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Employment Discrimination

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Similar to the 2005 survey period, during the 2006 survey period, the Eleventh Circuit Court of Appeals continued its trend of issuing fewer and fewer published decisions in the area of employment discrimination.[1] The court issued only six published decisions all year involving Title VII and only published nine opinions in the area of employment discrimination overall. With respect to *unpublished* opinions, however, the court continued to be extremely active, issuing 103 unpublished Title VII opinions and 148 unpublished employment discrimination opinions overall. This is further evidence of the fact that despite the proliferation of employment discrimination cases before the court, there continue to be fewer and fewer unsettled questions of law in this area. Clearly the most significant opinion of the year was the Supreme Court's retaliation decision in *Burlington Northern & Santa Fe Railway v. White*,[2] which greatly expanded Title VII's anti-retaliation provision by holding that

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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 2006. Cases arising under the following federal statutes are included: Title VII of the Civil Rights Act of 1964 ("Title VII") (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (2000)); the Age Discrimination in Employment Act of 1967 ("ADEA") (codified as amended at 29 U.S.C. §§ 621-634 (2000)); the Americans with Disabilities Act of 1990 ("ADA") (codified as amended at 42 U.S.C. §§ 12101-12113 (2000)); and the Civil Rights Acts of 1866 and 1871 (codified as amended at 42 U.S.C. § 1981 (2000) and 42 U.S.C. § 1983 (2000)).

2. 126 S. Ct. 2405 (2006).

section 704(a) of the Act[3] is not limited to adverse employment actions related to a plaintiff's employment or that occur at the workplace.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Jurisdiction

1. Definition of "Employer." In *Arbaugh v. Y & H Corp.*,[4] the Supreme Court was confronted with the issue of whether the numerical limitation on the number of employees contained in Title VII's definition of "employer"[5] was a matter of the trial court's subject matter jurisdiction or, rather, a substantive ingredient of the plaintiff's claim for relief.[6] The plaintiff had brought a Title VII action against her former employer, Y & H Corporation, alleging sexual harassment. Following a trial, the jury returned a verdict for the plaintiff in the amount of $40,000. Two weeks after the trial, the employer filed a motion to dismiss for lack of subject matter jurisdiction, raising for the first time that it had fewer than fifteen employees and thus was not covered by Title VII. The district court, believing this to be a jurisdictional issue, reluctantly granted the defendant's motion.[7] The Fifth Circuit Court of Appeals affirmed.[8]

The Supreme Court noted the broad grant of subject matter jurisdiction that Congress had given the federal courts in 28 U.S.C. § 1331,[9] that is, "'all civil actions arising under the Constitution, laws, or treaties of the United States.'"[10] The Court also noted the broad jurisdictional provision contained in section 706(f)(3) of Title VII itself.[11] Noting that its prior decisions on the issue of jurisdiction had been "less than meticulous,"[12] the Court unanimously held that "when Congress does

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3. 42 U.S.C. § 2000e-3(a).

4. 126 S. Ct. 1235 (2006).

5. 42 U.S.C. § 2000e(b) (2000) defines "employer" as "a person . . . who has 15 or more employees."

6. *Arbaugh*, 126 S. Ct. at 1238.

7. *Id.*

8. *Id.* at 1241.

9. 28 U.S.C. § 1331 (2000).

10. *Arbaugh*, 126 S. Ct. at 1239 (quoting 28 U.S.C. § 1331). Section 1331 provides as follows: "The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States." 28 U.S.C. § 1331.

11. *Arbaugh*, 126 S. Ct. at 1239 (citing 42 U.S.C. § 2000e-5(f)(3) (2000)). Section 2000e-5(f)(3) provides that district courts have jurisdiction over actions "brought under" Title VII. 42 U.S.C. § 2000e-5(f)(3).

12. *Arbaugh*, 126 S. Ct. at 1242.

not rank a statutory limitation on coverage as jurisdictional, courts should treat the restriction as nonjurisdictional in character."[13] Accordingly, the Court held that the threshold number of employees contained in Title VII's definition of "employer" was an element of the plaintiff's claim for relief and was not an issue of the trial court's subject matter jurisdiction.[14]

B. Theories of Liability and Burdens of Proof

1. Individual Liability. In *Dearth v. Collins*,[15] the Eleventh Circuit addressed the issue of whether an individual employee can be held liable under Title VII.[16] The plaintiff had been the administrative assistant to the defendant company's president and sole shareholder. Following the plaintiff's termination, she brought an action under Title VII alleging sexual harassment against both the company and the president, individually. The district court granted summary judgment for both defendants.[17] On appeal, the plaintiff, acknowledging the Eleventh Circuit's prior decisions holding that supervisors of public employers could not be held individually liable under Title VII,[18] argued that harassing supervisors of private employers, in appropriate circumstances, could be subject to liability under Title VII.[19] In rejecting this argument, the Eleventh Circuit held:

> To the extent that we have not so held before, we now expressly hold that relief under Title VII is available against only the employer and not against individual employees whose actions would constitute a violation of the Act, regardless of whether the employer is a public company or a private company.[20]

Accordingly, the Eleventh Circuit affirmed the decision of the district court.[21]

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13. *Id.* at 1245.
14. *Id.*
15. 441 F.3d 931 (11th Cir. 2006).
16. *Id.* at 933.
17. *Id.* at 932.
18. *Id.* at 933 (citing Hinson v. Clinch County Bd. of Educ., 231 F.3d 821, 827 (11th Cir. 2000); Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991)).
19. *Id.*
20. *Id.* (citing *Hinson*, 231 F.3d at 827; *Busby*, 931 F.2d at 772).
21. *Id.* at 936.

2. Disparate Treatment. In *Ash v. Tyson Foods, Inc.*,[22] the Supreme Court reversed the long-established standard utilized by the Eleventh Circuit in discriminatory failure to promote cases under Title VII.[23] The plaintiffs were two African-American superintendents working at a poultry plant owned by Tyson Foods. The plaintiffs applied for promotions to two open shift manager positions, but two white male applicants were chosen for the positions instead. The plaintiffs brought suit under Title VII and § 1981.[24] Following a trial, a jury ruled for the plaintiffs, but the district court granted the defendant's post-trial motion for judgment. On appeal, the Eleventh Circuit affirmed the district court with respect to one plaintiff, but reversed with respect to the other plaintiff.[25]

In vacating the Eleventh Circuit's decision, the Supreme Court focused on two concerns.[26] First, the Court commented on the Eleventh Circuit's characterization of the use of the term "boy."[27] The Eleventh Circuit had held that without additional evidence of discrimination, the use of the term "boy" by itself was not evidence of discrimination.[28] The Supreme Court held that although the use of the word "boy" will not "always be evidence of racial animus, it does not follow that the term, standing alone, is always benign."[29] The Court continued that the meaning of the use of the word would depend on "various factors including context, inflection, tone of voice, local custom, and historical usage."[30] Second, the Supreme Court addressed the Eleventh Circuit's standard in failure to promote cases.[31] In the past, the Eleventh Circuit had concluded that pretext in such cases could only be established when the disparity in qualifications between the plaintiff and the person selected was "'so apparent as virtually to jump off the page and slap you in the face.'"[32] The Supreme Court commented that this standard was "unhelpful and imprecise as an elaboration of the standard for inferring pretext from superior qualifications."[33] Although the

22. 126 S. Ct. 1195 (2006).
23. *Id.* at 1198.
24. 42 U.S.C. § 1981 (2000); *Ash*, 126 S. Ct. at 1196.
25. *Ash*, 126 S. Ct. at 1196.
26. *Id.* at 1197-98.
27. *Id.* at 1197.
28. *Id.*
29. *Id.*
30. *Id.*
31. *Id.* at 1197-98.
32. *Id.* at 1197 (quoting Cooper v. S. Co., 390 F.3d 695, 732 (11th Cir. 2004)).
33. *Id.*

Court noted that it was not prepared to define what the standard should be in such cases,[34] it was clear that the "jump off the page and slap you in the face" standard was not it.[35] The Court remanded the case to the Eleventh Circuit for further proceedings.[36]

In *Brooks v. County Commission of Jefferson County*,[37] the Eleventh Circuit had its first opportunity to address a Title VII failure to promote case following the Supreme Court's decision in *Ash*. The plaintiff, a white female, applied for promotion to the position of budget management officer for the defendant county. When the county selected Tracie Hodge, a black female, for the position instead of the plaintiff (based in part upon Hodge's prior experience serving as interim budget management officer), the plaintiff brought a race discrimination claim under Title VII. The district court granted summary judgment for the county.[38]

On appeal, citing the decision in *Ash* as well as its own prior decision in *Cooper v. Southern Co.*,[39] the Eleventh Circuit held, with respect to the issue of whether the county's selection of Hodge was based on reasons that were a pretext for discrimination, that the plaintiff had not met her burden of showing that "the disparities between her qualifications and Hodge's qualifications were so severe that no reasonable person could have chosen Hodge over her."[40] Accordingly, the Eleventh Circuit affirmed the district court's decision.[41]

In *Burke-Fowler v. Orange County*,[42] the Eleventh Circuit was confronted with the familiar issue of whether alleged comparators were "similarly situated" to the plaintiff; that is, that employees not in the plaintiff's protected category engaged in similar misconduct as the plaintiff but received more favorable disciplinary treatment.[43] The plaintiff worked as a correctional officer for the defendant County's corrections department. A number of years after she was hired, the plaintiff developed a relationship with and eventually married an inmate at the prison. The plaintiff did not disclose either her relationship or her marriage to her supervisors at the correctional facility. The County maintained a policy prohibiting correctional officers from fraternizing

34. *Id.* at 1198.
35. *Id.*
36. *Id.*
37. 446 F.3d 1160 (11th Cir. 2006).
38. *Id.* at 1162.
39. 390 F.3d 695 (11th Cir. 2004), *cert. denied*, 126 S. Ct. 478 (2005).
40. *Brooks*, 446 F.3d at 1163.
41. *Id.* at 1164.
42. 447 F.3d 1319 (11th Cir. 2006).
43. *Id.* at 1323.

with inmates. When the plaintiff's supervisors found out about her marriage, the plaintiff was terminated for violating the County's anti-fraternization policy. In the plaintiff's subsequent race discrimination action pursuant to Title VII, the district court granted summary judgment for the County.[44]

On appeal, the Eleventh Circuit was concerned primarily with whether the plaintiff had produced evidence of other "similarly situated" white correctional officers who had received more favorable treatment.[45] The plaintiff had presented evidence of two white correctional officers who established relationships with individuals who were incarcerated after the relationships had begun but were not terminated.[46] The court of appeals noted that this was a critical difference when compared to the plaintiff's case because the plaintiff had entered into her relationship with full knowledge of the County's policy and with full knowledge of the inmate's status as an inmate.[47] Citing its prior decision in *Maniccia v. Brown*,[48] the court of appeals held that the misconduct of the alleged comparators was not "'nearly identical'" to that of the plaintiff.[49] Accordingly, neither were deemed to be appropriate comparators, and the district court's opinion was affirmed.[50]

3. Direct Evidence. In *Tomczyk v. Jocks & Jills Restaurants, LLC*,[51] the Eleventh Circuit was confronted with the issue of what constitutes direct evidence of discriminatory intent for purposes of a Title VII claim.[52] The plaintiff was an upper-management employee for the defendant sports bar and restaurant chain. Following her termination, she brought, *inter alia*, a claim of race discrimination pursuant to Title VII. The district court granted summary judgment for the defendant.[53]

On appeal, the plaintiff argued that she had presented direct evidence of the defendant's discriminatory intent: evidence that the defendant's chairman of the board and controlling shareholder had used racial slurs in describing her physical appearance and in characterizing her as attractive to African-American men, which the plaintiff also argued was

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44. *Id.* at 1322.
45. *Id.*
46. *Id.* at 1325.
47. *Id.*
48. 171 F.3d 1364 (11th Cir. 1999).
49. *Burke-Fowler*, 447 F.3d at 1325.
50. *Id.* at 1325-26.
51. 198 F. App'x 804 (11th Cir. 2006).
52. *Id.* at 808-09.
53. *Id.* at 805.

sufficient to infer that the chairman found interracial relationships repulsive.[54] Citing its prior precedent that "'only the most blatant remarks'" would be deemed direct evidence of discriminatory intent,[55] the court of appeals affirmed.[56] The court noted that the plaintiff did not contend that the chairman had threatened to fire the plaintiff because of her interracial relationship.[57] However, the court also noted that there was evidence that the chairman had threatened to fire the plaintiff if she continued to hire her boyfriend for the defendant's promotional events.[58] Noting that "[a]ny business has the right to insist on conflict-free decision making about the expenditure of its funds,"[59] the Eleventh Circuit concluded there was no direct evidence of discrimination.[60]

4. Religious Discrimination. In *Richardson v. Dougherty County*,[61] the Eleventh Circuit addressed a claim for religious discrimination pursuant to Title VII.[62] The plaintiff, a Seventh Day Adventist, served as a deputy with the Dougherty County Sheriff's Office. According to the plaintiff's religious beliefs, he could not work on the Sabbath, which lasted from sundown on Friday until sundown on Saturday. The plaintiff requested that he not be required to work on the Sabbath as an accommodation for his religious beliefs. In response, the Sheriff's Office offered him the alternative accommodations of either swapping shifts with another deputy or taking annual leave. Thereafter, the plaintiff, along with several other deputies, was accused of sexual misconduct with a female deputy while on duty. The plaintiff was terminated following an investigation and then brought a Title VII action alleging religious discrimination. The district court granted summary judgment for the defendant.[63]

On appeal, the plaintiff initially argued that he had presented direct evidence of discrimination when the defendant made the following statement in response to his request for accommodation: "You want every Saturday off. We're sick of this. I wish you would find another

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54. *Id.* at 808-09.
55. *Id.* at 810 (quoting Wilson v. B/E Aerospace, Inc., 376 F.3d 1079, 1086 (11th Cir. 2004)).
56. *Id.* at 815.
57. *Id.* at 810.
58. *Id.*
59. *Id.*
60. *Id.* at 811.
61. 185 F. App'x 785 (11th Cir. 2006).
62. *Id.* at 788-89.
63. *Id.* at 787.

job."[64] The plaintiff also presented evidence that the defendants referred to him as a "preacher man," a "minister," and "too preachy."[65] However, concluding that this evidence did not meet the "only the most blatant remarks" standard for direct evidence, the Eleventh Circuit concluded that the statements were merely circumstantial evidence.[66] The court of appeals also held that the plaintiff had failed to prove his failure to accommodate claim.[67] It was undisputed that the plaintiff had not worked a single Sabbath after requesting his accommodation and that the Sheriff's Office had offered him two alternative accommodations.[68] Finally, because the plaintiff had presented no evidence that employees outside of his protected class had been treated more favorably than he had been treated, the court of appeals affirmed the district court's decision.[69]

5. Retaliation. In the most noteworthy decision during the survey period, the Supreme Court, in *Burlington Northern & Santa Fe Railway v. White*,[70] addressed the scope of the retaliation provision[71] found in section 704(a) of Title VII.[72] The plaintiff worked as a forklift operator for the defendant railroad. During the course of her employment, the plaintiff complained to the defendant's officials that her supervisor had repeatedly told her that women should not be working in the railroad's maintenance department. Although the supervisor was suspended and ordered to attend sexual harassment training, the plaintiff was also removed from her forklift duty and reassigned to perform only standard track laborer tasks. The plaintiff brought a Title VII action alleging that the reassignment of her duties was in retaliation for her complaint about her supervisor. Following a trial, a jury entered a verdict in the plaintiff's favor in the amount of $43,500.[73] On appeal, an initial Sixth Circuit panel reversed the judgment, but after rehearing the case en banc, the full court affirmed the judgment for the plaintiff.[74]

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64. *Id.* at 788-89.
65. *Id.* at 789.
66. *Id.*
67. *Id.*
68. *Id.*
69. *Id.* at 789-90, 791.
70. 126 S. Ct. 2405 (2006).
71. *Id.* at 2409.
72. 42 U.S.C. § 2000e-3(a) (2000). Pursuant to 42 U.S.C. § 2000e-3(a), an employer is prohibited from discriminating against an employee because the employee has "opposed any practice" made unlawful by Title VII or has "made a charge, testified, assisted, or participated in" a Title VII proceeding. *Id.*
73. *Burlington,* 126 S. Ct. at 2409-10.
74. *Id.* at 2410.

The Supreme Court addressed the defendant's argument that in order to establish a retaliation claim under Title VII, a plaintiff had to show an "'adverse employment action'" which constituted a "'materially adverse change in the terms and conditions' of [the plaintiff's] employment."[75] In concluding that the Act's retaliation provision was not intended to be restricted in this manner, the Court stated that the "scope of the anti-retaliation provision extends beyond workplace-related or employment-related retaliatory acts and harm."[76] The Court went on to conclude as follows:

> We conclude that the anti-retaliation provision does not confine the actions and harms it forbids to those that are related to employment or occur at the workplace. We also conclude that the provision covers those (and only those) employer actions that would have been materially adverse to a reasonable employee or job applicant. In the present context that means that the employer's actions must be harmful to the point that they could well dissuade a reasonable worker from making or supporting a charge of discrimination.[77]

In clarifying what it meant by the term "material adversity," the Court made it clear that employees complaining of discrimination "cannot immunize [themselves] from those petty slights or minor annoyances that often take place at work and that all employees experience."[78] Notwithstanding this limitation, it is anticipated that the decision in *Burlington* will significantly increase the number of Title VII retaliation claims that proceed to trial.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Prima Facie Case*

One noteworthy age discrimination decision rendered during the survey period dealt with the issue of a plaintiff's prima facie case burden. In *Mock v. Bell Helicopter Textron, Inc.*,[79] the court of appeals concluded, in an unpublished decision, that an employer's failure to give an explanation for its discharge decision at the time it terminates an employee could be used to demonstrate that the explanation eventually

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75. *Id.*
76. *Id.* at 2414.
77. *Id.* at 2409.
78. *Id.* at 2415 (citing 1 B. LINDEMANN & P. GROSSMAN, EMPLOYMENT DISCRIMINATION LAW 669 (3d ed. 1996)).
79. 196 F. App'x 773 (11th Cir. 2006).

given was pretextual.[80] When Mock was discharged from employment, he insisted that Bell provide him with a reason for its decision. Bell refused at the time, but later told him in writing that he had been terminated for unacceptable job performance.[81] The panel concluded that this practice established pretext: "In light of Bell's refusal to tell Mock—at the time it fired him—why his employment had come to an end, a trier of fact reasonably could find that the letter constituted a pretext for discrimination."[82] This decision could require practitioners to reconsider the standard advice given to employers that no explanation is required when discharging employees in an at-will situation.

B. Direct Evidence

Two decisions attempted to better define direct evidence. In *Roberts v. Design & Manufacturing Services, Inc.*,[83] one panel wrestled with what constitutes direct evidence of age discrimination. In the court below, Roberts, the plaintiff, attempted to establish a direct evidence case by pointing to certain statements made by a supervisor, Fitzgerald, months before Roberts had been terminated from employment. The district court determined the statements were not direct evidence.[84] The court of appeals likewise concluded that the statements were ambiguous and affirmed the lower court's grant of summary judgment to the defendants:

> Because the alleged statements can be subject to more than one interpretation, the district court did not err by concluding that Fitzgerald's comments were not direct evidence of employment age discrimination. Fitzgerald never stated that *he was going to fire Roberts because he was too old.* All of the proffered statements, which were primarily made months before Roberts was terminated, require *inferential* leaps that Fitzgerald terminated Roberts due to his age, which, under the law of this Circuit, is not direct evidence of employment discrimination.[85]

What makes the decision in *Roberts* noteworthy is the clearly age-based nature of the statements at issue. Roberts alleged that Fitzgerald had told him he "was getting too old for this stuff" and "needed to spend more time with [his] family and get back to playing golf" and that

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80. *Id.* at 774.
81. *Id.*
82. *Id.*
83. 167 F. App'x 82 (11th Cir. 2006).
84. *Id.* at 84.
85. *Id.* at 85 (citing Barnes v. Sw. Forest Indus., Inc., 814 F.2d 607, 610-11 (11th Cir. 1987)).

Fitzgerald made "frequent" inquiries as to when Roberts was going to "retire."[86]

In the second interesting direct evidence case, *Kincaid v. Board of Trustees*,[87] a second panel also concluded that statements attributed to persons in authority did not necessarily constitute direct evidence of age discrimination as to the plaintiff.[88] "When determining whether a statement is direct evidence of discrimination, we consider timing and whether the person making the statement was a decisionmaker."[89] The court of appeals determined the individuals making the statements were not decisionmakers.[90] "Because Lawrence was the sole decisionmaker, statements from other [defendant officials] did not constitute direct evidence of discrimination."[91]

C. *Adverse Employment Action*

In a decision handed down prior to the Supreme Court ruling in *Burlington Northern & Santa Fe Railway Co. v. White*,[92] the Eleventh Circuit in *Apodaca v. Secretary of the Department of Homeland Security*[93] affirmed that "'not all conduct by an employer negatively affecting an employee constitutes an adverse employment action'" for purposes of establishing a prima facie case of discrimination.[94] *Burlington Northern* is generally considered to have lowered the standard for establishing materially adverse employment actions for purposes of retaliation claims. Notwithstanding the sweeping language of *Burlington Northern*, the Eleventh Circuit continues to rely on prior precedent to the effect quoted above.[95]

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86. *Id.* at 84.

87. 188 F. App'x 810 (11th Cir. 2006).

88. *Id.* at 816.

89. *Id.* (citing Scott v. Suncoast Beverage Sales, Ltd., 295 F.3d 1223, 1227-28 (11th Cir. 2002); Standard v. A.B.E.L. Servs., Inc., 161 F.3d 1318, 1330 (11th Cir. 1998)).

90. *Id.*

91. *Id.* (citing Bass v. Bd. of County Comm'rs of Orange County, Fla., 256 F.3d 1095, 1107 (11th Cir. 2001)).

92. 126 S. Ct. 2405 (2006).

93. 161 F. App'x 897 (11th Cir. 2006).

94. *Id.* at 900 (quoting Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1238 (11th Cir. 2001)).

95. *Davis v. Town of Lake Park, Florida*, 245 F.3d 1232 (11th Cir. 2001), is still relied upon in the circuit for stating the proper standard that an adverse employment action must be a material one before it is actionable under the discrimination laws, distinguishing *Burlington Northern* as applying only in the retaliation context. *See, e.g.*, Beard v. 84 Lumber Co., 206 F. App'x 852, 857 (2006).

D. OWBPA Releases

In the only noteworthy published ADEA[96] decision rendered during the survey period, *Burlison v. McDonald's Corp.*,[97] the Eleventh Circuit provided practitioners with some useful instruction on compliance with the Older Worker Benefits Protection Act's ("OWBPA") informational requirements.[98] In an interlocutory appeal, McDonald's Corporation asserted that the district court had erroneously read the requirements of OWBPA.[99] Specifically, McDonald's Corporation argued that under the district court's reading of the OWBPA, employers would be required to provide departing employees with unhelpful information concerning their circumstances.[100] The Eleventh Circuit agreed, reversed the district court, and entered summary judgment in favor of the defendant.[101]

The court's discussion and analysis principally focused on the definition of the phrase "decisional unit."[102] The phrase is critical for determining the notifications required to be given to employees from whom releases are being sought in typical reduction in force situations. The decision is instructive in this regard and certainly is required reading when practitioners are confronted with similar questions in the future.

III. AMERICANS WITH DISABILITIES ACT

A. Essential Job Functions

In *Bishop v. Georgia Department of Family & Children Services*,[103] the Eleventh Circuit rendered perhaps the most amusing decision entered during the survey period. The district court had granted summary judgment for the defendant, concluding that "'exercising good judgment'" was an essential job function for the position of a Georgia

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96. 29 U.S.C. §§ 621-634 (2000).

97. 455 F.3d 1242 (11th Cir. 2006).

98. The OWBPA amended the ADEA by, *inter alia*, imposing very specific requirements on releases in order for them to be effective as to ADEA claims. Pub. L. No. 101-433, 104 Stat. 978 (1990) (codified as amended at 29 U.S.C. §§ 621, 623, 626, & 630 (2000)). The primary purpose of the OWBPA was to overturn the Supreme Court's decision in *Public Employees Retirement System v. Betts*, 492 U.S. 158 (1989).

99. *Burlison*, 455 F.3d at 1244.

100. *Id.*

101. *Id.* at 1249.

102. *Id. passim*.

103. No. 04-16695, 2006 U.S. App. LEXIS 5968 (11th Cir. Mar. 10, 2006).

Department of Family and Children Services Economic Support Supervisor.[104] Because of mental health issues, the plaintiff often made "inappropriate statements, ha[d] inappropriate interactions with other people, and exercise[d] poor judgment."[105] Her employer concluded these behaviors made the plaintiff unable to perform the essential functions of her job and discharged her for misconduct.[106]

While observing that "[e]xercising some degree of good judgment is arguably a function of every occupation,"[107] the Eleventh Circuit reasoned that it might not necessarily be an essential function of this particular job:

> Construing this evidence in the light most favorable to Plaintiff, a reasonable fact finder might infer from [the] record that [the plaintiff's employer] did not really consider "exercising good judgment" to be an essential function of Plaintiff's job. At the very least, a reasonable fact finder might find that Plaintiff exhibited the degree of acuity and consistency of judgment necessary to be a qualified person for the specific job in this case. We accordingly conclude that sufficient questions of fact exist such that summary judgment should not be granted.[108]

The case was remanded to the district court for a factual determination on the issue of whether exercising good judgment was indeed an essential function of this particular job.[109]

B. Reasonable Accommodation

Three reasonable accommodation cases decided during the survey period are worthy of comment. In *Warren v. Volusia County*,[110] the Eleventh Circuit affirmed the district court's grant of judgment for a public employer, ruling that the plaintiff had failed to specifically request a reasonable accommodation.[111] The case had been tried to a jury, which found in favor of the employee. The defendant moved for judgment as a matter of law, and the district court granted the motion.[112] In so ruling, the district court found "that no reasonable jury could have concluded that Warren requested a reasonable accommo-

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104. *Id.* at *4.
105. *Id.* at *2.
106. *Id.* at *3, *4.
107. *Id.* at *7 (citing Williams v. Motorola, Inc., 303 F.3d 1284, 1290 (11th Cir. 2002)).
108. *Id.* at *8-9.
109. *See id.* at *10.
110. 188 F. App'x 859 (11th Cir. 2006).
111. *Id.* at 863.
112. *Id.* at 861-62.

dation."[113] The Eleventh Circuit agreed, noting that Warren was required to make a specific demand for accommodation and that an attorney's statement during a workers' compensation settlement conference did not constitute a specific enough request.[114]

Bishop v. Georgia Department of Family & Children Services[115] also presented the court with a reasonable accommodation question. Again construing the evidence in the light most favorable to the plaintiff, the Eleventh Circuit concluded that her violations of her employer's policy did not necessarily "render her unable to perform the essential functions of her job with some reasonable accommodation."[116] We anticipate that we will be reporting on *Bishop* again at some future point given the difficult accommodation issues presented.

Finally, at least with respect to reasonable accommodation questions, *Kinsey v. City of Jacksonville*[117] is instructive on an employer's obligation when an employee is not qualified to perform any other available jobs. Kinsey suffered from hypertension, which made him unable to perform the job for which he had been hired—a laborer in the City Department of Public Works. Kinsey had been hired to work outdoors, but his hypertension did not permit outdoor activity for any length of time whenever the ambient temperature exceeded eighty degrees. His employer advised him to search for other employment within the City since he was no longer able to perform the job for which he had been hired. Kinsey made some effort to locate other City employment but failed to demonstrate that he was qualified to perform any other available position with the City. Eventually, Kinsey resigned his employment and this litigation ensued.[118] The district court granted summary judgment to the City on Kinsey's reasonable accommodation claim.[119] The court of appeals affirmed, noting that the City had made several unsuccessful attempts to assign Kinsey to other positions.[120] Because Kinsey failed to qualify for any of those available positions, the Eleventh Circuit agreed that the City had put forth legitimate nondiscriminatory and nonretaliatory reasons for its employment actions.[121]

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113. *Id.* at 862.
114. *Id.* at 861, 863.
115. No. 04-16695, 2006 U.S. App. LEXIS 5968, at *9-10 (11th Cir. Mar. 10, 2006).
116. *Id.* at *10.
117. 189 F. App'x 860 (11th Cir. 2006).
118. *Id.* at 861-62.
119. *Id.* at 862-63.
120. *Id.* at 864.
121. *Id.*

IV. CIVIL RIGHTS ACTS OF 1866 AND 1871

A. *Section 1981*

1. Retaliation. In *Tucker v. Talladega City Schools*,[122] the elements of a cause of action for retaliation under § 1981 were at issue.[123] The elements of such actions are not well-established.[124] The Eleventh Circuit concluded that a stand-alone action for retaliation can be maintained under § 1981 and embraced the notion that the elements of a § 1981 retaliation claim ought to be the same as the elements of a Title VII[125] retaliation claim.[126]

B. *Section 1983*

Garcetti v. Ceballos,[127] decided by the United States Supreme Court on March 30, 2006, was certainly the most widely reported § 1983[128] decision announced during the survey period. A sharply divided Supreme Court issued a five-to-four decision.[129] The Court decided that a public employee cannot bring a First Amendment claim based on speech that the employee makes during the course of his job duties.[130] The majority held that job "duty speech" by government employees was not protected under the First Amendment.[131] The result of the *Garcetti* decision is seen to be a significant narrowing of the scope of First Amendment claims that may be maintained by public employees under § 1983.[132]

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122. 171 F. App'x 289 (11th Cir. 2006).

123. 42 U.S.C. § 1981 (2000); *Id.* at 294.

124. *Tucker*, 171 F. App'x at 294; *see* Andrews v. Lakeshore Rehab. Hosp., 140 F.3d 1405, 1412 (11th Cir. 1998); *see also* Bass v. Bd. of County Comm'rs, 256 F.3d 1095, 1120 n.10 (11th Cir. 2001).

125. 42 U.S.C. §§ 2000e-2000e-17 (2000).

126. 171 F. App'x at 295-96.

127. 126 S. Ct. 1951 (2006).

128. 42 U.S.C. § 1983 (2000).

129. *Garcetti*, 126 S. Ct. at 1954.

130. *Id.* at 1962.

131. *Id.*

132. *See* Lynne Bernabei & Alan R. Kabat, Garcetti: *Nine Months Later, How Have the Federal Courts Analyzed 'Duty Speech' By Government Employees with First Amendment Claims*?, 45 Gov't Empl. Rel. Rep. (BNA) 264 (Feb. 27, 2007).

In *Battle v. Board of Regents for the State of Georgia*,[133] the Eleventh Circuit panel applied *Garcetti*.[134] Concluding that the plaintiff's retaliation claim failed under *Garcetti*, the court determined that Battle had been functioning within her clear employment duty when she encountered financial aid irregularities that she disclosed and subsequently claimed caused her to suffer retaliation.[135] Since her speech involved "duty speech," Battle's retaliation claim failed.[136]

In *Mitchell v. Hillsborough County*,[137] the Eleventh Circuit held that a public employee's "tasteless and vulgar ad hominem attack" on a county commissioner during a public hearing was not protected speech.[138] It is interesting that Mitchell was commenting on the matter under consideration by the county commission during a public hearing when he made these attacks.[139]

V. CONCLUSION

The dearth of published opinions in the employment arena was very noticeable during the survey period this year. The Authors were required to rely more on unpublished opinions than published ones to continue monitoring the trends in this area of decisional law.

133. 468 F.3d 755 (11th Cir. 2006).

134. *Id.* at 760.

135. *Id.* at 761.

136. *Id.* at 761-62.

137. 468 F.3d 1276 (11th Cir. 2006).

138. *Id.* at 1286, 1289. While not necessarily as amusing as the "essential job function" analysis required of the court of appeals in *Bishop v. Georgia Department of Family & Children Services*, No. 04-16695, 2006 U.S. App. LEXIS 5968 (11th Cir. Mar. 10, 2006), Mitchell's audacity to stand before a public meeting and to comment as he did, while on the clock, cannot help but get a chuckle from the reader.

139. *Id.* at 1279.