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Labor and Employment *

by W. Jonathan Martin II **

and Patricia-Anne Brownback ***

I. INTRODUCTION

This Article focuses on case law concerning federal laws pertaining to labor and employment.¹ The following is a discussion of those opinions.²

II. SUPREME COURT DECISIONS

The Supreme Court of the United States issued multiple decisions affecting labor and employment laws in 2020.

In *Babb v. Wilkie*,³ the plaintiff, Noris Babb, brought claims for discrimination under Title VII of the Civil Rights Act of 1964 (Title VII)⁴ and the Age Discrimination in Employment Act (ADEA)⁵ against the Secretary of the Veteran's Administration, Robert Wilkie.⁶ The Supreme Court took this case to determine whether the federal-sector provision,

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¹ For an analysis of labor and employment law during the prior survey period, see W. Jonathan Martin II, et. al., *Labor and Employment Law, Eleventh Circuit Survey Law*, 71 MERCER L. REV. 1059 (2020).

² This Article will focus solely on published opinions by the Eleventh Circuit because these are binding precedent on the Court.

³ 140 S.Ct. 1168 (2020).

⁴ Civil Rights Act of 1964 § 7, 42 U.S.C. §§ 2000e–2000e-17 (2019).

⁵ 29 U.S.C. § 633(a).

⁶ *Wilkie*, 140 S.Ct. at 1171.

§ 633a(a), of the ADEA requires the type of heightened “but-for” causation used in standard ADEA cases.⁷ Ultimately, the Court rejected using the heightened standard.⁸

The plaintiff claims that she was discriminated against in three specific instances: (1) her “advanced scope” designation was taken away, which made her eligible for promotion on the federal government’s General Scale from a GS–12 to a GS–13; (2) she was denied training opportunities and was passed over for positions in the hospital’s anticoagulation clinic; and (3) her holiday pay was reduced when she was placed in a new position. The plaintiff relied on evidence that supervisors made age-based comments to support her allegations that these personnel decisions were based at least in part on her age.⁹

The Supreme Court held that under the federal-sector provision of the ADEA, plaintiffs must show that “age must be a but-for cause of discrimination—that is, of differential treatment—but not necessarily a but-for cause of a personnel action itself.”¹⁰ The Court analyzed the plain meaning of the statutory language and determined that “shall be made free from any discrimination based on age” was the determining phrase.¹¹ The Court interpreted this to mean that the decision-making process for personnel decisions must not involve any consideration of age.¹² However, at the end of the day, the government will not be liable for damages unless the federal employee can show that age discrimination was the but-for cause of the employment action.¹³ So, if the government can show that the employment decision would have been made regardless of the employee’s age, the government will not be liable for any damages to the employee.¹⁴

In *Bostock v. Clayton County, Georgia*,¹⁵ the Supreme Court ruled that discrimination based on sexual orientation or gender identity is a form of “sex” discrimination prohibited under Title VII.¹⁶ This decision resolved three lower court decisions: *Bostock v. Clayton County* (Eleventh

⁷ *Id.*

⁸ *Id.*

⁹ *Id.* at 1171.

¹⁰ *Id.* at 1173.

¹¹ *Id.* at 1172 (quoting 29 U.S.C. § 633a(a)).

¹² *Id.* at 1173–74.

¹³ *Id.* at 1177–78.

¹⁴ *Id.* at 1178.

¹⁵ 140 S. Ct. 1731 (2020).

¹⁶ *Id.* at 1746–47.

Circuit)¹⁷ and *Zarda v. Altitude Express* (Second Circuit),¹⁸ which involved sexual orientation discrimination, and *EEOC v. R.G.* (Sixth Circuit),¹⁹ which involved gender identity discrimination.²⁰

The Supreme Court determined that Title VII incorporates a “but-for” test when someone is treated differently, and rejected the “sole cause” argument.²¹ Under the sole cause argument, employees cannot recover unless they show their protected class was the only reason the employer discriminated against them.²² Here, the Court said that an employee can show a violation of Title VII by showing that sex was a but-for reason for the adverse action.²³ The Court explained, “[i]f the employer intentionally relies in part on an individual employee's sex when deciding to discharge the employee—put differently, if changing the employee's sex would have yielded a different choice by the employer—a statutory violation has occurred.”²⁴ Specifically pertaining to sexual orientation and gender identity, “[s]ex plays a necessary and undisguisable role in the decision, [which is] exactly what Title VII forbids.”²⁵ In rejecting the argument that these protected characteristics are not spelled out in the statute, Justice Gorsuch provided examples of other situations where protected characteristics that were not specifically included in the statute, but are incorporated under Title VII, such as sexual harassment and “motherhood discrimination.”²⁶ As a result of this decision, employees may now bring charges with the Equal Employment Opportunity Commission (EEOC) for discrimination based on sexual orientation and gender identity, and can eventually bring lawsuits against their employers for the same.

¹⁷ 723 F. App'x 964 (11th Cir. 2018), *rev'd and remanded sub nom.* *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

¹⁸ 883 F.3d 100 (2d Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

¹⁹ 884 F.3d 560 (6th Cir. 2018), *aff'd sub nom.* *Bostock v. Clayton Cnty., Georgia*, 140 S. Ct. 1731 (2020).

²⁰ *Bostock*, 140 S.Ct. at 1738.

²¹ *Id.* at 1744.

²² *Id.* at 1748.

²³ *Id.* at 1742.

²⁴ *Id.* at 1741.

²⁵ *Id.* at 1737.

²⁶ *Bostock*, 140 S.Ct. at 1747.

III. AMERICANS WITH DISABILITIES ACT

The Americans with Disabilities Act (ADA)²⁷ prohibits discrimination by employers against qualified disabled individuals.²⁸ A “disability” under the ADA includes “a physical or mental impairment that substantially limits one or more major life activities . . . a record of such impairment; or being regarded as having such an impairment”²⁹ Major life activities include, among others, “caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”³⁰

Cases brought under the ADA are examined under a burden-shifting analysis, where the employee must first establish a prima facie case of discrimination.³¹ To establish a prima facie case of ADA discrimination, an employee must show “(1) a disability, (2) that she was otherwise qualified to perform the job, and (3) that she was discriminated against based upon the disability.”³² Once an employee has made out a prima facie case of discrimination, the burden then shifts to the employer to demonstrate a legitimate, nondiscriminatory reason for its actions.³³ If the employer meets this burden, the presumption of discrimination disappears; however, the employee can still prove discrimination by offering evidence demonstrating that the employer’s explanation is pretextual.³⁴

In *Munoz v. Selig Enterprises Inc.*,³⁵ the plaintiff was an executive assistant that suffered from chronic health issues related to her reproductive organs. She was eventually terminated after her supervisors said that her work performance deteriorated as a result of her medical conditions. She brought suit alleging Family and Medical Leave Act (FMLA)³⁶ interference and retaliation³⁷ and a failure to accommodate and retaliation under the ADA.³⁸ The United States

²⁷ 42 U.S.C. §§ 12101–12113.

²⁸ 42 U.S.C. § 12101(b).

²⁹ 42 U.S.C. § 12102(1).

³⁰ *Id.* at § 12102(2)(A).

³¹ *Cleveland v. Home Shopping Network, Inc.*, 369 F.3d 1189, 1193 (11th Cir. 2004).

³² *Id.*

³³ *Collado v. United Parcel Serv., Co.*, 419 F.3d 1143, 1151 (11th Cir. 2005).

³⁴ *Americans with Disabilities Act Practice and Compliance Manual* § 7:409 (2019); *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52 (2003).

³⁵ 981 F.3d 1265 (11th Cir. 2020).

³⁶ 29 U.S.C. §§ 2601–2654 (1993).

³⁷ Discussed *infra* Section VI. Family and Medical Leave Act; *Munoz*, 981 F.3d. at 1271.

³⁸ *Munoz*, 981 F.3d at 1271.

District Court for the Northern District of Georgia granted summary judgment on her ADA claims because the plaintiff failed to show that she was disabled within the meaning of the ADA.³⁹

A disability under the ADA is defined as an impairment that “substantially limits . . . a major life activity as compared to most people in the general population.”⁴⁰ This “include[s], but [is] not limited to, caring for oneself, performing manual tasks, seeing, hearing, eating, sleeping, walking, standing, lifting, bending, speaking, breathing, learning, reading, concentrating, thinking, communicating, and working.”⁴¹ It can also include the operation of a major bodily function, such as in this case, the endocrine or reproductive organs.⁴²

The United States Court of Appeals for the Eleventh Circuit agreed with the district court that the plaintiff failed to establish that she was disabled under the ADA.⁴³ The plaintiff claimed, but failed to present evidence on the record, that she was limited in the major life activities of working and sleeping.⁴⁴ Further, there was no record that Munoz’s health was impaired; there was no evidence of time, frequency, and duration of her impairments; and she relied only on her testimony as to the affects the medical conditions had on her.⁴⁵ The plaintiff did not present sufficient evidence that her reproductive system conditions substantially limited her ability to procreate.⁴⁶ The plaintiff did not carry her burden to show the first prong of the ADA analysis, that she was disabled under the ADA, and thus the district court was correct to grant summary judgment for this claim.⁴⁷

IV. TITLE VII OF THE CIVIL RIGHTS ACT

Title VII of the Civil Rights Act (Title VII) does not allow employers to discriminate based upon the protected classes of race, color, religion, sex, or national origin.⁴⁸ This includes limiting, segregating, or classifying employees “in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color,

³⁹ *Id.* at 1272.

⁴⁰ 29 C.F.R. § 1630.2(j)(1)(ii).

⁴¹ 42 U.S.C. § 12102(2)(A).

⁴² *Id.* at § 12102(2)(B).

⁴³ *Munoz*, 981 F.3d at 1273–74.

⁴⁴ *Id.* at 1273.

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *Id.* at 1274.

⁴⁸ 42 U.S.C. § 2000e-2(a).

religion, sex, or national origin.”⁴⁹ For an employee to prove disparate impact under Title VII, the employee must demonstrate that the employer used a particular employment practice on the basis of one of the above protected classes, and the employer cannot show that the alleged practice is job-related and related with business necessity.⁵⁰ “[T]he plaintiff in an employment discrimination lawsuit always has the burden of demonstrating that, more probably than not, the employer took an adverse employment action against him on the basis of a protected personal characteristic.”⁵¹ The nature of discrimination suits generally renders the “traditional framework” of direct evidence inadequate because a plaintiff cannot easily prove “the state of mind of the person making the employment decision.”⁵² “Furthermore, unlike some other torts, in which state of mind can be inferred from the doing of the forbidden act, the employer’s state of mind cannot be inferred solely from the fact of the adverse employment action”⁵³ Therefore, the Supreme Court developed a three-part, burden-shifting analysis “[t]o make matters somewhat easier for plaintiffs in employment discrimination suits.”⁵⁴

In *McDonnell Douglas Corp. v. Green*⁵⁵ and *Texas Department of Community Affairs v. Burdine*,⁵⁶ the United States Supreme Court established a three-step process for the “allocation of burdens and order of presentation of proof” when a plaintiff relies on circumstantial evidence to show discriminatory treatment.⁵⁷ Under this framework, one must first present a prima facie case of discrimination, and once a plaintiff meets this initial burden, the burden of production “shift[s] to the employer to articulate some legitimate, nondiscriminatory reason for the employe[r]’s [action].”⁵⁸ After this, the plaintiff who retains the burden of persuasion throughout, must then “show by the preponderance of the evidence that the defendant’s legitimate reasons were not the reasons that actually motivated its conduct, that the reasons were merely a ‘pretext for discrimination.’”⁵⁹

⁴⁹ *Id.*

⁵⁰ 42 U.S.C. § 2000e-2(k)(1)(A).

⁵¹ *Wright v Southland Corp.*, 187 F.3d 1287, 1292 (11th Cir. 1999).

⁵² *Id.* at 1289–1290.

⁵³ *Id.*

⁵⁴ *Id.*

⁵⁵ 411 U.S. 792 (1973).

⁵⁶ 450 U.S. 248 (1981).

⁵⁷ *Grigsby v. Reynolds Metals Co.*, 821 F.2d 590, 594 (11th Cir. 1987).

⁵⁸ *McDonnell Douglas*, 411 U.S. at 802.

⁵⁹ *MacPherson v. Univ. of Montevallo*, 922 F.2d 766, 774 (11th Cir. 1991) (quoting *Texas Dep’t Cmty. Affairs*, 450 U.S. at 253).

A. Harassment/Hostile Work Environment

In the Eleventh Circuit, for an employee to succeed on a hostile work environment claim under Title VII, the employee must prove five elements:

(1) she belongs to a protected class, (2) she was subjected to unwelcome harassment, (3) the harassment was based on her race, (4) the harassment was sufficiently severe or pervasive to alter the terms of her employment and create a discriminatorily abusive working environment, and (5) the employer is responsible for the environment under a theory of vicarious or direct liability.⁶⁰

In *Fernandez v. Trees, Inc.*,⁶¹ a Cuban employee sued his employer, Trees, Inc. (the Company), alleging hostile work environment and national origin discrimination.⁶² The United States District Court for the Middle District of Florida granted summary judgment for the Company on both claims determining that the alleged conduct was not severe and pervasive under the hostile work environment analysis, and the plaintiff failed to present a prima facie case for national origin discrimination.⁶³ On appeal, the Eleventh Circuit affirmed the lower court on the national origin discrimination claim, but overturned the hostile work environment summary judgment ruling.⁶⁴

The plaintiff worked as a foreman for a crew that provided utility clearance and vegetation management for the Company. The plaintiff's supervisor got into an altercation with another Cuban employee, and following that incident, the supervisor began using derogatory names regarding Cuban employees he supervised.⁶⁵ The plaintiff testified that this name calling would occur on a near-daily basis, despite the plaintiff asking his supervisor not to use these terms. After two months, the plaintiff attempted to commit suicide at a job site by pouring gasoline on himself and trying to light himself on fire. A co-worker prevented him from doing so. The plaintiff was then terminated.⁶⁶

In overturning the grant of summary judgment on the hostile work environment claim, the Eleventh Circuit held that there was sufficient evidence to raise a material issue of fact as to whether or not the

⁶⁰ *Smelter v. S. Home Care Services Inc.*, 904 F.3d 1276, 1284 (11th Cir. 2018).

⁶¹ 961 F.3d 1148 (11th Cir. 2020).

⁶² *Fernandez*, 961 F.3d at 1152.

⁶³ *Id.* at 1152.

⁶⁴ *Id.* at 1156–57.

⁶⁵ *Id.* at 1151. He would refer to them as “shitty Cubans,” “fucking Cubans,” and “crying, whining Cubans.” *Id.*

⁶⁶ *Id.* at 1151–52.

supervisor's conduct did rise to the level to create a hostile work environment.⁶⁷

Not only must a plaintiff establish a hostile work environment as outlined above, to show that harassment was sufficiently severe or pervasive to alter the terms or conditions of his employment, an employee must also prove that his work environment was both subjectively and objectively hostile.⁶⁸ "Turning to the objective inquiry, [the courts] consider four factors when evaluating whether harassment was objectively hostile: '(1) the frequency of the conduct; (2) the severity of the conduct; (3) whether the conduct is physically threatening or humiliating, or a mere offensive utterance; and (4) whether the conduct unreasonably interferes with the employee's job performance.'"⁶⁹

Beginning with the first factor, the plaintiff provided ample evidence that the harassment he faced was frequent since the derogatory comments were made almost daily by the supervisor.⁷⁰ As to the second factor, the court found that a reasonable jury could conclude that the harassment was sufficiently severe.⁷¹ The supervisor's remarks repeatedly targeted a protected group with vulgar and derogatory language and continued unabated after complaints by the plaintiff and his co-workers.⁷² This behavior likely meets the standard needed to implicate Title VII where a workplace is "permeated with discriminatory intimidation, ridicule and insult."⁷³ For the third factor, the plaintiff and his co-workers testified that the degrading comments were not only frequent, but also occurred in front of the whole crew, which was especially degrading.⁷⁴ Lastly, as to the fourth factor, the court held that the evidence was not as clear or typical, but ultimately determined that the plaintiff's suicide attempt was not wholly unrelated to his job performance.⁷⁵

Therefore, the court held that the plaintiff had raised enough of a material issue to proceed with his hostile work environment claim.⁷⁶

⁶⁷ *Id.* at 1155–56.

⁶⁸ *Fernandez*, 961 F.3d at 1153 (citing *Mendoza v. Borden, Inc.*, 195 F.3d 1238, 1246 (11th Cir. 1999) (*en banc*)).

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ *Id.* at 1154.

⁷² *Id.* at 1155.

⁷³ *Id.* at 1154 (citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)).

⁷⁴ *Id.* at 1155.

⁷⁵ *Id.*

⁷⁶ *Id.* at 1155–56.

B. Retaliation

In *Gogel v. Kia Motors Manufacturing Georgia*,⁷⁷ a divided, *en banc* Eleventh Circuit upheld the termination of a human resource professional alleged to have recruited employees to join her legal action against the company.⁷⁸ In so doing, the court of appeals held that “when the means by which an employee expresses her opposition ‘so interferes with the performance’ of her job duties ‘that it renders her ineffective in the position for which she was employed,’ this oppositional conduct is not protected under Title VII’s opposition clause.”⁷⁹

Gogel was the team relations manager at Kia Motors Manufacturing Georgia (KMMG). Her job duties included investigating allegations of harassment and discrimination, resolving conflicts, and resolving employee complaints to avoid litigation.⁸⁰ Among other things, Gogel was unhappy with the way she believed that KMMG handled a specific investigation of employee Diana Ledbetter. She also alleged that KMMG discriminated against its female employees. After complaining of discrimination, Gogel filed a charge of discrimination with the EEOC on her own behalf. KMMG did not take issue with this charge and, in fact, gave Gogel a significant year-end bonus a month later.⁸¹

During the holiday shut-down, the company discovered that Ledbetter filed a charge of discrimination using the same law firm that represented Gogel. In addition, two of Gogel’s subordinates came forward claiming that Gogel was recruiting them to join her lawsuit.⁸² Accordingly, KMMG terminated her employment because it lost confidence in her abilities to remain objective in her position.⁸³

The Eleventh Circuit held that, although filing a charge of discrimination on her own behalf was protected activity under Title VII, soliciting another employee to sue the company was not protected under Title VII given Gogel’s position within the company.⁸⁴ The court explained that soliciting Ledbetter to join her lawsuit and providing Ledbetter with the name of a lawyer so conflicted with Gogel’s duties as the team relations manager that the conduct rendered her ineffective in her position as a matter of law.⁸⁵ In so holding, the court observed:

⁷⁷ 967 F.3d 1121 (11th Cir. 2020).

⁷⁸ *Id.* at 1127.

⁷⁹ *Id.* at 1139.

⁸⁰ *Id.* at 1145.

⁸¹ *Id.* 1153 (dissent).

⁸² *Id.* at 1130–31.

⁸³ *Id.* at 1133.

⁸⁴ *Id.* at 1150.

⁸⁵ *Id.* at 1150.

It is well established that the protection afforded by Title VII's opposition clause is not absolute. To qualify for protection under the opposition clause, the manner in which an employee expresses her opposition to an allegedly discriminatory employment practice must be reasonable. When examining the reasonableness of the manner of an employee's conduct, we balanc[e] the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment.⁸⁶

In *Johnson v. Miami-Dade County*,⁸⁷ the Eleventh Circuit upheld the United States District Court for the Southern District of Florida's ruling that the Miami-Dade County Police Department did not terminate a police officer because he filed a charge with the EEOC; however, the court of appeals ultimately vacated and remanded a portion of the lower court's ruling because the district court did not use the *Lewis v. City of Union City*⁸⁸ comparator standard.⁸⁹

Harrius Johnson filed charges with the EEOC alleging race and sex discrimination. After he was fired by the county, he sued, not only alleging race discrimination, but also retaliation because he was terminated after filing the EEOC charges.⁹⁰ On appeal, the Eleventh Circuit held that Johnson, in the absence of valid comparator evidence, could not prove retaliation.⁹¹ In doing so, the court held that negative monthly evaluations were not materially adverse employment actions, and thus could not support a claim of retaliation.⁹² Additionally, his supervisor had legitimate, nondiscriminatory reasons for terminating him—he tried to circumvent the proper chain of command, and "[p]romoting the chain of command and punishing insubordination are legitimate, important concerns for a police force"⁹³

In attempting to show pretext, the plaintiff only pointed to the fact that the employer imposed discipline on him fifty-eight days after he filed the EEOC complaint.⁹⁴ The court held that other courts have found that timeframes shorter than fifty-eight days, absent other evidence, were

⁸⁶ *Id.* at 1139 (quoting *Rollins v. Fla. Dep't of Law Enf't*, 868 F.2d 397, 400–01 (11th Cir. 1989)).

⁸⁷ 948 F.3d 1318 (11th Cir. 2020).

⁸⁸ 918 F.3d 1213 (11th Cir. 2019).

⁸⁹ *Johnson*, 948 F.3d at 1322–23.

⁹⁰ *Id.* at 1322–24.

⁹¹ *Id.* at 1326.

⁹² *Id.* at 1326–27.

⁹³ *Id.* at 1327.

⁹⁴ *Id.*

insufficient to establish pretext.⁹⁵ Therefore, the Eleventh Circuit partially upheld the lower court's ruling but remanded part of it for reconsideration of the plaintiff's comparator evidence under the new standard adopted in *Lewis*.⁹⁶

In *Knox v. Roper Pump Co.*,⁹⁷ an African American father and daughter worked in the same facility for separate but related companies. One day, while off work, they got into an altercation and the father hit the daughter. When they returned to work, the daughter reported the father for violation of the workplace violence policy, and the father was suspended as a result. While suspended, he called the employee hotline and reported that he believed he was being discriminated against because of his race. He stated that Caucasian employees were not punished for similar conduct. The company said he could come back to work if he completed anger management while he was on unpaid leave. While Knox was completing the leave, the company presented him with a Last Chance Agreement (LCA). The LCA also included a release of all claims, including those under Title VII. When the plaintiff refused to sign the LCA, he was terminated. He brought claims of race discrimination and retaliation.⁹⁸ The district court granted summary judgment on both claims, citing a lack of proper comparators for the discrimination claim and lack of evidence that the complaint was the but-for cause of his termination.⁹⁹

On appeal, the Eleventh Circuit held that the grant of summary judgment on the discrimination claim was proper, but overturned summary judgment for the retaliation claim.¹⁰⁰ The court held that the comparators presented by the plaintiff were not similarly situated in all material respects as required under *Lewis*.¹⁰¹ However, the court found that there was a question of fact as to whether or not the plaintiff's complaint of race discrimination was the but-for cause of his termination.¹⁰² In coming to this conclusion, the court reasoned that the release was included in the LCA because of the plaintiff's complaint.¹⁰³ Had the LCA not included the release, the plaintiff would have signed

⁹⁵ *Johnson*, 948 F.3d at 1327–28.

⁹⁶ *Id.* at 1322–23.

⁹⁷ 957 F.3d 1237 (11th Cir. 2020).

⁹⁸ *Knox*, 957 F.3d at 1240.

⁹⁹ *Id.* at 1244.

¹⁰⁰ *Id.* at 1249.

¹⁰¹ *Id.* at 1247 (citing *Lewis*, 918 F.3d at 1218 (quotations omitted)).

¹⁰² *Id.* at 1245.

¹⁰³ *Id.*

the agreement, and would not have been terminated.¹⁰⁴ Therefore, through the chain of events, it is possible that but-for the plaintiff's complaint, he ultimately would not have been terminated.¹⁰⁵

In *Monaghan v. Worldpay US, Inc.*,¹⁰⁶ the Eleventh Circuit reversed the district court's grant of summary judgment to Worldpay US, Inc. (Worldpay) for Title VII retaliation.¹⁰⁷ Monaghan, a Caucasian woman over forty, began as an executive assistant at Worldpay but was terminated within ninety days. From the beginning, she was subjected to racial and ageist comments by her African American supervisor. When she complained to the executives about her supervisor, they told her just to avoid her supervisor and to stop reporting the conduct. Monaghan's supervisor found out that she was complaining and threatened not only her job, but also told her to "watch it," because she knew where she lived. Monaghan was eventually terminated, and she subsequently filed suit claiming retaliation under Title VII.¹⁰⁸ The district court granted summary judgment for Worldpay and dismissed the claims.¹⁰⁹ On appeal, the Eleventh Circuit reversed the district court and clarified the standard for retaliation in this circuit.¹¹⁰

In reaching its conclusion to reverse, the Eleventh Circuit reviewed the standard of proof required for retaliation under Title VII.¹¹¹ To grant summary judgment to Worldpay, the trial court relied on the standard outlined in *Gowski v. Peake*¹¹² finding that the "mistreatment at issue was 'sufficiently severe or pervasive to alter the terms and conditions of employment, thus constituting an adverse employment action.'"¹¹³ This differs from the standard adopted by the Supreme Court in *Burlington Northern & Santa Fe Railway Co. v. White*,¹¹⁴ and confirmed by the Eleventh Circuit in *Crawford v. Carroll*.¹¹⁵ There, the standard outlined for "retaliation is material if it 'well might have dissuade[d] a reasonable worker from making or supporting a charge of discrimination.'"¹¹⁶ Here, Monaghan argued that the trial court should not have applied the more

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 1245–46.

¹⁰⁶ 955 F.3d 855 (11th Cir. 2020).

¹⁰⁷ *Monaghan*, 955 F.3d at 863.

¹⁰⁸ *Id.* at 858–59.

¹⁰⁹ *Id.* at 857.

¹¹⁰ *Id.*

¹¹¹ *Id.* at 857.

¹¹² 682 F.3d 1299 (11th Cir. 2012).

¹¹³ *Monaghan*, 955 F.3d at 862 (citing to *Gowski*, 682 F.3d at 1312).

¹¹⁴ 548 U.S. 53 (2006).

¹¹⁵ 529 F.3d 961 (11th Cir. 2008).

¹¹⁶ *Monaghan*, 955 F.3d at 857 (quoting *Crawford*, 529 F.3d at 974).

stringent standard from *Gowski*, but rather should have applied the *Burlington Northern* standard.¹¹⁷ The court reviewed the differences in the two standards and determined that the *Gowski* court relied on § 2000e-2(a)(1)¹¹⁸ instead of § 2000e-3(a),¹¹⁹ a different section of Title VII. The court ultimately held that *Gowski* was inconsistent with *Burlington Northern*, and where there is a conflict, the court is required to resolve a dispute in panel decisions in favor of the oldest one.¹²⁰ In this case, that would be *Burlington Northern*.¹²¹

Therefore, the court reversed the grant of summary judgment on the grounds that Monaghan could clearly meet the standard under *Burlington Northern*.¹²² The facts clearly showed that Monaghan was subject to conduct from her supervisor that “well might have dissuaded [her] from making or supporting a charge of discrimination,” and she should be able to proceed to a trial.¹²³

In *Martin v. Financial Asset Management Systems Inc.*,¹²⁴ the court upheld a grant of summary judgment for retaliation under Title VII based on the fact that the decision maker in Martin’s termination was not aware of her complaints of sex and race discrimination.¹²⁵ Martin was hired as an operations manager and later promoted to director of operations. She claimed that, during meetings with the CEO about her performance, he would scream, kick chairs, and bang on the table. She filed a complaint with the EEOC, claiming that he did not behave this way toward some of her white, male co-workers. This claim was mediated and resolved, but about sixteen months later, the CEO berated her in front of her peers. Following this incident, she complained to Human Resources that the CEO was targeting her, and she needed to take a couple of days off for her health. Human Resources told the CEO that she thought she was being targeted for criticism and she needed to take some time off. When the CEO could not get in touch with her following this incident, he sent her a termination letter.¹²⁶ She brought suit for retaliation and the trial court granted summary judgment.¹²⁷

¹¹⁷ *Id.* at 862.

¹¹⁸ 42 U.S.C. § 2000e-2(a).

¹¹⁹ *Id.*; § 2000e-3(a).

¹²⁰ *Monaghan*, 955 F.3d at 862.

¹²¹ *Id.*

¹²² *Id.* at 862–63.

¹²³ *Id.*

¹²⁴ 959 F.3d 1048 (11th Cir. 2020).

¹²⁵ *Id.* at 1050.

¹²⁶ *Martin*, 959 F.3d at 1050–51.

¹²⁷ *Id.* at 1051.

The Eleventh Circuit affirmed the grant of summary judgment based on the fact that the plaintiff did not present evidence that the CEO, the decision maker, knew of the employee's protected activity.¹²⁸ The plaintiff claimed that the CEO's knowledge of her prior complaint (filing with the EEOC) was sufficient to show that he was aware, but the court denied this.¹²⁹ First, the significant time lapse between the previous EEOC's charge/resolution and her termination weakened the claim of retaliation.¹³⁰ Second, and most importantly, the plaintiff did not claim that she was fired for her earlier complaint, only the most recent complaint.¹³¹ Since she is unable to connect the two events, the grant of summary judgment was proper.¹³²

V. PREGNANCY DISCRIMINATION ACT

The Pregnancy Discrimination Act (PDA)¹³³ amended Title VII to prohibit sex discrimination on the basis of pregnancy.¹³⁴ It also prohibits treating a woman (applicant or employee) unfavorably because of childbirth or a medical condition related to pregnancy or childbirth.¹³⁵ Like discrimination based on other characteristics under Title VII, for claims under the PDA, courts use the three-part burden shifting analysis under *McDonnell Douglas* where circumstantial evidence is used to prove discrimination.¹³⁶ In 2015, the Supreme Court in *Young v. United Parcel Service, Inc.*¹³⁷ adopted a new standard for evaluating the prima facie case under the PDA.¹³⁸

In *Young*, the Supreme Court adopted a new standard to be used in PDA cases where indirect evidence of disparate treatment is used.¹³⁹ Under the new framework, the plaintiff must show "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.'"¹⁴⁰ The court rejected the

¹²⁸ *Id.* at 1053.

¹²⁹ *Id.* at 1055–56.

¹³⁰ *Id.* at 1056.

¹³¹ *Id.* at 1057.

¹³² *Martin*, 959 F.3d at 1058.

¹³³ 42 U.S.C. § 2000e(k).

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *McDonnell Douglas*, 411 U.S. at 801–04.

¹³⁷ 575 U.S. 206 (2015).

¹³⁸ *Young*, 575 U.S. at 229.

¹³⁹ *Id.* at 228.

¹⁴⁰ *Id.* at 229.

“similarly situated comparator” analysis for the purposes of the PDA.¹⁴¹ Rather, the courts should focus solely on whether or not the employees’ ability or inability to work is the same or similar—no matter the cause or reason for their situation.¹⁴²

In *Durham v. Rural/Metro Corp.*,¹⁴³ the Eleventh Circuit reversed and remanded the District Court for the Northern District of Alabama’s decision because the district court erred in its application of *Young* to the case at hand.¹⁴⁴

Durham worked as an EMT for Rural/Metro Corporation. She became pregnant, and her doctor recommended that she restrict herself to not lifting more than fifty pounds. As an EMT, she was required to be able to lift at least one hundred pounds at any point. She informed the company of her restrictions and requested an accommodation, but the company’s policy was that it would not grant these restrictions for employees who were not injured on the job. In the past, the company allowed other EMTs who were injured on the job to work light duty positions when they were limited on how much they could lift. When the company refused to accommodate Durham, she filed suit for discrimination under the Pregnancy Discrimination Act.¹⁴⁵ The district court granted summary judgment on the grounds that the plaintiff did not present similarly situated employees as comparators.¹⁴⁶

Under the *Young* analysis, Durham’s reason for the lifting restriction did not matter.¹⁴⁷ Her inability to perform her position was the same as those who were injured on the job, which satisfied the final prong of the prima facie case.¹⁴⁸ Because she did present similarly situated comparators, the Eleventh Circuit sent the case back down to the district court for re-examination.¹⁴⁹

VI. FAMILY AND MEDICAL LEAVE ACT

The Family and Medical Leave Act (FMLA) prohibits employers from interfering with, restraining, denying the exercise of (or the attempt to exercise) any of the rights under the FMLA.¹⁵⁰ The Eleventh Circuit

¹⁴¹ *Id.* at 217.

¹⁴² *Id.* at 219.

¹⁴³ 955 F.3d 1279 (11th Cir. 2020).

¹⁴⁴ *Durham*, 955 F.3d at 1281.

¹⁴⁵ *Id.* at 1281.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 1286–87.

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 1287.

¹⁵⁰ 29 U.S.C. § 2615(a)(1).

recognizes two claims from aggrieved employees: retaliation and interference claims.¹⁵¹ Under the FMLA, an employee is entitled to take twelve weeks of leave over a twelve month period for their own serious health conditions, or the serious health conditions of family members, and be reinstated upon their return from leave.¹⁵² For interference claims, employees must prove that they were denied their benefits under the FMLA.¹⁵³ However, the denial of a benefit is not the only way employers can interfere with the right of an employee; an employer may also be responsible for interference where it discourages its employees from using the leave to which they are entitled.¹⁵⁴

As for retaliation, an employee must prove that the employer “intentionally discriminated against him in the form of an adverse employment action for having exercised an FMLA right.”¹⁵⁵ This can be shown either through direct or circumstantial evidence.¹⁵⁶ Where there is only circumstantial evidence, the courts will apply the three-part burden shifting analysis outlined in *McDonnell Douglas*.¹⁵⁷ First, the plaintiff must show the three elements of a prima facie case: “(1) [he] engaged in [a] statutorily protected activity, (2) [he] suffered an adverse employment action, and (3) the decision was causally related to the protected activity.”¹⁵⁸ If the plaintiff can do this, the burden shifts to the employer to provide a legitimate, nondiscriminatory reason for the employment decision.¹⁵⁹ If the employer can do that, then the burden shifts back to the plaintiff to show pretext, or that the proffered reason is not true.¹⁶⁰

In *Munoz v. Selig Enterprises Inc.*, as outlined above, the plaintiff suffered from reproductive system conditions that caused her to be tardy and miss work. She was ultimately terminated for performance issues.¹⁶¹ Like her ADA claims, the district court granted summary judgment on her FMLA claims.¹⁶²

¹⁵¹ *Jones v. Gulf Coast Health Care of Del., LLC*, 854 F.3d 1261, 1267 (11th Cir. 2017).

¹⁵² *Id.*

¹⁵³ *Id.*

¹⁵⁴ *Id.*

¹⁵⁵ *Id.* at 1270 (citing *Strickland v. Water Works & Sewer Bd. of City of Birmingham*, 239 F.3d 1199, 1207 (11th Cir. 2001)).

¹⁵⁶ *Id.* at 1270.

¹⁵⁷ *Id.* at 1271.

¹⁵⁸ *Id.* (quoting *Shaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236, 1243 (2010)).

¹⁵⁹ *Id.* at 1271.

¹⁶⁰ *Id.*

¹⁶¹ *Munoz*, 981 F.3d at 1269–71.

¹⁶² *Id.* at 1272.

The Eleventh Circuit upheld the grant of summary judgment as to the plaintiff's interference claims reasoning that the plaintiff did not show she was harmed by the company's failure to notify her of her FMLA rights.¹⁶³ Under the FMLA, the interference must result in damages for the employee.¹⁶⁴ Here, the plaintiff would have needed to present evidence that her termination was a result of the company's failure to give her FMLA rights—she did not show this and thus the court said her claim failed.¹⁶⁵

However, as to the retaliation claim, the Eleventh Circuit reversed and remanded the district court, finding that the plaintiff presented questions of fact as to whether or not she was terminated for attempting to exercise her rights under FMLA.¹⁶⁶ The plaintiff properly provided notice to her employer that she would need leave in the future.¹⁶⁷ Shortly after she gave this notice, her boss downloaded software to track her off-task time, and then after her treatment began, drafted a memo outlining her performance deficiencies.¹⁶⁸ The court held that the plaintiff met her burden to show pretext by showing that her supervisors made many negative comments about her leave.¹⁶⁹ Therefore, the court held that a jury could reasonably conclude that the plaintiff was terminated because of her complaints and/or requests for leave.¹⁷⁰

VII. FAIR LABOR STANDARDS ACT

The Fair Labor Standards Act (FLSA)¹⁷¹ requires employers to pay covered employees engaged in commerce a minimum of \$7.25 for all hours worked.¹⁷² Additionally, if an employee works over forty hours in any workweek, an employer is required to pay that employee overtime at a rate of one and one-half times the employee's regular rate.¹⁷³ Employees can be "covered" by the FLSA in one of two ways: enterprise coverage or individual coverage.¹⁷⁴ For enterprise coverage, an employee must work for an employer that has at least two employees and has an annual dollar

¹⁶³ *Id.* at 1275.

¹⁶⁴ 29 U.S.C. § 2617.

¹⁶⁵ *Munoz*, at 1274–75.

¹⁶⁶ *Id.* at 1282.

¹⁶⁷ *Id.* at 1276–77.

¹⁶⁸ *Id.* at 1270.

¹⁶⁹ *Id.* at 1278.

¹⁷⁰ *Id.*

¹⁷¹ 29 U.S.C. §§ 201–219.

¹⁷² 29 U.S.C. § 206(a).

¹⁷³ 29 U.S.C. § 207(a)(1).

¹⁷⁴ 29 U.S.C. § 203(s).

of sales or business done of at least \$500,000.¹⁷⁵ Employees may be covered individually if their work regularly involves them in commerce between the states, and they are “engaged in commerce or in the production of goods for commerce.”¹⁷⁶

In *Vasconcelo v. Miami Auto Max, Inc.*,¹⁷⁷ the plaintiff brought claims against his employer for failure to pay wages correctly, seeking \$12,000 in back pay plus liquidated damages. The defendant made an Offer of Judgment under Rule 68 of the Rules of Civil Procedure¹⁷⁸ for \$3,500, but the plaintiff turned down this offer. The case went to trial, where the plaintiff was awarded \$194.40. As the prevailing party, he was entitled to recover his attorney’s fees, which he claimed totaled \$60,000. The district court reduced the attorney fee’s award to \$13,038 (37%) and taxed him \$1,340.00 for costs incurred by the defendant after the Rule 68 offer.¹⁷⁹ The plaintiff appealed the reduction of attorney’s fees and taxation of costs.¹⁸⁰

The Eleventh Circuit upheld the district court’s reduction of fees and taxation of costs.¹⁸¹ The court reasoned that the trial court is well within its discretion to reduce the fees, and the decision will not be set aside unless it is clear abuse.¹⁸² As for the taxation of costs, the plaintiff argued that the Offer of Judgment was ambiguous because it was not clear whether it included attorneys’ fees and costs.¹⁸³ The court rejected this argument stating that it was clear from a plain reading of the offer that attorneys’ fees were not included, and even if it was ambiguous, it would have been construed against the drafter.¹⁸⁴

VIII. CONCLUSION

As this Article demonstrates, the issues arising under labor and employment law are becoming progressively more challenging each year. Regardless of whether a practitioner specializes in state, federal, administrative, or other matters pertaining to labor and employment, it is important to recognize and stay abreast of the ever-evolving trends, policies, cases, and federal guidelines. How the law will evolve, and

¹⁷⁵ *Id.*

¹⁷⁶ *Id.*

¹⁷⁷ 981 F.3d 934 (11th Cir. 2020).

¹⁷⁸ FED. R. CIV. P. 68.

¹⁷⁹ *Vasconcelo*, 981 F.3d at 937–39.

¹⁸⁰ *Id.* at 939.

¹⁸¹ *Id.* at 940, 944.

¹⁸² *Id.* at 940.

¹⁸³ *Id.* at 943.

¹⁸⁴ *Id.*

change, remains to be seen. For now, the cases above give practitioners some guidance for the time being.