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Employment Discrimination

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Employment Discrimination

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The field of Employment Discrimination continued to be alive and well during the 2016 survey period.[1] Although the United States Court of Appeals for the Eleventh Circuit continued its recent trend of issuing the vast majority of its employment discrimination cases as unpublished opinions (often per curiam opinions affirming a summary judgment for the employer), the court of appeals rendered far more published opinions during the survey period than has recently been its practice. The Eleventh Circuit issued six published Title VII opinions, and fifteen published employment discrimination opinions overall. For instance, in *Villarreal v. R.J. Reynolds Tobacco Co.*,[2] the Eleventh Circuit, en banc, held that job applicants cannot sue an employer for disparate impact discrimination under the Age Discrimination in Employment Act.[3] In *Peppers v. Cobb County*,[4] the court of appeals rendered a significant opinion on the

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This Article covers significant cases in the area of employment discrimination law decided by the Supreme Court of the United States and the United States Court of Appeals for the Eleventh Circuit during 2016. Cases arising under the following federal statutes are included: 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, 1985 (2012); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2012); and the Americans 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, Eleventh Circuit Survey*, 67 MERCER L. REV. 875 (2016).

2. 839 F.3d 958 (11th Cir. 2016).

3. *Id.* at 973.

4. 835 F.3d 1289 (11th Cir. 2016).

concept of joint employers for purposes of Title VII and the various employment discrimination statutes.[5] Finally, in *Quigg v. Thomas County School District*,[6] the Eleventh Circuit rejected the utilization of the familiar *McDonnell Douglas* model of proof at the summary judgment stage in Title VII mixed motive actions.[7]

The Supreme Court of the United States also made its contribution during the survey period. In *Green v. Brennan*,[8] the Court decided when the statute of limitations begins to run in the context of a constructive discharge claim.[9] In *CRST Vann Expedited, Inc. v. Equal Employment Opportunity Commission*,[10] the high court, in the midst of affirming a $4 million attorney fee award to the defendant employer, decided that a defendant does not need to obtain a favorable ruling on the merits in order to become a "prevailing party" under Title VII.[11]

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Coverage under the Act

1. Joint Employers.

Title VII of the Civil Rights Act of 1964[12] prohibits certain forms of discrimination against employees by employers. In *Peppers v. Cobb County*,[13] the issue was whether the defendant could be drawn within the scope of the Act's coverage through application of the joint employer theory. The plaintiff was a retired criminal investigator with the Cobb Judicial Circuit District Attorney's Office. After he learned that a less experienced female in the office was earning a substantially higher salary (approximately $15,000 more a year) than he was making for performing the same job, the plaintiff brought a lawsuit under both Title VII (alleging gender discrimination) and the Equal Pay Act.[14] However, the defendant that the plaintiff chose to sue was not the Cobb County District Attorney's Office; rather, he brought suit against Cobb County. Finding that the county and the district attorney's office were not joint

5. *See id.*
6. 814 F.3d 1227 (11th Cir. 2016).
7. *Id.* at 1232-33.
8. 136 S. Ct. 1769 (2016).
9. *Id.* at 1774.
10. 136 S. Ct. 1642 (2016).
11. *Id.* at 1651.
12. 42 U.S.C. § 2000e to 2000e-17 (2012).
13. 835 F.3d 1289 (11th Cir. 2016).
14. 29 U.S.C. § 206 (2012 & Supp. II 2015).

employers, the district court granted summary judgment for the defendant.[15]

On appeal, the Eleventh Circuit closely examined the nature of the relationship between the district attorney's office and the county. The court noted that under the Georgia constitution, the district attorney's office was a separate legal entity, and that the county was responsible only for approving the district attorney's annual budget.[16] Applying past precedent, the court of appeals reasoned that the joint employer issue turned on (1) the degree of control that the alleged joint employer had over the employee; and (2) whether the alleged joint employer "had the power to hire, fire, or modify the terms and conditions of the employee's employment."[17] The Eleventh Circuit went on to conclude:

> The long and short of it is that the District Attorney alone filled nearly all the roles traditionally filled by an employer. Indeed, Cobb County had no more control over the nature, power, and functions of the investigators than it had the authority to determine which cases and prosecutions the District Attorney's Office ought to pursue.[18]

Agreeing with the district court that a joint employer relationship had not been established, the court of appeals affirmed.[19]

2. Sovereign Immunity.

In *Longo v. Seminole Indian Casino-Immokalee*,[20] the Eleventh Circuit decided that a casino operated by the Seminole Tribe of Florida was immune from suit under Title VII.[21] An employee had filed a lawsuit against the casino alleging gender discrimination and retaliation under Title VII. The district court granted the defendant's motion to dismiss on the ground that the tribe was a federally recognized tribe entitled to sovereign immunity.[22] On appeal, the Eleventh Circuit noted that whether a tribe was "federally acknowledged" was determined by whether it was included on a list published by the Bureau of Indian Affairs.[23] Since the Seminole Tribe was included on the Bureau's list, the

15. *Peppers*, 835 F.3d at 1294.
16. *Id.*
17. *Id.* at 1297.
18. *Id.* at 1300.
19. *Id.* at 1301.
20. 813 F.3d 1348 (11th Cir. 2016).
21. *Id.* at 1350.
22. *Id.* at 1349.
23. *Id.*

Eleventh Circuit held that it was bound by the Bureau's determination, and affirmed the district court's dismissal on grounds of sovereign immunity.[24]

B. Disparate Treatment—Burden of Proof

1. Mixed Motive.

In *Quigg v. Thomas County School District*,[25] a case of first impression, the Eleventh Circuit determined the appropriate burden of proof in a mixed motive case relying on circumstantial evidence (as opposed to direct evidence of discrimination).[26] The plaintiff was employed as the superintendent of the Thomas County School District. After several years of a tumultuous relationship with several school board members, the school board voted five to two against renewing the plaintiff's contract. There was evidence that, following the vote, one of the school board members had remarked that the plaintiff "needed a strong male to work under her to handle problems, someone who could get tough."[27] The plaintiff then filed a gender discrimination and retaliation lawsuit pursuant to both Section 1983 of the Civil Rights Act of 1866[28] and Title VII. The district court granted summary judgment for the school board.[29]

On appeal, the primary issue before the Eleventh Circuit was the proper burden of proof in the plaintiff's mixed motive gender discrimination claim. The court of appeals found that, at least at the summary judgment stage, the proper framework was not the traditional *McDonnell Douglas* test adopted by the Supreme Court,[30] but rather, the test annunciated by the United States Court of Appeals for the Sixth Circuit in *White v. Baxter Healthcare Corp.*[31] Under that test, in order to defeat summary judgment in a mixed motive claim, the plaintiff need only present evidence sufficient to show that (1) the defendant took an adverse employment action against the plaintiff; and (2) [a protected characteristic] "was *a* motivating factor" for the defendant's adverse employment action.[32] In applying the test, the Eleventh Circuit found that there was

24. *Id.* at 1350.
25. 814 F.3d 1227 (11th Cir. 2016).
26. *Id.* at 1232-33.
27. *Id.* at 1234.
28. 42 U.S.C. § 1983 (2012).
29. *Quigg*, 814 F.3d at 1234-35.
30. *Id.* at 1232, 1238.
31. 533 F.3d 381 (6th Cir. 2008).
32. *Id.* at 402 (emphasis added).

a disputed issue of material fact as to whether the plaintiff had been discriminated against on account of her gender, and remanded the case for consideration of this issue, as well as the defendant's "same decision" defense (namely, whether the defendant would have taken the same action notwithstanding its partial discriminatory motive).[33]

2. Failure to Hire.

In *EEOC v. Catastrophe Management Solutions,*[34] the issue was whether the defendant discriminated against an African-American job applicant when it failed to hire her pursuant to its race-neutral grooming policy when she refused to cut her dreadlocks. The defendant was a claims processing company in Mobile, Alabama that provided customer service support to insurance companies. The applicant applied for a customer service representative position, and came to her job interview "dressed in a blue business suit and wearing her hair in short dreadlocks."[35] The defendant initially offered the applicant a job, but then rescinded the job offer when she would not comply with the defendant's race-neutral grooming policy by cutting her hair. The Equal Employment Opportunity Commission (EEOC) brought suit on the applicant's behalf, alleging race discrimination pursuant to Title VII. The district court granted the defendant's motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6).[36]

On appeal, the Eleventh Circuit clarified that the EEOC was bringing only a disparate treatment claim, and not a disparate impact claim alleging that the race-neutral grooming policy had a discriminatory impact on African-Americans.[37] The EEOC's theory was that the defendant's application of its grooming policy constituted racial discrimination on its face "because dreadlocks are a manner of wearing the hair that is physiologically and culturally associated with people of African descent."[38] In rejecting this argument, the Eleventh Circuit concluded as follows:

> Critically, the EEOC's proposed amended complaint did not allege that dreadlocks themselves are an immutable characteristic of black persons, and in fact stated that black persons choose to wear dreadlocks because that hairstyle is historically, physiologically, and culturally associated with their race. That dreadlocks are a "natural outgrowth"

33. *Quigg*, 814 F.3d at 1243-44.
34. 837 F.3d 1156 (11th Cir. 2016).
35. *Id.* at 1159.
36. *Id.* at 1158; FED. R. CIV. P. 12(b)(6).
37. *Catastrophe Mgmt. Sols.*, 837 F.3d at 1161.
38. *Id.*

> of the texture of black hair does not make them an immutable characteristic of race.[39]

Noting that the EEOC's position ran "headlong into a wall of contrary caselaw,"[40] the court of appeals noted that it was tasked with simply interpreting the law, and not "with grading competing doctoral theses in anthropology or sociology."[41] After noting the court's respect for the plaintiff's "[intensively] personal decision and all [that] it entails,"[42] the court of appeals affirmed the district court.[43]

In *Calvert v. Doe*,[44] an interesting unpublished decision, the plaintiff lost his primary argument on appeal, but still managed to gain a reversal of the employer's summary judgment ruling below.[45] The plaintiff had previously filed a Title VII race discrimination claim against Fulton County, Georgia, which had settled the claim in 2004. Since that time, the plaintiff had applied for positions twenty-six different times, but had received only one job interview for a juvenile clerk position. Following that interview, the plaintiff was not hired, although four candidates who ranked below him received job offers. The plaintiff then filed a retaliation claim against the county pursuant to Title VII. The district court granted summary judgment for the county.[46] On appeal, the plaintiff argued that the district court erred when it excluded from evidence a statement by the juvenile court's human resources coordinator that the plaintiff had not been hired because "'somebody up the street' did not want to hire [the plaintiff] because of the lawsuit."[47] "The district court excluded [this statement] as inadmissible hearsay."[48] On appeal, relying on its prior decision in *Kidd v. Mando American Corp.*,[49] the Eleventh Circuit agreed that the human resources coordinator's statement was not admissible under Rule 801(d)(2)(D) of the Federal Rules of Evidence[50] because she was a non-decision maker and her duties did not rise above a ministerial role in the decision-making process.[51] Nonetheless, the court of appeals

39. *Id.* at 1168
40. *Id.* at 1169.
41. *Id.* at 1171.
42. *Id.* at 1172.
43. *Id.*
44. 648 F. App'x 925 (11th Cir. 2016).
45. *Id.* at 926.
46. *Id.*
47. *Id.* at 927.
48. *Id.*
49. 731 F.3d 1196 (11th Cir. 2013).
50. FED. R. EVID. 801(d)(2)(D).
51. *Kidd*, 731 F.3d at 1207-08.

found that the plaintiff had established "a convincing mosaic of circumstantial evidence"[52] sufficient to create a material issue of disputed fact, and vacated the lower court's award of summary judgment.[53]

3. Gender Discrimination.

In *Chavez v. Credit National Auto Sales, LLC,*[54] the plaintiff, an auto mechanic, filed a gender discrimination lawsuit under Title VII alleging that she was terminated because she was a transgender person. The defendant asserted that it fired the plaintiff because she was sleeping while on the clock. It was not in dispute that the plaintiff had been caught after having slept for forty minutes in a customer's vehicle while on the clock. The district court granted summary judgment for the defendant.[55] On appeal, the Eleventh Circuit agreed that, under the traditional *McDonnell Douglas* burden-shifting framework, the plaintiff failed to create a jury issue as to pretext, since the plaintiff admitted to the sleeping conduct, and since the employer had also fired another employee for sleeping on the job.[56] However, the court of appeals also analyzed evidence that the plaintiff was subjected to a "heightened scrutiny"[57] after announcing her gender transition plans, and that the defendant bypassed its progressive disciplinary process when it terminated the plaintiff for sleeping on the job.[58] In the end, the court of appeals ruled that the plaintiff had presented enough evidence to show that a discriminatory animus was at least "a motivating factor" in the defendant's decision, and reversed the district court's grant of summary judgment.[59]

4. Sexual Harassment.

In *Furcron v. Mail Centers Plus, LLC,* [60] the manner in which the plaintiff complained of sexual harassment ended up getting her fired. The plaintiff was employed as a mail room clerk for a company which provided administrative support activities for the Coca-Cola Company. A coworker, Daniel Seligman, was transferred to the plaintiff's work area in the mail room, where they worked together for a period of six days.

52. *Calvert*, 648 F. App'x at 929.
53. *Id.*
54. 641 F. App'x 883 (11th Cir. 2016).
55. *Id.* at 884, 887.
56. *Id.* at 887.
57. *Id.* at 891.
58. *Id.*
59. *Id.* at 892.
60. 843 F.3d 1295 (11th Cir. 2016).

Seligman suffered from Asperger's Syndrome, which resulted in his frequently making awkward and inappropriate mannerisms in the workplace, "including, staring, brushing up against employees, and talking in people's faces."[61] The plaintiff initially tried to be friendly to Seligman, but she believed he mistook her behavior for flirtation. She complained that he frequently tried to stare at her breasts and buttocks when she bent over. She also noticed that he frequently had an erect penis while they worked together. She took a photograph of Seligman "from the neck down," so that she would have proof that Seligman "exhibited an erection in the workplace."[62] However, in addition to showing the photograph to management, the plaintiff also showed it to several coworkers, which violated company policy. Following an investigation, the plaintiff was terminated for "[t]aking sexually suggestive pictures of a male associate's private are[a] without his permission or knowledge."[63] The plaintiff brought suit under Title VII for sexual harassment and retaliation. The district court granted summary judgment for the defendant.[64]

On appeal, the Eleventh Circuit agreed that the district court had properly dismissed the plaintiff's retaliation claim.[65] However, with respect to the sexual harassment claim, the court of appeals focused on the district court's exclusion of the affidavit of another female coworker, who alleged that Seligman had also looked at her in a sexual manner, and "would look at [her] breasts and [her] rear when [she] bent over."[66] The district court had excluded the affidavit as "largely immaterial."[67] Determining that this type of "me too" evidence was admissible under Rule 404(b) of the Federal Rules of Evidence[68] to prove intent to discriminate, the Eleventh Circuit ruled that the district court had abused its discretion in excluding the affidavit,[69] and remanded the case for further proceedings.[70]

61. *Id.* at 1300.
62. *Id.* at 1301.
63. *Id.* at 1302.
64. *Id.* at 1303.
65. *Id.* at 1307.
66. *Id.* at 1308.
67. *Id.* at 1309.
68. FED. R. EVID. 404(b).
69. *Furcron*, 843 F.3d at 1309.
70. *Id.* at 1315.

C. Hostile Work Environment

Stancombe v. New Process Steel LP,[71] is another example of how difficult it is to establish a hostile work environment claim. The plaintiff was hired for a temporary position at a steel processing company. He resigned after working only one month following two incidents of alleged sexual harassment by a male coworker. The first incident involved the coworker hugging the plaintiff and touching his buttocks three times while stating, "good job, good job."[72] The plaintiff complained about this incident, which resulted in an immediate investigation. Pending the investigation, the plaintiff was transferred to a different location, and the coworker was directed not to have any contact with the plaintiff. Two days later, both the plaintiff and the coworker volunteered to work overtime over a weekend. At some point during this time, the coworker came over to the plaintiff's work area while the plaintiff was alone and kneeling down, grabbed the plaintiff's head, and "made three pelvic thrusts in his face."[73] This incident lasted only "three to four seconds."[74] In response, the plaintiff "angrily picked up his tools, clocked out, and left."[75] During the company's subsequent investigation, the coworker denied that this second incident took place, and there were no other witnesses. However, the coworker was suspended for three days for his admitted conduct in the first incident. The plaintiff filed an action pursuant to Title VII alleging a hostile work environment based on sex.[76] The district court granted summary judgment for the employer.[77]

On appeal, the Eleventh Circuit agreed with the district court.[78] Although the court of appeals agreed that the coworker's conduct was "inappropriate and vulgar,"[79] the court concluded that the evidence was insufficient to establish that the conduct was "discrimination because of sex" or that it was sufficient to "alter the 'conditions' of the victim's employment."[80] The court also noted that there was no basis on which to hold

71. 652 F. App'x 729 (11th Cir. 2016).
72. *Id.* at 731.
73. *Id.*
74. *Id.*
75. *Id.*
76. *Id.* at 731-32.
77. *Id.*
78. *Id.* at 741.
79. *Id.* at 734.
80. *Id.*

the employer liable since the company had taken "immediate and appropriate correction action."[81] Accordingly, the court of appeals affirmed.[82]

D. Employer Defenses

1. Statute of Limitations.

In *Green v. Brennan,*[83] the issue before the Supreme Court of the United States was when the statute of limitations begins ticking in the context of a constructive discharge claim. The plaintiff, an African-American, had worked for the United States Postal Service in Colorado for thirty-five years. After he was denied a promotion to a vacant postmaster position, he complained that he was denied the promotion because of his race. Following his complaint, the plaintiff's relationship with his supervisors "crumbled."[84] Thereafter, two of the plaintiff's supervisors accused him of intentionally delaying the mail, which was a criminal offense. Following an investigation, the plaintiff signed an agreement in which he agreed to retire and resign in exchange for the Postal Service to not pursue criminal charges. Following his resignation, the plaintiff filed a complaint of discrimination with the Equal Employment Opportunity (EEO) counselor. This complaint was filed forty-one days after he submitted his resignation, but ninety-six days after he had signed the settlement agreement. In the plaintiff's subsequent lawsuit pursuant to Title VII alleging race discrimination, the district court granted summary judgment to the Postal Service, holding that the plaintiff had not filed his complaint with the EEO counselor within the required forty-five days.[85] The United States Court of Appeals for the Tenth Circuit affirmed this decision.[86]

The Supreme Court resolved a split in the circuits on this issue.[87] Three circuits, including the Tenth Circuit, held that the limitations period for constructive discharge claims began after the "employer's last discriminatory act."[88] The Supreme Court disagreed with these deci-

81. *Id.* at 736.

82. *Id.* at 741.

83. 136 S. Ct. 1769 (2016).

84. *Id.* at 1774.

85. *Id.* at 1775.

86. *Id.*

87. *Id.*

88. *Id.*; *see* Mayers v. Laborers' Health & Safety Fund of N. Am., 478 F.3d 364 (D.C. Cir. 2007); Davidson v. Ind.-Am. Water Works, 953 F.2d 1058 (7th Cir. 1992); *cf.* Flaherty v. Metromail Corp., 235 F.3d 133 (2d Cir. 2000); Draper v. Coeur Rochester, Inc., 147 F.3d 1104 (9th Cir. 1998); Hukkanen v. Operating Eng'rs, 3 F.3d 281 (8th Cir. 1993); and Young v. Nat'l Ctr. for Health Servs. Research, 828 F.2d 235 (4th Cir. 1987).

sions, however, and held that the limitations period begins for constructive discharge claims "only after an employee resigns."[89] The Court then remanded the case to the Tenth Circuit to determine when the plaintiff's notice of resignation "in fact" occurred.[90]

2. Judicial Estoppel.

In *Slater v. U.S. Steel Corp.*,[91] it is not the initial panel majority opinion which is of note, but rather, the lengthy concurring opinion of Senior Appellate Judge Gerald Tjoflat. The initial panel majority opinion was simply another example of what is now a fairly long line of Eleventh Circuit precedent determining that a plaintiff in an employment discrimination action is judicially estopped from bringing his or her employment discrimination claim, where the employee has failed to disclose the claim in a concurrent bankruptcy proceeding.[92] The plaintiff brought a Title VII action alleging race discrimination. A number of months after bringing her discrimination claim, the plaintiff filed a Chapter 7 bankruptcy petition. However, she failed to disclose her pending discrimination claim in her bankruptcy proceedings, where she was required to disclose under oath whether she had been "'a party' to any 'suits and administrative proceedings.'"[93] The district court granted summary judgment for the defendant, ruling that prior Eleventh Circuit precedent controlled its decision.[94] On appeal, relying upon its prior decision in *Burnes v. Pemco Aeroplex, Inc.*[95] and its progeny, the Eleventh Circuit affirmed.[96]

However, in a lengthy concurring opinion, Judge Tjoflat expressed his sharp disagreement with the result in the case. Judge Tjoflat initially noted that he concurred in the court's judgment because the result was dictated by binding Eleventh Circuit precedent.[97] The concurring opinion then went on to state that the "doctrine of judicial estoppel" as decided in the *Burnes* decision (and others) was "wrongly decided."[98] The concurring opinion concluded: "The consequences of today's decision make the

89. *Green*, 136 S. Ct. at 1776.

90. *Id.* at 1782.

91. 820 F.3d 1193 (11th Cir. 2016), *rehearing en banc granted and opinion vacated*, No. 12-15548, 2016 U.S. App. LEXIS 16090 (11th Cir. Aug. 30, 2016).

92. *See, e.g.*, Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010); Burnes v. Pemco Aeroplex, Inc., 291 F.3d 1282 (11th Cir. 2002).

93. *Slater*, 820 F.3d at 1196.

94. *Id.* at 1198.

95. 291 F.3d 1282 (11th Cir. 2002).

96. *Slater*, 820 F.3d at 1210.

97. *Id.* (Tjoflat, J., concurring).

98. *Id.*

problem clear: [the defendant] is granted a windfall, [the plaintiff's] creditors are deprived of an asset and the Bankruptcy Court is stripped of its discretion."[99] The concurring opinion then went on for many pages to explain why the court's prior decisions were wrong. Apparently, the concurring opinion attracted the attention of the remainder of the court. On August 30, 2016, rehearing en banc was granted, and the panel opinion was vacated.[100] Perhaps the 2018 Survey Article will reveal whether the full court sticks to its guns on its judicial estoppel precedent, or whether it decides, as the concurring opinion suggests, that those cases were "wrongly decided."[101]

E. Remedies

1. Consent Decrees.

Coffey v. Braddy[102] hopefully will mark the end of a thirty-four year old dispute in the City of Jacksonville, Florida Fire Department. In 1982, the district court entered a consent decree requiring Jacksonville's fire department to hire an equal number of black and white firefighters, until the ratio of "black fire fighters to white fire fighters reflect[ed] the ratio of black citizens to white citizens in the City of Jacksonville."[103] In 1992, after complying with the decree for ten years, the City of Jacksonville unilaterally stopped following the decree. The plaintiffs took no action for fifteen years, but in 2007, the plaintiffs, dissatisfied with the racial makeup of the Jacksonville fire department, filed a motion to show cause as to why the city should not be held in contempt for violating the 1982 decree. The district court denied the motion on the ground of laches, and dissolved the 1982 decree.[104] On appeal, the Eleventh Circuit agreed that the plaintiffs' fifteen-year delay "prejudiced the City's ability to defend itself"[105] and found that the district court's application of the doctrine of laches and dissolution of the 1982 decree was not an abuse of discretion.[106]

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99. *Id.*

100. Slater v. U.S. Steel Corp., No. 12-15548, 2016 U.S. App. LEXIS 16090 (11th Cir. Aug. 30, 2016).

101. *Slater*, 820 F.3d at 1210.

102. 834 F.3d 1184 (11th Cir. 2016).

103. *Id.* at 1186.

104. *Id.*

105. *Id.*

106. *Id.*

2. Attorney Fees.

CRST Vann Expedited, Inc. v. Equal Employment Opportunity Commission,[107] represents a huge victory for defendants' attorney fees under Title VII. The defendant is a trucking company that employed a team driving system in which two employees were assigned to share driving duties with each truck. The EEOC brought suit on behalf of one of the defendant's female drivers and all other "similarly situated" female employees, alleging sexual harassment and a sexual hostile working environment.[108] Although the EEOC purported to represent 250 female employees, nearly one hundred of the claims were dismissed as a discovery sanction (when the EEOC failed to produce the women for deposition), and the claims of all but sixty-seven female employees were found to be barred on a variety of grounds. With respect to the final sixty-seven female employees, the district court ruled that these claims were all barred because the EEOC had not fulfilled its statutory obligation to investigate and conciliate these claims. Accordingly, the district court dismissed the action and held that the defendant was a prevailing party.[109] In response to the defendant's ensuing motion for an award of attorney fees, the district court ruled that the EEOC's failure to fulfill its presuit obligations was "unreasonable," and awarded the defendant $4 million in attorney fees.[110] On appeal to the United States Court of Appeals for the Eighth Circuit, relying on its own precedent,[111] the court of appeals reversed the award of attorney fees, ruling that the district court's dismissal of the remaining sixty-seven claims was not a "judicial determination on the merits," which the court found was a prerequisite to a defendant's award of fees.[112]

Before the Supreme Court, however, the Court, relying largely on its notion of "common sense," reversed the Eighth Circuit.[113] The Court held that a Title VII defendant "need not obtain a favorable judgment on the merits in order to be a 'prevailing party.'"[114] The Court went on to explain that although a defendant "might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations,"[115] the

107. 136 S. Ct. 1642 (2016).

108. *Id.* at 1647-48.

109. *Id.* at 1648-49.

110. *Id.*

111. *See* Marquart v. Lodge 837, Machinists & Aerospace Workers, 26 F.3d 842 (8th Cir. 1994).

112. *CRST*, 136 S. Ct. at 1650.

113. *Id.* at 1651.

114. *Id.*

115. *Id.*

defendant was considered a prevailing party under the statute "whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision."[116] The defendant now has four million reasons to celebrate its procedural, non-merits victory!

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

Two noteworthy Age Discrimination in Employment Act of 1967 (ADEA) [117] cases were decided by the Eleventh Circuit during the survey period. One decision will probably be reviewed by the Supreme Court of the United States. The other concerned an issue of potentially narrow application, the issue of tribal sovereign immunity.

A. Coverage under the Act

In *Villarreal v. R.J. Reynolds Tobacco Co.*,[118] in an en banc opinion, the court of appeals decided that job applicants may not maintain claims under the ADEA based upon a disparate impact theory of liability.[119] Circuit Judge William Pryor wrote the majority opinion. Several judges filed concurring and dissenting opinions.[120] According to Judge Pryor, "[t]he main issue presented by this appeal is whether the [ADEA] allows an unsuccessful job applicant to sue an employer for using a practice that has a disparate impact on older workers."[121] A majority of the circuit judges concluded that Section 4(a)(2) of the ADEA[122] protects an individual only if he has a "status as an employee."[123] The dissents took issue with Judge Pryor's statutory interpretation and would have allowed a more expansive reading of Section 4(a)(2), thereby permitting applicants to maintain disparate impact claims under the ADEA.[124] Judge Pryor noted that job applicants are not without recourse, notwithstanding the majority's narrow reading of Section 4(a)(2).[125] Judge Pryor maintains

116. *Id.*

117. 29 U.S.C. §§ 621-634 (2012).

118. 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 2017 U.S. LEXIS 4193 (June 26, 2017).

119. *Id.* at 961.

120. *Id.* (Jordan, J., concurring in part and dissenting in part; Rosenbaum, J., concurring in part and dissenting in part; Martin, J., dissenting in which Wilson, J. and Pryor, J. join, and in which Jordan, J. and Rosenbaum, J. join as to Part II).

121. *Id.*

122. 29 U.S.C. § 4(a)(2) (codified at 29 U.S.C. § 623(a)(2)).

123. *Villarreal*, 839 F.3d at 961.

124. *Id.* at 973.

125. *Id.* at 970.

that applicants may still bring claims of disparate treatment under Section 4(a)(1) of the ADEA,[126] notwithstanding the narrow reading.[127] Villarreal sought certiorari review from the Supreme Court of the United States.[128] On June 26, 2017, the Supreme Court denied Villarreal's petition.[129]

B. Tribal Immunity

In the other ADEA appeal reported during the survey period, *Williams v. Poarch Band of Creek Indians*,[130] a panel concluded that even though Indian tribes are not specifically included in the list of entities included in the definition of the term "employer" adopted by Congress for ADEA coverage purposes, Congress did not intend to abrogate tribal sovereign immunity when enacting the ADEA. Consequently, ADEA suits against tribes are barred.

In *Williams*, a long-term employee of the Poarch Band of Creek Indians tribe asserted that her employment had been unlawfully terminated due to her age and that she had been replaced by a younger, inexperienced individual. The Poarch Band moved to dismiss the suit, arguing that the federal courts are without subject matter jurisdiction over such claims due to the doctrine of tribal sovereign immunity.[131] The district court dismissed the action on that ground and this appeal followed.[132] The court of appeals concluded that the district court had correctly decided the question.[133]

After extensively reviewing the interesting history of the Poarch Band of Creek Indians,[134] the panel concluded that the Poarch Band had never waived its immunity and consequently retained its common law exemption from suits generally.[135] The court next concluded that Congress had not abrogated the doctrine of tribal immunity for age discrimination

126. Pub. L. No. 90-202, § 4(a)(1), 81 Stat. 602, 602 (1967) (codified at 29 U.S.C. § 623(a)(1)).

127. *Villarreal*, 839 F.3d at 970.

128. Villarreal v. R.J. Reynolds Tobacco Co., 839 F.3d 958 (11th Cir. 2016), *cert. denied*, 2017 US LEXIS 4193 (June 26, 2017).

129. 2017 US LEXIS 4193 (June 26, 2017).

130. 839 F.3d 1312 (11th Cir. 2016).

131. *Id.* at 1314.

132. *Id.*

133. *Id.*

134. *Id.* at 1315-16.

135. *Id.* at 1317-18.

claims when enacting the ADEA in 1967.[136] Aligning the Eleventh Circuit with the United States Courts of Appeal for the Second, Eighth, and Tenth Circuits,[137] the panel reasoned that the greater weight of authority supported the right of the Poarch Band to tribal sovereign immunity from claims based on the ADEA. [138]

III. AMERICANS WITH DISABILITIES ACT OF 1990

A. Qualified Individuals

Valdes v. City of Doral[139] presented an Eleventh Circuit panel with the question of whether or not a police officer who was unable to respond to emergencies due to his disability is a qualified individual with a disability. Affirming the ruling of the district court that the police officer was no longer qualified, the panel concluded that because the police officer's panic disorder prevented him from responding to emergency calls for service, he was not qualified to occupy the position of employment as a police officer.[140]

The panel observed that in order to establish a prima facie case of disability discrimination under the Americans with Disabilities Act (ADA), [141] a plaintiff must show "he had a disability, he was a qualified individual, and he was subjected to unlawful discrimination because of his disability."[142] To be "qualified" for purposes of the ADA, an individual must be able to perform the "essential functions" of his job with or without reasonable accommodation.[143] It was undisputed that the plaintiff was limited to only performing office work because of his panic disorder. The plaintiff's doctor testified that he could not drive a police car, patrol the street, make arrests, testify in court, manage a law enforcement situation, or do anything that required leaving the office.[144] Concluding that the city had made clear that the ability to work outside the office was

136. *Id.* at 1318-24.

137. Garcia v. Akwesasne Hous. Auth., 268 F.3d 76, 88 (2d Cir. 2001); EEOC v. Fond du Lac Heavy Equip. & Constr. Co., 986 F.2d 246, 250-51 (8th Cir. 1983); EEOC v. Cherokee Nation, 871 F.2d 937, 939 (10th Cir. 1989). *See also* Longo v. Seminole Indian Casino-Immokalee, 813 F.3d 1348 (11th Cir. 2016).

138. *Williams*, 839 F.3d at 1325.

139. 662 F. App'x 803 (11th Cir. 2016).

140. *Id.* at 810.

141. 42 U.S.C. §§ 12101-12213 (2012).

142. *Valdes*, 662 F. App'x at 808.

143. *Id.*

144. *Id.* at 808-09.

essential to the lieutenant job the plaintiff occupied even though he might not be frequently called upon to demonstrate that ability:

> In that sense, a lieutenant is like a lifeguard, who must have the ability to rescue a swimmer in distress although he might not spend much time actually engaged in that essential activity. Given the substantial evidence favoring the City, there is no basis for a reasonable jury to [conclude] that Plaintiff could perform the essential function of working outside the office.[145]

Consequently, the panel affirmed the district court's grant of summary judgment in favor of the City of Doral.[146]

B. Reasonable Accommodation

Two published decisions during the survey period should help practitioners define the scope of an employer's obligation to accommodate individuals with disabilities. Accommodation cases are frequently litigated.

First, in *Frazier-White v. Gee*,[147] the plaintiff appealed a district court's order granting summary judgment to the defendant. In the run-up to the litigation, after suffering a work-related injury, the plaintiff sought an indefinite light duty assignment as an accommodation. Her employer determined that her request was unreasonable and eventually discharged her from employment after she had exhausted all available leaves. In the suit that ensued, the district court granted summary judgment to the employer, concluding that indefinite light duty status was not a reasonable accommodation request under the ADA.[148] The panel unanimously affirmed.[149]

In *EEOC v. St. Joseph's Hospital, Inc.*,[150] the panel concluded that the district court had correctly ruled on the hospital's motion for summary judgment, when it determined that the hospital did not have the obligation to unilaterally reassign the plaintiff to a vacant position without requiring that she compete with other applicants for the position.[151]

145. *Id.* at 810.
146. *Id.* at 813.
147. 818 F.3d 1249 (11th Cir. 2016).
148. *Id.* at 1255-56.
149. *Id.* at 1258.
150. 842 F.3d 1333 (11th Cir. 2016).
151. *Id.* at 1345-47.

IV. THE CIVIL RIGHTS ACT OF 1866

A. Section 1981

In *Moore v. Grady Memorial Hospital Corp.*,[152] the court concluded a hospital's suspension of the surgical privileges of a medical school assistant professor stated a cognizable Section 1981 of the Civil Rights Act of 1866[153] claim for interference with his existing contract rights with the medical school. The African-American medical doctor and medical school assistant professor appealed the dismissal of his § 1981 claims of race discrimination and retaliation against the hospital and certain medical doctors and staff members at the hospital.[154] The plaintiff had argued below that because his hospital privileges had been suspended, he lost his job as an assistant professor at the medical school.

The plaintiff "is a licensed, board-certified general surgeon and a specialist in laparoscopic and advanced robotic surgery."[155] As a condition of his employment on the faculty of the Morehouse School of Medicine, the plaintiff was required to obtain clinical privileges at Grady Memorial Hospital in Atlanta. Grady Memorial initially granted the plaintiff privileges, and he subsequently entered into an employment agreement with Morehouse as an assistant professor in the department of surgery.[156] Sometime later, concerns arose at Grady Memorial concerning certain surgical procedures that the plaintiff performed. As a result, his privileges at Grady were subsequently suspended, and acrimony ensued.[157] Ultimately, the plaintiff sued Grady Memorial and several of the physicians at Grady Memorial alleging various causes of action, including the § 1981 claims at issue on appeal.[158] The district court granted a motion to dismiss the federal claims and the doctor subsequently appealed.[159]

The principal § 1981 issue presented on appeal was whether the doctor could sufficiently identify and plead the existence of contractual relationship under which he had rights that were impaired as a result of the actions of the defendants.[160] Deciding that the district court had incorrectly relied on an earlier unpublished opinion to conclude that the doctor

152. 834 F.3d 1168 (11th Cir. 2016).
153. 42 U.S.C. § 1981 (2012).
154. *Moore*, 834 F.3d at 1169, 1171-72.
155. *Id.* at 1169.
156. *Id.*
157. *Id.* at 1170.
158. *Id.* at 1171.
159. *Id.*
160. *Id.* at 1172.

did not, the panel reversed.[161] The court of appeals concluded that a claim based on the suspension of medical privileges was a discriminatory act that interfered with the doctor's contract with the Morehouse School of Medicine. Consequently, at least for preliminary pleading purposes, an actionable cause of action had been stated. That portion of the decision of the district court was reversed and the cause was remanded for further proceedings.[162]

B. Section 1983

Several potentially significant Section 1983[163] decisions were rendered during the survey period, including one decided by the Supreme Court of the United States.

1. Political Affiliation.

Heffernan v. City of Paterson[164] provided the Supreme Court of the United States with the opportunity to clarify what impact, if any, critical factual mistakes made by defendants may have on § 1983 causes of action. Heffernan was a police officer with the City of Paterson, New Jersey.[165] City officials mistakenly believed that Heffernan had been actively involved in a mayoral campaign. In fact, he was not involved in any capacity in the campaign. Fellow police officers had observed Heffernan holding a campaign sign while speaking with individuals who were involved in the campaign. From this observation, his supervisors incorrectly concluded that he was involved and demoted him because of his "overt involvement" in the campaign.[166] The United States Court of Appeals for the Third Circuit concluded that Heffernan's attempted § 1983 claim was only actionable if his employer's actions had been prompted by his actual, rather than his perceived, exercise of free speech rights.[167] The Supreme Court reversed and remanded.[168] In a seven to two decision, the majority of the court concluded that employees are entitled to challenge unlawful First Amendment actions even if the government makes a factual mistake about the employee's behavior.[169]

161. *Id.* at 1173 (referring to Williams v. Columbus Reg'l Healthcare Sys., Inc., 499 F. App'x 928 (11th Cir. 2012)).

162. *Id.* at 1176.

163. 42 U.S.C. § 1983 (2012).

164. 136 S. Ct. 1412 (2016).

165. *Id.* at 1416.

166. *Id.*

167. *Id.*

168. *Id.* at 1419.

169. *Id.*

2. Alabama State Bar is Arm of the State.

In *Nicholas v. Alabama State Bar,*[170] the Eleventh Circuit concluded that the Alabama State Bar is an arm of the State of Alabama and therefore is entitled to Eleventh Amendment immunity from civil rights suits for the alleged deprivation of due process rights by members of the bar association.[171]

3. Sheriff as Chief Corrections Officer is not Arm of the State of Florida.

In *Stanley v. Broward County Sheriff,*[172] a former deputy sheriff brought an action against a Florida sheriff in his capacity as the chief correctional officer for Broward County after he was not rehired as a deputy sheriff because of his support of a political adversary of the sheriff. As a matter of first impression, the Eleventh Circuit concluded that Florida sheriffs do not act as an arm of the State of Florida when they serve in the capacity of chief correctional officer for a Florida county.[173]

4. Public Speech.

Continuing the evolution of public speech law following the decision of the Supreme Court of the United States in *Garcetti v. Cebollos,*[174] a panel of the court of appeals determined in *Carollo v. Boria,*[175] that a discharged city manager was speaking as a citizen and not pursuant to his job duties when he made reports to law enforcement and other agencies about alleged campaign law violations by city officials and therefore was entitled to First Amendment protection. The decision is worth reading because the panel takes the opportunity to "clarify the First Amendment rights of public employees."[176] What follows is a succinct discussion of the current state of First Amendment law in the Eleventh Circuit.[177]

5. "Be On the Look Out" For First Amendment Rights.

Bailey v. Wheeler[178] was the appeal of a police officer who had lost his job after reporting racial profiling and other potential violations of law by his fellow officers. In an ill-advised action they probably thought was

170. 815 F.3d 726 (11th Cir. 2016).
171. *Id.* at 733.
172. 843 F.3d 920 (11th Cir. 2016).
173. *Id.* at 921-22.
174. 547 U.S. 410 (2006).
175. 833 F.3d 1322 (11th Cir. 2016).
176. *Id.* at 1328.
177. *Id.* at 1328-32.
178. 843 F.3d 473 (11th Cir. 2016).

funny at the time, certain officers with the Douglas County, Georgia Sheriff's Department issued a "BOLO Advisory" to all law enforcement in the County following Bailey's firing, describing plaintiff as a "loose cannon", and an individual who constituted a danger to Douglas County law enforcement officers.[179] Bailey had filed a written complaint with his chief of police, reporting that other Douglasville officers and Douglas County Sheriff's deputies had been racially profiling minority citizens and committing other constitutional violations.[180] Several months later, after Bailey found himself without a job, he claimed in his suit that his firing was the result of his written complaint. He appealed his termination, again reporting constitutional violations during his unsuccessful administrative appeal.[181] The day following his appeal hearing, he alleged that a high-ranking officer with the Douglas County Sheriff's Office issued a countywide alert, known in law enforcement circles as a "BOLO," to all law enforcement officers.[182] The alert included Bailey's picture and warned law enforcement officers that he was a "'loose cannon'. . .[who was] a danger to any [law-enforcement officer] in Douglas County," and directed that all officers "act accordingly."[183] When he learned of the "BOLO," Bailey sued, alleging that its issuance violated his First Amendment rights. The defendants moved to dismiss the claim alleging they were entitled to qualified immunity from liability for their actions. The district court denied the motion and the defendants then appealed.[184]

A panel affirmed the district court's ruling, determining that Bailey had sufficiently alleged a First Amendment violation under those facts.[185] The panel concluded, that for qualified immunity purposes, Bailey's constitutional right to be free from retaliation that imperiled his life was clearly established.[186]

179. *Id.* at 478.
180. *Id.* at 477.
181. *Id.* at 478.
182. *Id.*
183. *Id.* at 479.
184. *Id.*
185. *Id.* at 483.
186. *Id.* at 483-85.