QUARTERLY BYTES

FEES & BURGESS, P.C.

Volume 8, Issue 4 December 2010

Retaliatory Discharge Claim Survives Death

In a matter of first impression, the Alabama Court of Civil Appeals determined that a claim for retaliatory discharge may survive the death of the claimant, and so may be brought by the claimant's estate. Gibson v. Staffco, L.L.C., 2010 WL 4679026 (Ala. Civ. App. Nov. 19, 2010). The Court of Civil Appeals treats a claim for retaliatory discharge like any tort claim, rather than a worker's compensation claim, which does not generally survive the claimant's death. Id. at *2.

The claimant, Christopher Gibson, filed an action against his employer, Staffco, L.L.C. (Staffco), for benefits under the Workers' Compensation Act for injuries he allegedly sustained during the course of his employment for Staffco. Mr. Gibson also asserted a claim for retaliatory discharge, claiming Staffco terminated his employment in retaliation to his demand for workers' compensation benefits. Several months after filing his action, Mr. Gibson died from causes unrelated to his alleged work-related injuries. Staffco filed motions to dismiss the workers' compensation claim and the retaliatory discharge claim on the basis that neither claim survived the claimant's death. Counsel for Mr. Gibson then sought to amend the complaint to add, as a plaintiff, the personal representative of Mr. Gibson's estate. The trial court granted both of Staffco's motions to dismiss, and Mr. Gibson's personal representative appealed.

Acknowledging the issue as one of first impression, the Court of Civil Appeals turned to case law suggesting the courts in Alabama treat a retaliatory discharge claim like any other tort claim: it is tried before a jury, does not fit within a contractual exclusion from arbitration for workers' compensation claims, and is governed by the general rules of tort law. The court also looked to the statutory language of section 25-5-57(a)(5) of the Alabama Code, specifying which claims survive a claimant's death under the Workers' Compensation Act. Because the statute is silent on the issue of whether a claim for damages survives a claimant's death, the court determined a claim for retaliatory discharge is not governed by section 25-5-57(a)(5). After considering both case law and statutory law, the court reversed the trial court's dismissal of Mr. Gibson's retaliatory discharge claim because he filed it before his death, holding the claim survives in favor of his estate and may be pursued by his personal representative. Consequently, the law in Alabama now allows a retaliatory discharge claim to survive a claimant's death.

FEES & BURGESS, P.C., Emphasizes:

- **General Civil Litigation**
- **Commercial Law & Litigation**
- **Municipal Law & Litigation**
- **Police Civil Liability Defense**
- **Employment Law & Litigation**
- **Construction Litigation**
- **Corporate Law & Government Contracting**
- **Insurance Defense**
- **Railroad Law**

Inside this issue:

LITIGATION SPOTLIGHT

Law Enforcement Investigatory Privilege Remains Strong in Alabama

This fall, the Alabama Supreme Court shielded a police department's internal affairs files from pre-action discovery. City of Mobile v. Howard, 2010 WL 4034865 (Ala. Oct. 15, 2010). The recent decision strengthens a line of state-law cases protecting, as privileged, investigative reports from discovery absent a showing of undue hardship.

This privilege, often called the "investigatory privilege," is statutory in nature. Section 12-21-3.1 of the Alabama Code provides "[n]either law enforcement investigative reports nor the testimony of a law enforcement officer may be subject to a civil or administrative subpoena …." The statute allows for an exception in civil cases "upon proof by substantial evidence, that the [party seeking the information] will suffer undue hardship and that the records, photographs[,] or witnesses are unavailable from other reasonable sources." Although the statute allows for an exception to the privilege in civil cases, Alabama courts impose a high burden on any party seeking disclosure of internal affairs files.

Eight years ago, the Court discussed the meaning of "undue hardship" and the factors a court may consider in determining whether a requesting party had met that burden in Ex parte Alabama Department of Mental Health & Mental Retardation, 840 So. 2d 863, 868 (Ala. 2002). The Court stated a "showing of undue hardship requires more than a mere conclusory statement by the party seeking the information that he or she could not obtain the equivalent of the information in the reports sought by discovery without undue hardship." Factors a court may consider include the unavailability of a witness whose statement cannot be obtained from another source; and lack of access to witnesses who gave statements. After noting the requesting party made *no* showing, let alone one necessary to meet the burden under the statute, the Court held the trial court abused its discretion in ordering the Alabama Department of Mental Health & Mental Retardation to produce its internal affairs files.

In the recent Howard case, the Alabama Supreme Court once again affirmed its stance on the investigatory privilege, holding that the requesting party, Mrs. Howard, did not demonstrate that she would experience undue hardship if she was unable to obtain the internal affairs file from the Mobile Police Department regarding an incident involving her minor son. In an attempt to demonstrate her need for the internal affairs file, Mrs. Howard argued the information contained in the file was unavailable to her through other means; the identity of potential eyewitnesses was unknown to her; and that the police officers involved in the incident were unlikely to speak with her voluntarily. The Court rejected Mrs. Howard's unsupported assertions and noted she did not offer any concrete proof that witnesses were unwilling to speak with her or that she had taken advantage of other discovery tools at her disposal. The Court once again prohibited discovery of internal affairs files based on the investigatory privilege.

HR CORNER

Regional NLRB Sues Employer for Termination Based on Facebook Posting

A regional office of the National Labor Relations Board (NLRB) in Connecticut has sued a local employer after it fired an employee who posted unfavorable comments about her supervisor on Facebook. Specifically, the regional NLRB notes that the company maintained an "overly broad" internet policy and terminated the employee in contravention of federal laws.

After receiving complaints from customers, the employee's supervisor requested that she draft an incident report summarizing the customer complaints. The supervisor and the company would then interview the employee to discuss the incident report. The employee requested union representation at the meeting, which the employer denied. Subsequently, the employee wrote negative comments about the supervisor on her personal Facebook page, using her home computer. This prompted replies from other employees who were supporting the employee and criticizing the supervisor. The employer discovered the postings and terminated the employee for violations of the company's internet policies.

The regional NLRB determined that the employee's Facebook postings were a "protected concerted activity" under the National Labor Relations Act (NLRA). It also determined that the company's internet policy was too broad because it prohibited employees from making negative comments about the company and from discussing the company on the internet in any way without the company's prior approval. The regional NLRB determined that such policies interfered with the employee's rights and abilities to engage in protected activity, which is in contravention of the NLRA.

The matter is set for administrative hearing in January of next year. Once this matter is finalized at the regional level, it may be appealed by either side to the NLRB agency in Washington, D.C. The agency would have the authority to set the NLRB's national stance regarding company restrictions on internet usage and company monitoring of private employee postings. Such a decision could have a significant impact on company policies and the information on which employers may base employment decisions.

PROTECTIVE MEASURES

Trial and Error

The Alabama Supreme Court recently took the opportunity to remind attorneys that speculation is not sufficient to support an award of punitive damages. <u>See</u> <u>Galaxy Cable, Inc., v. Davis</u>, 2010 WL 3518655 (Ala. Sept. 10, 2010). In <u>Davis</u>, a child tripped over a guy wire on which Galaxy Cable, Inc. (Galaxy), had placed a plastic guard. Galaxy performed annual inspections and had not noticed that the yellow guard was not correctly placed in its last inspection. When the child was injured, the guard was not where it belonged. The Court held that plaintiff presented insufficient evidence of wantonness. For the jury to find Galaxy acted wantonly, the jury had to speculate that the guard was in the same place on the day of the accident as it was when it was last inspected. Because that speculation was improper, the punitive damages portion of the jury award was reversed. In short, companies and their attorneys need to ensure that a plaintiff has properly proved its case, particularly if a jury awards punitive damages. Even if the underlying liability remains, the punitive damages portion of the award may be reversed.

QUARTERLY BYTES

FEES & BURGESS, P.C.

Volume 8, Issue 4 December 2010

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

FEES & BURGESS, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars:

January 19, 2011; 11:30 a.m. – 1:00 p.m. (CST), Holiday Inn, Research Park

Use of the New INCOTERMS ® 2010 in Domestic and International Transactions

This meeting hosted by Jeff Roth and Allen Anderson, of FEES & BURGESS, P.C., will help educate both buyers and sellers in the domestic and international arenas of changes found in the new and recently-released version of INCOTERMS ® 2010, which become effective January 1, 2011. This meeting will be hosted at the Holiday Inn, Research Park, conveniently located on University Drive.

January, 26, 2011, Huntsville, Al; 8:00 a.m. – 4:00 p.m. (CST), ABC Offices, Madison, AL

Risky Business in Construction Contracting: Reducing Risk and Increasing Profitability

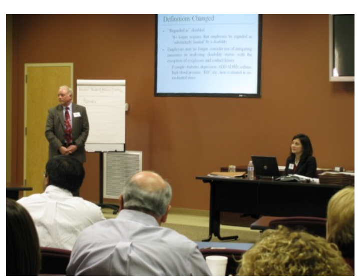
This day-long program, presented by Allen Anderson, Jeff Roth, and Ryan Blount is a must for focusing construction industry contractors on areas of business and compliance risk, and reviewing strategies for reducing and eliminating them.

April 14, 2011, Las Vegas, NV (In conjunction with IPC APEX EXPO)

Special Session: Contracting with the Customer: What the EMS Executive Needs to Know

This unique workshop presented by Jeffrey Roth and Allen Anderson, of FEES & BURGESS, P.C., addresses the specific issues EMS companies face while contracting. Participants will be led through the contracting lifecycle between an electronic manufacturing services (EMS) provider and its customer, starting with the 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).

If you would like more information , on these and more seminars, please go to www.feesburgess.com.



QUARTERLY BYTES

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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.

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