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Employment Discrimination

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The United States Supreme Court continued to be extremely active in the realm of employment discrimination during the 2009 survey period.[1] The Court decided five significant employment cases during 2009. Perhaps the most significant was the decision in *Gross v. FBL Financial Services, Inc.*,[2] in which the Court handed employers a huge victory as to the burden of proof necessary to establish age discrimination claims pursuant to the Age Discrimination in Employment Act of 1967 (ADEA).[3] On the other hand, employees were the clear winner in *Crawford v. Metropolitan Government of Nashville*,[4] in which the Court expanded the scope of potential retaliation claims pursuant to Title VII of the Civil Rights Act of 1964 (Title VII).[5] Finally, in *Ricci v. Destefano*,[6] the Court, in upholding the use of test scores for promotion to

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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 2009. Cases arising under the following federal statutes are included: the Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. §§ 621–634 (2006); the Civil Rights Act of 1866, 42 U.S.C. § 1981 (2006); Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e to 2000e-17 (2006); and the Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. §§ 12101–12213 (2006). For analysis of Eleventh Circuit employment discrimination law during the prior survey period, see Peter Reed Corbin & John E. Duvall, *Employment Discrimination, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1173 (2009).

2. 129 S. Ct. 2343 (2009).

3. 29 U.S.C. §§ 621–634 (2006); *see Gross*, 129 S. Ct. 2343.

4. 129 S. Ct. 846 (2009).

5. 42 U.S.C. §§ 2000e to 2000e-17 (2006); *see Crawford*, 129 S. Ct. 846.

6. 129 S. Ct. 2658 (2009).

lieutenant and captain within the New Haven, Connecticut Fire Department, held that the city could not lawfully engage in disparate treatment discrimination in order to avoid a good faith concern that its test for promotion resulted in disparate impact discrimination.[7]

In stark contrast to the Supreme Court, the most significant trend during the survey period for the United States Court of Appeals for the Eleventh Circuit was the huge *decrease* in the number of employment discrimination cases handed down by the court during the survey period. In recent years, the court has followed a trend of handing down fewer and fewer published employment discrimination opinions; however, this trend had been offset by the significant increase in unpublished decisions handed down by the appellate court. While the trend toward fewer published decisions continued during the 2009 survey period (indeed, there was only one published Title VII opinion during the entire survey period, and only three published employment discrimination decisions overall), there was also a marked decrease in the number of unpublished discrimination opinions during the survey period. In 2008 the Eleventh Circuit handed down approximately eighty-five unpublished Title VII opinions and approximately one hundred twenty unpublished employment discrimination opinions overall;[8] in 2009 the number of unpublished opinions dwindled to only twenty-six unpublished Title VII opinions and forty-five unpublished employment discrimination opinions overall—or approximately one-third of the number of cases handed down the previous year. This is an indication that the law in this area is becoming so well established that not only are there fewer and fewer unanswered questions for the appellate court to address, but practitioners have greatly diminished the number of appeals they are pursuing above the trial court level.

I. TITLE VII OF THE CIVIL RIGHTS ACT OF 1964

A. Theories of Liability and Burden of Proof

1. Disparate Treatment. In *Ricci v. Destefano*,[9] the United States Supreme Court was confronted with a challenge to the test for promotion to the rank of lieutenant or captain within the Fire Department of New Haven, Connecticut. Despite the City of New Haven's efforts to make

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7. *Id.* at 2675.

8. *See* Peter Reed Corbin & John E. Duvall, *Employment Discrimination, 2008 Eleventh Circuit Survey*, 60 MERCER L. REV. 1173, 1174 (2009).

9. 129 S. Ct. 2658 (2009).

sure that it developed a promotion test that was fair, job-related, and nondiscriminatory (including the hiring of an outside consultant to achieve this result), the actual test results brewed a firestorm of debate. White candidates clearly outperformed minority candidates. For instance, of the ten candidates eligible for promotion to lieutenant as a result of the test, all ten were white. Of the nine candidates eligible for promotion to captain, seven were white and two were Hispanic. No black candidate was included in the group eligible for promotion to either position.[10] After several public hearings and much debate,[11] the city threw out all of the test scores because of a concern that the test had a discriminatory impact on the black candidates.[12] The white and Hispanic firefighters who were due a promotion based upon the test results then sued the city under both Title VII[13] and the Equal Protection Clause of the Fourteenth Amendment,[14] alleging that they had been discriminated against on account of their races. The district court granted summary judgment for the defendants, and the United States Court of Appeals for the Second Circuit affirmed this decision.[15]

The Supreme Court accepted it as a given that the city—however well intentioned its actions—had discriminated against the white and Hispanic firefighters on account of their race when it threw out the test results.[16] The question before the Court, however, was whether the city had "a lawful justification for its race–based action."[17] The firefighters, of course, argued that such disparate treatment discrimination could only be permitted if the test, in fact, violated Title VII's disparate impact provision. The city, on the other hand, argued that its actions were justified as long as it had a good faith belief that the test was discriminatory in impact. The Supreme Court rejected both arguments and adopted a middle ground.[18] The Court held that before an employer can engage in intentional disparate treatment discrimination for the purpose of avoiding unintended disparate impact discrimination, the employer must have "a strong basis in evidence to believe it will be subject to disparate–impact liability if it fails to take the race–conscious, discriminatory action."[19] Because there was no genuine dispute that

10. *Id.* at 2664–66.
11. *See id.* at 2666–71.
12. *Id.* at 2671.
13. 42 U.S.C. §§ 2000e to 2000e-17 (2006).
14. U.S. CONST. amend. XIV, § 1.
15. *Ricci*, 129 S. Ct. at 2671–72.
16. *Id.* at 2674.
17. *Id.*
18. *See id.* at 2675.
19. *Id.* at 2677.

the city did not have a strong basis in evidence to believe that its promotion test was unlawful under a disparate impact theory, the Supreme Court remanded the case and directed that summary judgment be entered for the firefighters whose test results had been voided.[20]

In *Hyde v. K.B. Home, Inc.*,[21] the Eleventh Circuit was confronted with the familiar issue of what constitutes an "adverse action" for purposes of disparate treatment liability under Title VII. The plaintiff brought an action alleging gender and pregnancy discrimination under Title VII. The district court had granted summary judgment for the employer, in part, because it found that the plaintiff had not suffered an adverse employment action.[22] On appeal, the plaintiff argued that she had suffered the withdrawal of work assignments while taking intermittent Family Medical Leave Act (FMLA)[23] leave, and this constituted a sufficient tangible employment action under Title VII.[24] The Eleventh Circuit disagreed.[25] The court of appeals noted that the plaintiff's job title did not change, nor did she receive any reduction in pay.[26] Although the plaintiff was reassigned and had some responsibilities reduced while taking intermittent FMLA leave, the court noted that the employer had done so simply to take reasonable steps to ensure that its business operation was not interrupted.[27] Finding no "'serious and material change in terms, conditions, or privileges of employment,'"[28] the court of appeals affirmed.[29]

2. Sexual Harassment. In *Corbitt v. Home Depot U.S.A., Inc.*,[30] the Eleventh Circuit's only published Title VII opinion during the survey period, the court was confronted with allegations of male-on–male sexual harassment. The plaintiffs were former Home Depot store managers in Mobile, Alabama, and Pensacola, Florida. Problems began to occur when Leonard "Lenny" Cavaluzzi became Home Depot's regional human resources manager. Within a month of Cavaluzzi's transfer to this

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20. *Id.* at 2681.
21. 355 F. App'x 266 (11th Cir. 2009).
22. *Id.* at 267–68.
23. 29 U.S.C. §§ 2601–2654 (2006).
24. *Hyde*, 355 F. App'x at 269.
25. *Id.* at 270.
26. *Id.*
27. *Id.*
28. *Id.* at 269 (emphasis omitted) (quoting Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir. 2001)).
29. *Id.* at 270.
30. 589 F.3d 1136 (11th Cir. 2009), *vacated*, 598 F.3d 1259 (11th Cir. 2010). Following preparation of this Article, the Eleventh Circuit vacated this opinion and voted to rehear the case en banc. *See* Corbitt v. Home Depot U.S.A., Inc., 598 F.3d 1259 (11th Cir. 2010).

position, he began making inappropriate sexual overtures to both of the plaintiffs. The overtures included numerous telephone calls of a sexual nature over a period of months. There were also unwanted physical touchings, which included massaging the plaintiffs' neck and shoulders, playing with their hair, hugging them, and on one occasion putting his hand on one plaintiff's thigh under a table. Both plaintiffs complained about Cavaluzzi's conduct with a store human resources manager. The manager spoke to Cavaluzzi several times, but Cavaluzzi's conduct did not change. The plaintiffs then made a formal complaint pursuant to Home Depot's sexual harassment policy. There were no incidents of harassment after this complaint was made. However, less than a month thereafter, both plaintiffs were terminated as the result of an investigation that allegedly uncovered questionable mark downs and discounted sales.[31] The plaintiffs brought suit under Title VII, alleging hostile work environment sexual harassment and retaliation. The United States District Court for the Southern District of Alabama granted summary judgment for the defendant, finding that the alleged harassment was not sufficiently severe or persuasive to create a hostile work environment and that there was no causal connection between the plaintiffs' complaint of harassment and the investigation leading to their termination.[32]

On appeal, the Eleventh Circuit initially noted that "we apply the same standards to heterosexual sexual conduct and homosexual conduct."[33] In analyzing the alleged harassing conduct, the court of appeals noted that some of Cavaluzzi's comments were "merely complimentary," whereas others were "clearly flirtatious."[34] The court also noted that "[a]lthough [the plaintiffs] may be subjectively more uncomfortable because a presumably gay man made the flirtatious comments, this does not factor into the objective component of the analysis."[35] The court reached a similar conclusion on the alleged touching incidents and agreed with the district court that the conduct at issue "was not sufficiently severe or pervasive."[36] However, the court did conclude that there was enough evidence to show that Cavaluzzi had participated in the investigations leading to the plaintiffs' terminations to create a genuine issue of material fact on the retaliation claim.[37]

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31. 589 F.3d at 1143–50.
32. *Id.* at 1142–43.
33. *Id.* at 1152.
34. *Id.* at 1153.
35. *Id.*
36. *Id.* at 1156.
37. *Id.* at 1159.

Accordingly, the retaliation claim was remanded for further proceedings, whereas the remainder of the district court's opinion was affirmed.[38] The Eleventh Circuit will review this case en banc.[39]

In *Blackmon v. Wal-Mart Stores East, L.P.*,[40] the plaintiff worked as a cashier at a Wal-Mart store in Miami, Florida. One of the plaintiff's coworkers made several sexual comments to the plaintiff, such as, "You know I want to screw you, don't you?," and the like, culminating in a single incident in which the coworker came up behind the plaintiff and grabbed her breast. The plaintiff complained about the touching incident, and Wal-Mart immediately began an investigation. Within two weeks, the coworker was terminated from employment. Within a period of a few weeks following his termination, however, the coworker came into the store as a customer, and he made threatening remarks to the plaintiff while she was working as a cashier. When the plaintiff complained about this conduct, her manager instructed her to simply walk away from her register if the former coworker came back into the store. Soon thereafter, the plaintiff was terminated for excessive absenteeism.[41] The plaintiff brought suit under Title VII and the Florida Civil Rights Act of 1992,[42] alleging sexual harassment and retaliation. The United States District Court for the Southern District of Florida granted summary judgment for Wal-Mart. On appeal, the plaintiff argued that Wal-Mart's response to her complaint was inadequate in that although the coworker had been terminated, he should have been banned from the store in light of his continuing threatening comments as a customer.[43] In rejecting this argument, the Eleventh Circuit held as follows:

> [Wal-Mart] reprimanded [the coworker] several times and, within two weeks of the touching incident, it terminated his employment. [The plaintiff's] argument that Wal-Mart should have banned [the coworker] from the store is unavailing in light of these facts. Wal-Mart's termination of [the coworker] was a prompt and adequate remedy.[44]

The court also agreed with the district court that there was insufficient evidence that the plaintiff's termination was a pretext for retaliation, and affirmed.[45]

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38. *Id.* at 1170.
39. *Corbitt*, 598 F.3d at 1259.
40. 358 F. App'x 101 (11th Cir. 2009).
41. *Id.* at 103–04.
42. FLA. STAT. ANN. §§ 509.092, 760.01–760.11 (West 2005 & Supp. 2010).
43. *Blackmon*, 358 F. App'x at 104.
44. *Id.*
45. *Id.* at 105.

In *Lockett v. Choice Hotels International, Inc.*,[46] the Eleventh Circuit again was confronted with the issue of what degree of severity and pervasiveness is necessary to establish a hostile environment sexual harassment claim. The plaintiff worked in reservations for a Clarion Hotel in Tampa, Florida. One of her coworkers worked in the hotel café. When the plaintiff would visit the café, the coworker made explicit sexual comments to her. For example, he talked about sexual positions, said he would "go down on [her] good," said that her boyfriend "ain't F'ing [her] right," and said that she needed "to get with a real guy."[47]

The plaintiff quit using the café for about three weeks and complained to the hotel about the coworker's behavior. At a meeting to discuss the matter, the coworker admitted his conduct.[48] He also "jumped in [the plaintiff's] face and acted like he was going to hit [her]."[49] The plaintiff responded to him, "I have a boyfriend for you."[50] The hotel terminated the coworker for his sexual statements but also terminated the plaintiff for threatening the coworker at the meeting. The plaintiff filed suit alleging hostile environment sexual harassment pursuant to Title VII and the Florida Civil Rights Act. The United States District Court for the Middle District of Florida granted summary judgment for the defendant.[51] On appeal, the Eleventh Circuit agreed with the district court, finding that the coworker's conduct, while "offensive," did not meet the "minimum level of severity or humiliation needed to establish sexual harassment,"[52] citing the court's prior decision in *Mendoza v. Borden, Inc.*[53]

3. Pregnancy Discrimination. In *AT&T Corp. v. Hulteen*,[54] the Supreme Court considered the question of whether an employer violates the Pregnancy Discrimination Act (PDA)[55] by paying pension benefits calculated under an accrual rule that, until passage of the PDA, gave less retirement credit for pregnancy leave than for other types of medical leave.[56] At issue was AT&T's pension plan. Prior to the passage of the PDA, AT&T employees on disability leave received full service credit for

46. 315 F. App'x 862 (11th Cir. 2009).
47. *Id.* at 863 (alterations in original).
48. *Id.* at 863–64.
49. *Id.* at 864 (quotation marks omitted).
50. *Id.* (quotation marks omitted).
51. *Id.*
52. *Id.* at 866.
53. 195 F.3d 1238, 1246–47 (11th Cir. 1999) (en banc).
54. 129 S. Ct. 1962 (2009).
55. 42 U.S.C. § 2000e(k) (2006).
56. *Hulteen*, 129 S. Ct. at 1966.

the entire period of the employee's absence whereas leave for pregnancy was treated as a "personal" leave, which had a maximum service credit (initially thirty days, later six weeks). On the effective date of the PDA in 1979, AT&T changed its plan and began giving full service credit for pregnancy leave. However, the company did not make any retroactive adjustment for service credits calculated prior to the enactment of the PDA. The plaintiffs were four AT&T employees who received less service credit because they had taken pregnancy leave, ranging from two months to seven months, prior to the enactment of the PDA. The plaintiffs brought suit pursuant to Title VII, alleging that AT&T's pension plan and its calculation of service credits violated the PDA. The United States District Court for the Northern District of California granted summary judgment for the plaintiffs, and the United States Court of Appeals for the Ninth Circuit affirmed this decision.[57]

The Supreme Court addressed the issue of whether the payment of pension benefits was a function of a bona fide seniority system under Section 703(h) of Title VII.[58] Citing its 1977 decision in *Teamsters v. United States*,[59] the Supreme Court held that "AT&T's system must also be viewed as bona fide, that is, as a system that has no discriminatory terms, with the consequence that subsection (h) controls the result here, just as in *Teamsters*."[60] Accordingly, the decision of the Ninth Circuit was reversed.[61]

4. Retaliation. In *Crawford v. Metropolitan Government of Nashville*,[62] the Supreme Court examined the scope of Title VII's retaliation provision, found in Section 704(a) of the Act.[63] Specifically, the Court examined the issue of whether Title VII's retaliation provision protects an employee who reveals discrimination, not on her own initiative, but in answering questions during an employer's internal investigation.[64] The Court held that the retaliation protection does extend this far.[65]

The defendant–employer had begun an investigation into "rumors" of sexual harassment by its employee relations director. The plaintiff never complained about the harassment but was interviewed about

57. *Id.* at 1967–68.
58. 42 U.S.C. § 2000e-2(h); *see Hulteen*, 129 S. Ct. at 1969–70.
59. 431 U.S. 324 (1977).
60. *Hulteen*, 129 S. Ct. at 1970.
61. *Id.* at 1973.
62. 129 S. Ct. 846 (2009).
63. 42 U.S.C. § 2000e-3(a); *Crawford*, 129 S. Ct. at 849–50.
64. *Crawford*, 129 S. Ct. at 849–50.
65. *Id.* at 851.

whether she had ever witnessed any harassing conduct as part of the company's investigation. The plaintiff articulated several incidents of inappropriate behavior by the employee relations director. Soon after the investigation was completed, the defendant fired the plaintiff, allegedly for embezzlement. The plaintiff brought suit pursuant to Title VII, alleging that her termination was in retaliation for the evidence she provided as to the employee relations director's conduct. The United States District Court for the Middle District of Tennessee granted summary judgment for the defendant, finding that the plaintiff's participation in the defendant's investigation did not fall within the scope of Title VII's retaliation protection. The United States Court of Appeals for the Sixth Circuit affirmed this decision.[66] In a unanimous decision, the Supreme Court held as follows:

> There is, then, no reason to doubt that a person can "oppose" by responding to someone else's question just as surely as by provoking the discussion, and nothing in the statute requires a freakish rule protecting an employee who reports discrimination on her own initiative but not one who reports the same discrimination in the same words when her boss asks a question.[67]

Accordingly, the Supreme Court reversed and remanded the case to the Sixth Circuit for further proceedings.[68]

II. AGE DISCRIMINATION IN EMPLOYMENT ACT

A. *Mixed Motive*

In perhaps the most significant employment decision rendered during the survey period, the United States Supreme Court adopted a new evidentiary standard for ADEA[69] claims in *Gross v. FBL Financial Services, Inc.*[70] Surprising both management and plaintiffs' attorneys, a sharply divided Court ruled that employees bringing disparate treatment claims under the ADEA must prove that age was the "but for" cause of the adverse employment action, not just a motivating factor.[71] Additionally, the Court held that the burden of persuasion does not shift to the employer in mixed motive ADEA cases.[72]

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66. *Id.* at 850.
67. *Id.* at 851.
68. *Id.* at 853.
69. 29 U.S.C. §§ 621–634 (2006).
70. 129 S. Ct. 2343 (2009).
71. *Id.* at 2350.
72. *Id.* at 2348.

Writing for a five-member majority, Justice Thomas held that unlike the other federal employment discrimination laws, the ADEA does not specifically provide that an employee may prove discrimination by simply showing that age was a motivating factor in the adverse employment decision.[73] Justice Thomas concluded that the Court's Title VII[74] decision in *PriceWaterhouse v. Hopkins*[75] does not apply to ADEA cases.[76] Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined the majority opinion.[77] Justices Stevens, Souter, Ginsburg, and Breyer dissented, with Justices Stevens and Breyer writing separate dissenting opinions.[78]

In his dissent, Justice Stevens observed that the "but for" causation standard was rejected by both the Court in *PriceWaterhouse* and by Congress when it enacted the Civil Rights Act of 1991.[79] Justice Stevens also objected that the majority had answered a question that was not briefed by the parties.[80] He would have answered only the question presented, and he reasoned that an employee "need not present direct evidence of age discrimination to obtain a mixed-motives instruction" and shift the burden of persuasion.[81]

Members of Congress responded swiftly to the decision. On October 6, 2009, lawmakers in both the House and the Senate introduced the Protecting Older Workers Against Discrimination Act,[82] which clarifies the standard of proof in ADEA cases and counteracts the Court's decision in *Gross*.[83] The bill would amend the ADEA to clarify the standard of proof required in ADEA actions, thereby overturning *Gross*.[84] Specifically, the House Bill states that an ADEA plaintiff establishes an unlawful employment practice by demonstrating by a preponderance of the evidence that age "was a motivating factor for the practice complained of, even if other factors also motivated that practice" or that "the practice complained of would not have occurred in the absence of [the plaintiff's age]."[85] Additionally, the House Bill provides

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73. *Id.* at 2349.
74. 42 U.S.C. §§ 2000e to 2000e-17 (2006).
75. 490 U.S. 228 (1989).
76. *Gross*, 129 S. Ct. at 2349.
77. *Id.* at 2346.
78. *Id.*
79. 42 U.S.C. §§ 1981–1996b (2006); *Gross*, 129 S. Ct. at 2353 (Stevens, J., dissenting).
80. *Gross*, 129 S. Ct. at 2353.
81. *Id.*
82. S. 1756, 111th Cong. (2009); H.R. 3721, 111th Cong. (2009).
83. S. 1756; H.R. 3721.
84. S. 1756; H.R. 3721.
85. S. 1756; § 3; H.R. 3721, § 3.

that plaintiffs can use the *McDonnell Douglas Corp. v. Green*[86] evidentiary framework to prove a violation of the ADEA.[87] As has been the case with other congressional responses to controversial Supreme Court decisions in the employment arena, the bill stands a good likelihood of passage.

B. Arbitrability of Employment Claims

In another split decision rendered during the survey period, the United States Supreme Court addressed the issue of arbitration of employment discrimination claims of union-represented employees under collective bargaining agreements. In *14 Penn Plaza LLC v. Pyett*,[88] a majority of the Court concluded that the "broad sweep" of the National Labor Relations Act (NLRA)[89] makes arbitration provisions in collective bargaining agreements enforceable and held that nothing in the text of the ADEA prohibits arbitration of age discrimination claims.[90]

Writing for the five-member majority,[91] Justice Thomas stated that the decision did not contradict the Court's decision in *Alexander v. Gardner-Denver Co.*[92] Justice Thomas went on to state, however, that he believed the decision in *Gardner-Denver* to be "a strong candidate for overruling."[93]

Justice Stevens dissented, arguing that the majority's decision disregarded several long-standing Supreme Court precedents, including *Gardner-Denver*.[94] Justice Souter issued a separate dissent, which was joined by Justices Stevens, Ginsburg, and Breyer.[95] In his dissent, Justice Souter also argued that the majority's decision was inconsistent with *Gardner-Denver*, but he further stated that the departure may have little practical effect because of remaining questions about the enforceability of the waiver that was negotiated by the union.[96]

The collective bargaining agreement at issue in the appeal prohibited discrimination against employees and cited a number of federal and

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86. 411 U.S. 792 (1973).
87. S. 1756; § 3; H.R. 3721, § 3.
88. 129 S. Ct. 1456 (2009).
89. 29 U.S.C. §§ 151–169 (2006).
90. *Pyett*, 129 S. Ct. at 1464–65.
91. *Id.* at 1460. Chief Justice Roberts and Justices Scalia, Kennedy, and Alito joined in the opinion. *Id.*
92. *Id.* at 1461; Alexander v. Gardner-Denver Co., 415 U.S. 36 (1974).
93. *Pyett*, 129 S. Ct. at 1469 n.8.
94. *Id.* at 1475–76 (Stevens, J., dissenting).
95. *Id.* at 1476 (Souter, J., dissenting).
96. *Id.* at 1481.

state discrimination laws, including the ADEA.[97] The agreement went on to provide that "'[a]ll such claims'" were subject to arbitration under the bargaining agreement "'as the sole and exclusive remedy for violations.'"[98] Disputes arose under the agreement, and several bargaining unit members filed grievances with the union. The union proceeded to arbitration concerning those grievances but declined to pursue grievances alleging that the company had discriminated against the employees because of their ages. The workers then filed age discrimination charges with the United States Equal Employment Opportunity Commission (EEOC). The EEOC dismissed the charges, and the employees thereafter filed suit alleging ADEA violations. The employer filed a motion to compel arbitration on the age-bias claims under the collective bargaining agreement.[99] The United States District Court for the Southern District of New York denied the motion, and the United States Court of Appeals for the Second Circuit affirmed, holding that "a union-negotiated mandatory arbitration agreement purporting to waive a covered worker's right to a federal forum with respect to statutory rights is unenforceable."[100] The Supreme Court reversed, concluding that the ADEA allows for arbitration of such claims.[101] A majority of the Court reasoned that because the employees had designated a union to be their exclusive bargaining representative as provided for under the NLRA, and the union had entered a collective bargaining agreement that provided for arbitration of specific disputes, those statutory rights had been properly waived.[102]

C. Waivers and Releases

Two unpublished Eleventh Circuit opinions rendered during the survey period dealt with the subject of waivers and releases under the Older Workers Benefit Protection Act.[103] Each will be discussed briefly.

In *Wells v. Xpedx*,[104] the plaintiff appealed a summary judgment in favor of his former employer. The United States District Court for the Middle District of Florida granted summary judgment for Xpedx after

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97. *Id.* at 1461 (majority opinion).

98. *Id.*

99. *Id.* at 1462.

100. Pyett v. Pa. Bldg. Co., 498 F.3d 88, 92 (2d Cir. 2007), *rev'd sub nom.* 14 Penn Plaza LLC, 129 S. Ct. 1456 (2009).

101. *Pyett*, 129 S. Ct. at 1474.

102. *Id.*

103. 29 U.S.C. §§ 623, 626, 630 (2006).

104. 319 F. App'x 798 (11th Cir. 2009).

finding that Wells had executed a valid agreement to release all claims he had against his former employer (including any possible ADEA claims) in exchange for his acceptance of what the court deemed a generous severance package.[105] The judgment of the district court was affirmed.[106]

The court of appeals concluded that the evidence presented sufficiently indicated that Wells indeed had knowingly and voluntarily waived his ADEA claims.[107] The court concluded that the employer had shown that the termination agreement had been written in a manner calculated to be understood by Wells, who was an educated business professional experienced in negotiating multimillion dollar contracts with large retailers.[108]

In *Lerman v. City of Fort Lauderdale, Fla.*,[109] the court of appeals had occasion to consider application of the Lilly Ledbetter Fair Pay Act of 2009[110] to the ADEA.[111] The court concluded that the Ledbetter Act was inapplicable and affirmed the United States District Court for the Southern District of Florida's entry of summary judgment in favor of the City of Fort Lauderdale concerning an early retirement incentive program.[112]

D. Retaliation

One unpublished retaliation decision rendered during the survey period is worthy of brief note. In *Watson v. Alabama Farmers Cooperative, Inc.*,[113] the Eleventh Circuit affirmed the grant of summary judgment by the United States District Court for the Middle District of Alabama on the plaintiff's retaliatory transfer claim.[114] While accepting part of the plaintiff's argument that the district court had failed to consider certain facts, the panel nevertheless concluded that the plaintiff had failed to produce sufficient evidence for a reasonable jury to conclude that his reassignment constituted a materially adverse employment action.[115] The court determined that the undisputed evidence indicated the employer had created the transferred position for

105. *Id.* at 799.
106. *Id.* at 801.
107. *Id.* at 800–01.
108. *Id.*
109. 346 F. App'x 500 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1543 (2010) (mem.).
110. 42 U.S.C.A. § 2000e-5(e)(3) (West Supp. 2009).
111. *Lerman*, 346 F. App'x at 502.
112. *Id.*
113. 323 F. App'x 726 (11th Cir. 2009).
114. *Id.* at 730.
115. *Id.* at 729.

the sole purpose of providing the plaintiff with a job.[116] The court reasoned that "[w]e do not believe that this is the type of action that would dissuade 'a reasonable worker from making or supporting a charge of discrimination.'"[117]

III. AMERICANS WITH DISABILITIES ACT

Despite the enactment of the ADA Amendments Act of 2008[118] and the issuance of very permissive regulations by the EEOC in the wake of its enactment,[119] the anticipated flood of new litigation has not yet reached the appellate court level. Cases heard by the United States Court of Appeals for the Eleventh Circuit during the survey period all concerned claims arising under the Americans with Disabilities Act of 1990 (ADA)[120] prior to the effective date of the Amendments Act.

A. Prima Facie Case

The appeal in *Calvo v. Walgreens Corp.*[121] dealt in part with the question of whether the plaintiff had established a prima facie case of disability discrimination. The United States District Court for the Southern District of Florida had granted summary judgment to the employer on the plaintiff's discrimination claim.[122] Completely reexamining each element of a prima facie case of disability discrimination, the Eleventh Circuit concluded that the plaintiff had indeed established each element on her claim.[123] The court also concluded that the plaintiff had sufficiently established a genuine issue of material fact concerning her claim that Walgreens had failed to accommodate her disability.[124] This portion of the plaintiff's appeal was therefore reversed and remanded.[125]

The plaintiff did not fair as well in *Keeler v. Florida Department of Health*.[126] The United States District Court for the Middle District of Florida granted the defendant's motion for summary judgment, finding that the plaintiff failed to meet her burden of establishing a prima facie

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116. *Id.* at 730.
117. *Id.* (quoting Crawford v. Carroll, 529 F.3d 961, 974 (2008)).
118. 110 Pub. L. No. 325, 122 Stat. 3553 (codified in scattered sections of 42 U.S.C. ch. 126).
119. *See* 29 C.F.R. pt. 1600 (2009).
120. 42 U.S.C. §§ 12101-12213 (2006).
121. 340 F. App'x 618 (11th Cir. 2009).
122. *Id.* at 619.
123. *Id.* at 624.
124. *Id.* at 625.
125. *Id.*
126. 324 F. App'x 850 (11th Cir. 2009).

case of disability discrimination under the ADA on her failure to transfer claim.[127] The court of appeals affirmed, holding that the plaintiff had failed to show that the defendant even knew of her alleged impairments.[128] The plaintiff testified in her deposition that "nobody knew" of her claimed disability when she asked to be transferred, and she admitted that she did not disclose her disability until after the position at issue had already been filled.[129] On appeal, the plaintiff asserted that the employer should have known of her limitations "because she took lots of notes, cried while speaking to [her supervisor] about the transfer, and advised [her supervisor] that her position as a records technician was stressful and overwhelming."[130] This behavior did not put the department on notice that Keeler was disabled because it "in no way suggested that Keeler was substantially limited in any major life activity."[131]

B. Business Necessity Defense

In the only published ADA decision rendered during the survey period, a security officer who failed a mandatory hearing test challenged the policy requiring applicants for security positions to pass the test without the use of a hearing aid.[132] The security officer claimed that the testing requirements violated the ADA.[133] The court of appeals determined that there was no violation.[134]

The court concluded that the United States Marshals Service's prohibition against the use of hearing aides by federal court security officers during mandatory hearing tests did not violate the ADA because the Marshals Service had established that the ban was both job-related and a business necessity.[135] The decision provides a good and current analysis of the business necessity defense. The court concluded that because the Marshals Service met its burden of proof, the burden shifted to the plaintiff to offer a reasonable job accommodation that would have allowed him to comply with the ban.[136] It concluded that his proposal, the complete elimination of the ban, "destroys the very standard we have

127. *Id.* at 851.
128. *Id.* at 856–57.
129. *Id.*
130. *Id.* at 856.
131. *Id.*
132. Allmond v. Akal Sec., Inc., 558 F.3d 1312, 1316 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1139 (2010) (mem.).
133. *Id.*
134. *Id.* at 1318.
135. *Id.* at 1317–18.
136. *Id.* at 1318.

just upheld as a legitimate business necessity" and, thus, was unreasonable.[137]

C. *Cat's Paw*

In an unpublished decision, a one-handed sales employee of a furniture company failed to show under the cat's paw theory of liability that her firing violated the ADA. In *Dwyer v. Ethan Allen Retail, Inc.*,[138] the plaintiff claimed on appeal that her immediate supervisor tried to have her fired because of her disability. She claimed that he then used his superior as a "cat's paw" through which he carried out his discriminatory intent.[139]

The United States District Court for the Southern District of Florida found that Dwyer had made a prima facie case under a cat's paw theory but that Ethan Allen had offered a legitimate nondiscriminatory reason for terminating her employment: her violation of company policy.[140] The Eleventh Circuit disagreed on appeal, holding that under the cat's paw theory, a lack of independent investigation by the decisionmaker is a necessary element of the plaintiff's prima facie case.[141] "Even assuming that [the immediate supervisor] harbored a discriminatory animus towards Dwyer, record evidence showed that [the ultimate decisionmaker] independently investigated Dwyer's conduct and that [the ultimate decisionmaker] came to her own conclusion that a Policy violation had occurred."[142]

IV. SECTION 1981

A. *Protected Activity and Retaliation*

The facts in *Jackson v. The GEO Group, Inc.*[143] are somewhat interesting and worthy of discussion. A corrections officer sued his private employer claiming he had been transferred, then suspended, and ultimately fired from employment in retaliation for giving a newspaper interview alleging racial bias at the correctional facility at which he had been employed.[144] The United States District Court for the Southern District of Florida found that Jackson had not established a prima facie

137. *Id.*
138. 325 F. App'x 755 (11th Cir. 2009).
139. *Id.* at 757.
140. *Id.*
141. *Id.*
142. *Id.*
143. 312 F. App'x 229 (11th Cir. 2009).
144. *Id.* at 230–32.

retaliation case with respect to his transfer, suspension, or discharge; and even if he had, he failed to show that his former employer's legitimate, nonretaliatory reason for firing him was a pretext for retaliation.[145]

The Eleventh Circuit concluded that there was only one issue in dispute on appeal, and that was "whether Jackson showed that he was engaging in statutorily protected activity when he decided to speak with the newspaper reporter."[146] The court established the applicable standard:

> For this to have been the case, at the time he spoke with the reporter, he must have held an objectively and subjectively reasonable belief that he had been subjected to an adverse employment action and, as part of the same action, had been treated differently because of his race, thereby violating § 1981.[147]

The court of appeals held that the record lacked evidence that Jackson "was engaging in statutorily protected expression."[148] Further, "[r]egardless of whether Jackson subjectively believed that he had been the victim of racial discrimination, no objectively reasonable person would deem this to have been the case."[149] Concluding that Jackson was not opposing a job action "of the type necessary to establish discrimination,"[150] the court concluded that when he had been reassigned, Jackson had not been disciplined and did not experience a cut in pay, benefits, rank, hours, or any other substantial loss of seniority.[151] The court noted that "[a] reasonable person would not deem these changes to constitute 'a serious and material change in the terms, conditions, or privileges of employment,' as would be necessary for the reassignment to be an adverse employment action and for Jackson's opposition to be statutorily protected expression."[152] The court held that "no objective observer would have viewed the reassignment as racially discriminatory."[153]

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145. *Id.* at 230.
146. *Id.* at 234.
147. *Id.*
148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.* (quoting Davis v. Town of Lake Park, Fla., 245 F.3d 1232, 1239 (11th Cir. 2001)).
153. *Id.*

V. SECTION 1983

A. First Amendment

In *Lyon v. Ashurst*,[154] the plaintiff appealed the dismissal of her employment complaint against the director and other employees of the Alabama Department of Transportation. After the plaintiff resigned her employment with the Alabama Department of Transportation, the department director instructed that a "Do Not Re-hire" notation be placed in her personnel file because of her "disruptive, argumentative, and confrontational behavior" during her employment.[155] Unaware of this notation, the plaintiff sought but was denied several other jobs within the Alabama Department of Transportation, the State of Alabama, and other state agencies. When the plaintiff eventually learned of the "Do Not Re-hire" notation, litigation ensued. The plaintiff asserted in part that she had been retaliated against for filing a grievance and due to her participation in a hearing concerning another grievant during her employment.[156] The plaintiff claimed that the retaliatory actions violated her First Amendment[157] speech rights.[158] The court concluded that because her speech was asserted in the context of an administrative proceeding, it was personal to her and the other employee and did not involve a public forum.[159] Consequently, her speech did not involve a matter of public concern.[160] Her First Amendment claim was therefore dismissed.[161]

B. Procedural Due Process

The case of *Rademakers v. Scott*[162] presented the Eleventh Circuit with a procedural due process question. The Sheriff's Office of Lee County, Florida, had employed Rademakers, first as a patrol officer and then later as a detective. In 2006 she attended a retirement party for a high-ranking sheriff's department official, where it was alleged that she engaged in inappropriate behavior.[163] After the party, coworkers

154. No. 08-16778, 2009 U.S. App. LEXIS 24726 (11th Cir. Nov. 9, 2009).
155. *Id.* at *2 (internal quotation marks omitted).
156. *Id.* at *3.
157. U.S. CONST. amend. I.
158. *Lyon*, 2009 U.S. App. LEXIS 24726, at *3.
159. *Id.* at *5.
160. *Id.*
161. *Id.*
162. 350 F. App'x 408 (11th Cir. 2009).
163. *Id.* at 409.

complained that the plaintiff had rubbed her breasts against employees and engaged in other "inappropriate physical contact."[164] An investigation of the complaints was undertaken, and the department concluded that Rademakers had indeed committed conduct unbecoming an officer and also had been insubordinate by lying during the investigation. After Rademakers received notice of the investigation and of the likelihood that she would be terminated from employment because of its findings, she chose instead to resign her position of employment. Thereafter, she brought suit contending that she had been constructively discharged when forced to choose between resignation or termination without a pre-termination hearing. She also complained that she had been deprived of her liberty and property interest in her reputation and of continued employment in law enforcement without due process of law.[165] Rademakers testified at deposition that she learned that her termination "was a done deal" and that she either could resign or be fired if she did not do so.[166]

The Eleventh Circuit reasoned that a resignation from employment in response to "imminent termination may be considered voluntary if the totality of the circumstances suggest the decision to resign was a deliberate one."[167] "Because Rademakers resigned of [her] own free will even though prompted to do so by events set in motion by [her] employer, [she] relinquished [her] [liberty] interest voluntarily and thus cannot establish that [Scott] 'deprived' [her] of it within the meaning of the due process clause."[168]

C. Qualified Immunity

In *Bryant v. Jones*,[169] the Eleventh Circuit held that Dekalb County, Georgia public officials were not entitled to qualified immunity against claims that they "embarked on a wholesale plan to replace its white county managers with African Americans."[170] Former white county managers sued the DeKalb County chief executive officer, who was black, and others claiming that they were driven from their jobs as a part of the executive's call to establish a "darker administration" for the

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164. *Id.*
165. *Id.* at 409–10.
166. *Id.* at 410.
167. *Id.* at 412.
168. *Id.* (alterations in original) (emphasis and internal quotation marks omitted) (quoting Hargray v. City of Hallandale, 57 F.3d 1560, 1567 (11th Cir. 1993)).
169. 575 F.3d 1281 (11th Cir. 2009), *cert. denied*, 130 S. Ct. 1536 (2010) (mem.).
170. *Id.* at 1288.

county.[171] In December 2006 the district court rejected efforts to dismiss the case on qualified immunity grounds.[172] A unanimous Eleventh Circuit affirmed: "Because a reasonable official would have known that discriminating against county managers on account of their race was unlawful, the district court ruled correctly in denying the defendants qualified immunity."[173] "Although we are careful not to gild the lily, [one of the white managers] has introduced shocking evidence of an overt and unabashed pattern of discrimination."[174]

VI. SECTION 1985

A. A Heightened Pleading Standard?

In *Lyon v. Ashurst*,[175] the United States Court of Appeals for the Eleventh Circuit applied the *Bell Atlantic Corp. v. Twombly*[176] pleading standard to a § 1985 action.[177] The plaintiff's amended complaint had been dismissed by the district court because it failed to allege or support an inference that the claimed conspiracy as a whole was motivated by class-based animus.[178] On appeal, the Eleventh Circuit agreed and said that the "[p]laintiff's grounds for her entitlement to relief were no more than 'labels and conclusions, and a formalistic recitation of the elements of a cause of action.'"[179] "Even accepting all the allegations in [the] [p]laintiff's amended complaint as true, only speculation can fill the gaps in the complaint."[180]

It is reasonable to anticipate increased reliance on *Twombly* by the employment defense bar to require the plaintiffs to more clearly plead their attempted claims and a corresponding increase in motions to dismiss practice in the district courts. Appeals practice in this area may see an increase as well.

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171. *Id.* at 1289.

172. *Id.* at 1294.

173. *Id.* at 1300.

174. *Id.* at 1299.

175. No. 08-16778, 2009 U.S. App. LEXIS 24726 (11th Cir. Nov. 9, 2009). For additional discussion of this case, see *supra* text accompanying notes 154–61.

176. 550 U.S. 544 (2007). In *Twombly* the United States Supreme Court raised the pleading bar in securities law class actions. *See id.* Since the decision was rendered, litigants and jurists have struggled with the questions of the proper scope and breadth of the new heightened pleading standard to other causes of action, including employment cases.

177. 42 U.S.C. § 1985 (2006); *see Lyon*, 2009 U.S. App. LEXIS 24726.

178. *Lyon*, 2009 U.S. App. LEXIS 24726, at *3.

179. *Id.* at *7 (quoting *Twombly*, 550 U.S. at 555).

180. *Id.*

VII. CONCLUSION

Unpublished employment decisions continue to be the hallmark of the United States Court of Appeals for the Eleventh Circuit during the survey period. United States Supreme Court decisions rendered during the survey period provided the most interesting fodder and continue to reflect the conservative evolution of the Roberts Court.

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