 S. Ct. 435, cert. denied sub nom. *Kmart Corp v. Helton*, 117 S. Ct. 447 (1996).

245. 79 F.3d at 1090.

246. *Id.* at 1092.

247. *Id.*

248. *Id.*

249. *Id.*

250. *Id.*

251. *Id.* at 1093.

On appeal, the Eleventh Circuit analyzed the propriety of the two judges' actions in *Grayson* and *Helton*. On appeal, the Eleventh Circuit held that the section 216(b) "similarly situated" requirement was less stringent than that for joinder under Rule 20(a) or for separate trials under Rule 42(b).²⁵² As a consequence, the court concluded that the judge in the *Helton* case "acted within his discretion in allowing a [section] 216(b) opt-in class . . . because the plaintiffs ha[d] made substantial allegations and provided evidentiary support for their contention that they were victims of an age-motivated purge [by the defendant-employer] from 1990 to 1992."²⁵³ In this regard, the court was persuaded by the evidence presented to the judge that plaintiffs had met the similarly situated requirement of section 216(b).²⁵⁴ Moreover, the court held that the judge in *Helton* was not required to conduct a formal evidentiary hearing prior to making his section 216(b) ruling.²⁵⁵

However, the Eleventh Circuit paid close attention to the temporal scope of the opt-in class.²⁵⁶ In defining the scope, the judge in *Helton* allowed putative plaintiffs to "piggyback" onto the original *Grayson* plaintiff's 1991 EEOC charge.²⁵⁷ The Eleventh Circuit, in analyzing the propriety of that decision, held as an initial matter that piggybacking was available in ADEA cases and that an age discrimination plaintiff could piggyback provided that the appropriate legal requirements were satisfied.²⁵⁸ The court reasoned that "the principle behind the piggybacking rule [was] to give effect to the remedial purposes of the ADEA, and to not exclude otherwise suitable plaintiffs from an ADEA class action simply because they ha[d] not performed the 'useless act of filing a charge.'²⁵⁹ However, the court held that the *Grayson* charge was particularly inadequate as a representative charge for piggybacking purposes.²⁶⁰ First, the court noted that plaintiff "Grayson's own action [was] time-barred because he failed to file his written consent to opt into the *Helton* class within three years of his demotion."²⁶¹ Thus, the court ruled that plaintiff Grayson should have been barred from joining the *Helton* class, and his charge should not and could not have served as

252. *Id.* at 1096.

253. *Id.* at 1097.

254. *Id.* at 1099.

255. *Id.*

256. *Id.* at 1100.

257. *Id.* at 1101.

258. *Id.*

259. *Id.* at 1103.

260. *Id.* at 1104.

261. *Id.*

a representative charge for others in the case.²⁶² Second, the court noted that "even if Grayson's actions were not time-barred, his EEOC charge provide[d] insufficient notice of the scope of the class."²⁶³ Accordingly, the court held that in selecting the representative charge for the *Helton* class, the judge should not have selected plaintiff Grayson's charge, but rather "should have chosen the first timely filed charge of one of the named plaintiffs that [gave] adequate notice of the scope of the class."²⁶⁴ On the other hand, the Eleventh Circuit directed the judge "to define the *Helton* class to bar putative plaintiffs who have failed to file written consents to opt into the class within two years of their demotions for non-willful violations or within three years of their demotions for willful violations," citing applicable statute of limitations requirements.²⁶⁵ In summary, the Eleventh Circuit affirmed the judge's order in the *Helton* case allowing the creation of an opt-in class pursuant to 29 U.S.C. § 216(b), yet reversed and remanded the proceedings so that the judge could modify the temporal scope of the *Helton* class consistent with the Eleventh Circuit's opinion.²⁶⁶

2. EEOC Investigatory Authority. In *EEOC v. Tire Kingdom, Inc.*,²⁶⁷ the Eleventh Circuit had the opportunity to examine the powers possessed by the EEOC to conduct an investigation into a former employee's age discrimination claim despite the fact that the underlying charge was untimely. In that case, an employee had filed a charge with the EEOC alleging that defendant-employer had fired him from his position because of his age. The former employee's charge had allegedly been filed more than a year after he had been terminated, well outside the three-hundred day window for the charge to be considered timely. Nevertheless, the EEOC commenced an investigation and requested from defendant-employer information necessary to evaluate the allegations of age discrimination. However, the employer refused to provide the information requested, citing the untimeliness of the charge. The EEOC claimed that its authority to investigate claims of age discrimination existed regardless of the filing of a timely charge. Eventually, the EEOC was required to issue an administrative subpoena duces tecum and sought enforcement of the subpoena in the district court. The district

262. *Id.*

263. *Id.*

264. *Id.* at 1104-05.

265. *Id.* at 1107.

266. *Id.* at 1108.

267. 80 F.3d 449 (11th Cir. 1996).

court ordered defendant-employer to comply with the subpoena, and the employer appealed from that order.²⁶⁸

Thus, on appeal, the Eleventh Circuit faced yet another novel issue—whether the EEOC had the authority to conduct the challenged investigation in which the underlying charge had been untimely filed. The court answered in the affirmative, stating that “the ADEA grants the commission broad power to investigate, and nothing in its language suggests that this power is dependent upon the filing of an employee’s charge.”²⁶⁹ Furthermore, the court noted that the EEOC has an “independent right to bring suit to enforce the provisions of the ADEA[, and that a]n independent investigative authority logically precedes that right.”²⁷⁰ Moreover, the court rejected the employer’s reliance on the three-hundred day time limit, stating that the time limit applied only to cases brought under the ADEA by an individual against his or her employer, not by the EEOC.²⁷¹ Thus, the court concluded that “the Commission’s power to conduct an investigation into claims of age discrimination is not dependent upon the filing of a charge with[in] the time requirements” specified by the ADEA.²⁷² Therefore, the order of the district court enforcing the subpoena *duces tecum* was affirmed.²⁷³

III. EMPLOYEE RETIREMENT INCOME SECURITY ACT OF 1974

In *Godfrey v. BellSouth Telecommunications, Inc.*,²⁷⁴ the court faced retaliation issues arising under ERISA. In that case, plaintiff submitted a claim for benefits under defendant’s sickness and accident disability plan. However, defendant’s manager denied sickness benefits, and the review committees denied plaintiff’s appeals. Subsequently, defendant informed plaintiff that she would have to return to work or be discharged. Moreover, because of her sickness, plaintiff’s attendance record was the worst of any employee in her unit, and she was disciplined for her absences as a result.²⁷⁵ Yet, because plaintiff did return to work, she did not become eligible for benefits under defendant’s long-term disability plan. Eventually, plaintiff commenced suit in state court, which defendant later removed to federal court. Thereafter, plaintiff amended her complaint to add a retaliation claim under ERISA. After

268. *Id.* at 450.

269. *Id.* at 451.

270. *Id.*

271. *Id.*

272. *Id.*

273. *Id.* at 452.

274. 89 F.3d 755 (11th Cir. 1996).

275. *Id.* at 757.

a bench trial, the district court found that plaintiff was disabled under the terms of the sickness and disability benefit plan, issued an injunction ordering defendant to comply with ERISA, and ordered defendant to pay plaintiff a large amount in benefits. Defendant then appealed.²⁷⁶

On appeal, the court held as an initial matter that "[w]here the administrator of an ERISA benefits plan has discretionary authority to determine eligibility for benefits, a court reviews that determination under the arbitrary and capricious standard."²⁷⁷ However, the court held that "such a determination is not entitled to as much deference where the administrator has a conflict of interest."²⁷⁸ In this case, the court noted that if defendant-employer granted benefits to plaintiff, "it would have either had to hire a replacement worker or lose the services of an employee in that position."²⁷⁹ Thus, the court concluded that defendant's plan administrators had a conflict of interest.²⁸⁰ Therefore, after reviewing the evidence, the Eleventh Circuit concluded that the record fully supported the district court's finding that the denial of benefits to plaintiff was arbitrary and capricious and violated ERISA.²⁸¹ Moreover, the Eleventh Circuit agreed with the district court that defendant-employer unlawfully acted to prevent plaintiff from obtaining benefits under the sickness and disability plan and from becoming eligible for benefits under the long-term disability plan.²⁸² Consequently, the judgment of the district court was affirmed.²⁸³

IV. AMERICANS WITH DISABILITIES ACT

A. *Theories of Liability and Burdens of Proof*

In *McNely v. Ocala Star-Banner Corp.*,²⁸⁴ the Eleventh Circuit was presented with the issue of whether plaintiffs suing under the ADA could recover for discrimination without showing that their disability was the sole cause of the adverse employment action taken against them. In that case, plaintiff worked for defendant-newspaper company,

276. *Id.*

277. *Id.* at 757-58 (citing *Brown v. Blue Cross & Blue Shield*, 898 F.2d 1556, 1559 (11th Cir. 1990), *cert. denied*, 498 U.S. 1040 (1991)).

278. *Id.* at 758.

279. *Id.*

280. *Id.*

281. *Id.* at 759.

282. *Id.*

283. *Id.* at 761.

284. 99 F.3d 1068 (11th Cir. 1996), *petition for cert. filed*, 65 U.S.L.W. 3587 (U.S. Feb. 18, 1997) (No. 96-1318).

the Ocala Star-Banner Corporation. After having brain surgery, plaintiff began to have problems seeing visual images clearly. Though plaintiff's vision problems eventually made it difficult, if not impossible, for him to perform some of his job duties for Star-Banner, for a while, the newspaper provided assistance with those difficult duties. However, defendant later ended that assistance when it came to believe that plaintiff's eye trouble could be corrected with new eyeglasses. Thereafter, plaintiff McNely filed a grievance concerning his working conditions with the EEOC.²⁸⁵

Eventually, plaintiff's vision difficulties led to a lengthy shutdown of defendant's printing presses. Plaintiff insisted that the shutdown was caused by his inability to perform a required job function without assistance, but defendant contended it was caused by plaintiff's willful refusal to perform his job. Subsequently, the newspaper reassigned plaintiff to different job positions, none of which were suitable to plaintiff given his physical capabilities and skills.²⁸⁶

Later, in a meeting called to discuss the situation, plaintiff lost his temper with the highest ranking executive at Star-Banner. Plaintiff was immediately suspended without pay. However, during the suspension, plaintiff received a right-to-sue notice from the EEOC and thereafter filed a lawsuit against the newspaper alleging violations of the ADA. After the subsequent trial, the district court gave instructions to the jury that they could find for plaintiff only if plaintiff had proved that he was terminated solely because of his alleged disability, or if he had proved that he was terminated solely because he engaged in statutorily protected expression. Based on these instructions, the jury returned a verdict for defendant. On appeal, plaintiff contended that it was error for the district court to include the term "solely" in its instructions to the jury, and it was further error for the district court to limit the jury instruction to the term "terminated."²⁸⁷

In support of its argument on appeal, defendant contended that the provisions of the ADA "impose[d] liability only if the employer [took] adverse employment action[s] solely because of a reason prohibited by the statute."²⁸⁸ Conversely, plaintiff contended that the ADA provisions "imposed liability if a prohibited reason was but one factor in the employer's decision, so long as the inclusion of that prohibited factor

285. 99 F.3d at 1070.

286. *Id.*

287. *Id.* at 1071.

288. *Id.* at 1073. Defendant also asserted that plaintiff had waived its right to object to the jury verdict form, a contention which the Eleventh Circuit handily dismissed. *Id.* at 1072-73.

made the difference in the decision."²⁸⁹ After a thorough analysis of the issue, the court agreed with plaintiff and held that the verdict forms submitted to the jury misstated the liability standard applicable to an ADA case.²⁹⁰

First, the court looked at the statutory language of the ADA itself.²⁹¹ The court noted that the liability provisions of the ADA did not contain the word "solely" or any other similar restrictive term.²⁹² Furthermore, the court expressly refused to import use of the term "solely," as contained in the Rehabilitation Act of 1973, into the ADA.²⁹³ The court held that such an analogy would be contrary to the ADA's plain language.²⁹⁴

Second, the court looked at the legislative history of the ADA.²⁹⁵ In this regard, the court noted that the House Committee Report concerning the ADA expressly mentioned that the limiting language of the Rehabilitation Act, namely the term "solely" had been deleted from the ADA.²⁹⁶ In fact, the House Committee Report mentioned that a literal reliance on the phrase "solely by reason of his or her handicap" leads to absurd results. Thus, the court explained that the explanations the congressional committees gave concerning the ADA demonstrate that "Congress knew exactly what it was doing when, by omitting the word 'solely,' it provided a different liability standard under . . . the ADA than it provided under the Rehabilitation Act."²⁹⁷

Finally, the court analyzed the Supreme Court's interpretation of the term "because of" in the context of Title VII cases.²⁹⁸ Specifically, the court noted that "when Congress enacted the ADA in 1990, the Supreme Court had already authoritatively determined that, for Title VII cases, the term 'because of' did not mean 'solely because of.'"²⁹⁹ In fact, when ascertaining congressional intent in enacting the ADA, the court observed that it did so against the backdrop of Supreme Court case law interpreting the phrase "because of" under Title VII not to mean "solely because of."³⁰⁰ For this reason, the court held that "the ADA imposes

289. *Id.* at 1073.

290. *Id.* at 1078.

291. *Id.* at 1073.

292. *Id.*

293. *Id.* at 1073-74.

294. *Id.* at 1074.

295. *Id.* at 1074-75.

296. *Id.* at 1075.

297. *Id.*

298. *Id.* at 1075-76.

299. *Id.* at 1075. The Eleventh Circuit was referring to the Supreme Court's analysis of the "because of" issue in *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

300. 99 F.3d at 1076.

liability whenever the prohibited motivation makes the difference in the employer's decision, i.e., when it is a 'but-for' cause."³⁰¹

Notably, the court did address ADA cases from other circuits that tended to support defendant's position.³⁰² However, these other cases did not sway the court in its holding because the court felt that its opinion and holding were well reasoned.³⁰³ Indeed, the court flatly rejected the holding of an on-point case deciding that judgment for an employer was proper because plaintiff's alleged disability was not the sole cause of the demotion in question in the case.³⁰⁴ Rather, the court held that such a holding was "contrary to the language of the statute, the will of Congress, and the Supreme Court's interpretation of substantially identical causal language in the Title VII context."³⁰⁵

Similarly, the court held that it was error to limit the jury verdict form to the term "termination."³⁰⁶ The court noted that the ADA protects against more than just termination.³⁰⁷ Rather, the court explained that the ADA prohibited discrimination "in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment."³⁰⁸ Noting that "plaintiff's complaint alleged a variety of adverse employment actions short of his ultimate termination," the court concluded that the jury "verdict form was inconsistent with the ADA, with the complaint, [and] with the evidence presented at trial."³⁰⁹ Consequently, the judgment of the district court was reversed, and the case was remanded for a new trial.³¹⁰

In *Gordon v. E.L. Hamm & Associates*,³¹¹ the court addressed issues pertaining to whether a plaintiff was a qualified individual with a disability under the ADA. Plaintiff was employed with defendant-maintenance contractor performing duties that focused on repairing air

301. *Id.*

302. *Id.* at 1076-77. Specifically, the court considered *Doe v. University of Maryland Medical Sys.*, 50 F.3d 1261 (4th Cir. 1995); *Myers v. Hose*, 50 F.3d 278 (4th Cir. 1995); *Rizzo v. Children's World Learning Ctrs.*, 84 F.3d 758 (5th Cir. 1996); *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995); and *White v. York Int'l Corp.*, 45 F.3d 357 (10th Cir. 1995).

303. 99 F.3d at 1077.

304. *Id.* (rejecting *Despears v. Milwaukee County*, 63 F.3d 635 (7th Cir. 1995)).

305. *Id.*

306. *Id.* at 1077-78.

307. *Id.* at 1077.

308. *Id.* (quoting 42 U.S.C. § 12112(a) (1994)).

309. *Id.* at 1077-78.

310. *Id.* at 1078.

311. 100 F.3d 907 (11th Cir. 1996).

conditioning, heating, and refrigeration systems. While employed with defendant, plaintiff developed cancer. To undergo testing concerning the cancer, plaintiff was required to take an extended medical leave of absence from work.³¹²

Plaintiff asserted that upon his return to work from that leave of absence, the terms, conditions, and privileges of his job had changed substantially. "Specifically, he allege[d] he was no longer assigned to heating ventilation and air conditioning work but rather was required to perform general maintenance-type work."³¹³ Furthermore, plaintiff complained that he no longer had access to keys that he had possessed before his leave of absence and no longer had access to company vehicles. Eventually, plaintiff was terminated after an employment dispute arose regarding workmanship on a particular job to which he had been assigned.³¹⁴

Thereafter, plaintiff filed suit against defendant, contending that he had a disability under the ADA, was regarded by defendant as having such an impairment, and alleging that defendant discriminated against him in violation of the ADA. The jury subsequently rendered a verdict for the plaintiff on his ADA claims, and defendant appealed.³¹⁵

On appeal, the Eleventh Circuit reversed the lower court's judgment on the jury verdict.³¹⁶ The court specifically held that plaintiff did not have a disability under the ADA, and accordingly, was not entitled to the Act's protection.³¹⁷ In this regard, the court engaged in an exhaustive analysis regarding what constitutes a substantially limiting impairment under the ADA.³¹⁸ In reaching its determination, the court relied heavily upon the language of the Act, as well as the regulations promulgated by the EEOC interpreting the Act.³¹⁹ The court noted the plaintiff's contentions that the "side effects that he suffered as a result of his chemotherapy treatments qualified as 'physical impairments' under the ADA and that these impairments substantially limited his major life activities of caring for himself and working."³²⁰ However, the court, after considering evidence presented by plaintiff's doctor and plaintiff himself, found that reasonable persons "could not conclude that [plaintiff] had a physical or mental impairment that substantially

312. *Id.* at 909.

313. *Id.*

314. *Id.* at 909-10.

315. *Id.* at 908-10.

316. *Id.* at 915.

317. *Id.* at 912.

318. *Id.* at 910-12.

319. *Id.*

320. *Id.* at 911.

limited his ability to care for himself or to work.”³²¹ In this light, the court specifically stated “that the extent, duration, and impact of [plaintiff’s] chemotherapy treatment side effects on his ability to care for himself and to work reveal[ed] that these side effects [did] not substantially limit his ability” in those aspects.³²² Therefore, the court held that although plaintiff “may have had a ‘physical impairment’ as it is defined in the ADA, [it] did not substantially limit his ability to care for himself or to work” as required to invoke protections under the ADA.³²³

Similarly, the court concluded that the evidence presented at trial was “insufficient to support a finding that [defendant] regarded [plaintiff] as having a physical or mental impairment that substantially limited his ability to care for himself or to work.”³²⁴ The court found that the reassigning of plaintiff’s job tasks occurred in response to defendant’s business needs during the busy season for air conditioning repair work and was not a result of any physical impairment that plaintiff may have suffered.³²⁵ Furthermore, the court found that other responsibilities attendant to the reassigned duties, including those requiring access to keys and company vehicles, were part of the business duties that had been reassigned out of business necessity and were not modified in response to plaintiff’s physical impairment.³²⁶ Consequently, the judgment of the district court was reversed, and the matter was remanded to the district court so that it could enter judgment for defendant on plaintiff’s ADA claims.³²⁷

*Pritchard v. Southern Co. Services*³²⁸ involved allegations arising under the ADA as well as the Title VII gender discrimination issues previously discussed in Part I(A) of this Article. In that case, plaintiff contended that her performance of nuclear-related work for defendant severely exacerbated her depression. Although she requested and received a transfer by defendant from her electrical engineering job to the quality assurance department, that work also involved nuclear energy, and her depression grew worse.³²⁹ Eventually, plaintiff was placed on paid disability leave and subsequently on unpaid disability leave. Her doctor later stated that she could return to work, but not in

321. *Id.* at 912.

322. *Id.*

323. *Id.*

324. *Id.* at 913.

325. *Id.*

326. *Id.* at 914.

327. *Id.* at 915.

328. 92 F.3d 1130 (11th Cir.), amended by 102 F.3d 1118 (11th Cir. 1996), petition for cert. filed, 65 U.S.L.W. 3648 (U.S. Mar. 12, 1997) (No. 96-1442).

329. 92 F.3d at 1132.

the nuclear field. However, defendant did not transfer her to non-nuclear-related work, contending that all of its engineers needed to have the flexibility to perform such nuclear-related work. To the contrary, plaintiff contended that certain engineering jobs within the company required little or no nuclear work, but she was told by the company that she would be considered only for nonengineering jobs. Nevertheless, plaintiff was subsequently terminated by the company. After plaintiff filed suit pursuant, in part, to the ADA, the district court subsequently granted defendant's motion for summary judgment on plaintiff's ADA claims, and plaintiff appealed.³³⁰

On appeal, the court noted that depression had been held by other courts to constitute a mental impairment.³³¹ However, the court also noted that to constitute a disability under the ADA, the impairment needed to substantially limit a major life activity of the plaintiff.³³² Plaintiff claimed "that her depression substantially limited her ability to function, sleep, concentrate, and communicate."³³³ However, the district court had reasoned that "in order for [plaintiff] to have been discriminated against because of her disability, she had to have been disabled when she was terminated, not at some point in the past."³³⁴ The district court concluded that plaintiff's evidence as to impairment at the time of her termination only showed that she could not work in the nuclear field.³³⁵ The district court stated that "in order for a [plaintiff's] condition to substantially limit the ability to work, it must 'significantly restrict[] . . . the ability to perform either a class of jobs or a broad range of jobs in various classes as compared to the average person having comparable training, skills and abilities.'"³³⁶

In principal, the Eleventh Circuit agreed with the district court's legal conclusion that plaintiff's impairment, by itself, did not constitute a disability under the ADA because plaintiff's disability only prevented her from seeking a job in the nuclear field and not as an engineer in general.³³⁷ Nonetheless, the court found that there was a genuine issue of material fact concerning whether plaintiff suffered other symptoms when she was terminated, and as to whether those symptoms

330. *Id.*

331. *Id.* See, e.g., *Doe v. Region 13 Mental Health-Mental Retardation Comm'n*, 704 F.2d 1402, 1408 (5th Cir. 1983).

332. 92 F.3d at 1132.

333. *Id.*

334. *Id.*

335. *Id.* at 1133.

336. *Id.* (quoting 29 C.F.R. § 1630.2(j)(3)(i) (1991)).

337. *Id.*

substantially limited a major life activity of plaintiff.³³⁸ Indeed, plaintiff had presented evidence that at the time of her termination, she continued to suffer conditions and symptoms related to her depression, including fatigue and difficulty with sleeping and communicating. The court felt that such "evidence present[ed] a case for a jury to determine whether she suffered from those symptoms when she was terminated, and whether those symptoms substantially limited a major life activity."³³⁹ Furthermore, the evidence presented established that plaintiff had a record of being impaired and that the employer regarded her as being impaired, therefore creating further genuine issues of material fact as to whether plaintiff stated a claim under the ADA. Yet, even though the court overruled the district court's entrance of summary judgment in favor of defendant on the ADA claim, the court explained that plaintiff still needed to show on remand that she suffered not only from a disability, but also that she was discriminated against because of her disability and that she was a qualified individual with a disability.³⁴⁰

In *Harris v. H & W Contracting Co.*,³⁴¹ the court was called upon to determine what constitutes an "impairment" within the meaning of the ADA and whether an employee's impairment substantially limited her major life activities. In *Harris*, plaintiff suffered from a thyroid condition. Due to the medication she was taking, her thyroid problems never seriously interfered with her work or other life activities. In fact, plaintiff was successfully employed by defendant for a period of time as its comptroller. Later, plaintiff suffered a panic attack and was hospitalized for several days. However, there was no dispute that plaintiff's panic attack had been caused by an overdose of plaintiff's thyroid medication, and once the dosage was corrected, plaintiff suffered no more attacks.³⁴²

Nonetheless, while plaintiff was on sick leave, defendant hired another individual to be comptroller. Some time after plaintiff returned to work, she was informed that she should seek other employment because her replacement was now in charge. Plaintiff subsequently filed a charge with the EEOC alleging discrimination and violation of the ADA and

338. *Id.*

339. *Id.* at 1134.

340. *Id.* In so holding, the court also effectively reinstated plaintiff's Rehabilitation Act claims as well. However, the court later clarified its opinion, holding that individual officers of the employer were entitled to summary judgment on all claims, as they could not be individually liable under the ADA or the Rehabilitation Act. *Pritchard v. Southern Co. Servs.*, 102 F.3d 1118 (11th Cir. 1996).

341. 102 F.3d 516 (11th Cir. 1996).

342. *Id.* at 517-18.

subsequently brought suit in district court. However, the district court granted the employer's motion for summary judgment, holding that plaintiff "could not show that she had a 'disability' within the meaning of the ADA."³⁴³

On appeal, the court reversed the district court, finding that genuine issues of material fact existed as to whether plaintiff had a disability within the meaning of the ADA.³⁴⁴ The defendant argued that plaintiff did not suffer a disability because she had not been substantially limited in any of her major life activities by her thyroid problem.³⁴⁵ Relying on interpretive regulations promulgated by the EEOC, the court found that even though plaintiff controlled her impairment for the most part through medication, "[t]he determination of whether an individual is substantially limited in a major life activity must be made on a case by case basis, without regard to mitigating measures such as medicines."³⁴⁶ Furthermore, the court took judicial notice that plaintiff's thyroid condition "is capable of substantially limiting major life activities if left untreated by medication."³⁴⁷ Therefore, the court was "satisfied that the evidence produced in the case, including [plaintiff's] deposition testimony and matters subject to judicial notice, [was] sufficient to create a genuine issue of material fact about whether [plaintiff's] medical condition, in the absence of mitigating measures, would substantially limit her major life activities."³⁴⁸ Thus, the court held that "the district court erred when it concluded that plaintiff [could] not show she ha[d] a cognizable disability under the ADA."³⁴⁹

Moreover, the court found that plaintiff established "the existence of a genuine issue of material fact about whether [defendant] regarded her as having a substantially limiting impairment, even if she [did] not actually have one."³⁵⁰ In making this finding, the court relied on testimony of defendant's president, who had given a statement in connection with the state labor department investigation to the effect that he "felt the company was being put in jeopardy, at a disadvantage, due to [plaintiff's] type illness."³⁵¹ Based on this statement, the court was persuaded "that a genuine issue of material fact exist[ed] as to whether [the defendant] decided to permanently replace [plaintiff] as

343. *Id.*

344. *Id.* at 519.

345. *Id.* at 520.

346. *Id.* (citing 29 C.F.R. app. § 1630.2(j) (1996)).

347. 102 F.3d at 522.

348. *Id.* at 523.

349. *Id.*

350. *Id.*

351. *Id.*

comptroller because [it] regarded her as having a substantially limiting impairment.³⁵² As a result, the court held that the district court erred when it granted defendant's motion for summary judgment.³⁵³ Consequently, the entry of summary judgment was reversed, and the case was remanded for further proceedings.³⁵⁴

In *Moses v. American Nonwovens, Inc.*,³⁵⁵ the court established, in part, the contours of the "direct threat" exemption to the ADA. In that case, plaintiff suffered from epilepsy, and his job with the defendant-employer required him to sit on a platform above fast-moving machinery and to sit underneath a conveyor belt with in-running pitch points.³⁵⁶ Other duties required plaintiff to work next to exposed machinery that reached temperatures of 350 degrees Fahrenheit.³⁵⁷ Defendant, due to these dangerous circumstances in light of plaintiff's epilepsy, terminated plaintiff, and plaintiff brought suit alleging violation of the ADA. The district court entered summary judgment in favor of the employer, and plaintiff appealed.³⁵⁸

In determining the propriety of the district court's entrance of summary judgment in favor of the employer, the court carefully analyzed the direct threat exemption to the ADA.³⁵⁹ The court noted that under this exemption, an employer may terminate a "disabled employee if the disability renders the employee a 'direct threat' to his own health or safety."³⁶⁰ The court further stated that "the employee retains at all times the burden of persuading the jury either that he was not a direct threat, or that reasonable accommodations were available."³⁶¹ In the instant case, plaintiff did "not deny that there was a significant risk that if he had continued working for [defendant], he would have had seizures on the job."³⁶² Furthermore, the court noted that plaintiff pointed "to no probative evidence suggesting that [the defendant-employer] could have made his worksites safe."³⁶³ In this regard, the court held that defendant-employer's failure to "investigate possible accommodations . . . did not relieve plaintiff of his burden of producing probative evidence

352. *Id.*

353. *Id.*

354. *Id.* at 524.

355. 97 F.3d 446 (11th Cir. 1996), *cert. denied*, 117 S. Ct. 964 (1997).

356. 97 F.3d at 447-48.

357. *Id.* at 448.

358. *Id.* at 447.

359. *Id.* at 447-48.

360. *Id.* at 447 (citing 42 U.S.C. § 12113(a), (b) (1994)).

361. *Id.* (citing *Benson v. Northwest Airlines, Inc.*, 62 F.3d 1108, 1112 (8th Cir. 1995)).

362. *Id.*

363. *Id.* at 448.

that reasonable accommodations were available.³⁶⁴ Stated another way, the court held that an employer is not mandated to conduct a pretermination investigation concerning reasonable accommodation.³⁶⁵ Consequently, the court concluded that the district court did not err in granting the employer's motion for summary judgment under the direct threat exception to the ADA.³⁶⁶

In *Morisky v. Broward County*,³⁶⁷ the court addressed an issue concerning when knowledge of a disability of a job applicant may be imputed to the employer for ADA purposes. In that case, plaintiff, an applicant for a custodian position with defendant, brought an action under the ADA after defendant denied the applicant's request to have a pre-employment test read to her. Plaintiff contended that defendant was aware that she suffered from a disability because on the educational section of her job application, she indicated that she had not received a high school diploma and had instead completed special education courses. Furthermore, at the test, plaintiff allegedly informed the test proctor, through her vocational rehabilitation counselor, that she was illiterate and was suffering from bronchial asthma. Yet, at no time did plaintiff inform anyone employed by the defendant that she had a mental or developmental disability. Nonetheless, plaintiff maintained "that her statements at the testing site were sufficient to put [the defendant-employer] on notice of her disability."³⁶⁸ The district court subsequently granted the defendant's motion for summary judgment, and plaintiff appealed.³⁶⁹

On appeal, the Eleventh Circuit affirmed the district court's decision and used as its own opinion the district court's dispositive order, which was attached to the decision as an appendix.³⁷⁰ The Eleventh Circuit, through the district court's order, affirmed the fact that "[w]hile illiteracy is a serious problem, it does not always follow that someone who is illiterate is necessarily suffering from a physical or mental impairment."³⁷¹ Rather, the Eleventh Circuit and the district court agreed that "[v]ague or conclusory statements revealing an unspecified incapacity are not sufficient to put an employer on notice of its

364. *Id.*

365. *Id.*

366. *Id.*

367. 80 F.3d 445 (11th Cir. 1996).

368. *Id.* at 447.

369. *Id.* at 446.

370. *Id.* at 446-49.

371. *Id.* at 448.

obligations under the ADA.³⁷² Thus, summary judgment for the employer was affirmed.³⁷³

In *Mason v. Stallings*,³⁷⁴ the Eleventh Circuit addressed the issue of individual liability under the ADA. In that case, the court confirmed that the ADA "does not provide for individual liability, only for employer liability."³⁷⁵ This decision was in comport with other circuits addressing the issue.³⁷⁶ In reaching its holding, the court also utilized other courts' holdings under the ADEA and Title VII of the Civil Rights Act in analyzing the same individual liability issue arising under the ADA.³⁷⁷

B. Coverage

In *Gonzales v. Garner Food Services, Inc.*,³⁷⁸ the Eleventh Circuit faced an interesting scenario involving health insurance coverage of a former employee under the ADA. In that case, plaintiff was employed by defendant-restaurant management corporation, who "sponsored and administered a group welfare benefit plan which provided health insurance coverage up to a \$1 million lifetime limit."³⁷⁹ After plaintiff was diagnosed with AIDS and defendant learned of his condition when he submitted health insurance claims for medical treatment, the employer discharged him to avoid paying future health insurance claims.³⁸⁰ Following his termination, plaintiff paid the necessary premiums to continue his health insurance benefit coverage pursuant to the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA").³⁸¹ Nevertheless, "[a]t least partly because of [plaintiff's] continued participation in the health insurance benefit plan after his discharge, [defendant] amended the plan . . . to cap AIDS-related treatment to \$10,000 annually with a lifetime maximum limit of \$40,000."³⁸² Before plaintiff died, he "had exhausted the benefits available to him under the AIDS cap and was denied payment for claims

372. *Id.*

373. *Id.* at 446.

374. 82 F.3d 1007 (11th Cir. 1996).

375. *Id.* at 1009.

376. *Id.* (citing *EEOC v. AIC Sec. Investigations*, 55 F.3d 1276, 1279-82 (7th Cir. 1995)).

377. *Id.* (citing *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991); *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 511 (4th Cir.), *cert. denied*, 115 S. Ct. 666 (1994); *Miller v. Maxwell's Int'l Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied sub nom. Miller v. LaRosa*, 510 U.S. 1109 (1994)).

378. 89 F.3d 1523 (11th Cir. 1996).

379. *Id.* at 1524.

380. *Id.*

381. *Id.* 29 U.S.C. § 1161 (1994).

382. 89 F.3d at 1524.

submitted in excess, totaling approximately \$90,000.³⁸³ The district court granted defendant's motion to dismiss, and plaintiff's legal representation appealed, contending that he was a qualified individual with a disability within the meaning of the ADA.³⁸⁴

On appeal, defendant, in support of the district court's decision, argued that appellant failed to state a prima facie case of discrimination under Title I of the Act, claiming that plaintiff did not satisfy the qualified individual with a disability ("QID") requirement under the plain language of the ADA. Appellant, on the other hand, contended that once plaintiff took advantage of the opportunity to participate in the group health insurance plan, he was entitled to be provided with health insurance in a nondiscriminatory manner. In response, defendant argued that because plaintiff "neither held nor desired to hold a position with [defendant] at or subsequent to the time the alleged discriminatory conduct was committed," he did not satisfy the QID requirement.³⁸⁵

After analyzing the issues, the Eleventh Circuit noted that "[n]either the QID definition nor the ADA's definitions of 'employee' and 'discriminate' provided support for Appellant's position."³⁸⁶ In fact, after reviewing both the ADA and its legislative history, the court reasoned "that Congress intended to limit the protection of Title I to either employees performing, or job applicants who apply and can perform, the essential functions of available jobs which their employers maintain."³⁸⁷ Moreover, the court rejected the appellant's arguments and admonitions to "look to Title VII in seeking to understand ADA employment terms and [to] conclude that former employees are included within the scope of ADA protection."³⁸⁸ Rather, the court found "no clearly expressed legislative intent suggesting that former employees such as [plaintiff] should be covered under the Act."³⁸⁹ Therefore, the court concluded that plaintiff, as "a former employee, was not a 'qualified individual with a disability' as defined under the ADA and [was] therefore not entitled to the Act's protection."³⁹⁰ Consequently, the court ruled that the district court appropriately granted the defendant's motion to dismiss.³⁹¹

383. *Id.* at 1525.

384. *Id.* at 1524.

385. *Id.* at 1526.

386. *Id.*

387. *Id.* at 1527.

388. *Id.* at 1528.

389. *Id.*

390. *Id.* at 1531.

391. *Id.*

V. CIVIL RIGHTS ACT OF 1866

In *Shealy v. City of Albany*,³⁹² the Eleventh Circuit became involved in a decades old civil rights action against the City of Albany. In that case, the underlying class action was instituted in 1972 pursuant, in part, to Section 1981, "alleging a pattern or practice of racial discrimination in hiring, promotion, assignment and various other employment practices."³⁹³ In 1976, the district court had "entered a permanent injunction enjoining the City of Albany from such practices and mandating equal employment opportunities."³⁹⁴ Decades later in 1994, a black fire chief promoted a black applicant to the position of battalion chief within the city's fire department. The five nonselected applicants were white. These white applicants subsequently "filed a '[m]otion of Prospective Plaintiffs For Intervention,' [seeking] broad relief, including the dissolution of the 1976 permanent injunction, the setting aside of the complained of promotion, and the re-opening of the selection process."³⁹⁵ In a later evidentiary hearing, the fire chief "testified as to the subjective process he used in selecting the successful applicant for promotion."³⁹⁶ The district court rejected proffered testimony from the five unsuccessful applicants regarding the superiority of their qualifications. Nonetheless, the district court indicated that, if subsequently filed, the court would review their personnel files to determine their qualifications relevant to the successful applicant. However, approximately two hours later and prior to any such filing or review, the court ruled that there was no evidence of racial animus in the selection of the black applicant for promotion. Plaintiffs then appealed.³⁹⁷

On appeal, the Eleventh Circuit vacated the district court's ruling, having been convinced that there was an abuse of discretion by the district court.³⁹⁸ The court noted that the "[i]ntervenors' attempt to testify regarding their qualifications and [attempt to] introduce evidence comparing their qualifications to those of the successful applicant were cut off by the district court."³⁹⁹ In fact, the court expressly noted that "[i]n refusing the evidence, the district judge made a plea for Fire Department collegiality," to the effect that everyone within the fire

392. 89 F.3d 804 (11th Cir. 1996).

393. *Id.* at 804-05.

394. *Id.* at 805.

395. *Id.*

396. *Id.*

397. *Id.* at 804.

398. *Id.* at 806-07.

399. *Id.* at 806.

department was going to have to work together.⁴⁰⁰ The court stated that while aspirational, that goal was not sufficient reason to deny the presentation of admissible evidence, and furthermore, was to no avail because the complaint, having been lodged, already caused inherent and unavoidable disharmony.⁴⁰¹ Thus, the court ruled that "[t]he intervenors were effectively denied the opportunity to make out and support a prima facie case [of race discrimination], by the district court's refusal to allow them to testify regarding their qualifications, or to review their personnel files as promised."⁴⁰² Rather, the court held that plaintiffs must be allowed the opportunity to make out their prima facie case, and therefore vacated the district court's order and remanded the case.⁴⁰³

In *Goodgame v. American Cast Iron Pipe Co.*,⁴⁰⁴ the court was faced once again with the tricky issue concerning the retroactivity of changes made to Section 1981 by the Civil Rights Act of 1991. In that case, plaintiffs, who were black, brought suit against their defendant-employer, claiming that they were denied promotions because of their race. Subsequent to receiving right-to-sue notices from the EEOC, they filed a lawsuit in district court. The complaint alleged that plaintiffs were denied a promotion based on their race in violation of Section 1981 and Title VII. Plaintiffs "requested a jury trial with respect to their Section 1981 claims, but at the time had no right to a jury under Title VII. During the course of the litigation, Congress passed the Civil Rights Act of 1991."⁴⁰⁵ After the effective date of the Act, plaintiffs "moved to amend their complaint to state claims based on the new provisions of Section 1981 and Title VII."⁴⁰⁶ The district court held that "the new provisions retroactively applied to these claims, and allowed [plaintiffs] to amend their complaint. At trial, the [district] court submitted [plaintiff's] claims to the jury on special interrogatories that made no distinction between the Title VII and Section 1981 claims."⁴⁰⁷ The jury returned a verdict for plaintiffs.

As to one plaintiff, the verdict did not state whether the award was based on Section 1981 or on Title VII. As for the other plaintiff, the award was presumably under Section 1981 because the trial court had already granted the defendant-employer judgment as a matter of law on that plaintiff's Title VII claim. Nonetheless, "[a]fter the trial, but before

400. *Id.*

401. *Id.*

402. *Id.*

403. *Id.* at 807.

404. 75 F.3d 1516 (11th Cir. 1996).

405. *Id.* at 1518.

406. *Id.*

407. *Id.*

the trial court entered a final judgment, [the Eleventh Circuit] held that the Civil Rights Act of 1991 did not apply retroactively.⁴⁰⁸ Thus, as a remedial measure, "the trial court vacated the award of punitive damages and set aside the jury verdict, stating that the court would treat the jury as advisory" pursuant to Rule 39(c) of the Federal Rules of Civil Procedure.⁴⁰⁹ The district court then "asked the parties to submit proposed findings of fact consistent with the jury verdict, in order to help it fashion a final judgment compatible with pre-1991 Title VII and [Section 1981] provisions."⁴¹⁰

Subsequently, the district court entered judgment for defendant on every count except for one plaintiff's Title VII claim. As to plaintiffs' Section 1981 claims, the court granted defendant judgment as a matter of law. In this regard, the district court ruled that plaintiffs "had effectively waived their claims under 'old' [Section] 1981, since after they amended their complaint, they failed to allege and prove that the promotions at issue involved new and distinct relationships."⁴¹¹ Plaintiffs then appealed the district court's ruling.⁴¹²

On appeal, plaintiffs "argue[d] that the district court committed several errors in setting aside the jury's verdict and in [issuing] its final judgment."⁴¹³ Specifically, they contended that the district court erred by treating the jury as advisory under Rule 39(c) of the Federal Rules of Civil Procedure because they had a right to a jury trial for their Section 1981 claims.⁴¹⁴ Finally, plaintiffs challenged the district "court's decision to grant [the defendant-employer's] judgment as a matter of law on their [Section] 1981 claims[,] argu[ing] that the court should have granted them a new trial so that a jury could determine whether the disputed promotions involved new and distinct relationships as required under 'old' [Section] 1981."⁴¹⁵

After analyzing the issues, the Eleventh Circuit agreed with plaintiffs that Rule 39(c) plainly did not apply to their Section 1981 claims that were triable by jury as a matter of right.⁴¹⁶ The court expressly stated that "[i]t is axiomatic in such cases that a trial court cannot disregard a jury's verdict and substitute its own findings in deciding claims; otherwise, the court could effectively subsume the jury's function and

408. *Id.*

409. *Id.*

410. *Id.*

411. *Id.*

412. *Id.*

413. *Id.*

414. *Id.*

415. *Id.* at 1519-20.

416. *Id.* at 1520.

deprive litigants of their right to trial by jury.⁴¹⁷ Thus, the court noted that the district court's action in attempting to salvage the jury's verdict by setting it aside and treating it as advisory was insufficient to protect plaintiff's right to a jury trial on their Section 1981 claims.⁴¹⁸

Plaintiffs contended that the district "court should have granted them a new trial and allowed a properly instructed jury to decide if the promotions at issue involved new and distinct relationships," rather than granting defendant "judgment as a matter of law based on its findings that [plaintiff's] had waited 'too late' to raise claims under 'old' [Section] 1981."⁴¹⁹ The court agreed on this issue as well, reasoning that plaintiffs should not have been expected by the district court "to tailor their [Section] 1981 claims to be consistent with both pre-1991 law and the 1991 Act once the trial court held that the 1991 Act applied to their claims and allowed them to amend their complaint accordingly."⁴²⁰ Thus, the existence of a new and distinct relationship was the only element of plaintiffs' causes of action omitted from the instructions the jury received.⁴²¹ The court held that because a "properly instructed jury arguably could find for [plaintiffs], the proper remedy in this case was a new trial, not judgment as a matter of law for [defendant]."⁴²² Therefore, the Eleventh Circuit concluded that the district court's denial of plaintiff's request for a new trial as to plaintiffs' Section 1981 claims was an abuse of discretion, and reversed and remanded for a new trial on the applicable claims.⁴²³

417. *Id.*

418. *Id.*

419. *Id.* at 1520-21.

420. *Id.* at 1521.

421. *Id.*

422. *Id.*

423. *Id.*