QUARTERLY BYTES

FEES & BURGESS, P.C.

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Eleventh Circuit Rules in Favor of Employers in Recent Discrimination Cases

The Eleventh Circuit recently issued two decisions in favor of employers in employment discrimination cases brought by employees that had been terminated.

In Barnette v. Federal Express, Corp., Nancy Barnette was employed by Federal Express Corp. ("FedEx") as a delivery driver. In August 2004, Barnette's supervisor issued her a "Performance Reminder," because she had been involved in two preventable accidents within a twelve-month period. This letter indicated to Barnette that if she was involved in another preventable accident within a twelve-month period, she could receive severe disciplinary action, including termination. On November 9, 2004, Barnette was involved in another accident. Barnette failed to report the accident in accordance with FedEx policy and lied to her superiors about the events surrounding the accident. A few days after the accident, FedEx terminated her employment for violating company policy. Barnette sued FedEx, alleging that she had been discriminated against on the basis of gender in violation of Title VII. She claimed that "numerous" male employees had been involved in more frequent and more serious accidents than she had.

In affirming the district court's grant of summary judgment in favor of FedEx, the Eleventh Circuit found that Barnette failed to present a *prima facie* case of gender discrimination. When a gender discrimination claim is based on circumstantial evidence, the plaintiff must first show that: (1) she is a member of a protected class; (2) she was qualified for the position that she held; (3) she suffered an adverse employment action; and (4) she was treated less favorably than a similarly-situated individual outside her protected class. Barnette failed to show that she was treated less favorably than similarly-situated male employees, since none of the comparators she identified had been accused of lying about the existence of or events surrounding an accident as she had done. Furthermore, FedEx's reason for her termination, violation of its Acceptable Conduct Policy by failure to report an accident, was a legitimate and nondiscriminatory reason.

In Proe v. Facts Services, Inc., David Proe was terminated from his employment with Facts Services, Inc., and Ebix, Inc. (the "employers"), during a reduction in force. The employers then rehired another employee who was younger than the 59-year-old Proe. While Proe was qualified for the position, the employers considered the younger employee to be a better fit for the position. After his termination, Proe sued the employers for violation of the Age Discrimination in Employment Act ("ADEA").

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Again, the Eleventh Circuit affirmed the district court's grant of summary judgment for the employers. In order to show a *prima facie* case of age discrimination, Proe was required to show that: (1) he was a member of the protected group of persons between the ages of 40 and 70; (2) he was subjected to an adverse employment action; (3) he was qualified for the position; and (4) the position was awarded to a younger individual. Assuming *arguendo* that Proe presented a *prima facie* case of age discrimination, the Eleventh Circuit found that the employers' reasons for terminating Proe (the reduction in force) and their reasons for rehiring the younger employee (the fact that he was a better fit for the position) were legitimate, nondiscriminatory reasons for their challenged actions. Moreover, by merely questioning the employers' business judgment, Proe failed to show that these reasons were pretextual. Thus, Proe failed to show that age discrimination was the "but for" cause of the challenged employment actions.

Barnette v. Federal Express Corp., 2012 WL 4775029 (11th Cir. 2012);

Proe v. Facts Services, Inc., 2012 WL 4711588 (11th Cir. 2012)

PROTECTIVE MEASURES

IT ISN'T SEXY, BUT IT WORKS
Arguing That Plaintiff Has Not Met His Burden

Parties frequently focus on the facts to the exclusion of the burden of proof. Arguing about legal technicalities is not sexy, but recently, both the Alabama Supreme Court and the Alabama Court of Civil Appeals reversed trial courts based on the burdens plaintiffs failed to meet.

In Camping World, Inc. v. McCurdy, McCurdy was awarded a default judgment against Camping World. Camping World presented evidence that it had a meritorious defense. Specifically, Camping World argued that one of its affiliates was actually the proper defendant. The trial court refused to set aside the default judgment. On appeal, the Alabama Court of Civil Appeals held that McCurdy failed to meet his burden to rebut Camping World's evidence. Therefore, the default judgment was due to be set aside.

In Black Warrior Electric Membership Corp. v. McCarter, a jury found Black Warrior liable for negligence in failing to raise an electric line that was (allegedly) too low by national standards. Black Warrior presented evidence it did not know the line was low. McCarter then had the burden to present substantial evidence that Black Warrior did have notice. McCarter did not meet that burden, and the Alabama Supreme Court reversed the judgment against Black Warrior.

Both cases hinged on the burden of proof. And both defendants won by arguing the application of that burden. While burden is not a sexy argument, it is one that attorneys and clients need to make.

FEES & BURGESS, P.C. — Calendar of Events

Fees & Burgess, P.C., is proud to present, and participate in the presentation of, the following upcoming seminar:

Contracting with the Customer: What the EMS Manager Needs to Know

Date: February 21, 2013

Time: 9:00 a.m. - 5:00 p.m.

Location: San Diego, California

Fees & Burgess, P.C. shareholders, Allen Anderson and Jeffrey Roth, will be instructing a class, Contracting with the Customer, at the 2013 IPC APEX EXPO on Thursday, February 21, 2013 in San Diego, California.

Without a doubt, negotiating with OEMs is one of the biggest challenges facing EMS managers. What needs to be covered in the contract? Is your company protected? What should you do if there is a dispute? This comprehensive, two-part course addresses the specific contractual issues faced by EMS companies. Gain a step-by-step understanding of the contracting lifecycle between an EMS provider and its customer, starting with initial engagement and signing of a nondisclosure agreement, through the bid process and formal contract negotiation, to resolution of disputes under the applicable contract(s). Using real-life situations, the contracting process as well as the questions that must be answered before entering into an agreement will be covered. Participants must be representatives of EMS organizations to attend.

The Agenda is:

Part 1 - 9:00 AM - 12:00 PM

Confidentiality agreements, credit and financial risk, letters of credit, and bids (Exercises 1 and 2) ; Letters of intent and preliminary contract documents, purchase order acknowledgment, and "battle of the forms" (Exercises 3 and 4) .

Lunch - 12:00 PM - 2:00 PM

Part 2 - 2:00 PM - 5:00 PM

Negotiation of contract terms, warranties, limitation of liability, and product liability (Exercise 5) ; Contract guidelines, claim negotiation, and dispute resolution (Exercise 6).

It is recommended that participants attend both Part I (PD-47) and Part II (PD-48) in the afternoon.

For more information, including how to register for this class, click here.

Seminars

During these rough economic times, it is important to get the most for your money. The lawyers of Fees & Burgess, P.C., combined, have many years experience working in various fields, as both in-house and private counsel, representing a diverse clientele. Our attorneys have extensive experience in many areas of law, including employment law; intellectual property; supply chain management; mergers and acquisitions; contract negotiation; dispute resolution; and various other fields.

This wide field of knowledge provides our attorneys with the insight and know-how to be able to provide quality training on various topics. Our programs can be customized to fit any business need while keeping the costs of our training competitive, without sacrificing quality.

Topics that Fees & Burgess, P.C., can provide training on include, but are not limited to:

A Recession Era Guide to Collecting on Construction Contracts

Conducting Effective Workplace Investigations

Construction Contracting

Contingent Employees and Labor Outsourcing

Diversity Training

Elements of an Electrical Manufacturing Services Contract

Employment Law Survival Training for Managers

Family Medical Leave Act

Hiring and Firing

Immigration Compliance

Incoterms® 2010

Indemnity and Limitation of Liability Contract Clauses

International Contracting

Limiting Liability for Sexual Harassment

Managing Gender Identity Issues in the Workplace

Negotiation and Resolution of Federal Contract Claims

Privacy in the Workplace

Reducing Employee Benefits Costs for Alabama Businesses

Reducing Risk in Purchasing Terms and Conditions

Reduction in Workforce Strategies

Retaliation and Whistleblowers

Uniform Commercial Code: Primer to Articles 1, 2, and 2A

Violence in the Workplace

Wage and Hour Issues/Fair Labor Standards Act

Americans with Disabilities Act

Managing Employee Use of Internet and E-mail in the Workplace

Ethics, Business Conduct and Compliance in Government Contracting

For more information on these and other programs, please visit us online at www.feesburgess.com; contact us by e-mail at seminars@feesburgess.com; or by phone at (256) 536-0095.

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SPEAKERS

FEES & BURGESS, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program, please contact us at seminars@feesburgess.com.

NEWSLETTERS

FEES & BURGESS, P.C., also publishes *F&B HR Corner,* focusing on human resource issues; and *F&B SCM Memo,* focusing on the supply chain management industry. To receive any of these e-newsletters, please provide your contact information to newsletters@feesburgess.com.

To remove your name from our mailing list, please contact us at newsletters@feesburgess.com.

Michael L. Fees
mfees@feesburgess.com

Allen L. Anderson
anderson@feesburgess.com

Stacy L. Moon
smoon@feesburgess.com

Ryan G. Blount
rblount@feesburgess.com

FEES & BURGESS, P.C.
213 Green Street
Huntsville, Alabama 35801

Telephone (256) 536-0095
Facsimile (256) 536-4440

www.feesburgess.com

C. Gregory Burgess
gburgess@feesburgess.com

Jeffrey L. Roth
jroth@feesburgess.com

Allison B. Chandler
achandler@feesburgess.com

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"No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers."