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MAVERICK OR TRENDSETTER? FIFTH CIRCUIT ADDRESSES SLIPPERY QUESTIONS IN EMPLOYMENT DISCRIMINATION

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I. INTRODUCTION

Like all practice areas that focus almost exclusively on the application and interpretation of federal statutes, employment discrimination law presents the lawyer with two recurring questions: (1) What has the United States Supreme Court said about the issue? and (2) What has my federal circuit court said about the issue? As the Supreme Court continues to clarify the contours of the major discrimination statutes such as Title VII of the Civil Rights Act, the Americans with Disabilities Act ("ADA"), the Age Discrimination in Employment Act ("ADEA") and the Family and Medical Leave Act ("FMLA"), each federal circuit is called upon to decipher the often ambiguous language in the Court's major opinions. In addition, the appellate courts must frequently formulate their own standards for those issues yet to be addressed by the Court.

The Fifth Circuit Court of Appeals has recently tackled controversial issues in the employment discrimination arena. In the process, the court has filled some of the cracks inevitably left by a lack of authoritative discussion by the high Court. Nevertheless, it seems for every question answered, a new one emerges. This article discusses the recent developments in Fifth Circuit employment discrimination law, including a number of critical issues yet to be resolved by the court. Part II examines the question of whether an "ultimate employment decision" is required in non-retaliation disparate treatment cases and analyzes the court's most recent pronouncements on the issue. Part III discusses the apparent disagreement on the court with respect to the application of the affirmative defense in hostile environment sexual harassment cases. Part IV analyzes the Supreme Court's rejection of the Fifth Circuit's "judicial estoppel" rule in ADA cases. Finally, Part V discusses the court's recent holding that the evidentiary framework established in *McDonnell Douglas Corp. v. Green*[1] applies to retaliation cases under the FMLA.

II. COURT WRESTLES WITH THE ISSUE OF WHETHER AN "ULTIMATE EMPLOYMENT DECISION" IS REQUIRED IN NON-RETALIATION DISPARATE TREATMENT CASES

Title VII of the Civil Rights Act of 1964 prohibits covered employers from discriminating against their employees on the basis of race, color, religion, sex, or

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1. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

national origin[2] and from retaliating against employees who oppose discrimination or who participate in certain activities in connection with discrimination claims.[3] In order to prevail in either a disparate treatment or a retaliation claim, the Fifth Circuit requires a Title VII plaintiff to demonstrate that she suffered an "adverse employment action" at the hands of her employer.[4] While it appears to be settled that "adverse employment action" in the context of a retaliation claim means "ultimate employment decision,"[5] it is not at all clear whether the same stringent standard should be applied in non-retaliation cases where the plaintiff is alleging only disparate treatment. While the district courts within the circuit have apparently interpreted the rather inconsistent Fifth Circuit language as answering this question in the affirmative, one panel of the Fifth Circuit recently hinted that the lower courts (and a prior Fifth Circuit opinion) have gotten it wrong and that the issue will soon be confronted head-on.[6]

The Fifth Circuit introduced the phrase "ultimate employment decision" in *Dollis v. Rubin*,[7] a case involving both a disparate treatment claim and numerous retaliation claims. In so doing, the court imposed a considerably stricter standard than some other circuits with respect to the "adverse employment action" element.[8] Affirming the dismissal of the retaliation claims because of the plaintiff's failure to satisfy the "adverse employment action" element, the court uttered the now familiar language, "Title VII was designed to address ultimate employment decisions, not to address every decision made by employers that arguably might have some tangential effect upon those ultimate decisions."[9] Significantly, in unveiling the "ultimate employment decision" terminology, *Dollis* cited *Page v. Bolger*,[10] a Fourth Circuit opinion which held that a required element of *all* Title VII claims, expressly including disparate treatment claims, is discrimination in an "ultimate employment decision such as hiring, granting leave, discharging, promoting, and compensating."[11] Consistent with *Page*, *Dollis* went on to affirm the dismissal of the disparate treatment claim, holding that the plaintiff failed to demonstrate that she had been subjected to an "ultimate employment decision" based on her race or sex.[12]

The Fifth Circuit returned to the "ultimate employment decision" standard in *Mattern v. Eastman Kodak*,[13] a case involving retaliation but no disparate treatment

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2. Though all claims under Title VII technically involve unequal treatment of employees, claims arising from unequal treatment based on these protected categories will be referred to in this Section as disparate treatment claims, as distinguished from retaliation claims.

3. 42 U.S.C. 2000(e)(2)-(3).

4. *See* Ward v. Bechtel Corp., 102 F.3d 199, 202 (5th Cir. 1997) (disparate treatment); Barrow v. New Orleans Soc. Sec. Ass'n, 10 F.3d 292, 298 (5th Cir. 1994) (retaliation).

5. *See, e.g.*, Mattern v. Eastman Kodak Co., 104 F.3d 702, 707 (5th Cir. 1997).

6. *See* Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398 (5th Cir. 1999).

7. *See* Dollis v. Rubin, 77 F.3d 777 (5th Cir. 1995).

8. *See* Burger v. Central Apartment Mgmt., Inc., 168 F.3d 875, 878 (5th Cir. 1999) ("Our court has analyzed the 'adverse employment action' element in a stricter sense than some other circuits.").

9. *Dollis*, 77 F.3d at 781-82 (citing Page v. Bolger, 645 F.2d 227, 233 (4th Cir. 1981)).

10. *Page*, 645 F.2d at 227.

11. *Dollis*, 77 F.3d at 781-82 (citing *Page*, 645 F.2d at 233).

12. *Dollis*, 77 F.3d at 782.

13. Mattern v. Eastman Kodak Co., 104 F.3d 702 (5th Cir. 1997).

claims. Judge Barksdale, writing for the court, quoted the *Dollis* language referenced above and stated that *Dollis* was the culmination of Fifth Circuit precedent establishing that "Title VII's *anti-retaliation provision* refers to ultimate employment decisions, and not to an 'interlocutory or mediate' decision which can lead to an ultimate [employment] decision."[14]

Mattern explained that the "ultimate employment decision" requirement is grounded in the language of Title VII—specifically, the term "discriminate," which is found in the anti-retaliation provision.[15] Judge Barksdale's discussion of the distinction between the anti-retaliation provision of Title VII and the statute's general proscription against disparate treatment based on protected categories is worthy of full quotation:

> [T]he anti-retaliation provision states that employers shall not "discriminate" against employees for taking action protected by Title VII. 42 U.S.C. § 2000e-3. In defining this term, we look, of course, to other Title VII sections for guidance; in this case, the preceding section is helpful. That section states, in part, that it is unlawful to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions or privileges or employment." 42 U.S.C. § 2000e-2(a)(1). This type of employer action contrasts sharply with the more vague proscription, found in the next subpart, of "limitation" of employees which deprive or "would tend to deprive" the employee of "opportunities" or "adversely affect his status." 42 U.S.C. § 2000e-2(a)(1),(2). It goes without saying that this second subpart reaches much farther than the first. It reaches acts which merely "would tend" to affect the employee; obviously, the way in which the employee may be affected in this subpart is much broader. Id. The anti-retaliation provision speaks only of "discrimination"; [sic] there is no mention of the vague harms contemplated in § 2000e-2(a)(2). Therefore, this provision can only be read to exclude such vague harms, and to include only ultimate employment decisions.[16]

Mattern's interpretation of Title VII's separate discrimination provisions and its explication of the ultimate employment decision requirement seemingly raised a number of questions. Were ultimate employment decisions only required in retaliation cases, so that a plaintiff alleging ordinary disparate treatment needed only demonstrate "vague harms" that "merely would tend" to affect her? Had *Mattern* overruled *Dollis'* application of the ultimate employment decision requirement to disparate treatment claims? Was Judge Barksdale's discussion of vague harms tend[ing] to affect the employee dicta since *Mattern*, a pure retaliation case, did not require an interpretation of the requirements for a disparate treatment case?

The answers to these questions, at least for a while, appeared clear. *Dollis* was read to mean exactly what it said—that "Title VII [not the anti-retaliation provision of Title VII, but all of Title VII] was designed to address ultimate employ-

14. *Id.* at 708 (emphasis added).
15. *Id.* at 709.
16. *Id.* at 708-09.

ment decisions . . . ."[17] Acknowledging no limitation by *Mattern* on the *Dollis* holding, district courts across the Fifth Circuit have held that all Title VII plaintiffs, whether alleging retaliation claims or solely disparate treatment claims, must establish that they were subjected to a discriminatory ultimate employment decision.[18] The Fifth Circuit itself, though not expressly doing so, has appeared on occasion to embrace the broader application of the ultimate employment decision requirement that *Mattern* seemed to reject.[19]

Over the past few months, however, a number of Fifth Circuit panels have inched closer to addressing the question of whether the *Dollis* holding is sound in light of *Mattern*'s interpretation of Title VII's prohibitions. In *Burger v. Central Apartment Management*,[20] a retaliation case addressing the ultimate employment decision element, the court, for the first time, reiterated Judge Barksdale's statutory interpretation in *Mattern* and emphasized that ultimate employment decisions are required in retaliation cases because "a retaliation claim cannot be based solely on a defendant's act of 'limit[ing]' an employee 'in any way which would deprive [that employee] of employment opportunities or otherwise adversely affect his status as an employee.'"[21] The very next day the court issued its opinion in *Watts v. Kroger*,[22] a retaliation case in which the court held that the plaintiff had not satisfied the ultimate employment decision requirement. Significantly, the court cited *Mattern* in a footnote for the proposition that, "for the purposes of Title VII retaliation claims," adverse employment actions are defined as ultimate employment actions.[23]

The clearest indication yet that the Fifth Circuit has recognized and may soon address the apparent inconsistency between *Dollis* and *Mattern* is found in *Shackelford v. Deloitte & Touche*,[24] a case involving both disparate treatment and retaliation claims in which the ultimate employment decision requirement was discussed at length. In *Shackelford*, the plaintiff alleged that her employer refused to train her on the basis of race.[25] The district court held that denying training to an employee is not an adverse employment action covered by Title VII and granted summary judgment to the employer.[26] On appeal, the Fifth Circuit noted that the plaintiff's argument based on the *Mattern* ultimate employment

17. *Dollis*, 77 F.3d at 781.

18. *See* Padilla v. Carrier Air Conditioning, 67 F. Supp. 2d 650 (E.D. Tex. 1999); Jeffery v. Dallas County Med. Exam'r, 37 F. Supp. 2d 525 (N.D. Tex. 1999); Dobbs v. Southern Diversified, No. 1:97CV-D-D, 1998 WL 94844 (N.D. Miss. February 2, 1998); Hill v. East Mississippi State Hosp., No. 4:97CV74LN (S.D. Miss. January 8, 1999).

19. *See* Ross v. University of Texas at San Antonio, 139 F.3d 521, 527 (5th Cir. 1998) (Age Discrimination in Employment Act, 29 U.S.C. § 621); Bennett v. Total Minatome Corp., 138 F.3d 1053, 1060 n.10 (5th Cir. 1998) (stating in dicta that the conduct complained of in the plaintiff's disparate treatment claim did not constitute ultimate employment decisions).

20. Burger v. Central Apartment Mgmt., Inc., 168 F.3d 875 (5th Cir. 1999).

21. *Id.* at 878 (citing the disparate treatment proscription, 42 U.S.C. § 2000e-2(a)(2)).

22. Watts v. Kroger Co., 170 F.3d 505, 512 (5th Cir. 1999).

23. Id. at n.5.

24. Shackelford v. Deloitte & Touche, LLP, 190 F.3d 398 (5th Cir. 1999).

25. *Id.* at 403.

26. *Id.* at 406.

decision standard was inapplicable to her pure race discrimination claim and should be applied only to retaliation cases.[27] The court side-stepped the issue, however, and concluded that even if adverse employment actions in the pure disparate treatment context are those actions which merely "'tend to' adversely affect the employee," the plaintiff's case failed that test as well.[28] According to the court, there was no reasonable basis on which to conclude that the conduct which the plaintiff complained of "would tend to result in a change of employment status, benefits or responsibilities."[29]

The *Shackelford* panel refused to answer the question of whether an ultimate employment decision is required in a disparate treatment case.[30] On the other hand, the court did not expressly reject the plaintiff's position that an ultimate employment decision is not required. Add to this holding the recent Fifth Circuit opinions discussed above, and it is likely that the Fifth Circuit may soon be forced to clarify the definition of adverse employment action as it relates to non-retaliation/disparate treatment claims under Title VII. At issue will be whether the *Dollis* ultimate employment decision standard should continue to apply to disparate treatment claims or whether plaintiffs need only demonstrate adverse employment actions which "would 'tend to' result in a change of employment status, benefits or responsibilities," the language offered for the first time in *Shackelford*.[31] In the meantime, however, *Dollis* remains the clearest statement of the law on this point, and its holding, as well as those of numerous district courts within the circuit, provide ample authority for the proposition that plaintiffs alleging pure disparate treatment claims must establish that they were unlawfully subjected to ultimate employment decisions at the hands of their employers.

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27. *Id.* at 406-07. It is curious and worth noting that in discussing the plaintiff's position, the *Shackelford* court inexplicably appeared to agree with the plaintiff's characterization of *Dollis v. Rubin* as "a retaliation case," though, as discussed above, *Dollis* clearly involved separate claims of retaliation *and* disparate treatment. This confusion could be based, at least in part, on the fact that headnote 9 preceding the body of the *Dollis* opinion erroneously describes the court's last holding as relating to the plaintiff's retaliation claim when in fact, the court's last holding concerned a disparate treatment claim. *See* Dollis v. Rubin, 77 F.3d 777, 778 (5th Cir. 1995). In any event, *Shackelford's* characterization of *Dollis* as a pure retaliation case may foreshadow an interpretation that *Dollis'* disparate treatment analysis was somehow dicta, which would, of course, allow that case to fit neatly within the rationale of *Mattern* and eliminate the necessity of expressly rejecting the *Dollis* reasoning.

28. *Shackelford*, 190 F.3d at 406-07 (citing Mattern v. Eastman Kodak Co., 104 F.3d 702, 708 (5th Cir. 1997)).

29. *Shackelford*, 190 F.3d at 407.

30. *Id.* at 406-07.

31. *Id.* at 407. This new verbiage introduced in *Shackelford* mirrors the Supreme Court's recently crafted definition of "tangible employment action," which is now utilized in the sexual harassment context. *See* Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 754 (1998). In fact, in his concurring opinion in *Indest v. Freeman*, Judge Wiener, in dicta, indicated his apparent view that the Supreme Court's terms are the functional equivalent of the Fifth Circuit's "adverse employment action" element. *See* Indest v. Freeman Decorating, Inc., 168 F.3d 795, 803 (5th Cir. 1999) (Wiener, J., specially concurring) (stating that "absent 'any adverse employment action,' i.e., any tangible employment action, an employer is never vicariously liable for a supervisor's conduct unless such conduct is either severe or pervasive . . . .").

III. "PROMPT REMEDIAL ACTION DEFENSE" SUGGESTED AS A MEANS TO AVOID LIABILITY TO HOSTILE ENVIRONMENT SEXUAL HARASSMENT CLAIMS

Speaking at the Federalist Society's National Lawyers Convention in Washington, D.C., on November 13, 1998, Fifth Circuit Judge Edith Jones remarked

> Here are the issues that were not decided [in the Supreme Court's most recent sexual harassment cases, *Burlington Industries v. Ellerth* and *Faragher v. City of Boca Raton*]. First of all, I don't regard these cases as definitive for what I would call incipient sexual harassment. Let us say that the boss does three offensive things spread over six months and finally the employee complains through the disciplinary proceedings and remedial action is taken. Does that mean that the employee still has a cause of action? Well, I think there are two possibilities. One is that there may not have been a sexually hostile environment in the first place. The other is that there may be some room in which to say that a prompt remedial action defense exists.[32]

Just over two months after delivering this address, Judge Jones authored *Indest v. Freeman Decorating* and officially injected the "prompt remedial action defense" into Fifth Circuit sexual harassment jurisprudence.[33] The opinion was immediately labeled the Fifth Circuit's "maverick new decision limit[ing] the imposition of vicarious liability on employers . . . ."[34] Actually, Judge Jones's *Indest* opinion did not enjoy a quorum of the panel and, therefore, is not binding authority.[35] Nevertheless, her discussion of employer liability for sexual harassment, coupled with Judge Wiener's special concurrence, illustrates a disagreement on the court regarding the application of the Supreme Court's sexual harassment affirmative defense.

Indest involved a female service representative who was subjected to crude sexual comments and gestures by a company executive while attending a six-day business convention.[36] After the convention, the plaintiff immediately complained to her supervisor, and her complaint was forwarded to the human resources director and to the company president.[37] The company conducted a thorough investigation that culminated in a reprimand and suspension of the harassing supervisor.[38] The company president personally informed the plaintiff of the company's action and assured her that the harasser would be prohibited from attending the convention in the future.[39] Nonetheless, the plaintiff filed a

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32. *Sex and the Supreme Court: Recent Developments in Sexual Harassment Litigation*, FED. SOC'Y LABOR & EMPLOYMENT LAW NEWS, Spring 1999, at 6.
33. *See* Indest v. Freeman Decorating, Inc., 164 F.3d 258 (5th Cir. 1999).
34. *A Maverick Decision from the Fifth Circuit*, INSIDE EMPLOYEE RIGHTS LITIGATION, Mar. 1999, at 3.
35. *See Indest*, 168 F.3d at 806 n.1 (Wiener, J., specially concurring).
36. *Indest*, 164 F.3d at 260.
37. *Id.*
38. *Id.* at 260-61.
39. *Id.* at 261.

discrimination charge with the Equal Employment Opportunity Commission and a subsequent complaint in federal court alleging sexual harassment.[40] The district court granted summary judgment in favor of the employer based on its prompt remedial action to the plaintiff's complaints, and the plaintiff appealed to the Fifth Circuit.[41]

Before addressing the employer liability issue, Judge Jones first discussed at length the Supreme Court's recent clarification of what constitutes actionable hostile environment sexual harassment in the first instance.[42] She noted that "Title VII is not a general civility code"[43] and emphasized that to satisfy the "demanding standard" that sexual harassment be "severe or pervasive," a plaintiff must demonstrate more than "[i]ncidental, occasional or merely playful sexual utterances" and "intersexual flirtation."[44] Applying this standard to the *Indest* facts, Judge Jones opined that, "whether [the plaintiff] was subjected to a sexually hostile working environment . . . is a question that we do not need to address, because . . . [the plaintiff] cannot establish a basis for [employer's liability]."[45]

Under *Ellerth*[46] and *Faragher*,[47] Judge Jones continued, an employer may raise an affirmative defense to its liability for hostile environment sexual harassment created by a supervisor by proving that (1) "it exercised reasonable care to prevent and correct promptly any sexually harassing behavior," and (2) "the plaintiff employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to avoid harm otherwise."[48] According to Judge Jones, however, the *Ellerth/Faragher* test does not apply to cases where the plaintiff quickly resorts to the grievance procedure, and the employer takes "prompt remedial action."[49] Judge Jones opined that "a case presenting only an incipient hostile environment corrected by prompt remedial action should be distinct from a case in which a company was never called upon to react to [the alleged harassment]."[50] To hold otherwise, Judge Jones reasoned, would amount to strict liability of employers in all cases where the facts do not present a plaintiff who fails to take advantage of the complaint procedure, even though the employer moved promptly to investigate and "nipped [the] hostile environment in the bud."[51] Judge Jones concluded that the *Indest* facts were distinguishable from, and therefore not governed by, *Ellerth* and *Faragher*, that the employer did not have to satisfy the second prong of the affirmative defense, and that it was nonetheless relieved of liability by its prompt remedial response to the plaintiff's harassment complaint.[52]

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40. *Id.*
41. *Id.*
42. *Id.* at 262-64.
43. *Id.* at 263 (citing Oncale v. Sundowner Offshore Servs., Inc., 523 U.S. 75, 80 (1998)).
44. *Indest*, 164 F.3d at 263-64.
45. *Id.* at 264.
46. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).
47. Faragher v. City of Boca Raton, 524 U.S. 775 (1998).
48. *Indest*, 164 F.3d at 265 (citing *Ellerth*, 524 U.S. at 742).
49. *Indest*, 164 F.3d at 265.
50. *Id.*
51. *Id.* at 266.
52. *Id.* at 267.

Just over a month after the release of Judge Jones's lead opinion in *Indest*, Judge Wiener issued a separate opinion concurring in the result on the ground that the plaintiff could not establish an actionable hostile environment, but stridently disagreeing with the proposition that an employer could absolve itself from liability for hostile environment sexual harassment simply by taking prompt action following the complaint.[53] Judge Wiener found no basis in any of the Supreme Court's sexual harassment jurisprudence for the notion that an employer is immune from liability for "severe or pervasive" harassment that is at the same time of an "incipient" nature.[54] According to Judge Wiener, if the plaintiff establishes that a supervisor has engaged in sexual harassment creating an actionable hostile environment, the plain language of *Ellerth* and *Faragher* require the employer to prove *both* elements of the affirmative defense to escape vicarious liability, notwithstanding the facts of the particular case.[55]

A careful reading of the *Indest* opinions reveals that Judges Jones and Wiener may disagree more over the form than over the substance of employer liability for sexual harassment. For example, Judge Wiener noted that "as a practical matter, inappropriate sexual conduct will virtually never rise to the level of actionability when an employer takes the kind of prompt remedial action that Judge Jones applauds (as do we all)."[56] Earlier in his opinion, Judge Wiener emphasized that to avoid liability, an employer must prove both elements of the affirmative defense, "*unless*, of course, [the plaintiff] cannot prove that the conduct [complained of] was 'sufficiently severe or pervasive' to constitute 'actionable' sexual harassment of the hostile work environment kind."[57] In other words, according to Judge Wiener, if there is a factual basis for what Judge Jones would term a "prompt remedial action/incipient harassment" defense, it is likely that the plaintiff will be unable to make out a prima facie case of hostile environment sexual harassment in the first instance. As such, the employer will not be liable, and the affirmative defense will never come into play.

Where Judge Jones's and Wiener's distinct methodology may become significant is in those cases where there is "severe" (but not ongoing/pervasive) sexual harassment, followed by an immediate complaint by the plaintiff and a prompt remedial response by the employer. Employing Judge Wiener's analysis, if the conduct was indeed severe and thus actionable sexual harassment, the employer will essentially be strictly liable, since the second prong of the affirmative defense will be unavailable. On the other hand, Judge Jones's reasoning would take the case out of the *Ellerth/Faragher* class of cases and would seemingly allow the employer to escape liability based on its prompt remedial action.

As more and more employers recognize the importance of well-publicized anti-harassment policies, and as employees become more comfortable taking advan-

53. Indest v. Freeman Decorating, Inc., 168 F.3d 795 (5th Cir. 1999).
54. *Id.* at 798.
55. *Id.* at 796.
56. *Id.* at 803.
57. *Id.* at 796 (citations omitted).

tage of complaint procedures, sexual harassment cases will more frequently involve the factual scenario that created the divergent opinions in *Indest*. Thus, defense lawyers will increasingly have the opportunity to raise the prompt remedial action argument. It will remain to be seen whether Judge Jones's or Judge Wiener's opinion will ultimately win the day.

IV. SUPREME COURT REJECTS FIFTH CIRCUIT APPLICATION OF JUDICIAL ESTOPPEL IN ADA CASES

Disapproving of the position taken by several other circuits that had addressed the issue, the Fifth Circuit, in *Cleveland v. Policy Management*,[58] held that the application for or receipt of social security disability benefits creates a rebuttable presumption that the claimant or recipient is judicially estopped from asserting that he is a "qualified individual with a disability" under the ADA. The court reasoned that the two claims incorporate two directly conflicting, "logically inconsistent" propositions, namely that the claimant is "totally disabled" and unable to work as required to obtain the social security benefits, but that he is able to perform the essential functions of the job as required for an ADA claim.[59]

In the wake of the Fifth Circuit's ruling in *Cleveland*, district courts within the circuit applied the estoppel presumption and almost invariably granted summary judgment to the employer in cases where an ADA plaintiff had applied for or received social security benefits.[60] Meanwhile, the plaintiff in *Cleveland* had appealed the court's ruling and, acknowledging the disagreement among the circuits on the issue, the Supreme Court granted certiorari.[61] On May 24, 1999, the Court issued its opinion vacating the Fifth Circuit's ruling and remanding the case for further consideration.[62]

At the outset, the Court examined the precise language of the statutes at issue and the requirements for obtaining relief under each.[63] The Court noted that to receive social security benefits, a claimant must take the position that he is unable "to engage in any substantial gainful activity . . . ."[64] On the other hand, to state a claim under the ADA, he must argue that he is "a qualified individual with a disability" who can perform "the essential functions" of his job, at least with "reasonable accommodation."[65] The Court concluded that "despite the appearance of conflict that arises from the language of the two statutes, the two claims do not inherently conflict to the point where courts should apply a special negative presumption . . . ."[66]

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58. Cleveland v. Policy Mgmt. Sys. Corp., 120 F.3d 513, 518 (5th Cir. 1997).
59. *Id.* at 516-19.
60. *See e.g.*, Graf v. Wal-Mart Stores, Inc., 4 F. Supp. 2d 680, 682 (S.D. Tex. 1998); Pena v. Houston Lighting & Power Co., 978 F. Supp. 694, 699 (S.D. Tex. 1997); Jayroe v. Emerson Elec. Co., No. 4:98CV49LN (S.D. Miss. Apr. 23, 1999).
61. *Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795 (1999).
62. *Id.* at 807.
63. *Id.* at 801-804.
64. *Id.* at 801 (quoting the Social Security Act, 42 U.S.C. 423(d)(1)(a)).
65. *Id.* at 801 (quoting the ADA, 42 U.S.C. 12111(8)).
66. *Id.* at 802.

According to the Supreme Court, the Fifth Circuit's presumption of estoppel was unwarranted "because there are too many situations in which a [social security] claim and an ADA claim can comfortably exist side by side."[67] For example, since the Social Security Administration does not take into account the possibility of "reasonable accommodation," "an ADA suit claiming that the plaintiff can perform her job *with* reasonable accommodation may well prove consistent with a [Social Security] DI claim that the plaintiff could not perform the job *without* it."[68] Further, an individual might qualify for social security benefits "and yet, due to special individual circumstances, remain capable of 'perform[ing] the essential functions' of her job."[69] Finally, the individual's condition might have changed over time, "so that a statement about that disability at the time of an individual's application for [social security] benefits may not reflect an individual's capacities at the time of the relevant employment decision."[70]

In sum, the Court rejected the Fifth Circuit's special negative presumption of estoppel and essentially held that each case should be judged on its own facts as to the impact that the filing of a social security claim has on an ADA lawsuit. In so holding, however, the Court warned that "in some cases an earlier [social security] claim may turn out genuinely to conflict with an ADA claim" and that the plaintiffs in these cases "cannot simply ignore the apparent contradiction that arises" between the social security claim and the ADA claim.[71] Rather, the plaintiff must "proffer a sufficient explanation" for the contradiction.[72] What is or is not a sufficient explanation is a question with which the district courts no doubt will soon begin to grapple.

V. COURT HOLDS THAT MCDONNELL DOUGLAS APPLIES TO FMLA RETALIATION CLAIMS

The FMLA[73] is one of the newest federal statutes in the realm of employment law; therefore, the Fifth Circuit continues to clarify the standards to be applied in the various claims arising under the statute. In *Chaffin v. John H. Carter*,[74] the court held that when direct evidence is lacking, the *McDonnell Douglas*[75] evidentiary framework will be applied to claims that an employer retaliated against an employee who exercised rights guaranteed by the FMLA.[76]

In *Chaffin*, the court first explained the FMLA's separate entitlement and proscriptive elements.[77] First, the Act requires covered employers to provide eligible employees up to twelve weeks per year of unpaid leave for certain purposes.[78]

67. *Id.* at 802-03.
68. *Id.* at 803.
69. *Id.* at 804.
70. *Id.* at 805.
71. *Id.* at 805-06.
72. *Id.* at 806.
73. 29 U.S.C. 2601-2654.
74. Chaffin v. John H. Carter, 179 F.3d 316 (5th Cir. 1999).
75. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).
76. *Chaffin*, 179 F.3d at 31.
77. *Id.*
78. *Id.*

After a qualifying absence, the employer must restore the employee "to the same position or a position comparable to that held by the employee before the leave."[79] In addition, an employer may not "'interfere with, restrain, or deny the exercise of . . . any right provided under' the FMLA."[80] Thus, employers have "a prescriptive obligation . . . [to] grant employees substantive rights guaranteed by the FMLA" and "a proscriptive obligation—they may not penalize employees for exercising these rights."[81]

Next, the court turned to the question of what organizational framework should be applied when an employee alleges that she was penalized for exercising rights under the FMLA.[82] Concluding that the familiar *McDonnell Douglas* approach should apply, the court reasoned that "there is no significant difference between such claims under the FMLA and similar claims under other anti-discrimination laws."[83] The court went on to opine:

> When the often thorny question of intent is involved, deciphering the employment relationship becomes essential and, in this endeavor, *McDonnell Douglas* has proved an enduring guide for courts addressing claims under various statutes, including Title VII, the Age Discrimination in Employment Act, and the Americans with Disabilities Act [footnote omitted]. Nothing in the FMLA landscape suggests that the teachings of *McDonnell Douglas* would be less useful in ferreting out illicit motivations in that setting [footnote omitted]."[84]

As the *Chaffin* court correctly noted, "[t]he *McDonnell Douglas* framework is by now familiar even to those not experts in employment discrimination law."[85] A plaintiff alleging retaliation under the FMLA must establish a prima facie case by demonstrating that (1) she engaged in a protected activity under the FMLA (i.e., requested and was granted a leave of absence); (2) the employer subjected her to an adverse employment action amounting to an ultimate employment decision; and (3) there is a causal connection between the protected activity and the employment decision.[86] Once the plaintiff makes this preliminary showing, the employer must articulate a legitimate, non-retaliatory reason for the employment decision.[87] If the employer carries this burden, the plaintiff then must prove that the proffered reason was not the true reason for the employment decision and that the real reason was the plaintiff's participation in the protected activity.[88] The good news for employment lawyers after *Chaffin* is that there is already a well established body of case law applying the *McDonnell Douglas* framework, which can now be applied by analogy to what looks to be the newest type of discrimination case—retaliation under the FMLA.

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79. *Id.*
80. *Id.*
81. *Id.*
82. *Id.*
83. *Id.* (citing King v. Preferred Technical Group, 166 F.3d 887 (7th Cir. 1999)).
84. *Chafin*, 179 F.3d at 31.
85. *See id.*
86. *See id*; Boriski v. City of College Station, 65 F. Supp. 2d 493, 501-02 (S.D. Tex. 1999).
87. *Chaffin*, 179 F.3d at 319.
88. *Id.*

VI. CONCLUSION

Perhaps more than any other area of federal court litigation, employment discrimination law continues to confront the practitioner with new and difficult questions when representing either the employee or management client. The most recent Fifth Circuit employment discrimination cases, rather than establishing any clearly defined "rules of the road," portend spirited argument on several key issues. As this area of the law continues to evolve, and as the critical questions are resolved, the Fifth Circuit will no doubt play a major role in the development of employment jurisprudence.