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Employment Discrimination

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Employment Discrimination

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Perhaps the most significant cases during the 2014 survey period were those that were not handed down by United States Supreme Court, rather than the cases that were decided.[1] Easily the most talked about case during the survey period was the case pending before the Supreme Court, *Young v. United Parcel Service, Inc.*,[2] in which the Court will decide whether the Pregnancy Discrimination Act[3] requires employers to offer work place accommodations to pregnant employees in order to remain on the job. Another high profile case is *Mach Mining, LLC v. Equal Employment Opportunity Commission*,[4] in which the Supreme Court will decide whether the Equal Employment Opportunity Commission's (EEOC) statutorily required efforts to engage in conciliation before taking employers to court is subject to judicial review. However,

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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 2014. Cases arising under the following federal statutes are included: the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§621-634 (2012); the Civil Rights Act of 1866 and 1871, 42 U.S.C. §§1981, 1983 (2012); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§2000e to 2000e-17 (2012); and the American with Disabilities Act of 1990 (ADA), 42 U.S.C. §§12101-12213 (2012).

1. For analysis of Eleventh Circuit employment discrimination law during the prior survey period, see Peter Reed Corbin & John E. Duvall, *Employment Discrimination*, 65 MERCER L. REV. 909 (2014).

2. 134 S. Ct. 2898 (2014). The Supreme Court handed down its decision in *Young* on March 25, 2015. *See* 135 S. Ct. 1338 (2015).

3. 42 U.S.C. §§ 2000e(k) (2012).

4. 134 S. Ct. 2872 (2014). The Supreme Court handed down its decision in *Mach* on April 29, 2015. *See* 135 S. Ct. 1645 (2015).

treatment of the decisions in *Young* and *Mach Mining* will have to await the 2015 survey article because 2014 came to an end with the cases still pending before the Supreme Court.

That is not to say that the Supreme Court or the United States Court of Appeals for the Eleventh Circuit were not busy during the 2014 survey period. Indeed they were. Many decisions were handed down. However, the vast majority of Eleventh Circuit cases were unpublished decisions, and the majority of those decisions affirmed summary judgments in favor of employers. The number of these decisions again raises the question of why there continues to be so many appeals in this area in the face of well-established precedent. Selected highlights from these cases are summarized below.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Coverage under the Act – the Definition of Employer

The Eleventh Circuit's decision in *Mastro v. Seminole Tribe of Florida*[5] is not that significant, but it is mentioned because it involved an issue that simply does not arise very often. The plaintiff worked as a car dealer at the Seminole Indian Casino in Immokalee, Florida.[6] In response to the plaintiff's lawsuit alleging gender discrimination and retaliation pursuant to Title VII of the Civil Rights Act of 1964[7] and the Florida Civil Rights Act,[8] the district court granted the tribe's motion to dismiss, finding that the tribe and casino were entitled to tribal immunity.[9] On appeal, the Eleventh Circuit affirmed the dismissal, but did not reach the immunity question.[10] Instead, the Eleventh Circuit relied upon the language of Section 701(b) of Title VII, recognizing that "Congress chose to expressly exempt Indian tribes from Title VII's definition of 'employer.'"[11]

B. Disparate Treatment

In *Galdamez v. DHL Air Express USA*,[12] the Eleventh Circuit underscored how difficult it can be for a plaintiff to establish a "comparator" for purposes of a Title VII prima facie case, i.e., a

5. 578 F. App'x 801 (11th Cir. 2014).
6. *Id.* at 802.
7. 42 U.S.C. §§ 2000e to 2000e-17 (2012).
8. FLA. STAT. ANN. § 760.1 (West 2010).
9. *Mastro*, 578 F. App'x at 802.
10. *Id.* at 802-03.
11. *Id.* at 803; *see also* 42 U.S.C. §§ 2000e(b).
12. 578 F. App'x 887 (11th Cir. 2014).

"similarly situated" employee not in the plaintiff's protected category who received more favorable treatment for similar workplace infractions.[13] The plaintiff worked for DHL, a global air freight company, at the Miami International Airport. Her job as an international service agent was physically demanding and involved lifting heavy objects. The plaintiff injured her knee on the job and requested a light-duty assignment. However, her request was denied by DHL. The plaintiff brought suit pursuant to Title VII, alleging gender discrimination. The district court granted summary judgment for the employer.[14] On appeal, the Eleventh Circuit affirmed, agreeing that the plaintiff had not established a prima facie case because the plaintiff had not shown that "DHL's employment policies were applied less favorably to her than to a similarly situated male employee, i.e., a comparator."[15] Even though the plaintiff argued that two male employees who had received light-duty assignments were valid comparators, the court of appeals rejected this argument because the male employees had different supervisors than the plaintiff and worked in different circumstances.[16]

An alternative to the comparator method of establishing a prima facie case under Title VII is the method of presenting a "convincing mosaic" of circumstantial evidence from which a reasonable jury could infer that the defendant acted with discriminatory intent.[17] This is exactly the method that was relied upon by the plaintiff in *Smith v. City of New Smyrna Beach*.[18] The plaintiff worked as a firefighter and paramedic for the City of New Smyrna Beach. During her initial job interview in 2003, the city's Fire Chief told the plaintiff that he usually "only really hire[d] men that hunt, fish, or camp" but that he had heard the plaintiff was "a pretty good ballplayer." After the plaintiff was hired, the only other woman working for the fire department, a lieutenant who became the plaintiff's mentor, advised her to "[k]eep your head down and your mouth shut." Soon after the plaintiff was hired, one of the three male battalion chiefs told the plaintiff that he did not believe women should be in the fire service. Another male lieutenant commented toward the plaintiff, "We [don't] need another split-tail here." The plaintiff experienced similar comments throughout her employment until her termination in 2008. The plaintiff brought a gender discrimination action pursuant to Title VII. Following a six-day jury trial, the jury

13. *Id.* at 891-92.
14. *Id.* at 889.
15. *Id.* at 891, 898 (internal quotation marks omitted).
16. *Id.* at 892.
17. *See* Smith v. Lockheed-Martin Corp., 644 F.3d 1321, 1328 (11th Cir. 2011).
18. 588 F. App'x 965 (11th Cir. 2014).

ruled for the plaintiff and awarded her $244,000 in loss compensation and $200,000 for emotional pain and mental anguish.[19] On appeal, the city argued that the plaintiff presented insufficent evidence to allow the jury to infer that the city intentionally discriminated against her on the basis of her gender, but the Eleventh Circuit had little difficulty in concluding otherwise.[20] Finding that plantiff had presented evidence that she "was not allowed to change shifts, was denied proper gear, and was yelled at or disciplined in situations where male firefighters were not similarly reprimanded," the court of appeals affirmed.[21]

C. Hostile Work Environment

Perhaps the most noteworthy Title VII case handed down by the Eleventh Circuit during the survey period was *Adams v. Austal, U.S.A., L.L.C.* [22] The plaintiffs worked at a shipyard in Mobile, Alabama. They alleged a racially hostile work environment at the ship yard, and presented evidence of "vulgar racial graffiti in the men's restroom, appearances of nooses, displays of Confederate flags, and utterances of racial slurs."[23] Over a period of almost ten years, the company had repeatedly cleaned the graffiti from the restroom walls until, as the court noted, "it finally wised up and painted the walls black."[24] The district court granted summary judgment for the defendants in the cases of thirteen plaintiffs. Two cases went to trial, and in both instances, the jury ruled for the defendant.[25] On appeal, the issue before the court of appeals was whether a plaintiff could rely on evidence of racial harassment that he was not personally aware of in order to prove his claim. On this key issue, the Eleventh Circuit stated, "We now hold that an employee alleging a hostile work environment cannot complain about conduct of which he was oblivious for the purpose of proving that his work environment was objectively hostile."[26]

In doing so, the Eleventh Circuit joined five other circuits in taking this position.[27] In applying this holding to the case at hand, the court of appeals "conclude[d] that seven of the employees presented sufficient evidence that their work environments were objectively hostile," and

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19. *Id.* at 967-68, 969-73.
20. *Id.* at 976.
21. *Id.* at 977-78.
22. 754 F.3d 1240 (11th Cir. 2014).
23. *Id.* at 1245.
24. *Id.*
25. *Id.*
26. *Id.*
27. *Id.* at 1250.

vacated the district court's award of summary judgment.[28] However, the court affirmed summary judgment in the other six cases, and also affirmed the two jury verdicts.[29]

D. Sexual Harrassment

In *Swindle v. Jefferson County Commission,*[30] the Eleventh Circuit reaffirmed the importance of maintaining a formal anti-harassment policy that includes an effective complaint procedure for purposes of establishing the *Faragher-Ellerth* affirmative defense[31] in sexual harrassment cases.[32] The plaintiff worked for the Jefferson County Sheriff's Office as a member of the "weight crew." She worked in that position for approximately three and a half years until she was placed on administrative leave because of the county's financial problems. Prior to being placed on administrative leave, the plaintiff filed an internal complaint of sexual harassment, alleging that her immediate supervisor and another manager had been sexually harassing her for almost two years. The alleged conduct involved a variety of incidents of sexual comments, physical touching, and sexually suggested actions. Following an investigation by the Sheriff's Office, both of the supervisors were terminated. Thereafter, the plaintiff filed an action pursuant to Title VII asserting a sexual harassment claim. The district court granted summary judgment for the Sheriff's Office, finding that the Sheriff had established the *Faragher-Ellerth* affirmative defense.[33] On appeal, the Eleventh Circuit agreed and affirmed the district court's decision.[34] Regarding the first prong of the *Faragher-Ellerth* defense (that the employer "exercise[] reasonable care to prevent and promptly correct harassing behavior"), the court of appeals agreed that the Sheriff Office's formal anti-harassment policy, which had been openly adopted and communicated, met this prong.[35] Regarding the second prong of the

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28. *Id.* at 1245.
29. *Id.* at 1245, 1257.
30. 593 F. App'x 919 (11th Cir. 2014).
31. The *Faragher-Ellerth* affirmative defense in certain sexual harassment cases was established by the Supreme Court's decisions in *Faragher v. City of Boca Raton,* 524 U.S. 775 (1998) and *Burlington Industries, Inc. v. Ellerth.,* 524 U.S. 742 (1998). The defense has two basic elements: "(1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the . . . employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Burlington Indus., Inc.,* 524 U.S at 765.
32. *See Swindle,* 593 F. App'x at 923-24, 929.
33. *Id.* at 921-22.
34. *Id.* at 925.
35. *Id.* at 923-24.

Faragher-Ellerth defense (that the plaintiff "unreasonably failed to take advantage of the employer's preventive and corrective opportunties"), the Eleventh Circuit agreed that this prong was met as well.[36] Of note to the court of appeals was the delay by the plaintiff of almost two years in reporting her first instance of alleged harassment.[37]

E. Retaliation

In *Booth v. Pasco Co.*,[38] although the plaintiffs brought Title VII actions against both their county employer and their union, it is the claim against the union, the International Association of Firefighters Local 4420, that is worthy of comment. Pasco County, Florida employed the plaintiffs as emergency workers. After filing internal grievances, both plaintiffs were transferred to less desirable positions. Believing the transfers to be retaliatory, the plaintiffs filed complaints of discrimination against both the county and the union with the EEOC and the Florida Commission on Human Relations. Thereafter, the union distributed an "update on legal issues," in which it made specific reference to the discrimination charges brought by the plaintiffs and noted that the charges were "a frivolous claim with no grounds for support" but "could be very costly and generate a legal bill of $10,000 or more."[39] Following the distribution of its memo, virtually all of the plaintiffs' co-workers shunned them.

In a subsequent jury trial of the plaintiffs' retaliation claims pursuant to Title VII, the jury entered a verdict against the union and in favor of the plaintiffs, awarding each plaintiff $75,000 for emotional pain and mental anguish and $8,000 in punitive damages.[40] On appeal, the union argued that imposing liability against it on the basis of the posted memo violated its First Amendment right to freedom of speech.[41] The court of appeals concluded that the memo posted by the union "contained both an implicit 'call for reprisal' and also a threat of further retaliation."[42] Further, the court of appeals concluded that the plaintiffs' filing of EEOC charges "was not a matter of public concern," and therefore, "the Union's response [also] was not speech on a matter of

36. *Id.* at 923-25.
37. *Id.* at 924.
38. 757 F.3d 1198 (11th Cir. 2014).
39. *Id.* at 1200-03.
40. *Id.* at 1205-06.
41. *Id.* at 1209.
42. *Id.* at 1212.

public concern."[43] Accordingly, the judgment against the union was affirmed.[44]

F. Procedural Issues: Judgment as a Matter of Law (JMOL)

In *Connelly v. Metropolitan Atlanta Rapid Transit Authority*,[45] the primary issue before the court of appeals was whether the district court properly "entered judgment as a matter of law based on inconsistent jury verdicts."[46] As it turned out, the court of appeals ruled that the inconsistent verdict did not matter and reversed the district court.[47] The plaintiff, a white male, worked several years for Metropolitan Atlanta Rapid Transit Authority (MARTA). However, after the transit authority hired a black female as the plaintiff's supervisor, things changed radically. The new supervisor, who referred to herself as a "mean black bitch," "butted heads from the get-go" with the plaintiff.[48] She soon determined that plaintiff's services "were no longer needed" and promptly fired him.[49]

In the plaintiff's subsequent lawsuit pursuant to Title VII alleging racial discrimination and retaliation, the jury ruled for the plaintiff on his claim against the transit authority (awarding him $500,000 in compensatory damages), but ruled against the plaintiff on his claim against the supervisor.[50] Following the trial, however, the district court granted the transit authority's motion for judgment as a matter of law, finding that the verdict in favor of the supervisor also mandated a judgment in favor of the transit authority.[51] On appeal, the Eleventh Circuit reversed, finding that the "consistency of the jury verdicts was irrelevant."[52] According to the court of appeals, in ruling on a motion for judgment as a matter of law, "only the sufficiency of the evidence matters."[53] Finding that there was more than sufficient evidence to support the jury's verdict against the transit authority, the court remanded the case to the district court to reinstate the verdict against the transit authority.[54]

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43. *Id.* at 1215.
44. *Id.* at 1216.
45. 764 F.3d 1358 (11th Cir. 2014).
46. *Id.* at 1359.
47. *Id.* at 1363-64.
48. *Id.* at 1359-61.
49. *Id.* at 1361.
50. *Id.* at 1362.
51. *Id.* at 1362-63.
52. *Id.* at 1363.
53. *Id.*
54. *Id.* at 1360.

G. Employer Defenses

1. Judicial Estoppel. In *Dunn v. Advance Medical Specialties, Inc.*,[55] the Eleventh Circuit reaffirmed the availabilty of the judicial estoppel defense in situations where the plaintiff filed a petition for bankruptcy but failed to disclose the existence of his or her employment claim as a potential asset in the bankruptcy filings.[56] This case also underscores the importance on the defendant's part of finding out during the discovery process whether the plaintiff has filed for bankruptcy.[57] The plaintiff, after being terminated from her corporate recruiter position with the defendant, filed a discrimination action pursuant to both the Americans with Disabilities Act of 1990[58] and Title VII.[59] Approximately two months after filing her lawsuit, the plaintiff and her husband filed a Chapter 7 petition for bankruptcy protection but did not disclose her discrimination lawsuit as a contingent asset in the bankruptcy filings. The district court granted summary judgment for the defendant, finding the the plaintiff was judicially estopped from asserting her discrimination claim because of the failure to disclose the claim in her bankrupcty petition.[60] The district court also denied the bankruptcy Trustee's motion to vacate the summary judgment order pursuant to Rule 60(b)(4) of the Federal Rules of Civil Procedure,[61] rejecting the Trustee's argument that the Trustee was the only entity with standing to pursue the claim.[62] On appeal, the Eleventh Circuit, relying upon its prior decision in *Burnes v. Pemco Aeroflex, Inc.*,[63] and subsequent rulings, affirmed both of the district court's rulings.[64]

2. After-Acquired Evidence. In *Garner v. G. D. Searle Pharmaceuticals Co.*,[65] the Eleventh Circuit recognized the defense of after-acquired evidence, but unfortunately for the defendant, the court of appeals found that the defendant waived the right to assert the

55. 556 F. App'x 785 (11th Cir. 2014).
56. *Id.* at 788.
57. *See id.*
58. 42 U.S.C. §§ 12101–12213 (2012).
59. *Dunn*, 556 F. App'x at 787.
60. *Id.* at 787.
61. FED. R. CIV. P. 60(b)(4).
62. *Dunn*, 556 F. App'x at 787-88.
63. 291 F.3d 1282 (11th Cir. 2002).
64. *Dunn*, 556 F. App'x at 788, 789.
65. 581 F. App'x 782 (11th Cir. 2014).

defense.[66] The facts of the case could be a commentary on the inefficiency on the American judicial system. The plaintiff brought a gender discrimination action pursuant to the Equal Pay Act[67] and Title VII.[68] Following a bench trial in 1993, the district court did not issue its opinion holding the defendant liable until January 2002, for reasons that are not explained in the court's opinion. Thereafter, it took the district court more than an additional decade to resolve the issue of damages. From beginning to end, this relatively simple employment discrimination suit took almost twenty-three years to reach a resolution. And then, of course, there was an appeal to the Eleventh Circuit! As part of the lower court's resolution, the district court limited the plaintiff's back-pay award based on after-acquired evidence, finding that the plaintiff would have been discharged even in the absence of the defendant's discrimination because of her falsification of a physician call report.[69] On appeal, however, the Eleventh Circuit found that the after-acquired evidence doctrine was an affirmative defense that the defendant needed to affirmatively plea.[70] The court of appeals noted that the defendant never amended its answer to assert after-acquired evidence as an affirmative defense, nor had the defense been raised as an issue in the pre-trial order.[71] Finding that it would "not countenance such sandbagging," the Eleventh Circuit found that the defendant waived the right to assert the after-acquired evidence defense and reversed the district court's limitation on the plaintiff's back-pay award.[72]

H. Remedies; Attorney Fees

The Supreme Court's decision in *Ray Haluch Gravel Co. v. Central Pension Fund of the International Union of Operating Engineers*[73] is not an employment discrimination case, but it is briefly mentioned because of its potential impact on attorney fees disputes in employment discrimination cases.[74] The underlying litigation was pursuant to the Employee Retirement Income Security Act of 1974 (ERISA),[75] and the case involved the issue of fringe benefit contributions to a union benefit

66. *Id.* at 785-86.
67. 29 U.S.C. § 206 (2012).
68. *Garner*, 581 F. App'x at 783.
69. *Id.*
70. *Id.* at 785.
71. *Id.* at 785-86.
72. *Id.* at 786.
73. 134 S. Ct. 773 (2014).
74. *See generally id.*
75. 29 U.S.C. §§1001–1461 (2012).

fund.[76] The issue before the Supreme Court was whether, pursuant to 28 U.S.C. § 1291,[77] the underlying decision on the merits of the case was a "final decision."[78] In its prior decision in *Budinich v. Becton Dickinson & Co.*,[79] the Court held that the underlying decision on the merits was a final, appealable decision for purposes of § 1291 even if the issue of attorney fees had not yet been determined.[80] The issue before the Court in *Ray Haluch Gravel Co.* was whether the result is any different if the unresolved claim for attorney fees was based on a contract rather than a statute.[81] The Court held that it made no difference; the result was the same.[82] Accordingly, the Supreme Court stated that "[w]hether the claim for attorney's fees is based on a statute, a contract, or both, the pendency of a ruling on an award for fees and costs does not prevent, as a general rule, the merits judgment from becoming final for purposes of appeal."[83]

The lesson to be learned from this case for the employment discrimination practioner is that if you intend to appeal an employment discrimination case, make sure that you file a timely notice of appeal after the district court renders its decision on the merits, even though, as is usually the case, the issue of attorney fees and costs (which is generally a collateral evidentiary proceeding) has not yet been resolved.[84]

In *Lewis v. Haskell Slaughter Young & Rediker, LLC*,[85] the Eleventh Circuit, in essence, refereed a dispute between a plaintiff and her former lawyer.[86] The plaintiff filed a discrimination action pursuant to Title VII. During discovery in the case, the plaintiff sent an email to her former attorney's firm requesting information about the case. The attorney considered the email to be "derogatory, accusatory, and demanding," and soon thereafter advised the plaintiff that she would be withdrawing from the case.[87] Shortly thereafter, the plaintiff (through a different counsel) filed a notice of acceptance of an offer of judgment by the defendant (in the amount of $85,000). On the same day, the

76. *Ray Haluch Gravel Co.*, 134 S. Ct. at 777.
77. 28 U.S.C. § 1291 (2012).
78. *Ray Haluch Gravel Co.*, 134 S. Ct. at 777. Pursuant to 28 U.S.C. § 1291, only "final decisions" of a district court may be appealed to a United States Court of Appeals.
79. 486 U.S. 196 (1988).
80. *Id.* at 199-200.
81. *Ray Haluch Gravel Co.*, 134 S. Ct. at 780.
82. *Id.*
83. *Id.* at 777.
84. *See generally id.*
85. 582 F. App'x 810 (11th Cir. 2014).
86. *See generally id.*
87. *Id.* at 812.

former attorney filed a motion to withdraw and a notice of attorney's lien against the judgment. The district court concluded that the former attorney was entitled to attorney fees in quantum meruit, and awarded the former attorney $38,250 in attorney fees.[88] On appeal, the Eleventh Circuit concluded that, under Alabama law, the district court properly applied the quantum meruit theory, and that the former attorney had "just cause" to withdraw from the case.[89] However, there was also a very spirited dissent by District Judge Middlebrook (sitting by designation).[90] According to the dissent, the former attorney's "unilateral and precipitous withdrawal without consultation with the client or permission from the tribunal constituted abandonment of the suit and precludes compensation."[91] In the authors' opinion, the dissent got it right.

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

Only two noteworthy Age Discrimination in Employment Act of 1967 (ADEA)[92] appeals were decided during the survey period. In *Crisman v. Florida Atlantic University Board of Trustees*,[93] a panel determined that the state university boards of trustees in Florida are entitled to Eleventh Amendment immunity from ADEA claims.[94] The Eleventh Circuit concluded that Florida had not consented to such suits against the university boards by merely stating under their enabling statute an intention for these entities to sue and be sued.[95] "A state waives its Eleventh Amendment immunity 'only where stated by the most express language or by such overwhelming implication from the text [of such an enabling statute] as will leave no room for any other reasonable construction.'"[96] Finding that there was no provision of the relevant Florida law that could be construed to constitute such a waiver, the court of appeals vacated the district court's finding to the contrary and remanded the case with instructions to the district court to dismiss the claim on Eleventh Amendment immunity grounds.[97]

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88. *Id.*
89. *Id.* at 813-14.
90. *Id.* at 815 (Middlebrook, J., dissenting).
91. *Id.* at 815.
92. 29 U.S.C. §§ 621–634 (2012).
93. 572 F. App'x 946 (11th Cir. 2014).
94. *Id.* at 949.
95. *Id.* at 948.
96. *Id.* at 947 (quoting Port Auth. Trans. Hudson Corp. v. Feeney, 495 U.S. 299, 305 (1990)).
97. *Id.* at 949.

The court in *Cardell v. Miami Beach Fraternal Order of Police*[98] affirmed summary judgment in favor of a public employer on an attempted ADEA claim.[99] The dispute in that case arose from the refusal by the city to permit the over-age- forty plaintiffs to switch from a five-year deferred retirement option, "DROP-5," after they had previously enrolled in a three-year version of the program. Arguing that age was the impermissible factor in the city's decision, the plaintiffs sued, claiming age discrimination in violation of the ADEA.[100] Affirming the grant of summary judgment in favor of the city by the district court, the panel concluded, "Appellants were denied access to the DROP-5 not because of their age, but rather because of their pension status."[101] The panel determined that the plaintiffs had failed to put forth any direct or circumstantial evidence supporting their claim of an impermissible motive behind the city's decision.[102]

III. AMERICANS WITH DISABILITIES ACT

A. *Americans with Disabilities Amendments Act of 2008*

Two decisions during the survey period concerned application of the Americans with Disabilities Amendments Act of 2008 (Amendments Act)[103] to conduct occurring after the amendments became effective. In the first appeal, *Morris v. Sequa Corp.*,[104] summary judgment was reversed because the district court did not correctly apply the Amendments Act in reaching its ruling.[105] The Eleventh Circuit determined that the district court erroneously concluded that the plaintiff's termination occurred in September of 2008, prior to the effective date of the amendments.[106] The panel found that there was a factual dispute pertaining to the actual date of termination, thereby precluding summary judgment.[107] The *Morris* panel relied on the earlier panel ruling during the survey period in *Mazzeo v. Color Resolutions International, LLC.*[108] In *Mazzeo*, another panel determined that the lower

98. 593 F. App'x 849 (11th Cir. 2014).
99. *Id.* at 900.
100. *Id.*
101. *Id.* at 902.
102. *Id.* at 901-02.
103. 42 U.S.C. § 12101.
104. 564 F. App'x 516 (11th Cir. 2014).
105. *Id.* at 516-17.
106. *Id.* at 517. The Amendments Act is applicable to all claims occurring after January 1, 2009. Pub. L. No. 110-325, 122 Stat. 3553.
107. *Morris*, 564 F. App'x at 517.
108. *Id; see also* 746 F.3d 1264 (11th Cir. 2014).

court in that case also failed to recognize the changes to the ADA made by Congress through enactment of the Amendments Act.[109] Those changes included lowering the standard for plaintiffs attempting to show a substantial limitation on a major life activity.[110] Given the passage of time since the amendments became effective, there probably will be no future appeals concerning this issue.

B. Essential Job Functions

In one of the only officially reported employment decisions rendered during the survey period, *Samson v. Federal Express Corp.*,[111] a divided panel concluded that a district court erred in granting summary judgment in favor of the defendant.[112] This appeal focused on the fact-sensitive question of what constitutes an essential job function for ADA purposes. In the district court, Federal Express Corporation (FedEx) successfully argued that the United States Department of Transportation (DOT) safety regulations implementing the Federal Motor Carrier Safety Act[113] obligated the company to mandate successful completion of a DOT medical examination as a prerequisite to employment for its truck maintenance technicians.[114] Technicians are required to test-drive commercial motor vehicles as part of their job responsibilities.[115] The plaintiff had applied for a technician position in Fort Myers, Florida, but was unable to obtain the necessary medical certification because he suffered from a physical limitation that disqualified him from driving commercial motor vehicles under the DOT safety regulations.[116]

While acknowledging that the regulations apply to employers transporting passengers or cargo in interstate commerce, and that FedEx is generally subject to those regulations, the Eleventh Circuit concluded that the district court erred by not focusing on whether the driving requirement was an essential function of the particular job in Fort Myers for which Samson applied.[117] The panel majority determined that the proper factual inquiry in the case was whether the limited truck driving that Samson would actually be required to perform as a maintenance mechanic technician in Fort Myers constituted transporting

109. *See Mazzeo*, 746 F.3d at 1269-70.
110. *Id.* at 1269.
111. 746 F.3d 1196, 1206 (11th Cir. 2014).
112. *Id.* at 1198.
113. 49 U.S.C. §§ 31131 to 31137, 31140 to 31144, 31146, 31147 (2012).
114. *Samson*, 746 F.3d at 1198-1200.
115. *Id.* at 1200.
116. *Id.* at 1199.
117. *Id.* at 1201-03.

property or passengers in interstate commerce as that term is defined within the regulations.[118] The majority concluded that the DOT regulations did not compel FedEx to require Samson to pass the medical examination to be qualified for the Fort Myers technician position.[119] Consequently, in the opinion of the panel majority, the regulations could not serve as the basis for an essential functions defense for that particular position.[120]

The majority additionally found that disputed factual questions remained to be decided regarding whether FedEx's medical examination prerequisite was an impermissible qualification standard, because "reasonable jurors could differ as to whether test-driving FedEx trucks is an essential function of the technician position."[121] FedEx contended that because federal regulations automatically disqualified an applicant from obtaining a commercial driver's license, Samson was incapable of performing an "essential" job function, namely, test driving its trucks with or without reasonable accommodation.[122] The majority concluded that these questions should not have been taken away from the jury.[123] Opining that test driving was a "miniscule" part of the technician position in Fort Myers, the majority stated the evidence offered below showed that "other FedEx Technicians throughout Florida generally test-drive an average of about 3.71 hours per year – an insignificant portion of their total time on the job."[124]

FedEx asserted on appeal that the medical examination requirement was not its choice, but rather was pressed upon it by the DOT through the safety regulations.[125] It further argued that the regulations required "employees who drive in interstate commerce, or who drive commercial motor vehicles over 26,001 pounds in either interstate or intrastate commerce, to obtain DOT medical certification."[126] A majority of the court disagreed, finding the weight restrictions to be irrelevant.[127] The majority stated, "If the employee's test-driving constitutes transporting property or passengers in interstate commerce, the DOT medical examination requirement applies."[128] Here, however,

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118. *Id.* at 1205.
119. *Id.* at 1205-06.
120. *Id.*
121. *Id.* at 1202.
122. *Id.*
123. *Id.* at 1203.
124. *Id.* at 1202 (emphasis omitted).
125. *Id.* at 1203.
126. *Id.*
127. *Id.* at 1205 n.10.
128. *Id.*

a witness for Samson testified that he never test-drove any FedEx truck carrying cargo, much less across the state line, which was "not surprising given that the Fort Myers facility is located near the Florida Gulf Coast far from any state line[s]."[129]

In his dissent, Judge James C. Hill took issue with the majority's highly-individualized focus on the particular job at issue rather than on the general requirements imposed on transportation employers under the DOT regulations.[130] "The majority is misplaced when it bases its analysis on the individual employee, who may or may not operate commercial motor vehicles in interstate commerce. The pertinent regulations apply to employers who operate commercial motor vehicles in interstate commerce."[131] "[I]f FedEx were to allow a technician to operate one of its commercial motor vehicles without a commercial driver's license and without a valid DOT medical certification, FedEx could be subject to both criminal and civil liabilities."[132] To illustrate what he considered to be a fallacy in the majority's reasoning, he posited, "But tell me, how far north must we go in the State of Florida for this line to start to blur and the possibility of interstate commercial travel to become more real?"[133] Nevertheless, the blanket application of the DOT safety requirements to the Fort Myers maintenance technician position required further factual analysis.[134] The case was reversed and remanded.[135]

C. *Employer Knowledge*

In *Corzine v. Little League Baseball, Inc.*,[136] the district court's grant of summary judgment for the employer was affirmed on appeal because the employer did not know of the plaintiff's disability until after it decided to terminate her employment.[137] During the final days of her employment, Corzine was diagnosed with a potential metastatic breast tumor. She was fired literally on the heels of receiving the news.[138] Her claim failed, however, despite the close timing between the events because she was unable to offer any evidence indicating that anyone

129. *Id.* at 1205.
130. *Id.* at 1206 (Hill, J., dissenting).
131. *Id.* (empasis omitted).
132. *Id.* at 1206 n.1.
133. *Id.* at 1206.
134. *Id.* at 1206 (majority).
135. *Id.*
136. 589 F. App'x 482 (11th Cir. 2014).
137. *Id.* at 483.
138. *Id.*

responsible for or participating in the employment decision to terminate her employment knew of her recent medical diagnosis.[139]

D. Accommodations

Not surprisingly, a number of cases reported during the survey period concerned an employer's duty to accommodate individuals with disabilities. One of the major objectives of the Amendments Act was to shift employment inquiries away from the question of whether a particular applicant or employee is disabled for purposes of the ADA to the individualized inquiry of whether the individual can perform the essential functions of a particular job with or without reasonable accommodation.[140] In *McCarroll v. Somerby of Mobile, LLC*,[141] a plaintiff's attempted-failure-to-accommodate claim proved unsuccessful in both the trial and the appellate courts because she was unable to demonstrate that she sought an accommodation until after the decision to terminate her employment had been reached.[142]

Perhaps the most popularly reported ADA accommodation decision rendered by the Eleventh Circuit during the survey period came in *Jarvela v. Crete Carrier Corp.*[143] In that case, another appeal involving interpretation of the DOT truck driver safety regulations, a panel concluded that a trucking company did not violate the ADA when it fired an alcoholic driver in reliance on the company's interpretation of its obligations under the regulations.[144] Acknowledging that transportation employers must determine who is qualified to drive a commercial motor vehicle under the DOT regulations, the Eleventh Circuit affirmed summary judgment for the employer.[145] Crete Carrier Corporation (Crete) determined that a current clinical diagnosis of alcoholism meant that a truck driver cannot be permitted to drive commercial vehicles under its interpretation of the DOT regulations. Crete successfully argued that the plaintiff's job description stated that an essential job duty was that the employee qualify as a commercial driver pursuant to the DOT regulations and company policy, which prohibits Crete from employing anyone who has a diagnosis of alcoholism within the past five years. Since the regulations place the onus on the employer to make

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139. *Id.*

140. *See* Pub. L. No. 110-325, 122 Stat. 3553.

141. No. 14-11040, 2014 U.S. App. LEXIS 23356 (11th Cir. Dec. 12, 2014).

142. *Id.* at *7, *8.

143. 754 F.3d 1283 (11th Cir. 2014), *overuled by* Jarvela v. Crete Carrier Corp., 776 F.3d 822 (11th Cir. 2015).

144. *Jarvela*, 776 F.3d at 831.

145. *Id.*

sure each employee is qualified to drive a commercial vehicle, Crete argued that the employer must determine whether someone suffers from a current clinical diagnosis of alcoholism.[146] The court of appeals found Crete's interpretation of the regulations to be reasonable.[147]

E. Conditional Job Offers

Wetherbee v. Southern Co.,[148] another officially reported decision, concerned the proper application of the business-necessity defense.[149] In the litigation's second trip to the court of appeals, the district court's grant of summary judgment for Southern Company was affirmed on other grounds.[150] Wetherbee sued Southern Company in 2008, claiming that it unlawfully discriminated against him when it refused to hire him to work at one of its nuclear power plants based upon information obtained during a required pre-hire medical evaluation. Wetherbee applied for a systems engineer position, and Southern Company extended to him a conditional offer of employment contingent upon his satisfactory completion of a standard, required medical examination. During the medical evaluation, Whetherbee revealed that although he had been diagnosed with bi-polar disorder, he was no longer taking the medications his doctor prescribed for him to manage this disorder. Whetherbee maintained that the medications were unnecessary because he had not experienced any bi-polar episodes in a number of years. The evidence further indicated that Wetherbee altered his medication regimen against his medical provider's recommendation. Because the job for which he was being considered required that he work on safety-sensitive systems and equipment in its nuclear power plant, Southern Company determined it could not safely hire him and rescinded the conditional job offer. Following an earlier remand, the district court found this decision to be job related and consistent with business necessity.[151] Wetherbee appealed that decision, and the Eleventh

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146. *Id.* at 829-31.

147. *Id.* at 831.

148. 754 F.3d 901 (11th Cir. 2014).

149. *Id.* at 903. The business-necessity affirmative defense is set forth in the language of the ADA. 42 U.S.C. § 12113(a). Under Title I of the ADA, it is generally an affirmative defense to a claim of discrimination that an alleged application of qualification standards, tests, or selection criteria that screens out, or tends to screen out, or otherwise denies a job or benefit to an individual with a disability, is job-related and consistent with business necessity, and the individual's job performance cannot be accomplished with reasonable accommodation. *Id.*

150. *Wetherbee*, 754 F.3d at 905.

151. *Id.*

Circuit affirmed the result reached below on other grounds.[152] "The only issue we need to address in this appeal, however, is whether a claim brought under 42 U.S.C. § 12112(d)(3)(C) requires a plaintiff to prove he is disabled."[153] The court joined other circuits in holding that an individual seeking relief must demonstrate he is a qualified individual with a disability.[154]

Russell v. City of Mobile Police Department[155] presented the court of appeals another medical inquiry question. At issue in *Russell* was whether an employee must demonstrate an actual injury to state a cognizable improper medical inquiry claim.[156] Russell sued the city, alleging that one of the city's supervisory employees engaged in an improper medical inquiry by questioning her about her fitness after she fainted at work. After becoming upset during a workplace incident, the plaintiff passed out on the job. She claimed the questioning by her public safety employer that followed was a medical inquiry, which her employer disputed.[157] She was unable to establish that her employer took any adverse employment action against her after the incident.[158] The plaintiff claimed her employer's actions exceeded the permissible scope of such inquiries.[159] The court of appeals concluded that the district court properly granted summary judgment for Russell's employer because she failed to demonstrate she suffered any injury or damages as a result of the alleged violation.[160]

F. Immunity

Another ADA decision rendered during the survey period concerned the scope of public employer immunity from such claims. In *Lightfoot v. Henry County School District*,[161] the court concluded that Georgia

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152. *Id.*

153. *Id.* at 903.

154. *Id.* at 903-04. The Seventh and Tenth Circuits hold that an individual seeking relief under § 12112(d)(3)(C) must demonstrate that she is a qualified individual with a disability. *See* O'Neal v. City of New Albany, 293 F.3d 998, 1010 n.2 (7th Cir. 2002) and Garrison v. Baker Hughes Oilfield Operations, Inc., 287 F.3d 955, 960 n.4 (10th Cir. 2002).

155. 552 F. App'x 905 (11th Cir. 2014).

156. *Id.* at 906. Section 12112(d)(4)(A) of the ADA created a cause of action against employers making improper medical inquiries. *Id.*

157. 552 F. App'x at 906-07.

158. *Id.* at 907.

159. *Id.*

160. *Id.*

161. 771 F.3d 764 (11th Cir. 2014).

school districts and school boards are not entitled to Eleventh Amendment immunity because they are not arms of the State of Georgia.[162]

IV. SECTION 1983

Again this year, decisions defining the scopes of the free speech rights of public employees and of public employer immunity from suit dominated the Civil Rights Act of 1866 § 1983[163] appeals decided by the Eleventh Circuit during the survey period. The following decisions on these and other issues are noteworthy.

A. *Abandonment of Claim*

Mosley v. Alabama Unified Judicial System[164] presented a panel with the rather interesting question of whether a plaintiff abandons her § 1983 claims by failing to specifically mention them in her response to a defendant's motion for summary judgment.[165] Under the facts specifically present in this appeal, the court concluded that the district court erred in finding against the plaintiff on that basis.[166] The court held that Mosley had not abandoned her § 1983 claims because the defendants failed to sufficiently challenge the merits of those claims in their motion for summary judgment.[167] Concluding that the motion for summary judgment below was not brought on all of the various claims asserted by Mosely in her complaint, it was an error for the district court to conclude that she abandoned those claims by not specifically addressing them in her response.[168] The case was remanded for further proceedings.[169]

B. *Equal Protection*

Owens v. Jackson County Board of Education[170] was an appeal by a public employer who was denied summary judgment on qualified immunity grounds of a gender retaliation claim.[171] Relying upon earlier precedent, the Eleventh Circuit determined that the district court

162. *Id.* at 777.
163. 42 U.S.C. § 1983 (2012).
164. 562 F. App'x 862 (11th Cir. 2014).
165. *Id.* at 864.
166. *Id.* at 865.
167. *Id.* at 864-65.
168. *Id* at 864-66.
169. *Id.* at 870.
170. 561 F. App'x 846 (11th Cir. 2014).
171. *Id.* at 847.

erred by denying the board of education's Fourteenth Amendment[172] immunity claim.[173] "This Court has held that a claim of gender-based retaliation 'simply does not implicate the Equal Protection Clause.'"[174]

C. First Amendment

Two First Amendment[175] cases, attempting to determine the proper contours of the Supreme Court's holding in *Garcetti v. Ceballos*,[176] were decided during the survey period. An appeal from the Eleventh Circuit, *Lane v. Franks*,[177] afforded the United States Supreme Court an opportunity to provide clarification. The Supreme Court found that the First Amendment protected an Alabama community college worker from retaliation for testifying against a former state legislator in a criminal fraud trial.[178] In a unanimous decision, the Court reversed the Eleventh Circuit, which had concluded the worker's testimony was part of his official duties as a public employee and, as such, was not protected speech.[179] In the same decision, however, the Court also held that the college president who did the firing was nevertheless entitled to qualified immunity from liability for that decision.[180] The Supreme Court concluded that the Eleventh Circuit had simply read *Garcetti* too broadly.[181]

The decision in *Franks* is significant because it puts to rest the strained assertion that a public employee who testifies in a judicial proceeding about things learned during the course of his public employment somehow automatically falls outside the scope of constitutional free speech protection.[182] This decision takes away the categorical exception for testimony connected to the employee's job,[183] which the Eleventh Circuit seemed to be endorsing in its decision below.[184] Under the Eleventh Circuit's reading of *Garcetti*, which found that an internal memorandum prepared by a prosecutor was unprotected

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172. U.S. CONST. amend XIV.
173. *Owens*, 561 F. App'x at 849.
174. *Id.* (quoting Watkins v. Bowden, 105 F.3d 1344, 1354 (11th Cir. 1997)).
175. U.S. CONST. amend. I.
176. 547 U.S. 410 (2006).
177. 134 S. Ct. 2369 (2014).
178. *Id.* at 2380.
179. *Id.* at 2379-80.
180. *Id.* at 2381.
181. *Id.* at 2379.
182. *Id.* at 2383.
183. *Id.* at 2381-82.
184. *See* Lane v. Cent. Ala. Cmty. Coll., 523 F. App'x 709, 712 (11th Cir. 2013) (discussing why it considered the testimony to be official duty activity).

employee speech, a public employee must be speaking as a private citizen on a matter of public concern to be shielded by the First Amendment.[185] If that were the case, then the inquiry shifts to whether the government employer had an adequate justification for its treatment of the worker.[186] The Court's opinion appears to sharpen the balance between a government employer's need to exercise control over a public employee's words and actions, and the ability of its public employees to shed light on government fraud and abuse without suffering retribution for doing so.[187] This is an important clarification of existing law. The clarification strengthens a public whistleblower's position to the extent that she is disclosing what she believes to be fraud.

On remand, the Eleventh Circuit subsequently determined that Lane's testimony fell within the scope of the *Ex parte Young* exception to the Eleventh Amendment's[188] prohibition against civil actions against state officials in their official capacity because Lane sought reinstatement to his former position of employment.[189] The court then sent the case back to the district court for subsequent proceedings consistent with its ruling and that of the Supreme Court.[190]

In another high profile case, *Brannon v. Finkelstein*,[191] the Eleventh Circuit reinstated a forensic psychologist's suit claiming he had been blacklisted by the Broward County Public Defender after testifying in favor of a Florida circuit court judge at an ethics hearing.[192] Brannon claimed that Finkelstein reduced and ultimately terminated his forensic consulting work for the public defender's office following his testimony. Brannon's testimony was allegedly in opposition to the position Finkelstein's deputies took in the proceeding. The district court granted summary judgment in favor of Finkelstein, finding there was no causal nexus between the testimony and subsequent changes Finkelstein made in the method used by his office to assign work to consulting forensic psychologists, including Brannon.[193] Following a detailed analysis of

185. *Id.* at 711.
186. *Lane*, 134 S. Ct. at 2381.
187. *See generally id.*
188. U.S. CONST. amend XI.
189. Lane v. Cent. Ala. Cmty Coll., 772 F.3d 1349, 1351 (11th Cir. 2014). The *Ex parte Young* exception provides that official capacity suits against state officials are permissible under the Eleventh Amendment when the plaintiff seeks prospective equitable relief to end continuing violations of federal law. Ex parte Young, 209 U.S. 123, 165-67 (1908).
190. *Lane*, 772 F.3d at 1351-52.
191. 754 F.3d 1269 (11th Cir. 2014).
192. *Id.* at 1272-73.
193. *Id.* at 1273-74.

the evidence, the Eleventh Circuit concluded that a reasonable jury could potentially side with either party and vacated the grant of summary judgment.[194]

D. Class of One

A decision rendered during the survey period provides some clarity on the proper application of the class-of-one concept in § 1983 actions. The Supreme Court recognized the viability of this type of equal protection claim by private citizens in *Village of Willowbrook v. Olech*,[195] and explained its limited application to public employment in *Engquist v. Oregon Department of Agriculture*:[196] "When those who appear similarly situated are nevertheless treated differently, the Equal Protection Clause requires at least a rational reason for the difference."[197]

In *Brackin v. Anson*,[198] the court affirmed summary judgment in favor of the public employer on an attempted class-of-one claim.[199] The court of appeals held that public employees cannot state actionable class-of-one claims against their public employers.[200]

E. Immunity

Consistent with the holding in the ADA context reached in *Lightfoot v. Henry County School District*,[201] in *Walker v. Jefferson County Board of Education*,[202] another published decision, the Eleventh Circuit concluded that Alabama county school boards are neither arms nor alter egos of the State of Alabama.[203] Thus, they did not enjoy Eleventh Amendment immunity.[204] In *Walker*, the court of appeals determined that intervening changes in Alabama law did not alter its earlier conclusion that Alabama school districts do not enjoy such immunity.[205] In a consolidated appeal, the school districts asked the Eleventh Circuit to reevaluate its earlier decision[206] rendered in *Stewart v.*

194. *Id.* at 1277-78.
195. 528 U.S. 562, 564 -65 (2000).
196. 553 U.S. 591 (2008).
197. *Id.* at 602.
198. 585 F. App'x 991 (11th Cir. 2014).
199. *Id.* at 996.
200. *Id.*
201. *See supra* notes 161-62 and accompanying text.
202. 771 F.3d 748 (11th Cir. 2014).
203. *Id.* at 757.
204. *Id.*
205. *Id.* at 750.
206. *Id.*

Baldwin County Board of Education.[207] Following a thoughtful and thorough analysis of the intervening developments in Alabama law, the Eleventh Circuit declined the invitation and reaffirmed *Stewart*.[208]

V. CONCLUSION

Employment law decisions rendered by the United States Court of Appeals for the Eleventh Circuit during the survey period continue to provide practitioners with useful insight on this evolving area of the law, as they have for over three decades. The authors thank the Mercer Law Review for allowing us to comment on those decisions each year over most of that time.

207. 908 F.2d 1499, 1511 (11th Cir. 1990).
208. *Walker*, 771 F.3d at 757.

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