Appellate Practice and Procedure

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I. INTRODUCTION

An appellate court is often characterized by the opinions that it writes. Though an appellate opinion represents a written expression and extension of the judicial personality, it is necessarily dictated in part by the facts of the case. As a result, a court’s application of appellate procedure may serve as a better crucible for assembling a judicial portrait and undertaking to study trends and direction.

This Article examines recent appellate cases with a view towards understanding appellate direction as well as assisting the practitioner with an overview of appellate procedure in action. The Eleventh Circuit’s emphasis on professionalism and on active management of its docket during 1997 is beneficial to both practitioners and parties. Taken in totality, the cases that follow plot a course towards increased accountability that translates into efficient and effective appellate decisionmaking. The phrase “sound judicial administration” appears frequently in 1997 cases, reflecting the court’s insistence that litigants and lower courts ease the burden on appellate dockets.

II. TRENDS TOWARDS PROFESSIONALISM AND ACTIVE DOCKET MANAGEMENT

The court of appeals used Chudasama v. Mazda Motor Corp.1 to deliver a reminder to the district courts that they must take an active role in managing cases on their dockets.2 Chudasama related to a discovery dispute when the district court entered a default judgment
against a defendant-manufacturer for failing to comply with a discovery order. In reversing the district court, the court was openly critical of the failure of the district court to supervise discovery as well as its apparent abdication to plaintiff’s counsel of the responsibility of preparing sensitive, dispositive orders. Further, according to the opinion, a district court’s failure to consider and rule on significant pretrial motions prior to issuing dispositive orders can constitute an abuse of discretion. While empathizing with the plight of the district courts following the imposition of strict case management deadlines, the court of appeals nonetheless expressed the view that critical pretrial motions cannot be deferred until a final pretrial conference unless absolutely necessary. Though framed as a direction to the district courts, the decision in Chudasama stands testament to the manner in which like cases will be treated in future appeals should a docket be ineffectively or improperly managed below.

Punctuating its commitment to aggressive docket management, the court of appeals in Fabric v. Provident Life & Accident Insurance Co. exercised its power to order summary judgment on appeal even though the beneficiary of that judgment did not assert a motion in the district court. Characterizing the insurance contract dispute case as a “slam dunk,” the court noted that the power of an appellate court to award summary judgment even when not sought below has been widely recognized. For relief to be granted, all facts bearing on the issue decided must be before the court and must demonstrate that the nonmovant is entitled to judgment as a matter of law. Given the court’s express recognition that awarding summary judgment to a nonmovant is an accepted method of expediting litigation, practitio-

3. Id. at 1362.
4. Id. at 1366-68. The court of appeals even took the extraordinary step of reassigning the case to another district judge upon its return to the district court. Id. at 1373.
5. Id. at 1367.
6. Id. at 1368 n.38 (citing Civil Justice Reform Act, 28 U.S.C. § 471 (1994)).
7. Id.
8. 115 F.3d 908 (11th Cir. 1997).
9. Id. at 914-15.
10. Id.
11. Id. at 915. The court distinguished Latecoere International, Inc. v. United States Department of Navy, 19 F.3d 1342 (11th Cir. 1994), on the ground that its refusal to award summary judgment on appeal in that case was factually related to the fear that appellant would be deprived of an opportunity to present its side of the dispute.
12. 115 F.3d at 915. Compare Massey v. Congress Life Insurance Co., 116 F.3d 1414 (11th Cir. 1997), in which the court of appeals reversed the district court’s sua sponte award of summary judgment for failure to give the nonmovant the required ten-day mandatory advance notice prior to entry of summary judgment. Id. at 1418.
ners may wish to consider seeking that relief to avoid further proceedings in the district court after remand.

The court of appeals did not limit its guidance to the district courts in the past year. In *Johnson v. City of Fort Lauderdale,*\(^{13}\) the court emphasized attorneys' obligations under the Federal Rules of Appellate Procedure\(^{14}\) in the context of a qualified immunity appeal.\(^{15}\) Counsel for both parties were taken to task for failing to submit an adequate statement of relevant facts with corresponding record cites.\(^{16}\) The court further noted a violation of Eleventh Circuit Rule 28-2(I)(ii),\(^{17}\) which contemplates that a proper statement of facts reflects a high standard of professionalism, lists both favorable and unfavorable facts, and identifies all inferences drawn from the facts.\(^{18}\) The court cautioned that these requirements are not to be taken lightly, especially because the court of appeals is not required to cull an appellate record in search of facts not included in the statement of facts.\(^{19}\) That the court prominently placed this discussion at the forefront of the opinion and devoted time to its discussion should serve as a reminder to future practitioners before the court that the high standard set in the court rules is not merely directory.

An example of the consequences of failing to abide by the federal rules is found in *Adler v. Duval County School Board,*\(^{20}\) a case relating to a challenge to a school district's policy of allowing prayer at a graduation ceremony.\(^{21}\) After finding that appellants' injunctive relief claims were moot given their graduation from high school, the court of appeals held that their damages claim had been waived due to their failure to appropriately address that claim by appellate brief.\(^{22}\) The court found appellants had failed to include the damages claim within their statement of issues presented for review and had omitted a demand that the court of appeals instruct the district court on remand to award monetary relief or hold proceedings thereon.\(^{23}\) Construing this inattentiveness to the rules as a "glaring omission,"\(^{24}\) the court plainly intends

\(^{13}\) 126 F.3d 1372 (11th Cir. 1997).
\(^{15}\) 126 F.3d at 1373.
\(^{16}\) Id.
\(^{17}\) 11TH CIR. R. 28-2(I)(ii).
\(^{18}\) 126 F.3d at 1373 n.1.
\(^{19}\) Id. at 1373.
\(^{20}\) 112 F.3d 1475 (11th Cir. 1997).
\(^{21}\) Id. at 1476.
\(^{22}\) Id. at 1478, 1480-81.
\(^{23}\) Id. at 1480-81.
\(^{24}\) Id. at 1481 n.12.
to hold litigants to the requirements of the rules when necessary to assure a fully developed record and a complete and concise argument of the issues to be decided upon appeal.

In Schlumberger Technologies, Inc. v. Wiley, the court of appeals examined circuit law relative to the decision of a district court not to permit an attorney to practice in a pro hac vice capacity. Noting some confusion regarding the relevant standard of review, the court indicated that it would review factual findings for clear error and the district court's application of the rules of professional conduct de novo. The court of appeals vacated the lower court order and held that binding circuit precedent requires a showing of unethical conduct sufficient to justify disbarment of a lawyer in order to justify denial of admission pro hac vice. In furtherance of its accountability posture through 1997, the court of appeals insisted that the district courts rest disqualification decisions on the violation of specific rules of professional conduct, not upon a subjective opinion that may vary from court to court.

III. APPELLATE TREATMENT OF INTERLOCUTORY MATTERS

During 1997 the court of appeals had numerous opportunities to consider interlocutory matters. Appellate practice and procedure is implicit in interlocutory matters, perhaps more than in final matters, given that litigants bear the additional burden of assuring that a case is subject to immediate appeal. Often, failure to meet appropriate time deadlines or to demonstrate a case appropriate for interlocutory treatment will prove as fatal to the appeal as would untimely filing of a notice of appeal.

Section 1292(a)(1) of Title 28 of the U.S. Code confers upon courts of appeals jurisdiction to consider interlocutory appeals from decisions of the district courts granting, refusing, or dissolving injunctions. Courts have elected this approach not due to

25. 113 F.3d 1553 (11th Cir. 1997).
26. Id. at 1558.
27. Id.
28. Id. at 1561-62.
29. Id. at 1561.
32. Massey, 116 F.3d at 1416. The court applied this principle in American Express Financial Advisors, Inc. v. Makarewicz, 122 F.3d 936, 939 (11th Cir. 1997), in which the court considered a denial of injunctive relief in an arbitration case but declined to review the district court order granting a stay because it had not been certified under 28 U.S.C.
jurisdictional strictures but rather as an accommodation to sound judicial administration.\textsuperscript{33} That approach did not change during 1997.

The court of appeals addressed the application of 28 U.S.C. § 1292-(a)(1) in the bankruptcy context in \textit{In re Culton}.\textsuperscript{34} In \textit{Culton} the district court ordered the bankruptcy court to undertake a further proceeding rendering the order appealed from interlocutory.\textsuperscript{35} Alternatively, the parties argued that the appeal should be treated as one under 28 U.S.C. § 1292(a)(1) because the district court order had the effect of nullifying a discharge of the debtor that could be considered to have injunctive effect.\textsuperscript{36} Under \textit{Carson v. American Brands, Inc.},\textsuperscript{37} an interlocutory order with injunctive effect that causes serious or irreparable consequences and can only be effectively challenged by immediate appeal may be appealed under section 1292(a)(1).\textsuperscript{38} The court found that \textit{Culton} did not meet the \textit{Carson} test because all that occurred was the institution or reinstatement of a proceeding to revoke a discharge, and the court dismissed the appeal.\textsuperscript{39}

Certification of an order as final under rule 54(b) of the Federal Rules of Civil Procedure ("Rule 54(b)")\textsuperscript{40} is another method by which an interlocutory decision may reach an appellate court. Evaluating this process in \textit{Ebrahimi v. City of Huntsville Board of Education},\textsuperscript{41} the court of appeals reiterated that a district court's Rule 54(b) certification is not conclusive on the appellate court.\textsuperscript{42} The court also noted that it will evaluate the certification in the interest of sound judicial administration but will not overturn the certification unless it was clearly unreasonable.\textsuperscript{43} The court found the certification unreasonable in \textit{Ebrahimi} and found no deference due the district court when it failed to clearly and cogently articulate the factual and legal reasons warranting

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\bibitem{33} 116 F.3d at 1416.
\bibitem{34} 111 F.3d 92 (11th Cir. 1997).
\bibitem{35} \textit{Id.} at 93. \textit{Compare In re Hillsborough Holdings Corp.}, 116 F.3d 1391 (11th Cir. 1997). In \textit{Hillsborough Holdings} the court of appeals noted that to be final an order need not be the last order that concludes a bankruptcy case given that bankruptcy proceedings are an aggregation of controversies and may require final treatment, especially as to key assets of the debtor's estate. \textit{Id.} at 1393-94. Thus, any order that concludes a particular adversary proceeding may be deemed final and reviewable. \textit{Id.} at 1393.
\bibitem{36} 111 F.3d at 93-94 (citing 11 U.S.C. § 524(a)(2) (1994)).
\bibitem{37} 450 U.S. 79 (1981).
\bibitem{38} \textit{Id.} at 79.
\bibitem{39} 111 F.3d at 94.
\bibitem{40} \textit{Fed. R. Civ. P.} 54(b).
\bibitem{41} 114 F.3d 162 (11th Cir. 1997).
\bibitem{42} \textit{Id.} at 166.
\bibitem{43} \textit{Id.}
certification. The court of appeals criticized the district court for not undertaking to narrow and define the issues prior to certification and emphasized that sound judicial administration is not furthered when a three-judge panel must familiarize itself with a record that could have been evaluated by a single judge intimately familiar with the whole case. The better practice, according to the per curiam opinion, was to certify questions warranting appeal under 28 U.S.C. § 1292(b), furnishing the appellate court with the opportunity to protect its docket and choose whether an appeal is taken.

When an order is not final (permitting review under 28 U.S.C. § 1291), does not fall within that class of order authorizing interlocutory review under 28 U.S.C. § 1292(a), and has not been certified for appeal under 28 U.S.C. § 1292(b), it may nonetheless be subject to appeal under the collateral order doctrine announced by the U.S. Supreme Court in Cohen v. Beneficial Life Industrial Loan Corp. In fact, this circuit recognizes three exceptions to the finality requirement for purposes of appeal. Interlocutory orders may be directly appealed under the collateral order doctrine, the doctrine of practical finality (the Forgy-Conrad rule), or the exception for intermediate resolution of issues fundamental to the merits of the case. The doctrine of practical finality applies in cases relating to property contests, and the intermediate resolution exception has received a very narrow construction. Thus, the Cohen, or collateral order doctrine, is most widely applied.

One familiar application of the Cohen doctrine is an appeal of a denial of qualified immunity to a public official in an action brought pursuant to 42 U.S.C. § 1983. Class action defendants in Jordan v. AVCO Financial Services, Inc. attempted to exploit the accepted nature of

44. Id. at 167.
45. Id.
46. Addressing this procedure in Kemp v. IBM Corp., 109 F.3d 708, 711 (11th Cir. 1997), the court also observed that jurisdiction of an appeal on a certified question to a district court is not limited to the precise question certified because it is the district court order and not the certified question that is brought before the appellate court.
47. 114 F.3d at 168 n.1.
49. 337 U.S. 541 (1949). To be reviewable under Cohen, an order must conclusively determine the disputed question, resolve an important issue completely separate from the merits, and be effectively unreviewable on appeal from a final judgment. Id. at 546.
50. Devine v. Indian River County Sch. Bd., 121 F.3d 576, 579 n.8 (11th Cir. 1997).
51. Id.
52. Id.
54. 117 F.3d 1254 (11th Cir. 1997).
those types of appeals by arguing an analogy existed to their defense under the McCarran-Ferguson Act. They argued that the proscription on interference in insurance rose to the level of an immunity and should thus be deemed within the application of Cohen. The court of appeals, after initially finding jurisdiction, reversed itself and determined that the Act instead functioned as a statute of state law preemption and was not analogous to the types of immunity granted as qualified immunity, state-action immunity, or Eleventh Amendment immunity. The appeal was dismissed.

An interesting application of the Cohen test occurred in Devine v. Indian River County School Board when the court inquired into its jurisdiction to hear an appeal from the denial of a motion of counsel to withdraw and to allow the party to proceed pro se. The court concluded that it did possess jurisdiction because the order finally determined the ability of the party to appear pro se, that representation of plaintiff was separate from the action’s merits, and that compelling unwanted representation would offend the dignity and autonomy of plaintiff and the right to conduct his case. However, the ruling did draw a dissent. The dissent maintained that the third prong of the Cohen test had not been met because the denial of leave to proceed pro se did not rise to the level of barring the litigant from the courthouse and did not immediately destroy a fundamental right.

Cohen’s third prong was found to be a barrier to appeal in Kaufman v. Checkers Drive-In Restaurants, Inc., an action involving an employment dispute. The employee sought an interlocutory appeal from the decision of the district court not to entertain pendent state law claims under its supplemental jurisdiction. The court of appeals found that the employee failed to demonstrate that collateral estoppel would bar the claims he sought to protect on appeal and that as a

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56. 117 F.3d at 1257.
58. 117 F.3d at 1257.
59. Id. at 1258.
60. 121 F.3d 576 (1997).
61. Id. at 578.
62. Id. at 579-80. The court distinguished a series of Supreme Court cases holding that representation-related orders were not subject to immediate appeal based on the third prong of its analysis. Id. at 581.
63. Id. at 586 (Harris, J., dissenting).
64. 122 F.3d 892 (11th Cir. 1997).
65. Id. at 893.
consequence he was not at immediate risk of irretrievable loss.\textsuperscript{66} Under that circumstance, the appeal was dismissed.\textsuperscript{67}

IV. TIMELINESS OF THE NOTICE OF APPEAL AND PRESENTATION OF ARGUMENT

When a party fails to timely file a notice of appeal, an appellate court is without jurisdiction to proceed.\textsuperscript{68} Notwithstanding this general rule, the federal rules do permit a district court to extend the time for the filing of a notice upon a showing of excusable neglect.\textsuperscript{69} In this circuit a determination of whether excusable neglect is present takes the form of a flexible analysis of factors such as the danger of prejudice to the nonmovant, the length of time of the delay, the reason for the delay, and whether the movant acted in good faith.\textsuperscript{70}

Though the court of appeals liberalized the rule concerning excusable neglect in 1996, the sequel to that case includes some important caveats to the more liberal rule. In \textit{Advanced Estimating System, Inc.}\textsuperscript{71} the Court had the opportunity to re-visit the case in which it broadened consideration of late-filed appeals. The first appeal had resulted in a remand to the district court for a determination of whether excusable neglect had been shown. Following the remand, the district court found that excusable neglect existed, but the court of appeals disagreed. According to the opinion, since the claim of excusable neglect arose out of counsel's misunderstanding of the federal rules, excusable neglect could not be shown as a matter of law.\textsuperscript{72} Thus, even though this circuit continues to recognize a more liberal standard for excusable neglect, an attorney's misunderstanding of the plain language of a rule cannot constitute excusable neglect such that a party is relieved of compliance with a statutory deadline.\textsuperscript{73}

In \textit{Zipperer v. School Board},\textsuperscript{74} the court of appeals determined that the district court had properly exercised its discretion in extending the

\begin{itemize}
  \item \textsuperscript{66} \textit{Id.} at 894-95.
  \item \textsuperscript{67} \textit{Id.} at 895.
  \item \textsuperscript{68} \textit{Pinion}, 928 F.2d at 1525.
  \item \textsuperscript{69} \textit{Fed. R. App. P.} 4(a)(5).
  \item \textsuperscript{70} \textit{Zipperer} v. \textit{School Bd.}, 111 F.3d 847, 849 (11th Cir. 1997). This case marks an application of the liberalization of the excusable neglect standard initiated by the Supreme Court in \textit{Pioneer Investment Services Co. v. Brunswick Associates, Ltd.}, 507 U.S. 380, 388 (1993), and adopted by this circuit last year in \textit{Advanced Estimating System, Inc. v. Riney}, 77 F.3d 1322, 1325 (11th Cir. 1996).
  \item \textsuperscript{71} 130 F.3d 996 (11th Cir. 1997).
  \item \textsuperscript{72} \textit{Id.} at 998.
  \item \textsuperscript{73} \textit{Id.}
  \item \textsuperscript{74} 111 F.3d 847 (11th Cir. 1997).
\end{itemize}
time for an appeal under the Individuals with Disabilities Education Act ("IDEA") when the notice of appeal was filed one day late and had been mailed more than six days prior to the deadline but was delayed in the mail. Another issue that surfaced with surprising frequency during the past year was the failure of an appellant to raise arguments or claims prior to an appeal. The general rule is that an appellate court will not consider an argument raised for the first time on appeal. However, the rule is not without exception. This circuit has permitted consideration of an issue not raised until appeal when the issue involves a pure question of law if refusal to consider it would amount to a miscarriage of justice. The reasoning behind the exception is that precluding consideration of an issue is a rule of practice, not jurisdiction, and therefore, an appellate court may exercise its discretion in determining whether to reach an issue. In determining whether to extend consideration to an issue not raised below, an appellate court will look to the twin factors of avoiding prejudice to the parties and judicial economy. The courts may also elect to reach unraised issues when the proper resolution is beyond all doubt.

V. DOCTRINES OF STANDING, RIPENESS, JUSTICIABILITY, AND MOOTNESS

Standing of a party to proceed with an action is a jurisdictional question and may be the most important of the jurisdictional doctrines. In Engineering Contractors Ass'n v. Metropolitan Dade County, the court discussed standing in an affirmative action context and found standing to exist based upon certain stipulations of the parties. In this regard, the court noted that while parties cannot stipulate to a court's jurisdiction, they can stipulate facts that bear on

76. 111 F.3d at 850.
77. Herman v. Nationsbank Trust Co., 126 F.3d 1354 (11th Cir. 1997) (failure to raise argument until reply brief precluded court consideration); Bok v. Mutual Assurance, Inc., 119 F.3d 927 (11th Cir. 1997) (noting exceptions to rule exist, but finding them inapplicable).
78. Damiano v. FDIC, 104 F.3d 328, 333 n.6 (11th Cir. 1997).
80. Id. at 503.
81. Id.
82. Engineering Contractors Ass'n v. Metropolitan Dade County, 122 F.3d 895, 903 (11th Cir. 1997).
83. 122 F.3d 895 (11th Cir. 1997).
84. Id. at 905-06.
the jurisdictional inquiry.\textsuperscript{85} As it happened, these stipulations were crucial to the determination of standing; the court explained that stipulations are designed to remove the burden of parties to introduce evidence and that it would look to the stipulations as evidence that plaintiffs were impacted by the programs under attack.\textsuperscript{86}

Closely related to the standing doctrine is the issue of ripeness. The ripeness doctrine protects federal courts from engaging in speculation or wasting resources on potential or abstract disputes.\textsuperscript{87} Deciding ripeness compels inquiry into the fitness of issues for judicial decision and the hardship to the parties of withholding consideration.\textsuperscript{88} In \textit{Digital Properties, Inc. v. City of Plantation},\textsuperscript{89} the court of appeals affirmed the district court's dismissal of a property owner's claim for zoning violations.\textsuperscript{90} According to the opinion, though the injury requirement is applied most loosely in the First Amendment context, the case presented was not mature due to plaintiff's rush to the courthouse and his erroneous assumptions about the accrual of a claim.\textsuperscript{92}

Whereas ripeness indicates the existence of an unmatured claim, the opposite principle is expressed in the mootness doctrine: when rights that have accrued nevertheless become unenforceable due to the occurrence of subsequent events or passage of time. At least two cases involved a determination of mootness last year.\textsuperscript{93} In one of these cases, the court applied the mootness doctrine to specific claims, declining to hear an injunctive relief claim but permitting a damages claim to go forward.\textsuperscript{94}

A final area of federal jurisdictional scrutiny is a determination of whether a claim is justiciable. The justiciability of a controversy is not dependent on the existence of a federal statute but on whether judicial resolution of a controversy is consonant with the separation of powers principles contained in the U.S. Constitution.\textsuperscript{95} A fascinating case study of this principle is found in \textit{Aktepe v. United States},\textsuperscript{96} in which

\begin{itemize}
\item 85. \textit{Id.} at 905.
\item 86. \textit{Id.} at 905-06.
\item 87. \textit{Digital Properties, Inc. v. City of Plantation}, 121 F.3d 586, 589 (11th Cir. 1997).
\item 88. \textit{Id.}
\item 89. 121 F.3d 586 (11th Cir. 1997).
\item 90. \textit{Id.} at 591.
\item 91. U.S. CONST. amend. I.
\item 92. 121 F.3d at 591.
\item 93. \textit{Johnson v. Florida High Sch. Activities Ass'n}, 102 F.3d 1172 (11th Cir. 1997); \textit{Lucero v. Trosch}, 121 F.3d 591 (11th Cir. 1997).
\item 94. 121 F.3d at 596.
\item 95. \textit{Aktepe v. United States}, 105 F.3d 1400 (11th Cir. 1997).
\item 96. 105 F.3d 1400 (11th Cir. 1997).
\end{itemize}
the court reviewed the lower court's dismissal of an action by Turkish sailors and their representatives who were injured when a United States naval vessel engaged in war games erroneously fired a live missile at the Turkish ship. 97 The court concluded, as had the district court, that the controversy was not justiciable because it constituted a political question. 98 The court found that entertaining the action would require the judiciary to interject itself into military decisionmaking and foreign policy, areas entrusted to correlative governmental branches. 99 An attempt by plaintiffs to frame the dispute as a negligence action, routinely cognizable in the courts, was rejected because adjudicating the negligence issue would require invasion of the military chain of command. 100

VI. STANDARDS OF REVIEW

A statement of the standard of review applicable to each of a party's contentions on appeal is required in this circuit. 101 To assist the practitioner in satisfying this requirement, the court has detailed the applicable standards in the following situations: review of sanctions applied under rule 11 of the Federal Rules of Civil Procedure, 102 review of jurisdictional dismissal, 103 review of a district court ruling as to admissibility of evidence, 104 review of a motion for relief from judgment under rule 60(b) of the Federal Rules of Civil Procedure, 105 review of summary judgment, 106 review of jury instructions, 107 review of a motion to alter or amend judgment under rule 59 of the Federal Rules of Civil Procedure, 108 review of a denial of attorney fees under Title VII, 109 review of a decision under the Federal Tort Claims Act, 110 review of a motion for new trial, 111 review of denial of a motion for

112. Kaimowitz v. Orlando, 122 F.3d 41 (opinion amended on rehearing 131 F.3d 950 (11th Cir. 1997)).
113. United States v. Gecas, 120 F.3d 1419 (11th Cir. 1997).
115. Republic of Panama v. BCCI Holdings, 119 F.3d 935 (11th Cir. 1997).
117. Mills v. Freeman, 118 F.3d 727 (11th Cir. 1997).
118. Heaven v. Trust Co. Bank, 118 F.3d 735 (11th Cir. 1997).
121. Negron v. City of Miami Beach, 113 F.3d 1563 (11th Cir. 1997).
122. Schlumberger Techs., Inc. v. Wiley, 113 F.3d 1553 (11th Cir. 1997).
128. Dysert v. United States Secretary of Labor, 105 F.3d 607 (11th Cir. 1997).
130. Combs v. Plantation Patterns, 106 F.3d 1519 (11th Cir. 1997).
131. Lone Star Steakhouse & Saloon, Inc. v. Longhorn Steaks, Inc., 106 F.3d 355 (modified on rehearing 122 F.3d 1379 (11th Cir. 1997)).
133. Nolen v. Jackson, 102 F.3d 1187 (11th Cir. 1997).