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Labor and Employment

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There were a number of important decisions in the labor and employment law arena handed down by courts within the Eleventh Circuit during the January 1, 2013 to December 31, 2013 survey period.[1] The following is a discussion of the most significant of those opinions.

I. THE DODD-FRANK WALL STREET REFORM AND CONSUMER PROTECTION ACT

Congress passed the Dodd-Frank Wall Street Reform and Consumer Protection Act of 2010 (Dodd-Frank or the Act)[2] in the wake of the great financial collapse of 2008. Ever since, federal courts have struggled to interpret Dodd-Frank with regard to a wide range of issues that the Act left either unsettled or unaddressed.[3] In *Pruett v. BlueLinx Holdings,*

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1. For an analysis of labor and employment law during the prior survey period, see Patrick L. Coyle, Alexandra Garrison Barnett & Brooks A. Suttle, *Labor and Employment, Eleventh Circuit Survey*, 64 MERCER L. REV. 965 (2013).

2. Pub. L. No. 111-203, 124 Stat. 1376 (2010) (codified in scattered sections of U.S.C. titles 7, 12, 15, 22, and 42).

3. In addition to numerous ambiguities and inconsistencies in Dodd-Frank's statutory language, the legislative purpose and congressional intent underlying parts of the Act can be difficult to discern, and may even appear to be at odds with regard to certain provisions. This is often attributed to the way in which Congress, responding to immense public pressure to act, hastily debated and passed Dodd-Frank as an amalgamation of a variety of bills already in existence at the time, rather than drafting the Act anew from the ground up. Indeed, one commentator even described Dodd-Frank, not entirely inaccurately, as "a trash-compactor collection of unrelated provisions thrown together in the mad rush to pass a bill, any bill." *See* David John, *Passed Hastily, Dodd-Frank Is a Counterproductive Mess,*

Inc.,[4] Judge J. Owen Forrester of the United States District Court for the Northern District of Georgia held that whistleblowers bringing retaliation claims under section 78u-6(h)(1)(A) of Dodd-Frank are not entitled to a jury trial.[5] The decision, an issue of first impression among the federal courts with regard to so-called Dodd-Frank whistleblower plaintiffs, sets an important precedent that could significantly impact the calculus of both employers and employees in deciding whether and how to bring or defend against Dodd-Frank whistleblower claims.

In *Pruett*, the plaintiff was a former compliance manager at the defendant company who claimed that he was retaliated against for reporting what he alleged were potential violations of the securities laws to the Public Company Accounting Oversight Board, which then communicated the allegations to the Securities and Exchange Commission (SEC). After the plaintiff filed his complaint, the company moved the court to dismiss plaintiff's demand for a jury trial, arguing that no such right was provided for by the Act.[6] That is, while Dodd-Frank specifically amended the existing whistleblower provisions in the Sarbanes-Oxley Act (SOX)[7] to include an express right to a jury trial,[8] no similar provision was incorporated into the new whistleblower protections contained in the Securities Exchange Act of 1934 (Exchange Act),[9] which were created by Dodd-Frank and pursuant to which the plaintiff had brought his retaliation claim.[10]

U.S. NEWS & WORLD REP. (Oct. 17, 2011) *available at* http://www.usnews.com/debate-club/should-the-dodd-frank-act-be-repealed/passed-hastily-dodd-frank-is-a-counter productive-mess.

4. 2013 U.S. Dist. LEXIS 185551 (N.D. Ga. Nov. 12, 2013).

5. *Id.* at *3, *10; *see also* 15 U.S.C. § 78u-6(h)(1)(A) (2012).

6. *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *2.

7. Pub. L. No. 107-204, 116 Stat. 745 (2012) (codified at 15 U.S.C. §§ 7201-7266).

8. *See* 18 U.S.C. § 1514A(b)(2)(E) (2012) (guaranteeing plaintiffs who qualify as whistleblowers under SOX the right to a jury trial). The provision was added to SOX by way of amendment in section 922(c) of Dodd-Frank. 18 U.S.C. § 922(c), 124 Stat. at 1842.

9. Pub. L. No. 73-291, 48 Stat. 881 (1934) (codified at 15 U.S.C. § 78a-78pp).

10. Section 922(a) of Dodd-Frank amended the Exchange Act to provide new anti-retaliation protections for employees who qualify as whistleblowers under the Exchange Act, as distinct from SOX whistleblower plaintiffs. *Compare* 15 U.S.C. § 78(h) (2012) *with* 18 U.S.C. § 1514A (2012). Specifically, Dodd-Frank added a new section to the Exchange Act, § 21F, entitled "Securities Whistleblower Incentives and Protection." (codified as amended at 15 U.S.C. § 78u-6). Within this new section, there is a provision that an employer may not "discharge, demote, suspend, threaten, harass, directly or indirectly, or in any other manner discriminate against" an employee who provides certain types of information to the SEC regarding alleged violations of the securities laws. 15 U.S.C. § 78u-6(h)(1)(A). The Exchange Act whistleblower statute, however, is silent on the right to a jury trial, unlike the amended SOX provisions. *Compare* 15 U.S.C. § 78u-6(h)(1)(A), *with*

Because the Exchange Act is silent on the issue of a jury right for whistleblower plaintiffs, the court in *Pruett* began with the Seventh Amendment[11] and its traditional two-part analysis.[12] Under that test, courts first "compare the nature of the issues to be resolved to eighteenth century actions brought in the courts of England prior to the merger of the courts of law and equity," and then "assess whether the remedy sought is legal or equitable in nature."[13] The court found that the first factor favored a jury right as the retaliation claim at issue was most analogous to the common-law tort of wrongful discharge.[14]

Regarding the second factor of the Seventh Amendment analysis—the nature of the remedy sought—the Dodd-Frank amendments to the Exchange Act limit the remedies available to a successful whistleblower plaintiff to the following: "(i) reinstatement with the same seniority status that the individual would have had, but for the discrimination; (ii) [two] times the amount of back pay otherwise owed to the individual, with interest; and (iii) compensation for litigation costs, expert witness fees, and reasonable attorneys fees."[15]

In *Pruett*, the court observed that "reinstatement, hiring, and back pay are generally considered equitable remedies,"[16] which can be defined as remedies intended to make the employee "whole."[17] Thus, the key issue

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18 U.S.C. § 1514A. It was under Dodd-Frank that the plaintiff brought his retaliatory discharge claim. *Pruett*, 2013 U.S. Dist LEXIS 185551, at *1.

Notably, prior to the Dodd-Frank amendments, SOX was also silent as to a jury right for whistleblower plaintiff. James L. Buchwalter, Annotation, *Construction and Applications of Whistleblower Provision of Sarbanes-Oxley Act, 18 U.S.C.A. § 1514A(a)(1)*, FED. 2D 315 (2006). The majority of courts that considered the issue concluded that no such right existed. *See* Jones v. Home Fed. Bank, 2010 U.S. Dist. LEXIS 3579, at *19-20 (D. Idaho Jan. 14, 2010) (citing cases addressing the right to a jury trial for SOX whistleblower plaintiffs and deciding to follow "the majority of cases that have . . . held that no right to a jury trial exists"). *See also* Granfinanciera, S.A. v. Nordberg, 492 U.S. 33, 41-42 (1989) (holding that the right to a jury trial is not guaranteed by the Seventh Amendment where only equitable remedies are involved); Walton v. Nova Info. Sys., 514 F. Supp. 2d 1031, 1034 (E.D. Tenn. 2007) (holding that "since the back pay damages under the remedies provision of the Sarbanes-Oxley Act are restitutionary damages intended to 'make the employee whole,' such damages are equitable in nature, not legal, and do not give Plaintiff the right to a jury trial").

11. U.S. CONST. amend. VII.

12. *Pruett*, 2013 U.S. Dist LEXIS 185551, at *3-4.

13. *Id.* at *4-5 (quoting Stewart v. KHD Deutz of Am. Corp., 75 F.3d 1522, 1525 (11th Cir. 1996)). Furthermore, "[t]he nature of the remedy sought is the more important inquiry in [the] analysis." *Stewart*, 75 F.3d at 1525.

14. *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *5.

15. 15 U.S.C. § 78u-6(h)(1)(C).

16. 2013 U.S. Dist LEXIS 185551, at *5.

17. *Id.* at *5-6.

before the court was whether the doubling of a back-pay award under § 78u-6(h)(1)(C)(ii) made the statutory remedy more than restitutionary or equitable in nature, moving it instead into the field of compensatory, liquidated, or punitive damages, as the plaintiff contended.[18]

Siding with the defendants, the court held that "[t]he purpose of the remedies in § 78u-6(h)(1)(C) is clearly to place the employee in the position he would have been absent any retaliatory actions."[19] Thus, the remedies available for Exchange Act whistleblowers are restitutionary in nature, and the court did not find the fact that the back-pay award is doubled under the statute to be significant in its analysis.[20] To the contrary, "the automatic doubling is a calculation that lacks the discretion generally associated with monetary damages awarded by a jury."[21] As such, there is nothing for a jury to decide, as the Exchange Act's whistleblower provisions do not require a determination of "willfulness" before the proper remedy can be determined.[22] Rather, "[t]he court simply calculates the back pay—which is its responsibility and not that of a jury—and doubles that amount."[23]

To conclude its analysis, the court also considered the legislative history of Dodd-Frank with regard to whistleblower laws.[24] As noted previously, the Exchange Act's whistleblower provisions, enacted by Dodd-Frank, are closely analogous to the SOX whistleblower provisions as they existed prior to being amended by Dodd-Frank to include an

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18. *Id.* at *6-7 & n.1. In *Pruett*, the court also held, after the plaintiff conceded the argument, that under the plain language of the Exchange Act, punitive damages are not an available remedy for whistleblower plaintiffs. *Id.* at *2. Accordingly, the court granted the defendant's motion to dismiss the plaintiff's punitive damages claim. *Id.; see also* Kramer v. Trans-Lux Corp., 2012 U.S. Dist. LEXIS 136939, at *19 (D. Conn. Sept. 25, 2012) (granting motion to strike punitive damages from a Dodd-Frank whistleblower claim and limit the plaintiff to the remedies expressly available in the statute).

19. *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *8.

20. *Id.* at *6.

21. *Id.*

22. *Id.* at *6, *8. *Compare* Trans World Airlines, Inc. v. Thurston, 469 U.S. 111, 125, 129, 130 (1985) (holding that damages under the Age Discrimination in Employment Act (ADEA) are liquidated and punitive in nature because they require a "willfulness" finding), *with* Jordan v. United States Postal Serv., 379 F.3d 1196, 1202 (10th Cir. 2004) (holding that damages under the Family and Medical Leave Act (FMLA) and Fair Labor Standards Act (FLSA) are liquidated but are not penalties because they do not require a finding of willfulness).

23. *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *6. Under Dodd-Frank, relief for a prevailing whistleblower plaintiff "shall" include reinstatement, two times the amount of back pay owed, and compensation for various costs incurred in bringing the action. *See* 15 U.S.C. § 78u-6(h)(1)(C).

24. *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *9-10.

express right to a jury trial.[25] The remedies available under SOX, however, also include "compensation for any special damages,"[26] which the court found to be "arguably broader" than the remedies available under Dodd-Frank.[27] Yet the majority of courts considering the pre-amendment SOX whistleblower remedies nonetheless found them to be equitable in nature, and thus they did not entitle whistleblower plaintiffs to a jury trial under the Seventh Amendment.[28] Moreover, the court noted that when Congress passed Dodd-Frank, it chose to specifically amend SOX to include a jury right, but did not include a similar provision for Exchange Act whistleblowers "despite being aware of the legal controversy surrounding whether a jury trial was available under Sarbanes-Oxley."[29] As Congress, through Dodd-Frank, amended both SOX and the Exchange Act at the same time, the discrepancy between the two statutes' whistleblower provisions would appear to indicate congressional intent *not* to provide a jury right under the latter.[30] Pursuant to its analysis, then, the court in *Pruett* granted the defendant's motion to strike the plaintiff's request for a jury trial.[31]

Judge Forrester's decision in *Pruett* sets a significant precedent within the Eleventh Circuit on an important issue of first impression. In addition to offering some clarification on one of Dodd-Frank's many ambiguities, the decision also provides some level of certainty as to who the fact-finder will be at an Exchange Act whistleblower trial. Overall, then, the decision will probably be seen as a "win" for employers, since juries are generally considered to be more sympathetic toward civil-suit plaintiffs than judges in these types of cases. Indeed, the lack of an automatic jury right under the Dodd-Frank amendments may discourage some former employees from bringing frivolous whistleblower claims. While it remains to be seen how the issue will play out before other courts, unless and until Congress amends the Exchange Act's whistleblower provisions as enacted by Dodd-Frank, it seems likely that the *Pruett* decision will represent persuasive authority outside of the Eleventh Circuit.

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25. *See supra* note 8 and accompanying text.
26. 18 U.S.C. § 1514A(c)(2)(C).
27. *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *8.
28. *Id.* at *9, *10; *see also supra* note 8 and accompanying text.
29. *Pruett*, 2013 U.S. Dist. LEXIS 185551, at *9, *10.
30. *Compare* 18 U.S.C. § 1514A, *with* 15 U.S.C. § 78u-6.
31. 2013 U.S. Dist. LEXIS 185551, at *10.

II. FAIR LABOR STANDARDS ACT

Under long-standing Eleventh Circuit precedent established in *Lynn's Food Stores, Inc. v. United States*,[32] settlements of Fair Labor Standards Act (FLSA)[33] claims between employers and employees are unenforceable unless they are supervised and approved by either a court or the Department of Labor (DOL).[34] In *Nall v. Mal-Motels, Inc.*,[35] the Eleventh Circuit recently expanded the *Lynn's Food Stores, Inc.* rule to also apply to settlements reached between employers and *former* employees.[36] In so doing, the Eleventh Circuit went further than any other court of appeals thus far in prohibiting private waivers of FLSA claims,[37] and in fact set itself at odds with a recent trend toward permitting some FLSA settlements that has developed in other jurisdictions.[38] Before turning to the *Nall* decision, however, a brief review of the history of private waivers under the FLSA is warranted.

In the FLSA as it was originally enacted in 1938, "[n]othing was mentioned as to the ability of parties to enter into private settlements."[39] Inevitably, however, the issue of whether FLSA liability could be waived by agreement soon made its way before the United States Supreme Court. In the dual cases of *Brooklyn Savings Bank v. O'Neil* [40] and *D.A. Schulte, Inc. v. Gangi*,[41] the Court first read into the FLSA a prohibition on private waivers based on public-policy concerns.[42] As the Court observed in *O'Neil*, such an analysis should ordinarily begin and end with the statute itself.[43] However, because "[n]either the statutory language, the legislative reports nor the debates indicate[d] that the question at issue was specifically considered and resolved by Congress," the Court found it necessary to look to the

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32. 679 F.2d 1350 (11th Cir. 1982).

33. Pub. L. No. 75-718, 52 Stat. 1060 (codified at 29 U.S.C. §§ 201-219).

34. *Lynn's Food Stores, Inc.*, 679 F.2d at 1355.

35. 723 F.3d 1304 (11th Cir. 2013).

36. *Id.* at 1307.

37. *Id.* at 1307-08. The validity of a FLSA settlement depends on the enforceability of the employee's waiver of his or her right to bring a claim pursuant to the statute, and the terms "waiver" and "settlement" are more or less interchangeable in this context. *Id.*

38. *See infra* note 55 and accompanying text.

39. Martinez v. Bohls Equip. Co., 361 F. Supp. 2d 608, 619 (W.D. Tex. 2005) (providing a detailed review of the history of the FLSA and the case law interpreting it with regard to settlements of claims).

40. 324 U.S. 697 (1945).

41. 328 U.S. 108 (1946).

42. *See Gangi*, 328 U.S. at 115.

43. *See O'Neil*, 324 U.S. at 705 ("[T]he question of whether the statutory right may be waived depends upon the intention of Congress as manifested in the particular statute.").

policies underlying the statute to attempt to discern congressional intent.[44] In considering those policies, the Court found that allowing private compromises of FLSA liquidated-damages claims could threaten the Act's legislative purpose of guaranteeing workers a certain minimum wage, because employers might use their superior bargaining power to extract settlement agreements from their employees for amounts far less than would be recoverable under the statute.[45] Accordingly, in both *O'Neil* and *Gangi* the Court held that Congress could not have intended for such settlements to be enforced.[46]

Shortly after *O'Neil* and *Gangi* were decided, Congress explicitly addressed the settlement issue, first by passing Section 3 of the Portal–to–Portal Act of 1947[47] to allow for the compromise of certain then-existing FLSA claims,[48] and then by adding section 16(c) to the FLSA through the Fair Labor Standards Amendments of 1949,[49] which allows for settlement of FLSA claims under the supervision of the Secretary of Labor.[50] Many considered these amendments to be a negative reaction to *O'Neil* and *Gangi*, and thus a sign that "a Congress relatively contemporary with the passage of the FLSA in 1938 viewed these decisions as contrary to the intent of the FLSA."[51] Indeed, *O'Neil* and *Gangi* have been ignored by some courts in light of the FLSA amendments as being inconsistent with both congressional intent and

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44. *Id.* at 705-06.

45. *Id.* at 706-07. Under the FLSA, employers who violate the Act's minimum-wage provisions are automatically liable for liquidated damages in an amount equal to the wages owed. *See* 29 U.S.C. § 216(b) (2012). In *O'Neil* and *Gangi*, the defendant employers sought to enforce settlements reached with their employees that purported to pay back wages owed but waived the employees' right to bring a claim for liquidated damages under the Act. *See Gangi*, 328 U.S. at 112; *O'Neil*, 324 U.S. at 700. In both cases, however, the Court made clear that it was leaving open the question of whether private settlements were permissible where there was a bona fide dispute as to FLSA liability, as opposed to a dispute simply over the proper amount owed. *See Gangi*, 328 U.S. at 114-15 (declining to consider "the possibility of compromises in other situations which may arise, such as a dispute over the number of hours worked or the regular rate of employment"); *O'Neil*, 324 U.S. at 714 ("Our decision . . . has not necessitated a determination of what limitation, if any, section 16(b) . . . places on the validity of agreements between an employer and employee to settle claims arising under the Act if the settlement is made as the result of a bona fide dispute between the two parties, in consideration of a bona fide compromise and settlement."); *see also Martinez*, 361 F. Supp. 2d at 620-21.

46. *Gangi*, 328 U.S. at 114, 116; *O'Neil*, 324 U.S. at 707.

47. Pub. L. No. 80-49, 61 Stat. 84 (1947) (codified at 29 U.S.C. §§ 251-262 (2012)).

48. *See* 29 U.S.C. § 253.

49. Pub. L. No. 81-393, ch. 736, 63 Stat. 910 (1949) (codified at 29 U.S.C. § 216(c) (2012)).

50. *See* 29 U.S.C. § 216(c).

51. *Martinez*, 361 F. Supp. 2d at 625.

the general favorability of settlements as a means of promoting judicial economy.[52]

Several decades after *O'Neil* and *Gangi*, the Eleventh Circuit in *Lynn's Food Stores, Inc.* refused to approve an FLSA waiver that was made outside of the two recognized avenues for settling such claims: (1) settlements made under the supervision of the Secretary of Labor as provided for in section 16(c) of the FLSA; or (2) settlements entered by a district court as a stipulated judgment on claims brought directly by employees against their employer under section 16(b).[53] Indeed, the Court held that DOL- or court-approved settlements are the "only two ways in which back wage claims arising under the FLSA can be settled or compromised by employees,"[54] thus answering the question left open by the Supreme Court by prohibiting private waivers even where there is a bona fide dispute as to liability. In deciding that private waivers are never permissible under the FLSA, the Eleventh Circuit based its strict reading of the statute on the policy concerns that were identified in *O'Neil* and *Gangi*.[55] Specifically, the court focused on the policy

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52. *See* United States v. Allegheny-Ludlum Indus., Inc., 517 F.2d 826, 861-62 & n.42 (5th Cir. 1975) (concluding that the Portal-to-Portal Act was meant to overrule *O'Neil* and *Gangi* and noting that otherwise the courts would be overburdened with unnecessary litigation).

53. *Lynn's Food Stores, Inc.*, 679 F.2d at 1352-53. The permissibility of court-approved settlements was established in a decision by the former United States Court of Appeals for the Fifth Circuit, which is binding on the Eleventh Circuit. Jarrard v. Se. Shipbuilding Corp., 163 F.2d 960, 961 (5th Cir. 1947).

54. *Lynn's Food Stores, Inc.*, 679 F.2d at 1352; *see also Martinez*, 361 F. Supp. 2d at 631 (noting that "[n]o court other than the Eleventh Circuit has expressly held that such a settlement is prohibited").

55. *Lynn's Food Stores, Inc.*, 679 F.2d at 1352-53. Just as in *O'Neil* and *Gangi*, it was necessary to look to policy and legislative purpose because the FLSA, even as amended, does not expressly prohibit settlements where there is a bona fide dispute over liability. Rather, Congress amended the statute to allow for supervised settlements but neither endorsed nor rejected the possibility of there being other, non-statutory methods for compromising FLSA claims. *See Martinez*, 361 F. Supp. 2d at 626 ("Whether Congress intended section 16(c) to be the exclusive manner by which to settle claims does not have a clear answer."). As such, other circuit courts have reached different conclusions than the Eleventh Circuit when addressing this issue.

The Fifth Circuit, for example, recently followed *Martinez* in affirming that "a private compromise of claims under the FLSA is permissible where there exists a bona fide dispute as to liability." Martin v. Spring Break '83 Prods., LLC, 688 F.3d 247, 255 (5th Cir. 2012) (quoting *Martinez*, 361 F. Supp. 2d at 633). In *Martin*, the Fifth Circuit enforced a private FLSA settlement agreement negotiated by the employees' union and precluded the individual employees from later asserting FLSA claims in litigation. The court reasoned that because the settlement was negotiated by the union, it did not raise the normal public-policy concerns regarding unequal bargaining power between employer and employee. *See id.* at 257; *see also* Picerni v. Bilingual Seit & Preschool, Inc., 925 F. Supp. 2d 368, 378-79

determination that a supervised settlement "is more likely to reflect a reasonable compromise of disputed issues than a mere waiver of statutory rights brought about by an employer's overreaching."[56]

The recent decision in *Nall* is significant because it reaffirms the Eleventh Circuit's commitment to *Lynn's Food Stores, Inc.* and the requirement that all FLSA settlements be approved for fairness, despite recent contrary decisions in other circuits.[57] In *Nall*, the plaintiff quit her job as a front desk clerk at Mal-Motels because she was not being paid overtime and filed suit against her former employer for back wages under the FLSA. Subsequently, she was contacted by the owner of the company, who asked her to meet him at a motel without her attorney to discuss a settlement. The owner told the former employee that she was "ruining his business," and offered her between two and three thousand dollars to sign two documents he presented her with—a voluntary dismissal and a letter to her attorney informing him the case was settled. Nall later testified that she felt pressured and needed the money because she was homeless at the time. There was no written settlement agreement signed by the parties.[58]

After the plaintiff's voluntary dismissal was filed and initially rejected by the United States District Court for the Middle District of Florida because Nall had not moved to appear *pro se*, the owner hired an attorney to enforce the settlement.[59] The district court approved the settlement, over the plaintiff's objections, as "a fair and reasonable resolution of a bona fide dispute" under the FLSA, and dismissed the case.[60] The plaintiff appealed the case to the Eleventh Circuit, arguing that the settlement approved by the district court did not meet the requirements of *Lynn's Food Stores, Inc.*[61]

Arguably, the public-policy concerns expressed in that case regarding employers' unfair bargaining power over employees would not apply

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(E.D.N.Y. 2013). In *Picerni*, a New York federal court found that Rule 41 of the Federal Rules of Civil Procedure applies to FLSA cases, and that plaintiffs may voluntarily dismiss their FLSA claims after accepting an offer of judgment and before the defendant files an answer. 925 F. Supp. 2d at 375; Fed. R. Civ. P. 41. The court did note, however, that the settlement could still be scrutinized for fairness—that is, if the plaintiff later decides to challenge the settlement, the court in the subsequent action would be required to scrutinize it for fairness before agreeing to enforce it. *Picerni*, 925 F. Supp. 2d at 378-79.

56. *Lynn's Food Stores, Inc.*, 679 F.2d at 1354.

57. *See supra* note 55 and accompanying text.

58. *Nall*, 723 F.3d at 1305-06.

59. *Id.* at 1306.

60. *Id.* (quoting Nall v. Mal-Motels, Inc., 2012 U.S. Dist LEXIS 76441 (M.D. Fla. June 1, 2012)).

61. *See id.*

where the individual waiving his or her FLSA claim is no longer employed by the company.[62] The Eleventh Circuit, however, expressed its belief in *Nall* that the same factors that would lead to uneven bargaining power between an employer and a current employee were also applicable to the relationship between an employer and a former employee, and thus the *Lynn's Food Stores, Inc.* rule still applies.[63] That is, individuals who need their back wages promptly may still be at a disadvantage in bargaining with a former employer, and permitting employers to escape liquidated damages through private settlements "would undermine the deterrent effect of the statutory provisions."[64]

Having decided that *Lynn's Food Stores, Inc.* applied, the court held in *Nall* that the district court's approval of the settlement could only be upheld if the district court entered a stipulated judgment approving the settlement.[65] But because a stipulated judgment requires the approval of both parties, and because the plaintiff objected to the judgment, the court of appeals held that the settlement between Nall and Mal-Motels was neither supervised by the DOL nor memorialized by a *stipulated* judgment from the court, as required by the *Lynn's Food Stores, Inc.* rule.[66] Accordingly, the Eleventh Circuit vacated the district court's approval and remanded the case.[67]

Similar to *Lynn's Food Stores, Inc.*, the facts in *Nall* were unusually egregious with regard to the plaintiff's bargaining position, and the defendant's actions seemed clearly intended to pressure the plaintiff into accepting an unfair compromise of her FLSA rights.[68] Thus, while *Nall* reinforced and even expanded the *Lynn's Food Stores, Inc.* holding that

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62. *See generally id.* at 1307. As the court explained, "[t]he most cause for concern exists when the plaintiff employee is still working for the defendant employer. An employee is subject to the supervision and personnel decisions of her employer and the possibility of retaliation may pervade the negotiations," which is not the case with a former employee who negotiates a settlement. *Id.*

63. *Id.* at 1306-07.

64. *Id.* at 1307.

65. *Id.* at 1308.

66. *Id.*

67. *Id.*

68. As discussed above, the plaintiff in *Nall*, who was homeless and in desperate need of money, was asked by her former employer to come without her attorney to a motel room to discuss settlement and was offered between two and three thousand dollars in exchange for signing two documents that she was not given time to read. *Id.* at 1305-06. In *Lynn's Food Stores, Inc.*, the employees had not brought suit before the employer approached them offering a settlement for far less than the amount they were owed as determined by the DOL. *See* 679 F.2d at 1354. Moreover, the employees were mostly unaware that they had any rights under the FLSA; they had not consulted with an attorney before signing the settlement agreements, and many of them did not speak English. *Id.*

only settlements supervised by the DOL or entered by a court in a stipulated judgment are enforceable in the Eleventh Circuit, both cases would be easily distinguishable from those where fully informed and well-represented parties reached an out-of-court settlement for a voluntary dismissal, and then one party later sought to renege on the agreement. Indeed, the court in *Nall* specifically noted that it was not deciding "whether a judgment approving an out-of-court agreement entered with the assistance of counsel is a stipulated judgment even if the attorney later objects."[69] In such a case, the Eleventh Circuit might very well be amenable to the more pragmatic approach taken in some other circuits, which would allow for private settlements where the danger of unequal bargaining power and employer overreach is not present.[70]

As the Fifth Circuit has recently recognized,[71] the policy considerations upon which the holding in *Lynn's Foods Stores, Inc.* is based are not necessarily applicable to situations where employers have negotiated at arms' length a fair settlement of an FLSA claim with an employee represented by competent counsel.[72] Moreover, a strict rule prohibiting otherwise valid settlements of bona fide disputes over FLSA liability discourages the amicable settling of wage disputes, creates uncertainty for employers regarding confidentiality, and uses up valuable judicial resources on many cases that could be fairly settled without resorting to full-on litigation. Regardless, what the Eleventh Circuit will do in such a situation remains to be seen. What is certain is that, after *Nall*, employers in the Eleventh Circuit will be taking a large risk if they pursue private settlements of FLSA claims with any employee, current or former, that include a voluntary dismissal of the plaintiff's claim rather than a stipulated judgment entered by the court.

III. AGE DISCRIMINATION IN EMPLOYMENT ACT

Addressing an issue of first impression in the Eleventh Circuit, the court of appeals in *Sims v. MVM, Inc.*[73] affirmed the United States District Court for the Northern District of Georgia holding that an

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69. 723 F.3d at 1308 n.3.

70. *See Martin*, 688 F.3d at 249; *see also supra* note 55 and accompanying text. Indeed, even the Eleventh Circuit has approved of the dismissal of an FLSA claim pursuant to Fed. R. Civ. P. 12(h)(3) without judicial approval of the payment where the employee was paid his back wages in full as well as liquidated damages, but without attorney fees. *See* Dionne v. Floormasters Enters., Inc., 667 F.3d 1199, 1200 (11th Cir. 2012).

71. *Martin*, 688 F3d at 256 & n.10.

72. *Id.* at 257.

73. 704 F.3d 1327 (11th Cir. 2013).

employee claiming age discrimination under the Age Discrimination in Employment Act (ADEA or the Act)[74] must show that age was the "but-for" cause of his employer's adverse action, even when the employee's claim is based on the "cat's paw" theory of liability.[75] In so doing, the Eleventh Circuit made it clear that the Supreme Court's holding in *Gross v. FBL Financial Services, Inc.*[76]—that an ADEA plaintiff must prove that discrimination was the "but-for" cause of the adverse employment action—applies to ADEA cases in which the employee alleges that the decision maker acted based on the discriminatory animus of another employee.[77]

In *Sims*, MVM, Inc. (MVM) contracted with a correctional facilities provider in November 2007 to provide secure custody and transport services for federal prisoners in custody that were being held at various detention centers around Atlanta, Georgia. Because this was a start-up contract, MVM had to acquire a workforce. In December 2007, MVM hired Solomon Sims, Jr. as an operations supervisor. A month later, MVM hired Arnold Perkins as the project manager and Tom Davis as the assistant project manager. Davis was Sims's immediate supervisor.[78]

Sims's responsibilities as operations manager included reviewing government documentation and preparing the paperwork needed for the transportation of prisoners between different locations. Over time, Davis began to notice that Sims made more errors than other supervisors working on the same contract and that Sims's performance never improved. Similarly, Perkins observed during evaluations of the supervisors that the quality and accuracy of Sims's work was poorer than that of others, that Sims was uncomfortable using the computers he needed to produce documentation, and that it took Sims longer to prepare documents than it did other supervisors. In addition, other supervisors told Perkins that they sometimes had to correct Sims's paperwork before it was submitted to Perkins for review.[79]

Around the same time, in March 2008, the vice president of MVM notified Perkins that he needed to reduce the number of supervisors working on the prisoner transport project because the contract was substantially over budget. At first, Perkins delayed taking any action, but he was eventually instructed by the vice president to eliminate two

74. Pub. L. No. 90-202, 81 Stat. 602 (1967) (codified at 29 U.S.C. §§ 621-634 (2012)).
75. *Sims*, 704 F.3d at 1334.
76. 557 U.S. 167 (2009).
77. *Sims*, 704 F.3d at 1335-36 (discussing *Gross*, 557 U.S. at 177-78).
78. *Id.* at 1329-30.
79. *Id.* at 1330-31.

of the eight supervisors by August 11, 2008. Perkins immediately held individual meetings with each of the eight supervisors and Davis to advise the supervisors of their reduction-in-force (RIF) status. During those meetings, each supervisor except for Sims recommended that Sims be included in the RIF. During Perkins and Davis's individual meeting with Sims, Perkins advised Sims that he was to be included in the RIF. Sims was 71 years old at the time.[80]

Sims filed a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), alleging he was unlawfully terminated because of his age. In his charge, Sims claimed that Davis told him he was "too slow in performing [his] job," that "[i]f we have a cutback in management, I'm going to recommend you be terminated," and, "mind you, age has nothing to do with it." Later, Sims alleged that Davis told him "[y]ou're old and slow," but Sims never claimed that Davis made any other purportedly derogatory age-related remarks to him. The district court granted MVM summary judgment on Sims's ADEA claims.[81]

On appeal, Sims argued that Perkins, the clear decision maker, acted with discriminatory bias based on Sims's age when he terminated him. Sims also argued that Perkins's termination decision was influenced by the discriminatory animus of Davis, who was not a decision maker. In other words, Sims argued that Perkins acted as a so-called cat's paw for Davis's biases, and that MVM was therefore liable for Sims's unlawful termination.[82]

Addressing Sims's first argument, the Eleventh Circuit quickly held that age discrimination was not the "but-for" factor in Perkins's decision to lay off Sims.[83] In *Gross*, the Supreme Court established that an ADEA plaintiff claiming that his decision maker acted with unlawful bias must demonstrate that, but for the plaintiff's age, the decision maker would not have made its adverse employment decision.[84] In

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80. *Id.* at 1330-31, 1334.

81. *Id.* at 1329-31.

82. *Id.* at 1334-35; *see also* Staub v. Proctor Hosp., 131 S. Ct. 1186, 1194 (2011) (holding that under a cat's paw theory of liability, an employer may be liable for the discriminatory animus of a supervisor who was not charged with making the ultimate employment decision); Stimpson v. City of Tuscaloosa, 186 F.3d 1328, 1332 (11th Cir. 1999) (explaining that the cat's paw "theory provides that causation may be established if the plaintiff shows that the [decision maker] followed the biased recommendation [of another employee] . . . [and that] the recommender is using the [decision maker] as a mere conduit, or 'cat's paw' to give effect to the recommender's discriminatory animus").

83. *Sims*, 704 F.3d at 1334.

84. *See Gross*, 557 U.S. at 176, 177 (holding that the language "because of" in the ADEA statute means that a plaintiff must prove that discrimination was the "but-for" cause of the adverse action).

Sims, the Eleventh Circuit assumed arguendo that Sims had established a prima facie case of age discrimination under the *McDonnell Douglas Corp. v. Green*[85] framework, but nonetheless concluded that Sims could not "sustain his burden of proving that Perkins' age discrimination was the 'but-for' cause of his inclusion in the RIF."[86] Thus, the court affirmed the district court's holding that Sims did not establish an ADEA claim based on Perkins's alleged discriminatory animus.[87]

In analyzing Sims's argument for cat's-paw liability, the court first acknowledged that whether the "but-for" standard used for traditional ADEA claims applied to ADEA claims based on the cat's-paw-liability theory was a novel issue for the Eleventh Circuit.[88] Sims argued that, instead of applying the "but-for" standard to his ADEA cat's-paw claim, the court should apply a lower standard: the "motivating factor" standard.[89] His argument relied on the Supreme Court's decision in *Staub v. Proctor Hospital*,[90] in which the Supreme Court held that, in a Uniformed Services Employment and Reemployment Rights Act (USERRA)[91] case, an employer could only be liable under a cat's-paw theory of liability if the "subordinate supervisor (1) performs an act motivated by antimilitary animus that is intended to cause an adverse employment action, and (2) that act is a proximate cause of the ultimate employment action."[92]

Looking to the language of the ADEA and that of USERRA, the Eleventh Circuit disagreed and held that the "but-for" standard, not the "motivating factor" standard, applies to ADEA claims based on the cat's paw theory of liability.[93] The court noted that, unlike USERRA, the ADEA "states that it is unlawful if an employee suffers adverse employment action '*because of* such individual's age'" and therefore the ADEA "requires a 'but-for' link between the discriminatory animus and the adverse employment action."[94] Thus, the court concluded, in order to prevail on his cat's-paw ADEA claim, "Sims must prove that Davis's animus was a 'but-for' cause of, or a determinative influence on, Perkins' ultimate decision."[95] Because Sims failed to establish a "but-for" link

85. 411 U.S. 792 (1973) (discussing burdens of proof and persuasion in ADEA cases).
86. *Sims*, 704 F.3d at 1334.
87. *Id.* at 1337.
88. *Id.* at 1334-35.
89. *Id.* at 1335.
90. 131 S. Ct. 1186 (2011).
91. Pub. L. No. 103-353, 108 Stat. 3149 (1994) (codified at 38 U.S.C. § 101 (2012)).
92. *Sims*, 704 F.3d at 1335 (citing *Staub*, 131 S. Ct. at 1194).
93. *Id.* at 1336.
94. *Id.* at 1335-36 (quoting 29 U.S.C § 623(a)(1)).
95. *Id.* at 1337.

between Davis's alleged bias and his termination as part of the RIF, the court affirmed the district court's grant of summary judgment to MVM.[96]

The court focused on four facts to come to this conclusion: First, it noted that Perkins had been aware of the fact that he would have to eliminate supervisor positions as part of the RIF for five months and that he had been evaluating the supervisors' performances during this time.[97] Second, the Court pointed to the fact that Perkins testified that the decision to include Sims in the RIF was his decision alone, and was based on his own personal observations and evaluations.[98] The court next noted that, while Perkins did consult Davis about the supervisors' performances, Perkins testified that Davis's opinion about Sims merely confirmed Perkins's own independent opinion about him.[99] Lastly, the court highlighted that, during the meetings Perkins and Davis held with each of the eight supervisors, "every supervisor except for Sims himself recommended that Sims should be one of the two who had to be laid off."[100]

Applying the "but-for" standard of causation, the Eleventh Circuit concluded that, based on the aforementioned facts, Sims had "not established that a reasonable juror could find that . . . Perkins acted as a mere cat's paw for Davis's discriminatory animus."[101] Because the court had already concluded that Sims failed to establish that Perkins's own bias was the "but-for" cause of his termination, the court affirmed summary judgment for MVM.[102]

The court's decision in *Sims* is significant in that it confirms that, in the Eleventh Circuit, the "but-for" causation standard applies in *all* ADEA claims—even ones that are not based directly on the decision maker's animus. In *Staub*, the Supreme Court laid out a different standard of causation for cat's-paw claims, one that more closely resembles the traditional tort-law standard of proximate cause.[103] But the Eleventh Circuit decision in *Sims* made it clear that an ADEA plaintiff—no matter his theory of liability—must prove *more* than proximate cause to be successful.[104] Parsing the statutory language, the court in *Sims* concluded that the ADEA has a higher burden of proof

96. *Id.*
97. *Id.*
98. *Id.*
99. *Id.*
100. *Id.*
101. *Id.*
102. *Id.*
103. *See Staub*, 131 S. Ct. at 1194.
104. *See Sims*, 704 F.3d at 1334.

than does USERRA and Title VII—statutes that do not use the phrase "because of" in their discrimination provisions.[105] In ADEA claims, the plaintiff must claim that, but for his age, he would not have suffered the alleged adverse employment action.[106]

The Eleventh Circuit noted that it was not the only circuit that had so concluded—in fact, the United States Court of Appeals for the Tenth Circuit in *Simmons v. Sykes Enterprises, Inc.*[107] similarly found that *Staub*'s lower causation requirement cannot be applied to age-discrimination cases because then the plaintiff would only "need to prove her supervisor's animus was somehow related to the termination and not that the animus was necessary to bring about the termination."[108] The latter standard that the discriminatory animus was the direct cause of the plaintiff's adverse employment action, is the "but-for" standard, and the Tenth Circuit concluded that this standard applies in all ADEA cases, including those based on the cat's-paw theory of liability.[109] Thus, in both the Tenth and Eleventh Circuits, an ADEA plaintiff has a higher burden of proof than in a Title VII or USERRA claim, even if that plaintiff is claiming that the decision maker acted based on another supervisor's discriminatory animus.

IV. AMERICANS WITH DISABILITIES ACT

In *Owusu-Ansah v. Coca-Cola Co.*,[110] the Eleventh Circuit ruled for the first time that an employee claiming that his employer violated the provision of the Americans with Disabilities Act (ADA or the Act)[111] that prohibits employers from requiring employees to take non-job-related medical examinations does not have to be disabled to bring his claim.[112] Instead, the court held that an ADA plaintiff bringing such a challenge need only be an "employee," according to the text of the ADA provision at issue in that case.[113]

In 1999, Franklin Owusu-Ansah began working for Coca-Cola (Coke) as a customer-service representative at one of Coke's Georgia call centers. After promoting Owusu-Ansah three times, Coke eventually promoted him to a quality assurance specialist position in 2005. In that

105. *See id.* at 1335.
106. *Id.*
107. 647 F.3d 943 (10th Cir. 2011).
108. *Id.* at 949.
109. *Id.* at 949-50.
110. 715 F.3d 1306 (11th Cir. 2013).
111. 42 U.S.C. §§ 12101-12213 (2012).
112. *Owusua-Ansah*, 715 F.3d at 1310-11.
113. *Id.*

role, Owusu-Ansah observed frontline call-center associates' performances. He could work from home, but was still required to report to his Georgia call center for certain meetings.[114]

During one such meeting in December 2007, Owusu-Ansah, who was from Ghana, met with his manager, Tanika Cabral, and expressed concerns about several incidents of alleged racial and ethnic discrimination and harassment by certain managers and employees. In this meeting, Owusu-Ansah "became agitated . . . [and] banged his hand on the table where they sat, and said that someone was 'going to pay for this.'"[115]

Concerned, Cabral told her own supervisor about Owusu-Ansah's behavior during the meeting. Cabral and her supervisor then contacted Coke's senior human resources manager who, after hearing about Owusu-Ansah's behavior in his meeting with Cabral, became concerned "because it sounded as though a threat had been made against an employee, or employees of the company." Next, the senior resource manager and one of Coke's security managers contacted Dr. Marcus McElhaney, Ph.D., an independent psychologist who specialized in threat assessment and crisis management.[116]

In a meeting with the human resources manager, Owusu-Ansah agreed to speak with Dr. McElhaney about his workplace issues. Dr. McElhaney immediately interviewed Owusu-Ansah about the latter's concerns with alleged instances of workplace discrimination. After his conversation with Owusu-Ansah, Dr. McElhaney expressed concerns to Coke that Owusu-Ansah was not emotionally and psychologically stable, that he may be "delusional," and that he was a "very stressed and agitated individual." Dr. McElhaney recommended that Owusu-Ansah be placed on paid leave to allow for further evaluation, and Coke placed Owusu-Ansah on such leave effective December 19, 2007.[117]

Dr. McElhaney continued to assess Owusu-Ansah's mental and psychological state during the months of December and January, and on January 22, 2008, Dr. McElhaney informed Coke's human resources manager that he still had concerns about Owusu-Ansah's emotional stability. He recommended that Owusu-Ansah undergo a psychiatric fitness-for-duty evaluation "to rule out the possibility of a mental condition that could interfere with his ability to successfully and safely carry out his job duties."[118]

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114. *Id.* at 1308.
115. *Id.* at 1309.
116. *Id.*
117. *Id.*
118. *Id.* at 1309-10.

Coke followed Dr. McElhaney's recommendation and informed Owusu-Ansah that, as a condition of his continued employment with Coke, he would have to "complete an evaluation to identify whether there were any issues that could represent a risk to the safety of others in the workplace."[119] Owusu-Ansah failed to attend his scheduled appointment to take the medical evaluation his doctor recommended. After Coke notified Owusu-Ansah that he would be placed on unpaid leave if he did not take the test, Owusu-Ansah eventually took it on March 20, 2008. The results of his test indicated that Owusu-Ansah was "within normal limits," and Dr. McElhaney accordingly cleared him to return to work, which he did on April 22, 2008.[120]

Owusu-Ansah then sued Coke, alleging that what happened to him was in violation of a provision of the ADA stating that:

> [a] covered entity shall not require a medical examination and shall not make inquiries of an employee as to whether such employee is an individual with a disability or as to the nature or severity of the disability, unless such examination or inquiry is shown to be job-related and consistent with business necessity.[121]

Specifically, Owusu-Ansah argued that Coke violated this provision by requiring him to undergo the fitness-for-duty evaluation in March 2008. The United States District Court for the Northern District of Georgia granted Coke's motion for summary judgment, finding that Owusu-Ansah's fitness-for-duty evaluation was job-related and consistent with a business necessity, as required by the ADA.[122] The Eleventh Circuit agreed that the medical evaluation Owusu-Ansah was required to take was both job-related and consistent with a business necessity, and therefore found that it was valid under § 12112(d)(4)(A) of the ADA.[123]

However, before the court addressed the validity of the medical test under the ADA provision, it discussed an issue on which the Eleventh Circuit had yet to rule: "whether an employee claiming protection under § 12112(d)(4)(A) of the ADA must prove that he is disabled."[124] In short, the court's first question in resolving this case was whether the ADA medical examination provision even applies to non-disabled employees like Owusu-Ansah at all.

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119. *Id.*
120. *Id.*
121. 42 U.S.C. § 12112(d)(4)(A) (2006).
122. *Owusu-Ansah*, 715 F.3d at 1307.
123. *Id.* at 1311.
124. *Id.* at 1310.

Looking to the language of § 12112(d)(4)(A), the court concluded that an ADA plaintiff does not need to be disabled to challenge his employer under that provision.[125] The court noted that, "[u]nlike other provisions of the ADA, § 12112(d)(4)(A) does not refer to a 'qualified individual'—a person who 'can perform the essential functions of the job' he or she holds or desires 'with or without reasonable accommodation.'"[126] Instead, the court pointed out, the ADA provision refers to an "employee."[127] The implication from the statutory language is that Congress intended the ADA provision to cover not just persons who qualify as "disabled" under the terms of the Act, but to cover any employee.[128]

The Eleventh Circuit also employed a common-sense reading of the statutory provision to come to its conclusion that it applies to disabled and non-disabled employees alike. The court noted that it "'makes little sense to require an employee to demonstrate that he has a disability to prevent his employer from inquiring as to whether he has a disability.'"[129] In other words, § 12112(d)(4)(A) applies in situations where an employer inquires into whether or not an employee has a disability, and therefore it must cover employees who are not disabled or else their employer would not need to make such an inquiry.[130] Nonetheless, the Court concluded that Coke's mandatory evaluation of Owusu-Ansah was both "job-related and consistent with business necessity," and therefore valid under § 12112(d)(4)(A).[131]

125. *Id.* at 1310-11.

126. *Id.* at 1310 (comparing 42 U.S.C. § 12101(8), with 42 U.S.C. § 12112(d)(4)(A)).

127. *Id.* at 1311 (quoting 42 U.S.C. § 12112(d)).

128. *Id.*

129. *Id.* (quoting Roe v. Cheyenne Mountain Conference Resort, 124 F.3d 1221, 1229 (10th Cir. 1997)).

130. *See id.*

131. *Id.* (quoting 42 U.S.C. § 12112(d)(4)(A)).

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