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Employment Discrimination

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Clearly the most significant case handed down during the 2015 survey period[1] was the March 2015 decision by the United States Supreme Court in *Young v. United Parcel Service, Inc.*[2] In *Young*, the Supreme Court decided that the Pregnancy Discrimination Act (PDA)[3] does, in fact, require employers to offer workplace accommodations to pregnant employees in order to remain on the job.[4] This case has almost certainly required a host of employers to review and probably revise the leave policies they had in place prior to the decision being handed down. Otherwise, the 2015 survey period was a busy, but unspectacular, year. Of course, in what has become an annual tradition, there was the usual large number of unpublished (and often per curiam) decisions handed down by the United States Court of Appeals for the Eleventh Circuit, most of which were decisions affirming summary judgment in favor of the employer.

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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 2015. 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*, 66 MERCER L. REV. 927 (2015).

2. 135 S. Ct. 1338 (2015).

3. 42 U.S.C. § 2000e(k) (2012).

4. *Young*, 135 S. Ct. at 1344.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Disparate Treatment

In *Flowers v. Troup County*,[5] the Eleventh Circuit was confronted with the issue of whether the plaintiff had presented sufficient evidence of pretext to allow his race discrimination claim to go to a jury.[6] The plaintiff worked as a high school football coach for Troup High School in Troup County, Georgia. When he was hired in 2010, the plaintiff had been the first black head football coach in Troup County since the school district was desegregated in 1973. In the spring of 2011, the plaintiff's coaching career was placed in jeopardy in the face of certain alleged recruiting violations involving some of his players. The district school board hired a private investigator to look into the recruiting issues. The private investigator found that the mother of one of Flowers' star football players had been evicted from her Troup County apartment (thus making the player ineligible because he could not meet the residency requirement). The investigator also found that the plaintiff had intervened by personally making rental payments to secure the apartment. Thereafter, the school superintendent fired the plaintiff based upon the investigative report.[7] The plaintiff filed an action under Title VII of the Civil Rights Act of 1964[8] alleging race discrimination. The district court granted summary judgment in favor of the school district.[9]

On appeal, the plaintiff made three arguments that he had created a jury question on the issue of pretext.[10] The Eleventh Circuit rejected all three.[11] First, the plaintiff argued that there was insufficient evidence to find he had committed the recruiting violations.[12] The court of appeals determined that it was "irrelevant whether [the plaintiff] had actually committed a recruiting violation."[13] Rather, the superintendent fired the plaintiff based on "an honest belief" the plaintiff had committed recruiting violations, and that was enough to show the

5. 803 F.3d 1327 (11th Cir. 2015).
6. *Id.* at 1333.
7. *Id.* at 1332-33.
8. 42 U.S.C. §§ 2000e to 2000e-17 (2012).
9. *Flowers*, 803 F.3d at 1333.
10. *Id.* at 1333-34.
11. *Id.* at 1334.
12. *Id.* at 1333-34.
13. *Id.* at 1334.

superintendent did not fire the plaintiff on a pretext.[14] Second, the Eleventh Circuit rejected the comparators the plaintiff put forth, holding no reasonable person would have found them sufficiently "similarly situated."[15] Finally, the Eleventh Circuit held the plaintiff failed to present "a convincing mosaic of circumstantial evidence" showing he had been the victim of race discrimination.[16] Rejecting all three arguments, the Eleventh Circuit affirmed the district court.[17]

B. Retaliation

The plaintiff in *Perry v. Rogers*,[18] was one of the few plaintiffs during this survey period who succeeded in getting an employer's summary judgment reversed on appeal.[19] The plaintiff was one of three plaintiffs who brought claims of race discrimination and retaliation against their employer, the Alabama Alcoholic Beverage Control (ABC) Board. The plaintiff worked as an Administrative Support Assistant II, a role in which she was responsible for answering the telephone and filing and retrieving documents. The plaintiff's supervisor subjected her to two disciplinary actions relevant to her claim of retaliation. The first was a written reprimand for tardiness and insubordination, and the second was a three-day suspension for violating leave policies and procedures. Before the plaintiff left for her suspension, her supervisor instructed her to create a staffing schedule to cover the switch board while she was gone. The plaintiff forgot to do so. When she returned from her suspension, she was confronted by her supervisor, who chided her for insubordination. Following this encounter, the plaintiff left the building. When she did not return to work after a few days, the defendant sent her a letter advising that her actions constituted job abandonment and voluntary resignation.[20]

In the plaintiff's subsequent lawsuit under Title VII, the district court granted summary judgment for the defendant on all counts.[21] On appeal, the Eleventh Circuit concluded that the defendant's "close monitoring and disciplinary decisions" within a month after the plaintiff filed her Title VII lawsuit were sufficient to create a jury question on the

14. *Id.*
15. *Id.*
16. *Id.* at 1335.
17. *Id.* at 1341.
18. 627 F. App'x 823 (11th Cir. 2015).
19. *Id.* at 825.
20. *Id.* at 824, 825-27.
21. *Id.* at 842.

issue of retaliation.[22] The court of appeals was also influenced by evidence that another manager had commented to the plaintiff's supervisor after the plaintiff walked off the job, "Man, you set her up," while making a "thumbs-up gesture" toward the supervisor.[23] This evidence, coupled with the close temporal proximity between the filing of the plaintiff's lawsuit and the subsequent disciplinary actions, was sufficient to create a disputed issue of material fact.[24] Accordingly, the court of appeals reversed and remanded with respect to the plaintiff's retaliation claim.[25]

C. *Pregnancy Discrimination Act*

Easily the most widely discussed case during the survey period was the Supreme Court opinion *Young v. United Parcel Service, Inc.*[26] The issue before the Court was how the PDA applies "in the context of an employer's policy that accommodates many, but not all, workers with nonpregnancy-related disabilities."[27] The plaintiff was employed as a part-time driver for the United Parcel Service, Inc. (UPS). Her duties included picking-up and delivering packages that had arrived by air carrier the previous evening. The plaintiff became pregnant. Her doctor advised her that she could not lift more than 20 pounds during the first 20 weeks of her pregnancy and could not lift more than 10 pounds thereafter. However, the requirements of the plaintiff's job as a part-time driver required her to lift parcels weighing up to 70 pounds (and up to 150 pounds with assistance). Accordingly, UPS advised the plaintiff that she could not work while under her lifting restriction.[28] The plaintiff then brought suit pursuant to Title VII, alleging UPS violated Title VII and the PDA by refusing to accommodate her "pregnancy-related lifting restriction."[29] UPS had a policy that accommodated workers who had been injured on the job, had a disability under the Americans with Disabilities Act (ADA),[30] or had lost their Department of Transportation (DOT) certification.[31] The district court

22. *Id.* at 833-34.
23. *Id.*
24. *Id.*
25. *Id.* at 834.
26. 135 S. Ct. 1338 (2015).
27. *Id.* at 1343-44.
28. *Id.* at 1344.
29. *Id.*
30. 42 U.S.C. §§ 12101-12213 (2012).
31. *Young*, 135 S. Ct. at 1347.

granted summary judgment in favor of UPS, and the United States Court of Appeals for the Fourth Circuit affirmed.[32]

The Supreme Court rejected the broad interpretation of the PDA advocated by the plaintiff and the Equal Employment Opportunity Commission (EEOC), as well as the narrow interpretation advocated by the defendant, and adopted more of a middle ground approach.[33] The Supreme Court held pregnant plaintiffs could establish disparate treatment under the PDA by following *McDonnell Douglas v. Green*[34] and the decision's long-established circumstantial evidence model of proof.[35] Thus, according to the Supreme Court, a plaintiff could establish a prima facie case under the PDA by showing "that she belongs to the protected class, that she sought accommodation, that the employer did not accommodate her, and that the employer did accommodate others 'similar in their ability or inability to work.'"[36] In response to a prima facie showing, the employer could rebut this showing by articulating "legitimate, nondiscriminatory" reasons for denying the accommodation.[37] Finally, the plaintiff would be given the opportunity to show the employer's articulated reasons were a pretext for a discriminatory motive.[38] Applying this model of proof, the Supreme Court determined that the Fourth Circuit decision should be vacated since there was a dispute as to whether the defendant had provided more favorable treatment to "at least some employees whose situation cannot reasonably be distinguished from [the plaintiff's]."[39] The Court did not determine whether pretext had in fact been established; rather, the Court left that decision for the Fourth Circuit on remand.[40] Regardless of the outcome of this specific case, however, the case clearly requires a host of employers to reexamine and revise their existing maternity leave policies.

D. Gender-based Salary Discrimination

The issue of gender-based salary discrimination was before the Eleventh Circuit in *Blackman v. Florida Department of Business & Professional Regulation*.[41] The plaintiff had begun her career as a

32. *Id.* at 1347-48.
33. *Id.* at 1349.
34. 411 U.S. 792 (1973).
35. *Young*, 135 S. Ct. at 1353.
36. *Id.* at 1354.
37. *Id.*
38. *Id.*
39. *Id.* at 1354, 1355.
40. *Id.* at 1356.
41. 599 F. App'x 907 (11th Cir. 2015).

typist for the Florida Department of Business and Professional Regulation (DBPR). Following a 20-year career, the plaintiff was promoted to the position of bureau chief of operations in the Division of Pari-Mutuel Wagering in 2006. At that time, she received a 14% raise in salary, earning $57,700. Thereafter, she received a legislatively-mandated raise of 3%, which brought her salary to approximately $59,500. The following year, the state legislature stopped providing its mandated annual raises. The plaintiff's salary then remained static for 5 years, until January 2012, when she received a 3.4% discretionary increase to $61,500.[42]

Upon learning that she made less than two other male division bureau chiefs and one of her male subordinates, the plaintiff filed suit pursuant to both Title VII and the Equal Pay Act of 1963,[43] alleging gender-based salary discrimination. The district court granted summary judgment for the DBPR, finding that the plaintiff had not established a prima facie case.[44] On appeal, the Eleventh Circuit agreed.[45] Employing a "burden-shifting framework" similar to that utilized in Title VII actions, the court of appeals determined that the plaintiff introduced virtually no evidence on the issue of the "skills and qualifications actually needed to perform [the comparator's] job."[46] The court emphasized the plaintiff's need to present evidence of "actual job content," and "not just job titles and descriptions," to show the jobs were "substantially similar."[47]

E. Employer Defenses

1. EEOC Obligation to Conciliate. In the administrative framework that must be exhausted prior to filing suit under Title VII, the first step in the administrative process is to file a charge of discrimination with the EEOC.[48] The EEOC then investigates the allegations set forth in the charge.[49] In the clear majority of instances, the EEOC finds no "reasonable cause" to believe the statute has been violated, and the agency issues a dismissal and notice of rights, which gives the charging party the right to bring its own lawsuit within ninety

42. *Id.* at 908.
43. 29 U.S.C. § 206 (2012).
44. *Blackman*, 599 F. App'x at 909.
45. *Id.*
46. *Id.* at 909, 910.
47. *Id.* at 912 (quoting Arrington v. Cobb Cnty., 139 F.3d 865, 876 (11th Cir. 1998)).
48. 42 U.S.C. § 2000e-5(b).
49. *Id.*

days of the notice (if the party so chooses).[50] However, in those instances where the EEOC finds "reasonable cause," the statute mandates that the EEOC must first try to eliminate the alleged discrimination by "informal methods of conference, conciliation, and persuasion" before the agency can file suit on the charging party's behalf.[51]

The extent to which the EEOC's informal conciliation process may be subject to judicial review was the issue before the Supreme Court in *Mach Mining, LLC v. Equal Employment Opportunity Commission*.[52] The employee in question filed a charge of discrimination with the EEOC, alleging the defendant refused to hire her as a coal miner because of her gender. Following its investigation, the EEOC determined there was "reasonable cause" to believe the defendant discriminated against the charging party. After conciliation efforts were exhausted, the EEOC filed suit pursuant to Title VII on the charging party's behalf. In its answer to the complaint, the defendant asserted the defense that the EEOC had not met its obligation of conciliating in good faith prior to filing suit.[53]

The EEOC moved for summary judgment, arguing its conciliation efforts were not subject to judicial review. The district court denied the EEOC's motion but certified the issue for immediate appeal. On appeal, the United States Court of Appeals for the Seventh Circuit reversed, holding the EEOC's conciliation efforts were not subject to judicial review.[54] On appeal to the Supreme Court, the High Court reversed the Seventh Circuit.[55] The Supreme Court held the EEOC's conciliation process was subject to judicial review, but the "scope of that review is narrow."[56] The Court further held the EEOC retained "extensive discretion to determine the kind and amount of communication with an employer appropriate in any given case."[57] In clarifying the scope of the EEOC's statutory requirement, the Court determined the EEOC "must inform the employer about the specific allegation" (which the Court also noted that the EEOC typically did in its reasonable cause determination) and "engage the employer in some form of discussion (whether written or oral), so as to give the employer an opportunity to

50. *Id.*
51. *Id.*
52. 135 S. Ct. 1645 (2015).
53. *Id.* at 1650.
54. *Id.*
55. *Id.* at 1656.
56. *Id.* at 1649.
57. *Id.*

remedy the allegedly discriminatory practice."[58] Deciding to give the EEOC a helpful hint as to how to comply with its burden, the Court went on to state that a sworn "affidavit," verifying that the above obligations have been met, "will usually suffice to show that it has met the conciliation requirement."[59] In the authors' view, the *Mach Mining* decision, although recognizing that employers may assert a "fail[ing] to conciliate in good faith" defense, has so gutted the defense and narrowed the scope of judicial review that the defense will be of little use in future litigation.[60]

2. Judicial Estoppel. It has become a routine area of inquiry in discovery by employers defending employment discrimination actions to inquire whether the plaintiff has filed a petition for bankruptcy. Plaintiffs who file a petition for bankruptcy, but fail to disclose their employment discrimination action in the schedule of assets required for the bankruptcy proceedings, may be subject to judicial estoppel in their employment claim.[61] This was precisely the case in *D'Antingnac v. Deere & Co.*[62] The plaintiff filed a Chapter 13 petition for bankruptcy in 2005. Three years later in August 2008, while her bankruptcy case was pending, the plaintiff filed a charge of race discrimination against the defendant with the EEOC. However, the plaintiff never disclosed her employment discrimination claim to the bankruptcy court before the bankruptcy closed in 2009. After the EEOC issued a Dismissal and Notice of Rights in response to plaintiff's charge in 2010, the plaintiff filed a race discrimination claim pursuant to Title VII. The district court granted summary judgment for the defendant, finding the plaintiff was judicially estopped from bringing her employment claim.[63] On appeal, the Eleventh Circuit affirmed, relying on its prior decision in *Burnes v. Pemco Arrowplex, Inc.*[64] (and other Eleventh Circuit decisions[65]), thus reaffirming the efficacy of the judicial estoppel defense in

58. *Id.* at 1655-56.

59. *Id.* at 1656.

60. EEOC v. Mach Mining, LLC, No. 11-cv-00879, 2016 U.S. Dist. LEXIS 5918, at *2 (S.D. Ill. Jan. 19, 2015). Not surprisingly, on remand from the Supreme Court, the district court determined that the EEOC had met its minimal burden by introducing a cursory affidavit that closely tracked the Supreme Court's suggested language. *See id.* at *1-4.

61. *See, e.g.*, D'Antignac v. Deere & Co, 604 F. App'x 875 (11th Cir. 2015).

62. 604 F. App'x 875 (11th Cir. 2015).

63. *Id.* at 876.

64. 291 F.3d 1282 (11th Cir. 2002).

65. *See* Robinson v. Tyson Foods, Inc., 595 F.3d 1269 (11th Cir. 2010); De Leon v. Comcar Indus., Inc., 321 F.3d 1289 (11th Cir. 2003).

appropriate cases.[66] The fact that the plaintiff had not filed her charge of discrimination until three years after filing her bankruptcy petition was of no help to the plaintiff; the Eleventh Circuit held the "Chapter 13 debtor has a continuing statutory duty to amend her schedule of assets to reflect a claim she raised . . . before the bankruptcy was discharged."[67]

3. Issue Preclusion. Employers are always prudent to be familiar with the relevant state law of issue preclusion when determining whether, and how far, to contest a former employee's claim for unemployment compensation. Sometimes the result can have an unintended consequence in subsequent employment litigation. Fortunately for the employer in *Green v. Mobis Alabama, LLC*,[68] Alabama law on issue preclusion did not prevent it from asserting its key defense in a wrongful termination lawsuit.[69] The plaintiff, who worked in the defendant's paint department, filed an internal complaint of sexual harassment, alleging her supervisor sent her inappropriate text messages and made inappropriate comments. Following an investigation, the supervisor was terminated. Several months later, the employer terminated the plaintiff for falsifying doctor's excuses in connection with her requests for leave. Following her termination, the plaintiff filed a claim for unemployment benefits. The plaintiff appealed an initial determination denying the benefits to the Alabama Department of Industrial Relations (ADIR), which ultimately determined that the employer did not terminate the plaintiff for misconduct connected with her work. In the plaintiff's subsequent Title VII action for retaliation (along with several other claims), the district court granted summary judgment for the defendant. On appeal before the Eleventh Circuit, the plaintiff argued the defendant was precluded from re-litigating the reasons for the plaintiff's discharge, relying upon the successful administrative decision on appeal by the ADIR.[70] However, the Eleventh Circuit rejected the plaintiff's argument.[71] The court of appeals held the administrative determination of no misconduct did not mean there was an identity of issues in the employment litigation.[72] The court noted that employers have a reasonable ground for terminating an employee that falls below the

66. *D'Antignac*, 604 F. App'x at 879.
67. *Id.* at 878.
68. 613 F. App'x 788 (11th Cir. 2015).
69. *Id.* at 790.
70. *Id.* at 791, 792-93, 795.
71. *Id.* at 796-97.
72. *Id.* at 796.

necessary threshold to constitute misconduct for unemployment compensation purposes.[73]

Accordingly, the court held the defendant's reason for terminating the plaintiff (a good faith belief that she had falsified her doctor's note) had not been litigated in the administrative proceeding.[74] Hence, the doctrine of issue preclusion did not prevent the employer from asserting its defense.

F. Remedies

1. Arbitration. The Supreme Court decision, *DIRECTV, Inc. v. Imburgia*,[75] although not an employment case, is briefly mentioned here because of its potential impact on employment arbitrations, which have become more and more prevalent in recent years. The plaintiffs, DIRECTV customers, brought suit against DIRECTV seeking damages for certain early termination fees that the defendant had imposed. DIRECTV, which had a service agreement with its customers to resolve all disputes by binding arbitration, moved the trial court to send the case to arbitration. Both the trial court and the California Court of Appeals refused to send the case to arbitration, finding the arbitration provision to be unenforceable under California law because it included a waiver of class arbitration.[76]

When the case made its way to the Supreme Court, however, the High Court determined the appellate court's interpretation of California law was irrelevant since the Federal Arbitration Act[77] preempted the waiver issue.[78] Holding that federal law requires the California Court of Appeals to enforce the arbitration agreement, the Supreme Court reversed the California court.[79] This case is yet another example of the Supreme Court's broad endorsement of the federal policy favoring arbitration as a means of resolving disputes.

2. Attorney Fees. It is rarely cost effective to litigate issues involving an award of attorney fees. However, two such cases made it to the Eleventh Circuit during this survey period and are worthy of brief mention. In the first case, *Turner v. Inzer*,[80] the defendant obtained an

73. *Id.*
74. *Id.*
75. 136 S. Ct. 463 (2015).
76. *Id.* at 466-67.
77. 9 U.S.C. §§ 1-307 (2012).
78. *DIRECTV*, 136 S. Ct. at 471.
79. *Id.*
80. 597 F. App'x 621 (11th Cir. 2015).

award of attorney fees.[81] The plaintiff had sued the Clerk of Court for Leon County, Florida, asserting a Title VII race discrimination and retaliation claim and a state law Whistle Blower Act[82] claim. The district court granted summary judgment for the defendant on both claims. However, with respect to the defendant's motion for an award of attorney fees, the district court found that the Title VII claim was frivolous and awarded the defendant attorney fees in the amount of $29,934.50, but it denied the defendant's motion for fees with respect to the whistle blower claim, finding that the claim had not been brought in bad faith.[83] On appeal, although the court of appeals agreed "considerable overlap" existed between the Title VII claim and the whistle blower claim, the court held the district court properly followed the Supreme Court decision *Fox v. Vice*[84] in allocating between the two claims; hence, it determined the district court had not abused its discretion.[85]

In the second case, *Maner v. Linkan LLC*,[86] the plaintiff won an award of attorney fees but not nearly as much as she sought.[87] The plaintiff brought a pregnancy discrimination and retaliation claim under Title VII against her former employer. The case went to trial, and the jury ruled in favor of the plaintiff. However, in the post-trial proceeding addressing the issue of attorney fees and costs, the plaintiff requested an award of $92,449.88, but the district court awarded only $38,558.-31.[88] On appeal, the Eleventh Circuit affirmed the district court's reductions.[89] Initially, the court agreed that the district court properly excluded the time the attorneys spent litigating the claim for state unemployment benefits from the award.[90] Similarly, the court of appeals held that the attorney travel time to and from the Anniston, Alabama courthouse during the three-day trial was also properly excluded.[91] Finally, the court of appeals concluded the district court's

81. *Id.* at 621.
82. FLA. STAT. ANN. §§ 112.3187-112.31895 (West 2013) (public employees and government contractors); FLA. STAT. ANN. §§ 448.102-448.105 (West 2014) (private employees).
83. *Turner*, 597 F. App'x at 621-22.
84. 563 U.S. 826 (2011).
85. *Turner*, 597 F. App'x at 622.
86. 602 F. App'x 489 (11th Cir. 2015).
87. *Id.* at 491.
88. *Id.* at 490-91.
89. *Id.* at 491.
90. *Id.*
91. *Id.* at 492.

finding of a lower appropriate hourly rate was reasonable based upon the local market, and hence not clearly erroneous.[92]

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

Five potentially significant Age Discrimination in Employment Act (ADEA)[93] cases were decided by panels of the court of appeals during this survey period. Each noteworthy decision will be briefly discussed.

A. Interference With Third Party Relations

In *Ashkenazi v. South Broward Hospital District*,[94] the Eleventh Circuit panel declined to rule that a claim for interference with employment opportunities with third parties can be stated under the ADEA.[95] The plaintiff, a medical doctor, challenged the defendant hospital district's revocation of his surgical privileges. The district court granted summary judgment in favor of the hospital district, concluding the doctor was an independent contractor and not an employee.[96] More significantly, the district court also ruled the doctor could not proceed with a third party interference claim because "a patient is not a doctor's employer."[97] The appellate panel agreed with the district court's conclusion in this regard but on different grounds.[98]

On appeal, the plaintiff asserted for the first time that the hospital district interfered with an employment relationship he had with another doctor, rather than with his patients as he had argued in the district court.[99] Finding the plaintiff had not previously raised this argument in the district court, the panel first determined this issue was not properly before it.[100] Assuming then, however, the plaintiff properly preserved the issue, the panel went on to decide the doctor's claim still failed because he had no existing contractual relationship with the third party doctor and could not offer any evidence beyond mere speculation concerning his possible entry into such a relationship.[101]

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92. *Id.* at 494-95.
93. 29 U.S.C. §§ 621-34 (2012).
94. 607 F. App'x 958 (11th Cir. 2015).
95. *Id.* at 966-67.
96. *Id.* at 960.
97. *Id.* at 966.
98. *Id.*
99. *Id.* at 967.
100. *Id.*
101. *Id.*

The panel concluded the plaintiff failed to show the hospital district interfered with an actual existing contractual relationship.[102] Since this was so, the plaintiff failed to present an actionable claim under the ADEA.[103] Continuing to maintain the distinction that exists between Title VII and the ADEA in interference with third party relations, the panel concluded in the ADEA context—and under the facts of this particular case—no cause exists under the ADEA when the plaintiff fails to show the defendant interfered with an actual, specific employment relationship.[104]

B. Cat's Paw

Another appeal decided during this survey period where the court of appeals declined to engraft jurisprudence from another anti-discrimination law into the ADEA was *Godwin v. WellStar Health System, Inc.*[105] There, the court of appeals was asked to consider the possible application of the cat's paw doctrine in ADEA cases.[106] The appeal provided the court of appeals with an opportunity to consider the correct application of a Title VII Supreme Court decision, *Staub v. Proctor Hospital*,[107] which was brought under the Uniform Services Employment in Reemployment Rights Act of 1994 (USERRA)[108] in 2011.[109] In *Staub*, the Supreme Court held the following: "[I]f a supervisor performs an act motivated by [a prohibited] animus that is *intended* by the supervisor to cause an adverse employment action, and if that act is a proximate cause of the ultimate employment action, then the employer is liable under USERRA."[110]

Rejecting the offer, the court of appeals in *Godwin* affirmed its 2013 decision in *Sims v. MVM, Inc.*,[111] that the "motivating factor" standard

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102. *Id.*

103. *Id.*

104. *Id.* Under Title VII, such claims have long been recognized as actionable. *See* Pardazi v. Cullman Med. Ctr., 838 F.2d 1155, 1156 (11th Cir. 1988).

105. 615 F. App'x 518 (11th Cir. 2015).

106. *Id.* at 526.

107. 562 U.S. 411 (2011). In *Staub*, the Court held an employer may be liable for a subordinate supervisor's bias if the plaintiff can prove the biased supervisor intended to cause a neutral decision maker to take an adverse action against the plaintiff and the supervisor's action proximately caused the ultimate adverse action. *Id.* at 422.

108. 38 U.S.C. §§ 4301-4334 (2012).

109. *Godwin*, 615 F. App'x at 528.

110. 562 U.S. at 422 (emphasis in original).

111. 704 F.3d 1327 (11th Cir. 2013). In *Sims*, the court held that in a cat's paw case an ADEA plaintiff must also prove the subordinate supervisor's "but-for" causation or "determinative influence" over the ultimate adverse action, not merely proximate causation. *Id.* at 1336.

set forth in *Staub* does not apply in cases alleging age discrimination under the ADEA.[112] Explaining that the causation standards under USERRA and the ADEA are significantly different, the court of appeals further observed that an ADEA plaintiff's burden is different:

> Thus, in order to succeed under a cat's paw theory of liability, an ADEA plaintiff must show more than that her adverse employment action would not have occurred in the absence of the action taken by the individual . . . with the alleged unlawful animus. Rather, the plaintiff must show that the biased individual's action had a "determinative influence" on the ultimate decision . . . or was a "determinative cause" . . . . And the but-for cause that a biased individual recommended that the plaintiff's employment be terminated does not constitute a "determinative cause" where "undisputed evidence in the records supports the employer's assertion that it fired the employee for its own unbiased reasons that were sufficient in themselves to justify termination."[113]

Notwithstanding its clarification of the proper analysis of the cat's paw theory in the ADEA context, the panel concluded the district court improperly granted summary judgment to the defendant on Godwin's ADEA claim for other reasons.[114]

C. Eleventh Amendment Immunity

Haven v. Board of Trustees of Three Rivers Regional Library System[115] was one of several cases decided during the survey period that refines immunity issues under Georgia law.[116] In 2014, the court of appeals issued its long awaited decision in *Lightfoot v. Henry County School District*,[117] which held that since the Georgia school districts are not arms of the state of Georgia, they are not entitled, under the Eleventh Amendment of the United States Constitution,[118] to immunity from suit.[119] The decision in *Lightfoot* clarified the availability of Eleventh Amendment immunity to constitutional claims against local governmental agencies in Georgia, and several cases like *Haven*, concerning different local government agencies followed in its wake.

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112. *Godwin*, F. App'x at 528; *see also Sims*, 704 F.3d at 1336.
113. *Godwin*, 615 F. App'x at 529.
114. *Id.* at 529-31.
115. 625 F. App'x 929 (11th Cir. 2015).
116. *See infra* note 137 and accompanying text.
117. 771 F.3d 764 (11th Cir. 2014).
118. U.S. CONST. amend. XI.
119. *Lightfoot*, 771 F.3d at 778. *Lightfoot* reaffirmed the continuing vitality of *Manders v. Lee*, 338 F.3d 1304, 1308 (11th Cir. 2003) (en banc).

After first concluding the arm-of-the-state argument was properly before it, the *Haven* panel declined to decide that issue.[120] Instead, the panel remanded the case to the district court to consider whether the clarified standard set forth in *Lightfoot* entitled the Three Rivers Regional Library System to Eleventh Amendment immunity in the first instance.[121]

D. Prima Facie Case

In *Liebman v. Metropolitan Life Insurance Co.*,[122] an Eleventh Circuit panel concluded an employee's length of employment in a particular position, alone, can support an inference the incumbent is qualified to perform her job for prima facie case purposes under the ADEA.[123] The panel concluded the district court improperly weighed evidence concerning the plaintiff's qualifications at the summary judgment stage.[124]

III. AMERICANS WITH DISABILITIES ACT

Somewhat surprisingly, only one noteworthy ADA decision was rendered during the survey period. In *Hill v. Clayton County School District*,[125] the court of appeals concluded, at least in Georgia, air conditioning can indeed be a reasonable accommodation.[126] The plaintiff, a public school bus driver, sought air conditioning on her school bus as an accommodation for her health condition. Her school district employer delayed responding to her accommodation request for several months. Suit eventually ensued when the plaintiff was unable to perform her job without the requested accommodation. The district court granted the employer summary judgment and the plaintiff appealed.[127]

Concluding numerous unresolved fact issues existed concerning the plaintiff's ADA claim, the appellate panel reversed the district court's grant of summary judgment on Hill's failure to accommodate claim.[128] The panel determined, among other issues, the evidence in the case was disputed as to whether a two-month delay in providing the requested air

120. *Haven*, 625 F. App'x at 934.
121. *Id.*
122. 808 F.3d 1294 (11th Cir. 2015).
123. *Id.* at 1299.
124. *Id.* at 1300.
125. 619 F. App'x 916 (11th Cir. 2015).
126. *Id.* at 921.
127. *Id.* at 917, 918, 921.
128. *Id.* at 921-22.

conditioning accommodation was reasonable under the circumstances.[129]

IV. SECTION 1983

A. *Eleventh Amendment Immunity*

Pellitteri v. Prine[130] is another of the Eleventh Amendment immunity decisions from Georgia rendered during this survey period.[131] The appellate panel in *Pellitteri* concluded Georgia sheriffs act as arms of the State when hiring and firing deputies.[132] Consequently, the Civil Rights Act of 1866 § 1983[133] provides immunity to sheriffs for claims concerning such decisions.[134]

To the same effect, in *Ballard v. Chattooga County Board of Tax Assessors*,[135] a panel concluded county tax assessment boards are also arms of the state of Georgia and, thus, entitled to Eleventh Amendment immunity.[136]

B. *Public Employee Speech*

Several interesting opinions concerning § 1983 public employee speech were decided during this survey period.[137] In *Moss v. City of Pembroke Pines*,[138] a panel affirmed the district court's grant of judgment as a matter of law in favor of the public employer.[139] The court of appeals determined the district court correctly found an assistant fire chief was speaking in furtherance of his job responsibilities and not as a citizen when he complained about his public employer's budgeting practices.[140]

Moss had been a firefighter for the City for over twenty years. Additionally, he served on the City's pension board. In 2009, the City claimed budget shortfalls and sought pension concessions from its employees, including its firefighters. Believing the City was negotiating

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129. *Id.* at 922.
130. 776 F.3d 777 (11th Cir. 2015).
131. *See infra* note 137 and accompanying text.
132. 776 F.3d at 783.
133. 42. U.S.C. § 1983 (2012).
134. *Pellitteri*, 776 F. 3d at 783.
135. 615 F. App'x 621 (11th Cir. 2015).
136. *Id.* at 628.
137. These cases indicate that courts continue to struggle with the proper application of the teachings contained in the Supreme Court decision *Garcetti v. Ceballos*, 547 U.S. 410 (2006), to real life situations.
138. 782 F.3d 613 (11th Cir. 2015).
139. *Id.* at 622.
140. *Id.* at 620-21.

in bad faith over these matters and the claimed budget crisis was not real, Moss spoke out on numerous occasions in different contexts. His position of employment was eliminated by the City the following year and he was consequently terminated from employment. Moss thereafter brought suit contending he had been fired in retaliation for his earlier speech. Following the close of evidence at trial, the City moved for judgment as a matter of law on Moss's speech claim, and the district court granted the City's motion, finding that Moss had been speaking as a private citizen.[141] On appeal, the panel agreed and affirmed.[142] The panel concluded none of the specific statements Moss claimed got him fired factored in that decision.[143]

In *Polion v. City of Greensboro*,[144] another panel determined a police officer's complaints about his superiors were not the substantial motivating factor in the termination of his employment.[145] Relying on *Moss*, and utilizing the four-part test set forth within that earlier decision, the panel concluded Polion failed to present sufficient evidence to demonstrate his complaints about his superiors "were a substantial motivating factor for his termination."[146] Rather, the panel determined the undisputed evidence showed Polion had been terminated from employment for entirely different reasons.[147]

Finally, in *Alves v. Board of Regents of the University System of Georgia*,[148] former employees were speaking as employees—rather than as citizens—when complaining about matters related to their employment.[149] A split panel affirmed the district court's grant of summary judgment for the employer.[150] Circuit Judge Beverly Martin dissented, opining the following: "I believe the First Amendment affords more protection to public employees than the Majority opinion allows."[151]

The Majority concluded five psychologists working at a university counseling and testing center were speaking as employees when they criticized their superior in written grievances.[152] The employees had

141. *Id.* at 616-17.
142. *Id.* at 622.
143. *Id.* at 620.
144. 614 F. App'x 396 (11th Cir. 2015).
145. *Id.* at 400-01.
146. *Id.* at 398-99.
147. *Id.* at 399-400.
148. 804 F.3d 1149 (11th Cir. 2015).
149. *Id.* at 1168.
150. *Id.*
151. *Id.* (Martin, J., dissenting).
152. *Id.* at 1153.

been laid off as part of a reduction-in-force after complaining.[153] They contended the workforce reduction was pretextual and that they had been terminated from employment in retaliation for complaining about the leadership and management practices of the center director.[154] The district court found that the complaints "constituted employee speech on an issue related to their professional duties, which would not be subject to First Amendment protection, and granted summary judgment . . . on that ground."[155] A majority of the panel affirmed.[156] In reaching this conclusion, the majority relied on the four-part test articulated earlier during the survey period in *Moss*.[157]

C. *Public Employee Loyalty*

In the only other noteworthy § 1983 appeal decided during this survey period, a panel concluded political loyalty is an appropriate job requirement for a Georgia deputy sheriff. In *Ezell v. Wynn*,[158] the Eleventh Circuit concluded that while the First Amendment[159] generally protects public employees from adverse employment actions based on political patronage, in certain instances, political loyalty may be an appropriate job requirement.[160] To reach that conclusion, it was necessary for the panel to wend its decisional way through a long history of Supreme Court and Eleventh Circuit public employee loyalty jurisprudence.[161] At the end of that journey, the panel held, based upon its precedent, it was "bound to conclude that political loyalty is an appropriate requirement for the position of deputy sheriff in Georgia."[162]

V. SECTION 1985

Only one noteworthy decision under § 1985 of the Civil Rights Act of 1871[163] was rendered during the survey period. In *Forsberg v. Pefanis*,[164] a panel concluded § 1985 makes punitive damages available to

153. *Id.*
154. *Id.*
155. *Id.*
156. *Id.*
157. *Id.* at 1159-68.
158. 802 F.3d 1217 (11th Cir. 2015).
159. U.S. CONST. amend. I.
160. *Ezell*, 802 F.3d at 1226.
161. *Id.* at 1223-25.
162. *Id.* at 1226.
163. 42 U.S.C. § 1985 (2012).
164. No. 10-10100, 2015 U.S. App. LEXIS 21402, at *1 (11th Cir. Dec. 11, 2015).

a prevailing plaintiff even when no compensatory damages are awarded.[165] The panel adopted the position of the United States Court of Appeals for the Seventh Circuit on this question.[166]

The case is particularly interesting because of its backstory. The plaintiff sued the defendant, alleging the defendant touched her inappropriately and made lewd remarks concerning her in the presence of others. In his attempted defense to the suit, Pefanis filed a false written statement he obtained from one of Forsberg's co-workers and subsequently ended up pleading guilty to conspiracy to obstruct justice when caught. The district court struck Pefanis' answer to the complaint as a sanction. Forsberg's claims were eventually tried to a jury, which returned a verdict against Pefanis. The jury, however, awarded Forsberg only punitive damages.[167] The appeal ensued.[168]

165. *Id.*

166. *Id.* (relying on Hennessy v. Penril Datacomm Networks, Inc., 69 F.3d 1344, 1352 (7th Cir. 1995)).

167. *Id.* at *1, *2.

168. *Id.* at *2.

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