Mercer Law Review

Volume 55
Number 4 *Eleventh Circuit Survey*

Article 8

7-2004

Employment Discrimination

Peter Reed Corbin

John E. Duvall

Employment Discrimination

by Peter Reed Corbin*
and John E. Duvall**

For the first time in the life of this Article, the 2003 survey period appears to have experienced a marked decrease in the number of decisions handed down by the United States Supreme Court and the Eleventh Circuit in the area of employment discrimination.[1] As Title VII[2] approaches its fortieth anniversary, perhaps this is an indication that there are fewer and fewer unsettled questions of law in this area. However, this decline in the number of decisions does not mean that the 2003 survey period was insignificant. The Supreme Court, in *Raytheon Co. v. Hernandez*,[3] continued its string of decisions restricting the potential scope of the ADA, and in *Desert Palace, Inc. v. Costa*,[4] the court rendered an important decision on the burden of proof in mixed-motive cases. Moreover, the Eleventh Circuit, after taking a year's vacation with respect to the difficult area of sexual harassment,

---

* Partner in the firm of Ford & Harrison LLP, Jacksonville, Florida. Mercer University, Walter F. George School of Law (J.D., cum laude, 1975); University of Virginia (B.A., 1970). Member, State Bars of Georgia and Florida.

** Partner in the firm of Ford & Harrison LLP, Jacksonville, Florida. Mercer University, Walter F. George School of Law (J.D., cum laude, 1985); Florida State University (B.S., 1973). Member, State Bar of Florida.

1. This Article covers significant cases in the area of employment discrimination law decided by the United States Supreme Court and the United States Court of Appeals for the Eleventh Circuit during 2003. Cases arising under the following federal statutes are included: Title VII of the Civil Rights Act of 1964, ("Title VII") (codified as amended at 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. IV 1998)); the Age Discrimination in Employment Act of 1967 ("ADEA") (codified as amended at 29 U.S.C. §§ 621-634 (1994 & Supp. V 1999)); the Americans with Disabilities Act of 1990 ("ADA") (codified as amended at 42 U.S.C. §§ 12101-12113 (1994 & Supp. III 1997)); and the Civil Rights Acts of 1866 and 1871 (codified as amended at 42 U.S.C. § 1981 (1994) and 42 U.S.C. § 1983 (Supp. III 1997)).

2. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1994 & Supp. IV 1998).

3. 124 S. Ct. 513 (2003).

4. 539 U.S. 90 (2003).

rendered two very significant decisions clarifiying how employers may defend such actions.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Theories of Liability and Burdens of Proof

1. Disparate Treatment. Even though the familiar circumstantial evidence model of proof adopted by the Supreme Court in *McDonnell Douglas Corp. v. Green*[5] was developed in 1973, courts still have difficulties with it. Three cases during the survey period illustrate this continuing challenge.

In two cases, the Court addressed the aspect of a plaintiff's prima facie burden requiring a showing that "similarly situated" employees not in plaintiff's protected group were involved in the same conduct as plaintiff, but were treated differently or disciplined more favorably. In the first action, *Knight v. Baptist Hospital of Miami, Inc.*,[6] plaintiff, an African-American female, was hired as a clinical nurse in the surgical services department of the defendant hospital. Defendant generally adhered to a four-step progressive program. The third step, called "decision-making leave," required that the employee take a paid leave day, during which the employee was required to draft and submit an "action plan" proposing a solution to the employee's deficiencies. If the employee submitted no "action plan," the employee had to either resign or be subject to termination. Plaintiff received a decision-making leave pursuant to this policy following an incident in which plaintiff was "rude and disrespectful" to fellow employees at the hospital.[7] After taking her decision-making leave, plaintiff submitted an action plan that was "argumentative and proposed no solution."[8] In response, defendant terminated plaintiff's employment. Thereafter, plaintiff brought an action pursuant to Title VII and the Florida Civil Rights Act,[9] alleging that she was terminated on account of her sex. The district court granted summary judgment for the hospital.[10]

On appeal, the Eleventh Circuit focused on whether plaintiff had met her prima facie burden of showing that a "similarly situated" employee

5. 411 U.S. 792 (1973).
6. 330 F.3d 1313 (11th Cir. 2003).
7. *Id.* at 1314-15.
8. *Id.*
9. FLA. STAT. ch. 760.10 (2000).
10. 330 F.2d at 1313.

not in plaintiff's protected group was treated more favorably.[11] Plaintiff pointed to evidence concerning a particular Caucasian nurse who allegedly committed similar acts of misconduct but was not terminated. However, the court of appeals rejected plaintiff's argument, finding that plaintiff's "documented performance and tardiness problems were much worse" than the Caucasian nurse's problems "in both number and nature."[12] Accordingly, the Eleventh Circuit agreed that plaintiff had not presented a prima facie case and affirmed.[13]

A similar fate awaited plaintiff in *Maynard v. Board of Regents*.[14] Plaintiff, after graduating from a medical school in Tennessee, joined the surgical registry program at the University of South Florida, which was typically a five-year program. At the end of his fourth year, plaintiff was advised that he would be required to repeat his fourth-year residency allegedly because of low scores on his ABSITE exam, an annual in-service examination required of residents throughout the country. Plaintiff appealed this decision to an internal Professional Dispute Resolution Committee ("PDRC"). However, before plaintiff's appeal was heard, a compromise was worked out under which plaintiff would contract as a fourth-year resident, while performing fifth-year work, after which his performance would be reviewed after six months. Thereafter, plaintiff received a letter identifying several problems with his performance, including: "failure to attend conferences, changing schedules without permission, untimely evaluations, and low ABSITE scores."[15] Again, plaintiff was advised that he was not eligible to be promoted to his fifth year of residency, and again, plaintiff appealed this decision to the PDRC. This time, however, plaintiff's appeal was denied, and plaintiff was formally terminated from the residency program. In plaintiff's subsequent suit pursuant to Title VII, the district court granted summary judgment for the university.[16] On appeal, plaintiff argued that he had presented a prima facie case by offering evidence of several alleged comparators who had similar negative evaluations but were not terminated from the residency program.[17] The court of appeals concluded that only one of these individuals was arguably similar to plaintiff, and even with respect to this individual, the alleged comparator's negative results "over an isolated period of time" were

11. *Id.* at 1316.
12. *Id.* at 1318.
13. *Id.* at 1319.
14. 342 F.3d 1281 (11th Cir. 2003).
15. *Id.* at 1285.
16. *Id.* at 1286.
17. *Id.* at 1288-90.

found to be of no comparison to plaintiff's "overall poor record over an extended period of time."[18] Agreeing that plaintiff had not presented a prima facie case, the Eleventh Circuit affirmed.[19]

In *Hall v. Alabama Association of School Boards,*[20] the Eleventh Circuit reaffirmed just how difficult establishing a failure-to-promote claim under Title VII is within the Eleventh Circuit. The promotion at issue involved the highly political position of the superintendent of education for Talladega County, Alabama. The County Board of Education engaged in a search process to replace the former superintendent, who had served the school system for two decades.[21] Plaintiff, an African-American, had served for a number of years as an administrator and assistant superintendent in the Talladega County school system and was one of the individuals seeking the new superintendent position.[22] Of twenty-five applicants for the position, plaintiff survived the initial cut and was one of the six finalists. The board interviewed each of the six finalists and then pared the list down to three individuals, one of whom was plaintiff. At this point, the chairman of the board engaged in heavy communication which each board member in an attempt to reach a consensus on a new superintendent.[23] In a subsequent meeting, the school board, by a vote of 4-1, selected one of the other finalists, William Gardner, a Caucasian who had served as a superintendent in other school systems outside of Alabama. When Gardner's appointment was announced, there was much racial strife and protest in the Talladega community, so much that Gardner decided to decline the appointment.[24] At this point, the school board reconvened, and this time, by a 3-2 vote, selected the other Caucasian finalist, Peggy Connell, who had held the position of administrator and principal at another school system in Alabama. Plaintiff then brought suit against the school board pursuant to Title VII, alleging that he was denied the superintendent position on account of his race.[25] The district court, in a lengthy memorandum opinion, granted summary judgment for the school board.[26]

---

18. *Id.* at 1290.
19. *Id.*
20. 326 F.3d 1157 (11th Cir. 2003).
21. *Id.* at 1158-59.
22. *Id.* at 1158.
23. *Id.* at 1160-61.
24. *Id.* at 1163.
25. *Id.* at 1164-65.
26. *Id.* at 1158.

On appeal, the Eleventh Circuit adopted in toto the "well-reasoned memorandum opinion" of the district court.[27] Citing the Eleventh Circuit's prior decision in *Cofield v. GoldKist, Inc.*,[28] the court found that, in a claim based on a failure to promote, it was not enough for a plaintiff to show a difference in relative qualifications in order to establish discriminatory intent, "unless those disparities are so apparent as virtually to jump off the page and slap you in the face."[29] The court noted that while the chairman of the school board (with his active telephone campaign to arrive at a "consensus") may have "engaged in Machiavellian actions," this did not necessarily mean "that he did so for racial reasons."[30] In this case, both the district court and the Eleventh Circuit agreed that, because all three of the finalists were very qualified on paper, and because the disparities between plaintiff's qualifications and those of the other two finalists were not so apparent "as virtually to jump off the page and slap one in the face," plaintiff fell short of proving his claim.[31]

2. Mixed-Motive Cases. The only Supreme Court case under Title VII during the survey period, *Desert Palace, Inc. v. Costa*,[32] concerned a so-called "mixed-motive" issue. The issue before the Court was whether a plaintiff must present direct evidence of discrimination in order to obtain a mixed-motive instruction to the jury in a Title VII case. Plaintiff was employed as a warehouse worker and heavy equipment operator for Caesar's Palace Hotel & Casino in Las Vegas. Defendant terminated plaintiff's employment after she was involved in a physical altercation with a fellow male employee. When the male employee received only a five-day suspension as opposed to termination, plaintiff filed suit pursuant to Title VII, alleging sex discrimination. At trial, the district court gave a standard mixed-motive instruction over defendant's objection (because plaintiff had not produced any "direct evidence" of discrimination). The jury then rendered a verdict for plaintiff, awarding back pay, compensatory damages, and punitive damages. The Ninth Circuit, *en banc*, affirmed the district court's judgment.[33]

The Supreme Court addressed, for the first time, the impact of the 1991 amendments to Title VII (which, among other things, codified the

27. *Id.*
28. 267 F.3d 1264 (11th Cir. 2001).
29. 326 F.3d at 1167-68 (quoting *Cofield*, 267 F.3d at 1268).
30. *Id.* at 1168.
31. *Id.*
32. 539 U.S. 90 (2003).
33. *Id.* at 91-93.

burden of proof in mixed-motive cases). Closely examining the language of the amended statute, the Supreme Court found nothing expressly or implicitly requiring a plaintiff to present direct evidence of discrimination in a mixed-motive case.[34] Accordingly, the Court unanimously concluded that no direct evidence showing was required in order to warrant a mixed-motive instruction.[35]

3. Sexual Harassment. Two significant decisions were handed down by the Eleventh Circuit addressing the parties' respective burdens in the context of sexual harassment cases. The first case, *Walton v. Johnson & Johnson Services, Inc.*,[36] clarified the employer's burden in establishing a *Faragher/Ellerth* affirmative defense.[37] Plaintiff worked as a sales representative for the defendant pharmaceutical company in Tampa, Florida. Defendant hired George Mykytiuk as its district manager for the Tampa area. In this position, Mykytiuk was plaintiff's direct supervisor. A few months after Mykytiuk was hired, plaintiff hosted a dinner program for a number of nurse practitioners and Mykytiuk attended. After the program, Mykytiuk told plaintiff that he was intoxicated, and asked her to follow him home. When they arrived, Mykytiuk invited plaintiff into his apartment (which was also his office) and offered her a glass of wine, which she accepted. Mykytiuk then began to talk about his marital difficulties, and told plaintiff what a good friend she had been. Mykytiuk then allegedly jumped on top of plaintiff and began to kiss her and then allegedly raped her. Plaintiff did not report this incident to either the police or the company.[38]

Several incidents occurred over the next couple of months during which Mykytiuk allegedly attempted to call plaintiff on numerous occasions, kiss her, or force himself upon her, including at least one additional incident when plaintiff accepted an invitation to go back to Mykytiuk's apartment after a meeting. While there, plaintiff again accepted a glass of wine from him, and again was allegedly raped by him (after complying with his request that she lie down on the floor so that he could give her a massage). More than two months later, plaintiff finally filed a sexual harassment complaint against Mykytiuk with defendant's human resources department. Defendant immediately began an investigation, including an interview with Mykytiuk three days later.

---

34. *Id.* at 93-95.

35. *Id.* at 96.

36. 347 F.3d 1272 (11th Cir. 2003).

37. *See* Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

38. 347 F.3d at 1275-76.

Mykytiuk alleged that he and plaintiff had been involved "in an intense and consensual affair."[39] Mykytiuk was suspended at the conclusion of this interview. Approximately a week later, the company investigators completed their investigation, finding that the affair between plaintiff and Mykytiuk was consensual. However, Mykytiuk was discharged for "exercising poor judgment."[40] Nonetheless, plaintiff never returned to work for defendant. After submitting her sexual harassment complaint, plaintiff began collecting short-term disability benefits under defendant's disability plan, and thereafter she received long-term disability benefits pursuant to defendant's long-term plan. When plaintiff's employment was terminated after the expiration of her short-term disability benefits, she brought suit under Title VII, alleging that she had been the victim of sexual harassment. The district court, concluding that plaintiff had not suffered an adverse employment action, granted summary judgment for defendant.[41]

On appeal, the Eleventh Circuit initially examined whether plaintiff had suffered a tangible job detriment.[42] Although the court of appeals noted that plaintiff's discharge would ordinarily constitute a tangible employment action, there was absolutely no evidence that plaintiff was discharged "*because of her sex.*"[43] Rather, the evidence was undisputed that plaintiff had been discharged "because she elected to take disability rather than return to work."[44] The court then addressed whether defendant had established its *Faragher/Ellerth* defense, assuming *arguendo* that plaintiff had suffered actionable sexual harassment.[45] With respect to the first prong of the defense (whether defendant acted reasonably to prevent and promptly correct the sexually harassing behavior), the court of appeals noted that after plaintiff finally reported the alleged harassing conduct, the company conducted an immediate investigation, suspended the alleged harasser three days later, and discharged the alleged harasser at the conclusion of its investigation.[46] In response to plaintiff's allegation that certain aspects of the investigation were inadequate, the court concluded that where the actions taken by the employer are "sufficient to address the harassing behavior," complaints about the investigation resulting in the employer's action

39. *Id.* at 1276-77.
40. *Id.* at 1278.
41. *Id.* at 1278-79.
42. *Id.* at 1280.
43. *Id.* at 1281 (emphasis in original).
44. *Id.*
45. *Id.* at 1283.
46. *Id.* at 1288.

"ring hollow."[47] Accordingly, the Eleventh Circuit agreed that the first prong of the affirmative defense had been established.[48]

With respect to the second prong of the affirmative defense (whether plaintiff unreasonably failed to take advantage of defendant's remedial measures), the Eleventh Circuit noted that "the victim of the alleged harassment has an obligation to use reasonable care to avoid harm where possible."[49] The court continued to observe: "Here [plaintiff] could have avoided most, if not all, of the actionable harassment by reporting Mykytiuk's behavior to [defendant] officials. By failing to do so, [plaintiff] did not give [defendant] an opportunity to address the situation and prevent further harm from occurring."[50] In conclusion, the court of appeals held that defendant had adequately established the second prong of its affirmative defense and affirmed the district court's decision.[51]

The decision in the second case, *Watson v. Blue Circle, Inc.*,[52] clarified when an employer has constructive notice of sexually harassing conduct. Plaintiff worked as a concrete truck driver for defendant Blue Circle, which was in the business of providing ready-mix concrete. Plaintiff alleged that she was subjected to various sexual incidents and statements involving her co-workers and several Blue Circle customers. The most serious incident involved another Blue Circle driver, who, after he and plaintiff dumped loads of concrete, allegedly splashed water on plaintiff as they washed down their trucks (with plaintiff responding in kind), tried to pick up plaintiff and throw her in the concrete that had just been dumped, and asked plaintiff to go out with him "for a couple of dollars." He also brushed his hand across plaintiff's buttocks as she was attempting to get into her truck.[53] Plaintiff complained about this incident to her supervisor. After an investigation, defendant determined that plaintiff and the co-worker were engaging in "horse play" with each other and instructed both of them not to engage in this type of conduct in the future. Besides this oral admonishment, no further action was taken. Plaintiff brought a Title VII action against Blue Circle, alleging hostile work environment sexual harassment. The district court granted summary judgment for Blue Circle, finding that the company had a valid and well-disseminated sexual harassment policy and had taken

47. *Id.*
48. *Id.* at 1288-89.
49. *Id.* at 1290.
50. *Id.*
51. *Id.* at 1291.
52. 324 F.3d 1252 (11th Cir. 2003).
53. *Id.* at 1255-56.

immediate and appropriate action with respect to plaintiff's complaint.[54]

On appeal, the Eleventh Circuit discussed its prior decision in *Farley v. American Cast Iron Pipe Co.*,[55] and whether Blue Circle, in light of its well-disseminated sexual harassment policy, was precluded from being charged with constructive notice of several of the incidents of alleged harassment involving plaintiff.[56] Distinguishing *Farley*, the court of appeals held that the fact that defendant's sexual harassment policy was "well-disseminated" was not, "standing alone," sufficient to "preclude a finding of constructive notice."[57] Rather, the harassment policy must have been "valid and effective."[58] On this latter issue, the court concluded that a genuine issue of material fact existed with respect to the effectiveness of Blue Circle's sexual harassment policy because a reasonable jury could have concluded that Blue Circle did not adequately investigate and respond to plaintiff's most serious sexual harassment allegation (on the grounds that the company's response was little more than telling the co-worker to refrain from engaging in horse play).[59] Accordingly, the Eleventh Circuit reversed the grant of summary judgment and remanded the case for further proceedings.[60]

4. Constructive Discharge. A common allegation in discrimination cases is that the plaintiff was "constructively discharged," i.e., that working conditions were "so intolerable" that a reasonable person in plaintiff's position "would [be] compelled to resign."[61] Whether a constructive discharge had occurred was the primary issue in *Fitz v. Pugmire Lincoln-Mercury, Inc.*[62] Plaintiff, who held the position of finance and insurance manager for the defendant automobile dealership, brought an action pursuant to Title VII. The district court found that the complaint was not timely filed, and it granted summary judgment for defendant.[63] On appeal, the Eleventh Circuit affirmed, but on different grounds.[64] The court concluded that no reasonable jury could

54. *Id.* at 1256.
55. 115 F.3d 1548 (11th Cir. 1997).
56. 324 F.3d at 1260.
57. *Id.*
58. *Id.*
59. *Id.* at 1260-61.
60. *Id.* at 1263.
61. Poole v. Country Club of Columbus, Inc., 129 F.3d 551, 553 (11th Cir. 1997).
62. 348 F.3d 974 (11th Cir. 2003).
63. *Id.* at 976.
64. *Id.*

have found that plaintiff was constructively discharged.[65] The court summarized the evidence of constructive discharge as follows: (1) Plaintiff was reprimanded for not attending a golf outing, but the reprimand was withdrawn as a mistake; (2) two cartoons were attached to plaintiff's office computer (but there was no evidence linking the cartoons to defendant); (3) plaintiff was offered the opportunity to leave his present position and become the dealership's sales manager; (4) plaintiff's co-workers made statements that defendant planned to fire him at some point in the future[66] (which the court characterized as "[m]ere suspicion of an unsubstantiated plot")[67]; and (5) plaintiff alleged that his pay was unequal[68] (the court responded: "[u]nequal pay cannot, standing alone, constitute a constructive discharge").[69] The court then characterized the totality of plaintiff's evidence of constructive discharge as follows: "[A] withdrawn reprimand; statements of supervisors that [plaintiff] concedes were not supposed to be revealed to him; cartoons that were admittedly not condoned by [defendant]; a job offer; and a baseless claim of unequal pay."[70] The court of appeals held that this evidence was insufficient as a matter of law to constitute a constructive discharge and affirmed.[71]

B. Defenses to Title VII Actions

1. Eleventh Amendment Immunity. In *Downing v. Board of Trustees of the University of Alabama*,[72] the issue before the court was whether the defendant Board of Trustees was entitled to Eleventh Amendment immunity in a same-sex sexual harassment action pursuant to Title VII. The district court ruled that plaintiff's claim was not barred by the Eleventh Amendment, and denied the board's motion to dismiss.[73]

On appeal, the Eleventh Circuit relied heavily on its prior decision in *Cross v. State of Alabama*,[74] in which it found no Eleventh Amendment immunity in a sexual harassment and hostile work environment claim

65. *Id.* at 979.
66. *Id.* at 978.
67. *Id.*
68. *Id.*
69. *Id.*
70. *Id.*
71. *Id.*
72. 321 F.3d 1017 (11th Cir. 2003).
73. *Id.* at 1021.
74. 49 F.3d 1490 (11th Cir. 1995).

pursuant to Title VII.[75] Discerning "no material difference between the sexual harassment in *Cross* and the harassment in the case at hand,"[76] except for the fact that in the instant case "both the perpetrator and the victim were male,"[77] the Eleventh Circuit agreed that there was no Eleventh Amendment immunity and affirmed.[78]

In *Williams v. Consolidated City of Jacksonville,*[79] the issue was whether Jacksonville's fire chief, Rayfield Alfred, was entitled to qualified immunity in the latest of a long-standing dispute concerning the promotion practices within the Jacksonville Fire and Rescue Department. The fire chief, who is African-American, decided not to create four new roving captain positions within the department, which resulted in four white lieutenants in the department being passed over for promotion. The four lieutenants then brought a race and gender claim pursuant to both Title VII and 42 U.S.C. § 1981 against the Consolidated City of Jacksonville and Chief Alfred, in his individual and official capacities. Chief Alfred moved for dismissal on the ground of qualified immunity, but the district court denied the motion.[80] However, on appeal, the Eleventh Circuit disagreed.[81] While the court of appeals agreed that the fire chief's actions, if established, would have constituted a constitutional violation, the court of appeals concluded that the unlawfulness of the chief's actions were not "clearly established."[82] Although the court observed, in light of prior precedent, that it had been established that it was unlawful for a public official to make a race-based or gender-based employment decision with respect to an existing position, in this case, the court noted that the fire chief's decision was whether to *create* four new upper level positions—a decision, according to the court, that involved "the core constructure of the fire department."[83] The court considered this distinction determinative and held that the fire chief was entitled to qualified immunity.[84]

2. Judicial Estoppel. Two cases during the survey period applied the doctrine of judicial estoppel to bar discrimination claims where the plaintiff failed to disclose the discrimination lawsuit in their bankruptcy

75. 321 F.3d at 1021-24.
76. *Id.* at 1023.
77. *Id.*
78. *Id.* at 1023-24.
79. 341 F.3d 1261 (11th Cir. 2003).
80. *Id.* at 1263-66.
81. *Id.* at 1266.
82. *Id.* at 1273.
83. *Id.* at 1272-73.
84. *Id.* at 1273.

court filings. In the first case, *DeLeon v. Comcar Industries, Inc.*,[85] plaintiff filed a petition for bankruptcy pursuant to Chapter 13 of the bankruptcy code. Several months later, plaintiff filed a discrimination action pursuant to Title VII, but never amended his bankruptcy file to list his discrimination action as a potential asset. The district court granted summary judgment for defendant on the ground of judicial estoppel.[86] On appeal, the Eleventh Circuit determined that the issue was controlled by its prior decision in *Burnes v. Pemco Aeroplex, Inc.*[87] Although *Burnes* involved a Chapter 7 filing, the Eleventh Circuit held that the rule of judicial estoppel established in *Burnes* "applies equally in Chapter 13 bankruptcy cases."[88]

A similar fate befell the plaintiff in *Barger v. City of Cartersville.*[89] Plaintiff brought a discrimination action contesting her demotion by the city from her position of personnel director to an hourly customer service representative. Approximately two months later, plaintiff filed a Chapter 7 bankruptcy petition but made no mention of her lawsuit in the bankruptcy filings. The twist in this case was that plaintiff had mentioned the discrimination suit to her bankruptcy attorney, but the bankruptcy attorney had failed to list the lawsuit as an asset. Notwithstanding this fact, the district court granted summary judgment for defendant on the ground of judicial estoppel.[90] On appeal, the Eleventh Circuit concluded that even if plaintiff's failure to disclose the lawsuit "could be blamed on her attorney, the nondisclosure could not in any event be considered inadvertent"[91] and the attorney's omission was found to be "no panacea."[92] Holding that the case was controlled by *Burnes* and *DeLeon*, the Eleventh Circuit affirmed.[93]

C. Procedural Matters

1. Conciliation. Employers may find the Equal Employment Opportunity Commission ("EEOC") more flexible to deal with in conciliation negotiations following the Eleventh Circuit's decision in *EEOC v. Asplundh Tree Expert Co.*[94] In that case, the EEOC, after a

85. 321 F.3d 1289 (11th Cir. 2003).
86. *Id.* at 1290.
87. *Id.*; 291 F.3d 1282 (11th Cir. 2002).
88. 321 F.3d at 1291.
89. 348 F.3d 1289 (11th Cir. 2003).
90. *Id.* at 1291-92.
91. *Id.* at 1295.
92. *Id.*
93. *Id.* at 1297.
94. 340 F.3d 1256 (11th Cir. 2003).

thirty-two month investigation, issued a "letter of determination" finding "reasonable cause" to believe that the charging party's allegations of racial harassment and retaliation were true.[95] Eight days later, the EEOC sent a draft conciliation agreement to defendant's general counsel in Philadelphia, Pennsylvania, but after the EEOC's lengthy investigation, gave defendant only twelve business days to respond. Shortly thereafter, defendant retained a Gainesville, Florida law firm, which promptly sent the EEOC a letter via facsimile, entering its notice of appearance and requesting a telephone conference to discuss and understand the "[EEOC's] basis for its determination."[96] The EEOC ignored this letter, and the next day, sent a letter advising that "efforts to conciliate this charge . . . were unsuccessful," and that "further conciliation efforts would be futile or non-productive."[97] Only two days later, the EEOC filed suit. The district court dismissed the action on the ground that the EEOC had failed to meet its statutory duty to conciliate in good faith and awarded attorney fees and costs to defendant.[98]

On appeal, the Eleventh Circuit, citing the Fifth Circuit decision in *EEOC v. Klingler Electric Corp.*,[99] concluded that the following three elements were required to meet the Title VII test of conciliation: "[T]he EEOC must (1) outline to the employer the reasonable cause for its belief that Title VII has been violated; (2) offer an opportunity for voluntary compliance; and (3) respond in a reasonable and flexible manner to the reasonable attitudes of the employer."[100] The Eleventh Circuit noted that, after taking almost three years to complete its investigation, the EEOC, "in a flurry of activity," gave defendant only twelve business days to respond to its proposed nationwide conciliation agreement, and then filed suit within a matter of a few days thereafter.[101] Commenting that the "duty to conciliate is at the heart of Title VII," the court of appeals concluded that this duty "must, at a minimum, make clear to the employer the basis for the EEOC's charges against it."[102] Agreeing that the EEOC had failed to meet its statutory duty of conciliating in good faith, the Eleventh Circuit concluded with the following parting shot: "In its haste to file the instant law suit, with lurid, perhaps newsworthy, allegations, the EEOC failed to fulfill its

95. *Id.* at 1258.
96. *Id.*
97. *Id.* at 1258-59.
98. *Id.* at 1259.
99. 636 F.2d 104 (5th Cir. 1981).
100. 340 F.3d at 1259.
101. *Id.* at 1259-60.
102. *Id.* at 1260.

statutory duty to act in good faith to achieve conciliation, effect voluntary compliance, and to reserve judicial action as a last resort."[103]

2. Class Actions. For a number of years, plaintiffs have encountered difficulties in certifying Title VII class action suits pursuant to Rule 23 of the Federal Rules of Civil Procedure.[104] This trend continued in *Hines v. Widnall*.[105] Plaintiffs were African-American civil employees at Eglin Air Force base in Pensacola, Florida. They brought a Title VII complaint seeking to represent a class of all former, current, and future African-American civil employees and applicants at Eglin, alleging a pattern and practice of discrimination against African-Americans in hiring, evaluation, and professional practices. The district court denied plaintiffs' motion for class certification.[106] On appeal, the Eleventh Circuit focused on the typicality requirement, i.e., whether there was a sufficient nexus between the claims of the purported class representatives and the claims of the class at large.[107] With respect to the only plaintiffs who were named applicants, the court of appeals agreed with the district court that both lacked standing to represent the claims of applicants because neither had exhausted his administrative remedy prior to filing suit.[108] As to the three remaining plaintiffs, the district court concluded that they could not "adequately represent the spectrum of jobs and divisions at Eglin" because they were seeking to represent a class that was "far too broad."[109] The Eleventh Circuit concluded that this was not an abuse of discretion and affirmed.[110]

D. Remedies Under Title VII

1. Arbitration. The enforceability of a *Gilmer/Circuit City*[111] style arbitration agreement was at issue in *Musnick v. King Motor Co.*[112] Plaintiff had signed an arbitration agreement with his employer, which contained the following provision with respect to the award of attorney fees and costs:

---

103. *Id.* at 1261.
104. FED. R. CIV. P. 23.
105. 334 F.3d 1253 (11th Cir. 2003).
106. *Id.* at 1254-55.
107. *Id.* at 1256.
108. *Id.* at 1259.
109. *Id.* at 1257.
110. *Id.*
111. *See* Gilmer v. Interstate/Johnson Lane Corp., 500 U.S. 20 (1991); Circuit City Stores, Inc. v. Adams, 532 U.S. 105 (2001).
112. 325 F.3d 1255 (11th Cir. 2003).

> The prevailing party shall be awarded costs including reasonable attorneys' fees, filing fee, subpoena service and witness fee, deposition and hearing transcription costs and similar expenses, but not including expert fees unless the expert was necessary to establishing or refuting liability. In cases where a party asserts any claim, position or defense, which is not substantially justified by the law or facts, the arbitrator shall award to the opposing party that party's reasonable attorney fees incurred as a result of that party's defending any such claim, position or defense.[113]

Plaintiff filed a religious discrimination action pursuant to Title VII. In response, defendant filed a motion to compel arbitration. However, the district court denied the motion, finding that the above provision relating to attorney fees and costs rendered the arbitration agreement unenforceable.[114]

On appeal, however, the Eleventh Circuit reversed, relying on its prior decision in *Bess v. Check Express,*[115] and the Supreme Court's decision in *Green Tree Financial Corp.-Alabama v. Randolph.*[116] Pursuant to those decisions, the Eleventh Circuit concluded that it was plaintiff's burden to establish that the "loser pays" provision in the arbitration agreement would likely result in such high costs that he was "effectively precluded from vindicating his Title VII rights in the arbitral forum."[117] Agreeing that plaintiff had not met this burden, the Eleventh Circuit reversed and directed that the case be remanded to arbitration.[118]

2. Consent Decrees. In what must have set some type of record, the long-standing class action dispute in *Reynolds v. McInnes,*[119] made its sixth visit to the court of appeals during the survey period.[120] This long-standing class action litigation, which has spanned eighteen years, has involved the defendant Alabama Department of Transportation ("ALDOT") and the State Personnel Department ("SPD"), two plaintiff classes of black employees and prospective employees of ALDOT, and an

---

113. *Id.* at 1257.

114. *Id.*

115. 294 F.3d 1298 (11th Cir. 2002).

116. 531 U.S. 79 (2000); 325 F.3d at 1258-62.

117. 325 F.3d at 1260.

118. *Id.* at 1262. Relying on *Musnick*, the Eleventh Circuit also reached an identical result in *Summers v. Dillards, Inc.*, 351 F.3d 1100 (11th Cir. 2003).

119. 338 F.3d 1201 (11th Cir. 2003).

120. *See* Peter Reed Corbin & John E. Duvall, *Employment Discrimination,* 52 MERCER L. REV. 1367, 1386-89 (2001) and 53 MERCER L. REV. 1367, 1382-83 (2002).

intervening class of non-black employees.[121] This latest appeal concerned an injunctive order from the district court requiring ALDOT to implement certain multi-grade job classifications in order to comply with a prior consent decree entered in the case.[122] On appeal, the Eleventh Circuit noted that the consent decree required that the jobs in question be "collapsed or restructured" if a job classification study mandated under the decree disclosed that the "existing distinctions in the levels of multi-grade jobs do not reflect actual differences in duties, responsibilities, or qualifications."[123] The Eleventh Circuit concluded that plaintiffs had not met their burden of proving by clear and convincing evidence that the job classifications proposed by defendants did not reflect the actual distinctions shown by the job study.[124] Accordingly, the court of appeals vacated the district court's order.[125] However, in doing so, the court of appeals offered some concluding thoughts in what is probably the most significant aspect of this case.[126] Comparing the action to "an elephant in the parlor," the court of appeals commented that the "problems of the *Reynolds* litigation have become too big to ignore."[127] Making note of the millions of dollars paid in attorney fees in the case to date, the court of appeals offered the following closing advice:

> With their fees for a particular effort not dependant upon its success, the plaintiffs' attorneys may have insufficient reason not to multiply proceedings and to contest every aspect of every part of every conceivable proceeding regardless of merit. The promise of fees for time spent without regard to the outcome of a motion or appeal in a case that apparently has endless potential for dispute may be the kerosene that has fueled the litigation fires which have raged out of control in this case. The district court may wish to consider whether cutting down on that fuel is an appropriate way to help bring the fire under control.[128]

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

Several ADEA cases decided during the survey period are worthy of note as they focused on the differences and similarities between ADEA

---

121. 338 F.3d at 1201-02.
122. *Id.* at 1207-08.
123. *Id.* at 1211.
124. *Id.* at 1215.
125. *Id.* at 1216.
126. *Id.* at 1217.
127. *Id.*
128. *Id.* at 1220 (citation omitted).

and Title VII causes of action. The decisions concern available defenses and legal theories under the two employment laws.

A. *Notice of Claim*

In *Jones v. Dillard's, Inc.*,[129] the court attempted to clarify when the statute of limitations for the purpose of filing charges begins to run in an ADEA claim. The district court had granted Dillard's motion for summary judgment, accepting its argument that Byrd's claim was time-barred because she had failed to file her EEOC charge within 180 days of any alleged act of discrimination.[130] The district court found that Byrd had reason to believe she had suffered age discrimination more than 180 days before she filed her EEOC charge.[131] Specifically, the trial court found that Byrd had suspected she was a victim of age discrimination long before November 1, 1999, the date that she learned that a twenty-eight-year-old woman had been hired to fill her former position. Byrd had been told in April or May of 1999 that her position was being eliminated. On June 12, 1999, she prepared notes about her discovery that two individuals were to be hired to perform similar work.[132] Dillard's argued successfully in the district court that the June 12, 1999, information started the 180-day clock ticking.[133] The Eleventh Circuit was unpersuaded on appeal, however.[134]

The court of appeals began its analysis with the following observations:

> Reviewing the case law in this area, we observe that some employers will seek to avoid liability by observing the letter of the law, while truly ignoring its spirit. The malicious employer can attempt to circumvent ADEA liability by timing its discriminatory acts. Firing an

---

129. 331 F.3d 1259 (11th Cir. 2003).

130. *Id.* at 1263. The period during which a person must file a complaint with the EEOC depends on whether or not a state is a "deferral state" under the ADEA. Deferral states are those that have a state agency equivalent to the EEOC. *See* 29 U.S.C. §§ 626(d), 633 (2000); *see also* Am. Airlines, Inc. v. Cardoza-Rodriguez, 133 F.3d 111 (1st Cir. 1998); Rhodes v. Guiberson Oil Tools Div., 927 F.2d 876, 878 (5th Cir. 1991). In deferral states, an aggrieved individual must file an age discrimination claim with the EEOC within 300 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(2). In states without a fair employment practices agency, the ADEA requires a charge be filed within 180 days after the alleged unlawful practice occurred. 29 U.S.C. § 626(d)(1) (2000). Alabama has a state discrimination statute, the Alabama Age Discrimination and Employment Act, but it does not have an EEOC equivalent. 331 F.3d at 1263.

131. 331 F.3d at 1262.

132. *Id.* at 1262-63.

133. *Id.* at 1262.

134. *Id.* at 1264.

> employee for "financial" reasons, concealing the true motivation (i.e., age), and then replacing that employee with someone outside of the protected class six months later is all that may be necessary to discriminate illegally yet escape liability. If the employee acts on a mere suspicion, he has acted prematurely: the employee's claim will likely fail because the truly damning evidence has not yet emerged—and will not emerge given the defendant's revelation of the suit. If, on the other hand, the employee lies in wait for the surfacing of tell tale evidence, i.e., the hiring of a younger employee, the cunning employer will escape liability by postponing the hiring of a replacement for at least six months. Thus, an employee thrust into this situation faces two equally unattractive options, neither furthering the ADEA's purpose.[135]

Relying on the analysis of the Supreme Court's holding in *Chardon v. Fernandez*,[136] the Eleventh Circuit concluded that the proper focus with respect to when a statute of limitations begins to run is the time of the discriminatory act, not when mere suspicions of discrimination arise.[137] The district court's grant of summary judgment on behalf of Dillard's was reversed and vacated.[138] Because there were remaining certified questions to be addressed by the Alabama Supreme Court concerning other state-law-based aspects of the appeal, the court delayed remand until the lower court addressed those questions.[139]

A similar question was before the court in *Wright v. AmSouth Bancorporation*.[140] In a corollary analysis, the court determined that the announcement of a final decision to terminate an employee, as opposed to the actual termination, triggers the filing period clock.[141]

On September 15, 1999, AmSouth issued a memorandum announcing the return of a former employee to assume a position very similar to that then occupied by Wright. Upon hearing the announcement, Wright suspected that he was the target of age discrimination and that his termination from employment was inevitable. On December 1, 1999, Wright was directed to meet with AmSouth human resources personnel to set an end date for his employment.[142] The district court granted

---

135. *Id.* (citations omitted).

136. 454 U.S. 6, 8 (1981).

137. 331 F.3d at 1266.

138. *Id.* at 1268.

139. *Id.* at 1270-71. The court delayed remand until the Alabama Supreme Court could define the limitation period applicable to Byrd's claim under the Alabama Age Discrimination and Employment Act. *Id.* at 1270.

140. 320 F.3d 1198 (11th Cir. 2003).

141. *Id.* at 1201.

142. *Id.* at 1200.

summary judgment for AmSouth, concluding that Wright should have known that he was about to be fired on September 15, 1999, when the announcement was made that the former employee was returning.[143] Applying the reasoning similar to that used by the panel in *Jones*,[144] this panel of the Eleventh Circuit disagreed with the lower court and instead concluded that while Wright might have subjectively concluded that his termination was inevitable when the announcement was made, that subjective belief, standing alone, provided no evidence of either a firm decision by AmSouth to fire him, or of the communication of such a decision from AmSouth.[145] The court of appeals observed:

> Wright's statement was nothing more than his subjective deduction based on the circumstantial evidence before him. AmSouth's reliance on Wright's speculation demonstrates the principal weakness of their argument: the absence of and unequivocal communication of the termination decision from AmSouth to Wright. The reemployment of Burks in September 1999 also offers no proof of and unequivocal communication of termination to Wright. When an employee is left simply to infer and deduce his employment status from the surrounding events, no *unequivocal* communication of an adverse employment decision has occurred. In the context of a Title VII discrimination case, we have said a plaintiff who "may have had reason . . . to suspect that she *might* be terminated [based on the circumstances known to her]. . . was not enough to start the charge filing running." We have also said a plaintiff must be "told that she is actually being terminated" before the 180-day filing period begins to run, "not that she *might* be terminated *if* future contingencies occur."[146]

Because the termination decision was first unequivocally communicated to Wright on December 1, 1999, the panel determined that the existence of this dispute precluded the district court's grant of summary judgment on the ADEA claim and reversed.[147]

B. Making Application

The court's decision in *Smith v. J. Smith Lanier & Co.*,[148] clarifies somewhat an employer's obligation to consider employees subjected to a reduction in force for other positions of employment. Smith's employer

---

143. *Id.* at 1201.
144. 331 F.3d 1259 (11th Cir. 2003).
145. 320 F.3d at 1203.
146. *Id.* (quoting Stewart v. Booker T. Washington Ins., 232 F.3d 844, 849 (11th Cir. 2000)).
147. *Id.*
148. 352 F.3d 1342 (11th Cir. 2003).

informed her that Smith's position was being eliminated to reduce the workforce. At that time, Smith orally stated that she would take any position available within the company and that she was even willing to relocate in order to remain employed with defendant. Following her termination meeting, but before her last day of work, Smith learned of several vacant positions listed on the company's website. She did not, however, express specific interest in any of them and never submitted any employment application for any available position at any other time. The district court granted summary judgment to her former employer with respect to the ADEA failure to rehire or transfer claims. The district court found that Smith failed to produce any evidence that she ever applied for a job or put her former employer on notice that she was interested in any specific position of employment that might have been available.[149]

Aligning with both the Sixth[150] and Seventh Circuits[151] on this question, the Eleventh Circuit held that a general interest in being rehired is insufficient as a matter of law to establish a prima facie age discrimination claim when an employer has publicized the availability of such positions to its general workforce.[152] An employee interested in alternate employment in the face of a reduction in force must make some effort to obtain the employment.[153]

C. Same Decision Defense

In *Steger v. General Electric Co.*,[154] the panel determined that the "same-decision" defense is available in ADEA claims.[155] Under the same-decision defense, even if an employee has shown that the employment decision was based on an illegal motive, the employer may nevertheless avoid liability by proving by a preponderance of the evidence that the same employment decision would have been made in the absence of any unlawful discrimination.[156] The panel explained

---

149. *Id.* at 1344.
150. Wanger v. G. A. Gray Co., 872 F.2d 142, 145-46 (6th Cir. 1989).
151. Box v. A & P Tea Co., 772 F.2d 1372, 1376 (7th Cir. 1985).
152. 352 F.3d at 1345.
153. *See id.* at 1345-46.
154. 318 F.3d 1066 (11th Cir. 2003).
155. *Id.* at 1075.
156. *Id.* at 1066. The same-decision defense was recognized by the United States Supreme Court in *Price Waterhouse v. Hopkins*, 490 U.S. 228, 252-53 (1989), a Title VII case. *See also* Pennington v. City of Huntsville, 261 F.3d 1262, 1269 (11th Cir. 2001). In order to effectively assert the defense, the employer's evidence "must show that its legitimate reason, standing alone, would have induced it to make the same decision." 318 F.3d at 1075 (quoting *Price Waterhouse*, 490 U.S. at 252). Under the defense, "proving that

that the evidence of the legitimate reason must also stand on its own.[157]

III. AMERICANS WITH DISABILITIES ACT

Clearly the most significant ADA decision reported during the survey period came from the Supreme Court. The decision continues the Court's trend of contracting the scope of the ADA.

In *Raytheon Co. v. Hernandez,*[158] the Supreme Court concluded that a company policy against rehiring former employees discharged for misconduct constituted a legitimate, nondisability-related reason for a refusal to rehire.[159] The Court determined that while both disparate impact and disparate treatment claims are cognizable under the ADA, the Ninth Circuit had improperly applied a disparate impact analysis to a disparate treatment claim.[160] Particular significance is that the decision of the Court was a unanimous one. However, Justices Souter and Breyer took no part in the decision of the case.[161]

As a result of testing positive for cocaine while initially employed by Raytheon, Hernandez was forced to resign his employment. Two years later, he applied for rehire, indicating that he had successfully completed drug rehabilitation. Raytheon refused to rehire Hernandez because (1) the earlier positive drug test result constituted misconduct under the company's employment policies, and (2) it had an unwritten policy against rehiring any employee terminated from employment for misconduct.[162]

Concluding that the Ninth Circuit had improperly focused on whether the policy in question screened out persons with a record of addiction, the Supreme Court observed that those factors pertain to disparate impact claims but not to disparate treatment claims.[163] Because Hernandez had waived a disparate impact theory by not timely raising it below, the Court reversed and remanded the case for further proceedings.[164]

---

the same decision would have been justified absent a retaliatory motive is not the same as proving the decision would have been made absent the motive." *Id.* at 1075-76 (quoting Speedy v. Rexnord Corp., 243 F.3d 397, 402 (11th Cir. 2001)).

157. 318 F.3d at 1076.

158. 124 S. Ct. 513 (2003).

159. *Id.* at 516.

160. *Id.* at 519.

161. *Id.* at 515.

162. *Id.* at 516.

163. *Id.* at 518-19.

164. *Id.* at 519-21.

A. Qualified Individuals and Reasonable Accommodations

In *Wood v. Green*,[165] the Eleventh Circuit determined that an employee's request for an indefinite leave of absence was not a reasonable accommodation under the ADA and, thus, the employee was not a "qualified individual with a disability" for ADA purposes.[166] Wood suffered from cluster headaches for a number of years, which his public sector employer valiantly attempted to accommodate during that time in various ways, including granting Wood numerous discretionary leaves.[167] The court concluded that in effect Wood was not seeking an accommodation to allow him to work through his indefinite leave request, but rather, extraordinary future dispensation.[168] The court of appeals explained:

> While a leave of absence might be a reasonable accommodation in some cases, Wood was requesting an indefinite leave of absence. Wood might return to work within a month or two or he could be stricken with another cluster headache soon after his return and require another indefinite leave of absence. Wood was not requesting an accommodation that allowed him to continue work in the present, but rather, in the future—at some indefinite time.[169]

Because Wood was requesting an indefinite leave of absence so that he might be able to return to work at some uncertain point in the future, his requested accommodation simply was not reasonable under the ADA.[170]

B. Coverage

In *Clackamas Gastroenterology Associates, P.C. v. Wells*,[171] the Supreme Court extended the general test for determining when a shareholder-director is an employee for purposes of other federal anti-

---

165. 323 F.3d 1309 (11th Cir. 2003).

166. *Id.* at 1311-14. In order to establish a prima facie case of ADA discrimination, a plaintiff must show, inter alia, that he was a "qualified individual with a disability." *See* Lucas v. W. W. Granger, Inc., 257 F.3d 1249, 1255 (11th Cir. 2001). Under the ADA, a "qualified individual" is a person who is capable of performing the essential functions of his or her job with or without reasonable accommodation. 323 F.3d at 1312.

167. 323 F.3d at 1311.

168. *Id.* at 1314.

169. *Id.*

170. *Id.*

171. 538 U.S. 440 (2003).

discrimination statutes in the ADA context.[172] Clackamas Gastroenterology Associates ("Clackamas") employed Wells for several years as a bookkeeper. Following the termination of her employment, Wells brought an action alleging disability discrimination. Clackamas denied that it was an employer covered by the ADA because it did not have fifteen or more employees in the requisite twenty weeks as required by the coverage definition of the ADA. Disposition of this question was dependent upon whether four physician shareholders who owned the professional corporation and constituted its board of directors were to be counted as employees for coverage purposes.[173] Relying on an "economic realities" test first adopted by the Seventh Circuit Court of Appeals,[174] the district court had concluded that the four doctors in question were "more analogous to partners in a partnership than to shareholders in a general corporation"[175] and therefore were "not employees for purposes of the federal anti-discrimination laws."[176] A divided panel of the Ninth Circuit Court of Appeals reversed, rejecting the economic realities approach and holding instead that "the use of any corporation, including a professional corporation 'precludes any examination to determine whether the entity is in fact a partnership.'"[177] The Ninth Circuit panel saw

> no reason to permit a professional corporation to secure the "best of both possible worlds" by allowing it to assert its corporate status in order to reap the tax and civil liability advantages and to argue that it was like a partnership in order to avoid liability for unlawful employment discrimination.[178]

The Supreme Court granted certiorari to resolve the conflict between the circuits.[179]

---

172. *Id.* at 450-51. Under the ADA, there is a fifteen employee threshold for coverage. 42 U.S.C. § 12111(5)(A) (2000). Under the ADEA, there is a twenty employee threshold for coverage. 29 U.S.C. § 630(b) (2000). Title VII has a fifteen employee threshold for coverage. 42 U.S.C. § 2000e(b) (2000). Consequently, the Court's analysis is significant to the question of whether federal anti-discrimination legislation is applicable to very small businesses.

173. 538 U.S. at 442.

174. *See* EEOC v. Dowd & Dowd, Ltd., 736 F.2d 1177, 1178 (1984).

175. 538 U.S. at 442.

176. *Id.*

177. *Id.* at 442-43 (quoting Hyland v. New Haven Radiology Assoc., P.C., 794 F.2d 793, 798 (2d Cir. 1986)).

178. *Id.* at 443 (quoting Wells v. Clackamas Gastroenterology Assocs., P.C., 1271 F.3d 903, 905 (9th Cir. 2001)).

179. *Id.* at 444.

Accepting the reasoning of the EEOC as dispositive on the issue,[180] the Court announced that the following six factors are relevant to the correct determination of whether a shareholder-director is an employee for coverage purposes: (1) "Whether the organization can hire or fire the individual or set the rules and regulations of the individual's work;"[181] (2) "Whether and, if so, to what extent the organization supervises the individual's work;"[182] (3) "Whether the individual reports to someone higher in the organization;"[183] (4) "Whether and, if so, to what extent the individual is able to influence the organization;"[184] (5) "Whether the parties intended that the individual be an employee, as expressed in written agreements or contracts;"[185] and (6) "Whether the individual shares in the profits, losses, and liabilities of the organization."[186]

The Court went on to state:

> As the EEOC's standard reflects, an employer is the person, or group of persons, who owns and manages the enterprise. The employer can hire and fire employees, can assign tasks to employees and supervise their performance, and can decide how the profits and losses of the business are to be distributed. The mere fact that a person has a particular title—such as partner, director, or vice president—should not necessarily be used to determine whether he or she is an employee or a proprietor. Nor should the mere existence of a document styled "employment agreement" lead inexorably to the conclusion that either party is an employee. Rather, as was true in applying common law rules to the independent-contractor-versus-employee issue . . . the answer to whether a shareholder-director is an employee depends on "all of the incidents of the relationship . . . with no one factor being decisive."[187]

IV. CIVIL RIGHTS ACTS OF 1866

Only a few noteworthy 1866 Civil Rights Act[188] decisions were reported during the survey period.

---

180. The EEOC filed a brief for the United States et al. as amici curiae, advocating that the Court should examine "whether shareholder-directors operate independently and manage the business or instead are subject to the firm's control." *Id.* at 449-50 (quoting Brief of Amici Curiae EEOC at 8, *Clackamus*, 538 U.S. 440 (No. 01-1435)).

181. *Id.*

182. *Id.* at 450.

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* (quoting EEOC Compliance Manual, Section 605:0009).

187. *Id.* at 450-51 (citations omitted).

188. 14 Stat. 27 (1866).

A. *Same Decision Defense*

In *Bogle v. McClure*,[189] the court affirmed punitive damages awards of two million dollars each for caucasian librarians employed by the City of Atlanta who were discriminated against on the basis of their race.[190] For purposes of this Article, however, the decision is most significant for holding that the same decision defense is available in Section 1983 actions.[191]

B. *Same Sex Sexual Harassment Not Clearly Established*

The Eleventh Circuit, in *Snider v. Jefferson State Community College*,[192] determined that Alabama public officials were entitled to qualified immunity in a same sex sexual harassment claim because the right to be free from such workplace harassment was not clearly established for section 1983 purposes at the time of plaintiff's cause of action.[193]

C. *Deciding Who is a Decision-Maker*

In a ruling that should be helpful for future municipal liability determinations in the State of Florida, the court concluded that a county administrator is not a final policy-maker with respect to the termination of the county library director.[194] This was so because the library director was entitled to administrative review under Florida law.[195]

---

189. 332 F.3d 1347 (11th Cir. 2003).

190. *Id.*

191. *Id.* at 1356.

192. 344 F.3d 1325 (11th Cir. 2003).

193. *Id.* at 1328. While acknowledging that courts had previously held that same sex sexual harassment claims were actionable under Title VII against a private employer, the panel concluded that that precedent did not fairly put public sector employers on notice that their alleged conduct violated a clearly established federal constitutional right. *Id.* While further acknowledging that the elements of Title VII and constitutional actions are the same, "[t]his observation, by itself however, would not compel every objectively reasonable government official to believe that, if its conduct violated Title VII, it would also necessarily violate the Constitution." *Id.* at 1328 n.4.

194. *Id.* at 1326.

195. Quinn v. Monroe County, 330 F.3d 1320, 1326 (11th Cir. 2003).

D. Attorney Fees Under Section 1988

In *Thompson v. Pharmacy Corp. of America,*[196] the court concluded that the time expended by an attorney on litigating a fees issue is properly awardable under section 1988.[197]

V. CONCLUSION

While several interesting employment law cases were decided during the survey period, the overall number of noteworthy cases reaching the Eleventh Circuit Court of Appeals continues to decline. Although employment law still represents a substantial portion of the Eleventh Circuit's docket, the past fear that such cases would eventually overwhelm the court's docket appears unwarranted.

196. 334 F.3d 1242 (11th Cir. 2003).
197. *Id.*; *see* 42 U.S.C. § 1988 (2000).