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Employment Discrimination

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After last year's blockbuster year, the United States Supreme Court was relatively quiet in the area of employment discrimination during the 2012 survey period.[1] The High Court's most significant ruling was its decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*,[2] in which the Court held that the First Amendment's[3] Establishment and Free Exercise Clauses create a "ministerial exception" that barred a disability discrimination lawsuit against a religious organization.[4]

However, the United States Court of Appeals for the Eleventh Circuit offset the Supreme Court's inactivity by handing down six published Title VII opinions and ten published decisions in the employment discrimination area overall (the highest number in recent years). Perhaps the most noteworthy of these was the decision in *Gowski v.*

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1. This Article covers significant cases in the area of employment discrimination law decided by the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit during 2012. Cases arising under the following federal statutes are included: the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621-634 (2006 & Supp. IV 2010); the Civil Rights Act of 1866 and 1871, 42 U.S.C. §§ 1981, 1983 (2006); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e-2000e-17 (2006 & Supp. IV 2010); and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101-12213 (2006 & Supp. IV 2010). For analysis of Eleventh Circuit employment discrimination law during the prior survey period, see Peter Reed Corbin & John E. Duvall, *Employment Discrimination, Eleventh Circuit Survey*, 63 MERCER L. REV. 1203 (2012).

2. 132 S. Ct. 694 (2012).

3. U.S. CONST. amend. I.

4. *Hosanna-Tabor*, 132 S. Ct. at 706.

Peake,[5] in which the court of appeals recognized for the first time a retaliatory hostile work environment claim.[6] The court also continued its recent trend of handing down a huge number of unpublished decisions, most often affirming a summary judgment for the employer. A select few of the more significant unpublished decisions have been reported on below.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Theories of Liability and Burdens of Proof

1. Pregnancy Discrimination. Becoming pregnant out of wedlock did not work out so well for the plaintiff in *Hamilton v. Southland Christian School, Inc.*[7] The plaintiff worked as a teacher for a small Christian school. She and her fiancé conceived a child and married a month later. Several months after, in the midst of a meeting for the purpose of requesting maternity leave, the plaintiff admitted that she had conceived the child before she was married. The school responded by firing the plaintiff for the "sin" of engaging in premarital sex.[8] The plaintiff filed suit pursuant to Title VII[9] alleging that she had been discriminated against because of her pregnancy.[10] The district court granted summary judgment for the school because the plaintiff could not produce evidence of "a nonpregnant comparator who was treated differently."[11]

On appeal, the Eleventh Circuit reversed the district court.[12] Citing its prior decision in *Smith v. Lockheed-Martin Corp.*,[13] discussed in the 2012 Eleventh Circuit Survey,[14] the court of appeals distinguished *McDonnell Douglas Corp. v. Green*[15] and held that there was "more than one way to show discriminatory intent" than the indirect model of proof.[16] "Another way," according to the court, was to present "circumstantial evidence that creates a triable issue concerning the employer's

5. 682 F.3d 1299 (11th Cir. 2012).
6. *Id.* at 1303-04.
7. 680 F.3d 1316 (11th Cir. 2012).
8. *Id.* at 1317-18.
9. 42 U.S.C. §§ 2000e-2000e-17 (2006 & Supp. IV 2010).
10. *Hamilton*, 680 F.3d at 1318.
11. *Id.*
12. *Id.* at 1321.
13. 644 F.3d 1321 (11th Cir. 2011).
14. *See* Corbin & Duvall, *supra* note 1, at 1205-06.
15. 411 U.S. 792 (1973).
16. *Hamilton*, 680 F.3d at 1320.

discriminatory intent."[17] Even without evidence of a comparator, the court held that the plaintiff had done exactly that.[18] Pointing to evidence that the school had been "more concerned about her pregnancy and her request to take maternity leave than about her admission that she had premarital sex," the court of appeals reversed and remanded the case for further proceedings.[19]

A similar fate befell the district court's decision in *Chapter 7 Trustee v. Gate Gourmet, Inc.*[20] The plaintiff worked as a customer service representative at the Hartsfield-Jackson Atlanta International Airport. She drove a truck for the defendant's catering business, and would drive the truck from the company's warehouse to the airport gate where a waiting airplane was docked. Using a lift system, she would push carts of food, drinks, and ovens across a ramp from her truck to the airplane. When the plaintiff became pregnant and developed medical restrictions (no lifting over twenty pounds, no prolonged standing, no working at heights that increased the chance of falling), she was terminated because the company allegedly had no available positions to accommodate the plaintiff's restrictions. In the plaintiff's resulting pregnancy discrimination action pursuant to Title VII, the district court granted summary judgment for the employer because the plaintiff could not identify a similarly situated individual outside of the protected class who was treated differently.[21]

On appeal the Eleventh Circuit, again relying upon its *Lockheed-Martin* decision, reversed.[22] Noting that under *Lockheed-Martin,* the lack of a comparator does not "necessarily doom" the plaintiff's case, the court of appeals held that there was enough "non-comparator evidence for a jury to reasonably infer that" the plaintiff had been discriminated against.[23] For starters, the plaintiff's supervisor had made his termination decision without even checking with his superiors as to whether there was an available light duty position that the plaintiff could have performed with her restrictions (despite the fact that it was company policy to do so).[24] The court also pointed to an admission that the company's human resources director had made at her deposition that the plaintiff's pregnancy had been a "substantial or motivating factor" in the

17. *Id.* (quoting *Lockheed-Martin Corp.*, 644 F.3d at 1328).
18. *Id.*
19. *Id.* at 1320-21.
20. 683 F.3d 1249 (11th Cir. 2012).
21. *Id.* at 1251-52, 1254.
22. *Id.* at 1255-56, 1261.
23. *Id.* at 1255-56 (quoting *Lockheed-Martin Corp.*, 644 F.3d at 1328).
24. *Id.* at 1256.

supervisor's decision to terminate her.[25] In the face of this evidence, the court of appeals vacated the summary judgment and remanded the case for further proceedings.[26]

2. Cat's Paw Theory. The decision in *Lockheed-Martin* and the Supreme Court's "cat's paw" case in *Staub v. Procter Hospital*[27] saved the plaintiff's case in *King v. Volunteers of America, North Alabama, Inc.*[28] The plaintiff worked as a service coordinator for Volunteers of America (VOA), a Christian organization that operated group homes for developmentally challenged individuals. The plaintiff's supervisor, according to the evidence, was an individual who frequently made racial comments (including the "n" word), displayed favoritism toward Caucasian employees, forced African-American employees to file false reports of misconduct against other African-American employees, and believed African-American employees were inferior. The supervisor also made it known that he would engineer the plaintiff's termination and that the defendant's CEO would "rubber stamp" any action that he took. A sequence of reprimands by the supervisor led to the plaintiff's termination by the CEO.[29] In the subsequent lawsuit by the plaintiff pursuant to Title VII and Section 1981[30] alleging race discrimination and retaliation, the district court granted summary judgment for VOA.[31]

On appeal, the Eleventh Circuit acknowledged the plaintiff could not establish her case either through direct evidence or through the traditional *McDonnell Douglas* approach (there was no evidence of a relevant comparator or that the plaintiff was replaced by a Caucasian employee).[32] However, citing *Lockheed-Martin*, the court of appeals noted that this was not fatal to her claims.[33] The court then held that, under *Staub*, there was sufficient evidence (particularly the evidence that the supervisor would engineer the plaintiff's termination and that the CEO would rubber-stamp anything he did) showing the CEO was the

25. *Id.* (internal quotation marks omitted).
26. *Id.* at 1261.
27. 131 S. Ct. 1186 (2011).
28. 502 F. App'x 823 (11th Cir. 2012).
29. *Id.* at 824-26.
30. 42 U.S.C. § 1981 (2006).
31. *King*, 502 F. App'x at 826.
32. *Id.* at 827.
33. *Id.* at 827-28.

supervisor's cat's paw in carrying out the plaintiff's termination.[34] Accordingly, the Eleventh Circuit reversed and remanded.[35]

The result in the above three cases raises the question, at least within the Eleventh Circuit, of the long-term continued vitality of the circumstantial evidence model of proof first established in *McDonnell Douglas v. Green*,[36] which has governed disparate treatment employment discrimination cases for forty years. Through a somewhat mechanical application of the elements in the *McDonnell Douglas* burden-shifting model of proof, the courts have resolved countless employment discrimination cases for many, many years (and more often than not in favor of the employer). The *Lockheed-Martin* approach, on the other hand, is a much more flexible, case-by-case approach to employment discrimination cases. It clearly will result in fewer summary judgments (and hence more settlements, which may well be what the court has in mind by taking this approach), and in this sense, will clearly benefit plaintiffs.

3. Religious Discrimination. In *Walden v. Centers for Disease Control & Prevention*,[37] the plaintiff worked as an Employee Assistance Program (EAP) Counselor for Computer Sciences Corporation (CSC), which administered the EAP pursuant to a contract with the Centers for Disease Control and Prevention (CDC). The plaintiff was a "devout Christian" who believed that same-sex sexual relationships were "immoral."[38] When confronted with a gay client involved in a same-sex relationship, the plaintiff referred the client to a colleague, explaining that she could not provide counseling because of her "personal values."[39] The client complained to the CDC, saying she felt "judged and condemned."[40] When the plaintiff would not alter her approach, she was removed from the EAP contract, and after she failed to apply for another position with CSC, she was laid off.[41] The plaintiff brought suit against both the CDC and CSC alleging that the defendants violated her free exercise rights under the First Amendment and the Religious Freedom Restoration Act of 1993[42] (RFRA); and also alleging religious

34. *Id.* at 828.
35. *Id.* at 830.
36. 411 U.S. 792 (1973); *see also* Texas Dep't of Cmty. Affairs v. Burdine, 450 U.S. 248 (1981).
37. 669 F.3d 1277 (11th Cir. 2012).
38. *Id.* at 1280 (internal quotation marks omitted).
39. *Id.* at 1280-81 (internal quotation marks omitted).
40. *Id.* at 1281 (internal quotation marks omitted).
41. *Id.* at 1282.
42. 42 U.S.C. §§ 2000bb-2000bb-4 (2006).

discrimination pursuant to Title VII.[43] The district court granted summary judgment for the defendants on all claims.[44]

On appeal, much of the court's decision addressed the First Amendment and RFRA claims.[45] As to the Title VII religious discrimination claim against CSC, the Eleventh Circuit held that the defendant had provided the plaintiff "with a reasonable accommodation as a matter of law."[46] After removing the plaintiff from the EAP contract, CSC had offered her the opportunity to seek another position within the company and had offered to provide assistance in doing so. The plaintiff declined to do so. Finding that CSC had done all it was required to do under Title VII, the Eleventh Circuit affirmed.[47]

4. Hostile Work Environment. *Guthrie v. Waffle House, Inc.*[48] is a good example of just how difficult it is to establish a hostile work environment claim in the Eleventh Circuit. The plaintiff, a Caucasian female, worked as a waitress at a Waffle House restaurant. She alleged that two African-American male co-workers, one a cook and the other her supervisor, sexually harassed her in the workplace.[49] They allegedly "grabbed [her] butt" several times, "talked dirty" to her several other times, asked her out on a date a number of times, told her that they wanted to "have [her]," and made other similar offensive statements.[50] There was also evidence that the plaintiff and the cook would hug in a friendly manner and would occasionally joke around with each other.[51] The plaintiff filed suit pursuant to Title VII, alleging racial and sexual harassment. The district court granted summary judgment for Waffle House.[52]

On appeal the Eleventh Circuit, relying heavily on its prior decision in *Mendoza v. Borden, Inc.*,[53] affirmed.[54] The court of appeals agreed that the plaintiff had failed to show harassment that was either objectively or subjectively severe or pervasive enough to establish a

43. *Walden*, 669 F.3d at 1283.
44. *Id.*
45. *Id.* at 1285-92.
46. *Id.* at 1293.
47. *Id.* at 1294-95.
48. 460 F. App'x 803 (11th Cir. 2012).
49. *Id.* at 804.
50. *Id.* at 804-05 (internal quotation marks omitted).
51. *Id.* at 805.
52. *Id.*
53. 195 F.3d 1238 (11th Cir. 1999) (en banc).
54. *Guthrie*, 460 F. App'x at 806-09.

hostile work environment claim.[55] In addition to the evidence that the plaintiff had joked with and hugged the cook, the court of appeals also noted that the plaintiff had waited almost a year after the alleged harassment began before reporting it to the company's complaint hotline.[56]

5. Retaliation. In a case of first impression, the Eleventh Circuit, in *Gowski v. Peake*,[57] joined the other eleven circuits in recognizing a retaliatory hostile work environment claim.[58] The plaintiffs were employed as doctors for a VA hospital in Bay River, Florida. The plaintiffs alleged that they had been retaliated against by the hospital in various ways (changing their duty assignments, removing them from committees, denying them privileges, reprimanding them, and the like) after they had filed internal Equal Employment Opportunity (EEO) complaints.[59] The plaintiffs also presented evidence that the hospital "did not look highly on employees who filed EEO complaints" and carried out a concerted plan to target them, spread rumors about them, attempted to ruin their reputations, and collected reports against them in an effort to terminate them.[60] In the plaintiffs' resulting Title VII action, following a two-week jury trial, the jury ruled for both plaintiffs and awarded substantial damages.[61]

On appeal, the Eleventh Circuit had to decide first whether it recognized a cause of action for retaliatory hostile work environment, and if so, whether the evidence was sufficient to support the jury's verdict.[62] As noted above, the court had little difficulty in answering the first question "yes," holding that recognizing this cause of action was "consistent with the statutory text, congressional intent, and the EEOC's own interpretation of the statute."[63] The court of appeals also answered the second question with a "yes," finding that the evidence had established that the defendants had "created a workplace filled with intimidation and ridicule that was sufficiently severe and pervasive to alter [the plaintiffs'] working conditions."[64]

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55. *Id.* at 806.
56. *Id.*
57. 682 F.3d 1299 (11th Cir. 2012).
58. *Id.* at 1312.
59. *Id.* at 1304.
60. *Id.* at 1305.
61. *Id.* at 1308.
62. *Id.* at 1303.
63. *Id.* at 1312.
64. *Id.* at 1313-14.

In *Brush v. Sears Holdings Corp.*[65] the Eleventh Circuit, through the application of the so-called "manager rule," held that a manager who voiced her disagreement with the way her company handled an internal sexual harassment investigation was not engaged in protected activity for purposes of Title VII's retaliation provision.[66] The plaintiff was tasked with conducting an investigation into a complaint that an employee was being sexually harassed by her supervisor. During the course of the investigation, the employee disclosed that she had been raped numerous times by the supervisor, but asked that neither her husband nor the police be told of the rapes. Even though the supervisor was fired, the plaintiff maintained that the matter should be reported to the police, but the employer honored the employee's wishes and declined. The plaintiff's continued insistence that the police be contacted eventually resulted in her own termination. After the plaintiff filed a retaliation action pursuant to Title VII, the district court granted summary judgment for the defendant.[67] On appeal, in affirming the district court pursuant to the manager rule, the Eleventh Circuit held that a manager who disagrees with or opposes the actions of his employer while "in the course of [his] normal job performance," is not engaged in protected activity.[68]

B. Procedural Issues

1. Jurisdiction. The appropriate forum for a federal employee to obtain judicial review of a discrimination claim was the issue before the United States Supreme Court in *Kloeckner v. Solis*.[69] The plaintiff worked for the Department of Labor (DOL). After DOL terminated her employment, the plaintiff filed a complaint of sex and age discrimination with DOL's civil rights office. Ultimately, the plaintiff appealed her termination to the Merit System Protection Board (MSPB). The MSPB dismissed her appeal on procedural grounds without reaching the merits of the plaintiff's discrimination claim. The plaintiff then filed a discrimination action against DOL in federal district court, which dismissed the case, finding that it lacked jurisdiction. The United States Court of Appeals for the Eighth Circuit affirmed.[70] However, the Supreme Court reversed, finding that the plaintiff had selected the

65. 466 F. App'x 781 (11th Cir. 2012).
66. *Id.* at 787-88.
67. *Id.* at 783-85.
68. *Id.* at 787.
69. 133 S. Ct. 596 (2012).
70. *Id.* at 602-03.

proper forum after all.[71] Although noting that in most cases, judicial review of an MSPB decision should be brought before the United States Court of Appeals for the Federal Circuit, the Supreme Court held that an exception to this rule covered discrimination claims, which, as specified in 5 U.S.C. § 7702(a)(1),[72] can be asserted in district court.[73]

2. Waiver of Time Limit on Filing Complaint. It is unusual for a pro-se plaintiff to make it as far as a jury trial, much less the court of appeals, but that is exactly what happened in *Ramirez v. Secretary*.[74] The plaintiff worked as an air traffic controller for the U.S. Department of Transportation (DOT). Following a dispute with the DOT over his rate of pay, the plaintiff contacted an EEO Counselor and complained that he was being discriminated against because he was Hispanic. The DOT dismissed his complaint because he had not contacted the EEO Counselor within forty-five days of the alleged discriminatory act as specified in the discrimination regulations governing federal agencies.[75] The plaintiff appealed the dismissal to the EEOC, who found that the plaintiff's complaint should have been treated as timely, since there was no evidence that the plaintiff was aware of the forty-five-day time limit. The DOT did not challenge the timeliness ruling. In the plaintiff's subsequent Title VII action, the district court dismissed the case as time-barred, relying on the forty-five-day rule.[76] However, on appeal, the Eleventh Circuit reversed, following similar decisions handed down by the United States Courts of Appeal for the Second and Ninth Circuits,[77] and held that since the DOT had never challenged the EEOC's ruling that the plaintiff's complaint had been timely, the agency was held to have waived any subsequent objection on timeliness grounds in the district court.[78]

C. Remedies

1. Taxation of Settlements. The issue of how employment discrimination settlements are to be treated for taxation purposes is often a thorny problem. That certainly proved to be the case in *Ahmed*

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71. *Id.* at 603-04.
72. 5 U.S.C. § 7702(a)(1) (2006).
73. *Kloeckner*, 133 S. Ct. at 603-04.
74. 686 F.3d 1239 (11th Cir. 2012).
75. *Id.* at 1244-46; *see* 29 C.F.R. § 1614.105(a)(1) (2012).
76. *Ramirez*, 686 F.3d at 1250-51.
77. *See* Briones v. Runyon, 101 F.3d 287, 291 (2d Cir. 1996); Girard v. Rubin, 62 F.3d 1244, 1248 (9th Cir. 1995).
78. *Ramirez*, 686 F.3d at 1253.

v. Commissioner.[79] The plaintiff brought a discrimination lawsuit pursuant to both Title VII and the Age Discrimination in Employment Act (ADEA),[80] in which he sought back pay and benefits, and compensatory and punitive damages.[81] The plaintiff settled the case for $150,000, of which $60,000 (or forty percent) was designated as attorney fees.[82] As to the plaintiff's portion totaling $90,000, the plaintiff opted to exclude the entire amount from his taxable income, taking the position that the settlement amount constituted compensation for physical injury and, pursuant to 26 U.S.C. § 104(a)(2),[83] was not taxable.[84] The Tax Court disagreed, and held that the entire settlement amount was taxable income.[85] On appeal, the Eleventh Circuit agreed, and affirmed the Tax Court's decision.[86] In reaching this decision, the court of appeals looked to the plaintiff's original discrimination complaint, which, according to the court, "'placed little emphasis' on his physical injuries," as well as the language of the settlement agreement, which did not specifically designate any portion of the settlement as compensation for physical injury.[87]

2. Back Pay. In *Holland v. Gee*,[88] the Eleventh Circuit examined the district court's action in vacating a back pay award pursuant to the after-acquired evidence defense.[89] In the process, the court of appeals determined that the district court misapplied the doctrine.[90] The plaintiff brought a pregnancy discrimination action against the defendant county sheriff. Following a jury trial, the jury awarded the plaintiff $80,000 in back pay and $10,000 for emotional distress. In post-trial motions, the district court vacated the back pay award, applying the after-acquired evidence defense.[91] On appeal, however, the Eleventh Circuit noted that the defendant had never raised the after-acquired evidence defense in its answer as an affirmative defense.[92] In addition, at oral argument, the defendant conceded that

79. 498 F. App'x 919 (11th Cir. 2012).
80. 29 U.S.C. §§ 621-634 (2006 & Supp. IV 2010).
81. *Ahmed*, 498 F. App'x at 920.
82. *Id.*
83. 26 U.S.C. § 104(a)(2) (2006).
84. *Ahmed*, 498 F. App'x at 920.
85. *Id.* at 921.
86. *Id.* at 922-23.
87. *Id.* at 921.
88. 677 F.3d 1047 (11th Cir. 2012).
89. *Id.* at 1053.
90. *Id.* at 1064.
91. *Id.* at 1054.
92. *Id.* at 1064.

he could point to no specific act of misconduct that the plaintiff had committed, only that there was evidence presented that *could* have resulted in a finding that the plaintiff's termination had been lawful.[93] Holding that the after-acquired evidence defense could only be applied where there was proof that the plaintiff had committed a specific act of "wrongdoing [that] was of such severity that the employee in fact would have been terminated on those grounds alone," the court of appeals concluded the district court had erred in vacating the back pay award.[94]

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Creating a Jury Question*

In *Kragor v. Takeda Pharmaceuticals America, Inc.*,[95] the court of appeals reversed and remanded a district court's grant of summary judgment for an employer.[96] The plaintiff, a pharmaceutical sales manager, had been fired for committing a serious offense.[97] The decisionmaker who fired her subsequently contradicted his earlier statement that she had committed a firing offense.[98] The court noted,

> When the employer's actual decisionmaker, after terminating an employee for misconduct (or the appearance of misconduct), says without qualification that the employee is exceptional, did nothing wrong, did everything right, and should not have been fired, that contradiction—when combined with a prima facie case—is enough to create a jury question on the ultimate issue of discrimination.[99]

An investigation had determined the plaintiff had provided improper gifts and benefits to one of her employer's major clients—a doctor. The employer also determined that the plaintiff had improperly approved reimbursements for subordinate employees' expenses. Orlando was a member of the employer's senior management team that fired Kragor as a result of the investigation.[100] The doctor claimed that Orlando later told him the plaintiff was an exceptional employee who "had done

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93. *Id.* at 1060.

94. *Id.* at 1065 (quoting McKennon v. Nashville Banner Publ'g Co., 513 U.S. 352, 362-63 (1995)).

95. 702 F.3d 1304 (11th Cir. 2012).

96. *Id.* at 1311.

97. *Id.* at 1307. The pharmaceutical industry is heavily regulated. Consequently, Takeda had strict conduct policies for its employees. *Id.*

98. *Id.* at 1310.

99. *Id.* at 1311.

100. *Id.* at 1307-10.

nothing wrong" and "should not have been fired."[101] The panel held that a reasonable jury could find Orlando's alleged statement contradicting his earlier reasons for firing the plaintiff was evidence of pretext, possibly to cover up age discrimination.[102]

The district court had granted summary judgment on the grounds that Orlando's "personal belief regarding plaintiff's conduct" should be detached from the company's asserted reasons for discharge.[103] "Orlando's denial of Takeda's proffered reason for Ms. Kragor's termination—which we accept as true for purposes of summary judgment—creates a jury question as to discrimination when combined with Ms. Kragor's prima facie case," the court of appeals said.[104] "We therefore reverse the district court's grant of summary judgment in favor of Takeda and remand for a trial on Ms. Kragor's claim that her termination was the result of age discrimination in violation of the ADEA."[105] The panel reasoned that the district court's characterization of Orlando's comments to the doctor is a reasonable one, "but it is not the only permissible construction of the remarks."[106] The panel ruled that it was also reasonable to interpret the statements as Orlando's admission that the proffered nondiscriminatory reason was actually a cover-up for age discrimination.[107]

B. Application of Gross at the Summary Judgment Stage

Vahey v. Philips Electronics North America Corp.[108] presented the court of appeals with an opportunity to discuss the impact of the Supreme Court's decision in *Gross v. FBL Financial Services, Inc.*,[109] on the continued vitality of the *McDonnell Douglas* burden-shifting framework in ADEA cases.[110] The panel took the middle course. "Because the Supreme Court did not overrule this precedent in *Gross*, we review Vahey's claims under both *McDonnell Douglas* and *Gross*."[111]

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101. *Id.* at 1310.
102. *Id.* at 1311.
103. *Id.* at 1310.
104. *Id.* at 1311.
105. *Id.*
106. *Id.*
107. *Id.*
108. 461 F. App'x 873 (11th Cir. 2012).
109. 557 U.S. 167 (2009).
110. As mentioned earlier in this Article, the *McDonnell Douglas* burden-shifting framework has been an analytical mainstay in employment law. When the Supreme Court decided *Gross* in 2009, questions quickly arose about whether *McDonnell Douglas* continued to be a proper analytic tool in ADEA cases.
111. *Vahey*, 461 F. App'x at 874.

In light of the decision and analysis in *Vahey*, ADEA plaintiffs must now survive both the *McDonnell Douglas* burden-shifting analysis and the *Gross* but-for requirement in order to survive summary judgment.

C. *Evidence of Animus*

In *Diehl v. Bank of America, N.A.*,[112] a reduction-in-force case, a supervisor referred to the plaintiff as "our old-timer."[113] The plaintiff argued in the district court that this statement was evidence of an age animus.[114] Granting summary judgment for the employer, the district court concluded, "this statement was made in the context of comparing years of services between employees," and it had been made after the decision that ultimately led to the plaintiff's discharge of employment.[115] The court of appeals agreed.[116] Given the context in which the statement was made, it was not evidence of a discriminatory animus.[117]

In another reduction-in-force case, *Proe v. Facts Services, Inc.*,[118] the court of appeals affirmed the grant of summary judgment to the employer where the employer simply considered the retained employee to be a "better fit" than plaintiff.[119]

D. *Interest Calculation*

Mock v. Bell Helicopter Textron, Inc.[120] made what should be its final trip to court of appeals during the survey period. We have reported on various aspects of *Mock* in previous survey articles.[121] After three years of "contentious litigation," on the merits, the plaintiff prevailed in a lawsuit against Bell Helicopter and was awarded substantial economic damages.[122] Nearly three more years of litigation followed on the collateral issues of attorney fees and costs. The district court ultimately awarded the plaintiff less than one half of the fees he sought. The plaintiff appealed.[123]

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112. 470 F. App'x 771 (11th Cir. 2012).
113. *Id.* at 773 (internal quotation marks omitted).
114. *Id.* at 774-75.
115. *Id.* (internal quotation marks omitted).
116. *Id.* at 775.
117. *Id.*
118. 491 F. App'x 135 (11th Cir. 2012).
119. *Id.* at 137-38.
120. 456 F. App'x 799 (11th Cir. 2012).
121. *See* Peter Reed Corbin & John E. Duvall, *Employment Discrimination, Eleventh Circuit Survey*, 62 MERCER L. REV. 1125, 1139 (2011).
122. *Mock*, 456 F. App'x at 801.
123. *Id.*

While the court of appeals affirmed the fee award, it concluded that the district court had clearly erred by failing to award interest on costs and fees from the date of entry of the final judgment.[124] "And, though we have not specifically addressed the issue of when interest begins to accrue on an award of attorneys' fees under 29 U.S.C. § 216(b), we find clear guidance in this Court's precedent."[125] The panel determined that awarding interest from the date of the final judgment on the merits is the proper approach and remanded the case for recalculation of the interest due on the attorney fees award.[126]

III. AMERICANS WITH DISABILITIES ACT

A. *The Ministerial Exemption*

The Supreme Court's decision in *Hosanna-Tabor Evangelical Lutheran Church & School v. EEOC*[127] concerned application of the ministerial exemption to an Americans with Disabilities Act (ADA)[128] retaliatory firing dispute. The Court unanimously concluded that the First Amendment's Establishment and Free Exercise clauses create a broad "ministerial exemption" that bar a discriminatory termination lawsuit against a religious organization by a school teacher who is also a commissioned minister.[129]

The High Court reversed the decision the United States Court of Appeals for the Sixth Circuit, which had overturned a district court's grant of summary judgment to the employer.[130] The district court had concluded that the ministerial exemption precluded the suit. The Sixth Circuit vacated and remanded, determining that the individual at issue did not qualify as a minister under prior interpretations of the ministerial exemption.[131]

In its decision, the Supreme Court substantially expanded the scope of the exemption.[132] In light of the historical background against which the First Amendment came into being, the Supreme Court held that that Establishment Clause prevents the government from appointing ministers, while the Free Exercise Clause bars it from interfering

124. *Id.* at 803-04.
125. *Id.* at 803.
126. *Id.* at 803-04.
127. 132 S. Ct. 694 (2012).
128. 42 U.S.C. §§ 12101-12213 (2006 & Supp. IV 2010).
129. *Hosanna-Tabor*, 132 S. Ct. at 709-10.
130. *Id.* at 710.
131. *Id.* at 701.
132. *Id.* at 706.

with religious organizations' freedom to pick their own ministers.[133] The two religious clauses provide the roots for a restated ministerial exemption, which keeps government from "intrud[ing] upon more than a mere employment decision."[134]

> By imposing an unwanted minister, the state infringes the Free Exercise Clause, which protects a religious group's right to shape its own faith and mission through its appointments. According the state the power to determine which individuals will minister to the faithful also violates the Establishment Clause, which prohibits government involvement in such ecclesiastical decisions.[135]

This appears to be the first case in which the Court has used the principle of separation to protect the anatomy of religious life.

B. Safe Harbor

Seff v. Broward County[136] presented the court of appeals with an opportunity to discuss the safe harbor provisions of the ADA.[137] At issue was whether Broward County's employee wellness program fell within the safe harbor provision for insurance plans. The court of appeals concluded that the wellness program was a term of the county's insurance and therefore fell within the safe harbor.[138] The named plaintiff originally brought suit seeking to represent a class of current and former Broward County employees who enrolled in the County's health insurance plan and incurred a twenty-dollar biweekly fee for declining to submit to biometric screening and a health risk assessment as part of its worker wellness program. Seff maintained that the screening and risk assessment violated the ADA prohibitions on non-voluntary medical examinations and disability-related inquiries.[139]

The panel concluded there is no requirement that an employee wellness program be explicitly identified in a benefit plan's written

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133. *Id.*

134. *Id.* at 697.

135. *Id.*

136. 691 F.3d 1221 (11th Cir. 2012).

137. 42 U.S.C. § 12201(c)(2) exempts certain insurance plans from the ADA's general prohibitions. *Seff*, 691 F.3d at 1223.

> The safe harbor provision states that the ADA "shall not be construed" as prohibiting a covered entity "from establishing, sponsoring, observing or administering the terms of a bona fide benefit plan that are based on underwriting risks, classifying risks, or administering such risks that are based on or not inconsistent with State law."

Id.; *see also* 42 U.S.C. § 12201(c)(2).

138. *Seff*, 691 F.3d at 1224.

139. *Id.* at 1222.

documents to qualify it as "term" of the benefit plan within the meaning of ADA safe harbor provision.[140] The panel concluded that the records made clear the County's insurer sponsored the wellness program as part of its contract to give the County a group health plan, the plan was only available to group plan enrollees, and the County advertised the program as part of its broader plan in at least two employee handouts.[141] "In light of these facts, the district court did not err in finding as a matter of law that the employee wellness program was a 'term' of Broward's group health insurance plan, such that the employee wellness plan fell within the ADA's safe harbor provision."[142]

IV. SECTION 1981

In *Jones v. UPS Ground Freight*,[143] a panel of the court of appeals concluded that banana peels can be evidence of racial harassment.[144] Building on its history of concluding that facially neutral terms may take on racial connotations in certain contexts,[145] the panel vacated the grant of summary judgment for an employer.[146] The district court had concluded that the plaintiff's claimed maltreatment was not sufficiently severe or pervasive to create a hostile work environment. The district court also concluded there is nothing inherently racist about a banana, absent direct supporting evidence.[147]

The appeals panel, however, had no difficulty concluding that such evidence created a jury question.[148] Quoting language used by other courts of appeals, the panel stated: "[I]t has become easier to coat various forms of discrimination with the appearance of propriety because the threat of liability takes that which was once overt and makes it subtle."[149]

The plaintiff claimed that he had complained to his employer on several occasions that he found banana pieces or peels on his truck after he left it parked at the employer's trucking terminal. The plaintiff testified that he found bananas on his truck on multiple occasions, they

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140. *Id.* at 1224.
141. *Id.*
142. *Id.*
143. 683 F.3d 1283 (11th Cir. 2012).
144. *Id.* at 1298.
145. *See, e.g.*, Ash v. Tyson Foods, Inc., 664 F.3d 883, 901 (11th Cir. 2011) (holding that use of the term "boy" could have racial connotation).
146. *Jones*, 683 F.3d at 1304.
147. *Id.* at 1291.
148. *Id.* at 1303-04.
149. *Id.* at 1297 (quoting Ellis v. CCA of Tenn., LLC, 650 F.3d 640, 645 (7th Cir. 2011)) (internal quotation marks omitted).

were always in just one or two places on the truck even though he parked it in a different location each night, and there was no evidence bananas were found on any other truck or that the plaintiff had ever found any other trash on his truck.[150] The panel concluded the plaintiff's version of events suggests that the bananas were not appearing on his truck by mere chance.[151]

V. SECTION 1983

In *Underwood v. Harkins*,[152] a divided panel concluded that a Georgia superior court clerk did not violate the First Amendment[153] when she dismissed a deputy clerk who had run against her in the election.[154] The court of appeals affirmed the grant of summary judgment to the election winner.[155] The court reasoned that when an elected official's immediate subordinate has the same duties and powers as the official under state or local law, the official does not violate the First Amendment by terminating the subordinate for opposing the official in an election.[156] The clerk had admitted she had fired the plaintiff based on her earlier candidacy. She maintained that her need for workplace confidentiality and loyalty outweighed the plaintiff's First Amendment interest in her candidacy.[157] The dissent in the decision argued that the question of whether a public employee holds a job from which she can be lawfully dismissed due to a state interest in political loyalty is a factual question, not a question of law.[158]

VI. SECTION 1985

A failed Section 1985[159] claim is worthy of mention because it arose out of the Mohawk Industries illegal workers litigation.[160] In *Carpen-*

150. *Id.* at 1298.
151. *Id.* at 1298-99.
152. 698 F.3d 1335 (11th Cir. 2012).
153. U.S. CONST. amend. I.
154. *Underwood*, 698 F.3d at 1345-46.
155. *Id.* at 1346.
156. *Id.* at 1343.
157. *Id.* at 1338, 1340.
158. *Id.* at 1346 (Martin, J., dissenting).
159. 42 U.S.C. § 1985 (2006).
160. A civil Racketeer Influenced and Corrupt Organization Act suit was filed in 2004 against Mohawk Industries by current and former employees. Carpenter v. Mohawk Indus., 479 F. App'x 206, 207 (11th Cir. 2012). It is known as the *Williams* suit. *Id.* The suit alleged a conspiracy between Mohawk and several temporary employment agencies to keep wages low through the use of illegal aliens as temporary workers. *See* Williams v. Mohawk Indus., Inc., 568 F.3d 1350 (11th Cir. 2009); Williams v. Mohawk Indus., Inc.,

ter v. Mohawk Industries, Inc.,[161] the plaintiff alleged that Mohawk's lawyers and human resource personnel conspired to deter him from testifying in the Williams litigation. To prevail on a deterrence based claim under Section 1985(2), a plaintiff must show the elements of a conspiracy.[162] The district court granted summary judgment in favor of Mohawk.[163] The court of appeals affirmed.[164] "For one thing, the evidence is insufficient to establish the second required element: that any force, intimidation, or threat was made by Mohawk in an effort to deter Plaintiff's involvement in the *Williams* case."[165] In fact, the panel concluded that the plaintiff's reasoning was flawed:

> One cannot reasonably infer that, simply by making false allegations against Plaintiff and by firing Plaintiff from his job—before he was to testify—Defendants had entered into a conspiracy to deter (that is, to discourage or to frighten) him from testifying. It is not to be expected that a group of conspirators would act to deter someone from testifying by just cutting off, in advance of his planned testimony, the most significant source of influence that the conspirators have over that person: his job. Firing someone from their job, amid false allegations of wrongdoing, seems as though it, by itself, would likely create animosity towards a former employer, thereby *encouraging*—not deterring—that fired employee's testimony against the company.[166]

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465 F.3d 1277 (11th Cir. 2006).

161. 479 F. App'x 206 (11th Cir. 2012).

162. *Id.* at 209.

163. *Id.* at 208.

164. *Id.* at 210.

165. *Id.* at 209.

166. *Id.* (quoting Wagner v. Daewoo Heavy Indus. Am. Corp., 289 F.3d 1268, 1271-72 (11th Cir. 2002), *vacated on other grounds*, 298 F.3d 1228 (11th Cir. 2002)) (internal quotation marks omitted).