

TIPSbulletin

News & Resources on Business Torts, Insurance and Products Liability

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DIMINISHED VALUE: A LESSON IN POLICY

David Broemel



The issue of diminution of value for personal lines automobile insurance has cooled off somewhat due to better policy wording and favorable court opinions,

but a survey in this area is highly relevant in light of recent decisions over Hurricane Katrina flood victims. The same rules of policy construction employed in automobile policies are being used to void exclusionary language for flood coverage.

Diminution of value has been defined as a “[r]ule of damages which provides for [an award of the] difference between ‘before’ and ‘after’ value of property which has been damaged or taken.” Black’s Law Dictionary 458 (6th ed. 1990). Insureds may argue that “...[i]n almost every case, a vehicle that has been damaged in a covered event will suffer some diminution of value, regardless of the efficacy of the repairs undertaken...” See *State Farm Mut. Auto. Ins. Co. v. Mabry*, 556 S.E.2d 114, 119 (Ga. 2001). Property and casualty insurers have reacted to diminution of value claims by adding specific exclusionary terms to their policies. An automobile policy, in its Comprehensive and Collision Coverage section, typically provides as follows:

We have the right to choose to settle with you in one of the following ways:

- a.) Pay the cost to repair the covered vehicle
- b.) Pay the actual cash value of the covered vehicle

c.) Return the stolen vehicle... and pay as described in a.) above...

Car Policy Booklet, Tennessee Policy Form 9842A.

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RETALIATORY DISCHARGE ACTIONS UNDER ALABAMA'S WORKERS' COMPENSATION ACT

Mac B. Greaves and Mieke A. Hemstreet



I. Introduction

Workers' compensation claims generally provide the exclusive remedy for an employee who is injured on the job. This means that an employee who is hurt while performing his or her job may only receive compensation for damages related to the injury from the employer by filing a workers' compensation claim under Alabama's Workers' Compensation Act. However, there are two main exceptions to this rule. First, an employee injured on the job may sue his or her employer if the employer terminates the employee solely because he or she filed a workers' compensation claim. This is known as

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Diminished Value: A Lesson in Policy Interpretation

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The policy contains the following provision under “Exclusions and Limitations”:

Exclusions from coverages

- 1.) Wear and tear, mechanical breakdown, and now diminished value under ISO policy
- 2.) The cost to repair the covered vehicle does not include any reduction in the value of the covered vehicle after it has been repaired, as compared to its value before it was damaged.

Id.

Where is the doctrine accepted?

The majority of courts reject diminished value claims for first party property damage to vehicles. Out of 28 states, only 11 have accepted the theory.

Not Accepted

AL IN SC
 AZ KY SD
 CA LA TN
 DE MA TX
 FL ME VA
 IL MO

Accepted

AR MT
 CO NC
 GA NY
 KA OK
 MN OR
 MS

Cases wherein diminution of value has been rejected are:

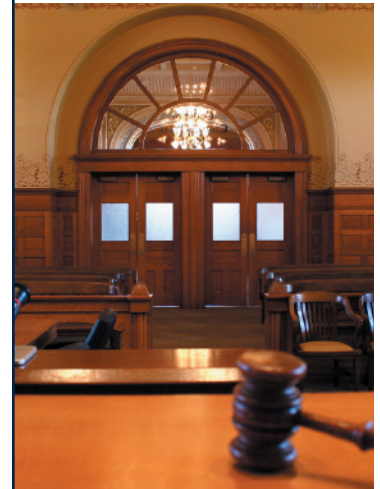
Pritchett v. State Farm Mut. Auto. Ins. Co., 834 So. 2d 785 (Ala. Civ. App. 2002); Johnson v. State Farm Mut. Auto. Ins. Co., 754 P.2d

330 (Ariz. Ct. App. 1988); Ray v. Farmers Ins. Exch., 246 Cal. Rptr. 593 (Cal. Ct. App. 1988); O'Brien v. Progressive N. Ins. Co., 785 A.2d 281 (Del. 2001); Siegle v. Progressive Consumers Ins. Co., 819 So. 2d 732 (Fla. 2002); Haussler v. Indem. Co. of Am., 227 Ill. App. 504 (Ill. App. Ct. 1923); Allgood v. Meridian Sec. Ins. Co., 836 N.E.2d 243 (Ind. 2005); Gen. Accident Fire & Life Assurance Corp. v. Judd, 400 S.W.2d 685 (Ky. 1966); Townsend v. State Farm Mut. Auto. Ins. Co., 793 So. 2d 473 (La. Ct. App. 2001); Campbell v. Markel Am. Ins. Cos., 822 So. 2d 617 (La. Ct. App. 2001); Hall v. Acadia Ins. Co., 801 A.2d 993 (Me. 2002); Given v. Commerce Ins. Co., 796 N.E.2d 1275 (Mass. 2003); Lupo v. Shelter Mut. Ins. Co., 70 S.W.3d 16 (Mo. Ct. App. 2002); Camden v. State Farm Mut. Auto. Ins. Co., 66 S.W.3d 78 (Mo. Ct. App. 2001); Schulmeyer v. State Farm Fire & Cas. Co., 579 S.E.2d 132 (S.C. 2003); Culhane v. W. Nat'l Mut. Ins. Co., 704 N.W.2d 287 (S.D. 2005); Black v. State Farm Mut. Auto. Ins. Co., 101 S.W.3d 427 (Tenn. Ct. App. 2002); Am. Mfrs. Mut. Ins. Co. v. Schaefer, 124 S.W.3d 154 (Tex. 2003); Bickel v. Nationwide Mut. Ins. Co., 143 S.E.2d 903 (Va. 1965).

Courts that have allowed the doctrine are:

MFA Ins. Co. v. Citizens Nat'l Bank, 545 S.W.2d 70 (Ark. 1977); Hyden v. Farmers Ins. Exch., 20 P.3d 1222 (Colo. Ct. App. 2000); State Farm Mut. Ins. Co. v. Mabry, 556 S.E.2d 114 (Ga. 2001); Venable v. Import Volkswagen, Inc., 519 P.2d 667 (Kan. 1974); Ciresi v. Globe & Rutgers Fire Ins. Co., 244 N.W. 688 (Minn. 1932); Potomac Ins. Co. v.

Wilkinson, 57 So. 2d 158 (Miss. 1952); Eby v. Foremost Ins. Co., 374 P.2d 857 (Mont. 1962); Edwards v. Maryland Motorcar Ins. Co., 197 N.Y.S. 460 (N.Y. App. Div. 1922); Pierce v. Am. Fid. Fire Ins. Co., 83 S.E.2d 493 (N.C. 1954); Nat'l Farmers Union Prop. & Cas. Co. v. Watson, 298 P.2d 762 (Okla. 1956); Dunmire Motor Co. v. Oregon Mut. Fire Ins. Co., 114 P.2d 1005 (Or. 1941).



How do courts construe insurance policies?

Courts generally treat an insurance policy as a regular contract in coverage disputes. The intention of the parties is considered in construing insurance contracts, but courts have developed some doctrines that completely negate clear exclusionary language in policies:

- “Contra Proferendum” is a doctrine that construes any ambiguity in a policy against the maker—always the insurer.
- Ambiguity is generally defined as being unclear or susceptible of more than one meaning (patent), or being unclear due to extrinsic facts (latent). Insureds often argue that a policy term is ambiguous

and should be construed in their favor.

- “Reasonable Expectations” is a subjective analysis courts use to override clear language and iron-clad exclusions. Pursuant to this doctrine, courts have held that if the agent, course of dealing, advertisements, or facts of the case would lead an insured to reasonably believe he is covered, coverage will issue.

The following cases resulted in diminished value awards for the insured:

- The repair estimate to fix collision damage to a Jeep Cherokee purchased for \$23,000, was \$16,868.96. The insured did not want car repaired, but the insurer did it anyway and the car dealer valued car at \$7,500.
- An insured’s brand-new truck was submerged in water over the hood. The insurer refused to pay the claim, but said it would “flush” the engine and transmission and nothing more.

Effect of Regulation

Unlike most private contracts, insurance is infused with public policy considerations and is heavily regulated. In spite of this, regulatory protection was held to be irrelevant in the Mabry case, even with an offer of assistance by the state Insurance Commissioner. Rate and form filings can seem to carry little weight for insurers defending litigation.

However, the South Carolina Department of Insurance supported an insurer facing a class action over payments of “actual charges” that resulted in a lower reimbursement to policyholders. The court appeared to give great weight to the South Carolina Department

of Insurance and granted judgment for the insurer. Ward v. Dixie National Life Ins. Co., 2006 WL 1529398 (D.S.C. May 10, 2006).

A federal court in Louisiana recently determined an ambiguity existed in the definition of the word “flood” in the disputed policy exclusion. The Court found there were two types of “floods” - one which occurs solely because of natural causes and another which occurs due to negligent or intentional act of man - in this case the failure of the levee board to properly maintain the levee and failure to warn of its breach. The Court found the ISO language susceptible of multiple meanings, hence ambiguous and held against insurers using the ISO exclusion. It also found that homeowners are “all risks” policies and if a peril is not clearly and unambiguously excluded, it is covered. The State Farm policy had a “lead-in” provision that preserved its flood exclusion, while the ISO anti-concurrent causation language was held to be ineffectual. State Farm made it clear that a flood was not covered regardless of the cause; therefore, its exclusion was upheld. In re Katrina Canal Breaches Consolidated Litigation, 2006 WL 3421012 (E.D. La. Nov. 27, 2006).



All too often courts ignore availability, affordability and market stability in favor of a few hard cases, especially

A federal court in Louisiana recently determined an ambiguity existed in the definition for the word "flood" in the disputed policy exclusion.

where class actions are involved. In a class action context especially, the question arises whether an automobile owner ever realizes a diminished value if he keeps the car for a number of years. Does the insured disclose the fact the car was repaired to a buyer? Can we ever know if full market value was obtained upon resale? And finally, diminished value may have some validity in third party claims, but not in a first party contract setting where an insured is willing to give up diminished value for lower premiums.

Conclusion

Since 2000, only 2 of the 14 courts that tried diminished value claims (in Colorado and Georgia) have found coverage. Clearer language and express exclusionary language, perhaps with better awareness of the issues, have turned the tide in insurers’ favor. For example, in a recent Tennessee decision, the court refused to find any ambiguity in the disputed “Limit of Liability” language. Black v. State Farm Mut. Auto. Ins. Co., 101 S.W.3d 427 (Tenn. Ct. App. 2002). Or, perhaps,

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plaintiff lawyers are focused on higher stakes in the Katrina litigation over flood exclusions. 

Resources

Thomas O. Farrish, Diminished Value in Automobile Insurance: The Controversy and its Lessons, 12 Conn. Ins. L. J. 39 (2005-2006).

William C. Wilson, Jr. of the Independent Insurance Agent's Association of America maintains a website at www.iiaba.net which includes the following articles:

- "Diminution of Value in the ISO Personal Auto Policy"
- "Diminution of Value Case Law - State by State Listing" (chart)
- "Rental Cars and Diminution of Value" (article)
- "Collision Damage Waivers in New York" (article)
- "Betterment in the ISO Personal Auto Policy" (article)
- "Top 10 Reasons to Purchase the Rental Car CDW/LDW" (white paper)

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UPDATE ON MEDICARE PART D: PREEMPTION OF STATE LAW CLAIMS



Jason Walters

As we reported in our Spring 2006 newsletter, many in the

insurance industry expect the new Medicare Part D prescription drug coverage (instituted under the Medicare Prescription Drug, Improvement, and Modernization Act of 2003 ("MMA")) to spawn a significant amount of consumer-based litigation as millions of older Americans enter the marketplace to purchase prescription drug plans. While it is still too early to gauge how prevalent Medicare Part D litigation will ultimately become, a federal court in the State of Washington recently handed down a decision that, if upheld, could have a far-reaching impact on Medicare Part D litigation nationwide.

In Uhm v. Humana, Inc., No. C06-0185-RSM, 2006 WL 1587443 (W.D. Wash. June 2, 2006), the court dismissed a purported class action lawsuit on grounds that the plaintiffs' contract and tort claims against a Part D plan sponsor were preempted by the MMA. The plaintiffs, a married couple, brought suit against Humana asserting various state law claims, including fraud and breach of contract, based on the company's alleged fraudulent advertising materials and alleged failure to provide the forms

necessary for the plaintiffs to obtain coverage. Humana moved to dismiss the case on the basis that the plaintiffs' claims were preempted by federal law. The court agreed and dismissed the lawsuit.

In reaching its decision, the court first found that plaintiffs' claims relating to fraudulent advertising materials were preempted by the MMA because the MMA's regulations regarding marketing materials superseded state law. With respect to preemption, the MMA provides that "the standards established under [the MMA] shall supersede



any state law or regulation" relating to Medicare Part D prescription drug plans and plan sponsors. 42 U.S.C. §§ 1395w-26(b)(3), 1395w-112(g) (2006). Such standards include the requirement that all marketing materials for prescription drug plans be previously approved by the Centers for Medicare and Medicaid Services ("CMS"). CMS will not approve materials which "could mislead or confuse Medicare beneficiaries, or misrepresent the Part D sponsor or its Part D plan." Uhm, 2006 WL 1587443 at *2. Because the MMA regulates the marketing

materials that can be used in conjunction with a Medicare Part D plan, the court held that the plaintiffs' state law claims relating to Humana's marketing materials were preempted by the MMA.

Plaintiffs' remaining claims were based on Humana's alleged failure to provide plaintiffs with the forms necessary to obtain coverage under the plan. Although these claims did not arise out of a coverage dispute over a particular medication, the court held that the claims were nevertheless subject to the MMA's coverage determination and appeal procedures. Because these administrative procedures conflict with state law, the court found that plaintiffs' state law claims were preempted and due to be dismissed. In reaching its decision, the court observed that "Congress intended Part D preemption to be broad in scope." Uhm, 2006 WL 1587443 at *4. The court also noted that under the MMA, "state laws are presumed to be preempted unless they relate to licensure or solvency." Id. (emphasis in original). The court thus concluded that all of plaintiffs' claims were preempted and due to be dismissed.

The Uhm court did not address the provision of the MMA which allows that a "Part D sponsor may also be subject to other applicable remedies available under the law." 42 C.F.R. § 423.752. The court also rejected the plaintiffs' argument that it should follow CMS's opinion that tort claims are not preempted. Instead, relying on the preemption provision incorporated into the MMA from existing Medicare law, the court held that any claim against an organization

relating to its status as a plan sponsor is preempted by the MMA. However, other courts could use these bases for finding that state law claims concerning Part D plans are not completely preempted by the MMA.

Uhm is now on appeal to the Ninth Circuit Court of Appeals. The parties are in the process of submitting their briefs and a decision will likely be handed down in the summer or fall of 2007. If the Ninth Circuit affirms the district court's decision, the holding will likely have a substantial impact on Medicare Part D litigation nationwide. Significantly, it could support defendants' positions that: (1) claims relating to Medicare Part D plans or plan sponsors are preempted by the MMA; and (2) federal jurisdiction and a corresponding right to removal to federal court exists in Medicare Part D litigation. Any such holding would undoubtedly create a chilling effect on Part D litigation and offer plaintiffs' lawyers little incentive to invest resources in this area. As for now, however, all we know for certain is that regardless of the outcome, the Ninth Circuit's decision is likely to have lasting implications on

the future of Medicare Part D litigation.

Burr & Forman LLP will continue to monitor Uhm v. Humana, Inc., along with other developments in Medicare Part D litigation, and will provide further updates, as warranted, in future editions of this newsletter. 🌐

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Retaliatory Discharge Actions Under Alabama's Workers' Compensation Act

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a workers' compensation retaliatory discharge claim. Second, an injured employee may sue his or her co-employees, despite the workers' compensation exclusivity provision, for damages related to his or her on-the-job injury. This is referred to as a co-employee claim. Because each of these exceptions have recently been a primary source of litigation in the area of employment law and deserve a thorough discussion, this article will be divided into two parts. The first portion of the article in this issue will focus only on retaliatory discharge cases, while the second portion, which will be published in a subsequent issue of this newsletter, will address only co-employee cases.

An employer cannot lawfully terminate an employee simply because the employee filed for workers' compensation benefits.

II. What Is A Workers' Compensation Retaliatory Discharge Claim?

Under Alabama law, an employment relationship is generally terminable at will by either party, with or without cause or justification, for a good reason, a wrong reason, or no reason at all. Culbreth v. Woodham Plumbing Co., Inc., 599 So.

2d 1120, 1121 (Ala. 1992). However, an employer cannot lawfully terminate an employee simply because the employee filed for workers' compensation benefits. The provision of Alabama's Workers' Compensation Act that prohibits this conduct is Section 25-5-11.1. This statute provides in relevant part:

No employee shall be terminated by an employer solely because the employee has instituted or maintained any action against the employer to recover workers' compensation benefits under this chapter or solely because the employee has filed a written notice of the violation of a safety rule...

Although this section fails to reference the damages that may be available to an employee under this provision, Alabama courts have determined that damages are awarded in accordance with the general law of torts. Caraway v. Franklin Ferguson Mfg. Co., 507 So. 2d 925 (Ala. 1987). Thus, pursuant to this statute, an employee may recover damages for an unlawful termination related to his or her on-the-job injury in addition to any workers' compensation benefits to which he or she may be entitled.

III. What is the Framework for Establishing a Retaliatory Discharge Claim Under Alabama law?

In a retaliatory discharge action under ALA. CODE Section 25-5-11.1, the following burdens are assigned to the parties. First, an employee must prove that he or she was

terminated because he or she sought to recover workers' compensation benefits. If the employee can show this, then the employer is allowed to show that it had a legitimate reason for discharging the employee as a defense to this claim. Twilley v. Daubert Coated Products, Inc., 536 So. 2d 1364, 1369 (Ala. 1988). If the employer offers a legitimate reason for the employee's discharge, the employee will have to prove that this reason is untrue and merely a pretext for actual retaliation. Id.

However, before the employer has to put forth its legitimate reason for terminating the employee, the employee must establish that he or she was terminated *solely* because he or she sought to maintain a workers' compensation action. Thus, questions such as what constitutes *sole* causation, what evidence is sufficient to establish sole causation, what constitutes an action and what constitutes termination arise under Section 25-5-11.1. Alabama courts have examined each of these issues in an attempt to clarify what an employee must show to prevail in a retaliatory discharge action.





IV. What Constitutes Causation?

Alabama's retaliatory discharge statute expressly requires that a plaintiff prove that he or she was terminated solely because of claiming workers' compensation benefits. Alabama Power Co. v. Aldridge, 854 So. 2d 554 (Ala. 2002). However, when the act was first passed, the courts interpreted the language very loosely, citing the legislative intent to soften the harshness of Alabama's at-will employment law. Twilley, 536 So. 2d 1364. Until recently and despite the clear wording in Section 25-5-11.1, the Alabama Supreme Court held that an employee's claim should not fail just because the employer presents evidence of a permissible reason for termination. See id. at 1368. In 2002, the Alabama Supreme Court changed this precedent by establishing that a plaintiff must prove that his or her termination was based *solely* upon the employee's on-the-job injury and the filing of a workers' compensation claim. Prior to Aldridge, the elements of a retaliation claim required the injured employee to prove (1) an employment relationship, (2) an on-the-job injury, (3)

knowledge on the part of the employer of the injury, and (4) subsequent termination of employment based upon the employee's injury and filing of a workers' compensation claim. The Aldridge court, however, specifically stated that an employee must show the following to succeed in a retaliatory discharge action:

- (1) an employment relationship;
- (2) an on-the-job injury;
- (3) notice to the employer of the on-the-job injury; and
- (4) subsequent termination of employment based solely upon the employee's on-the-job injury and the filing of a workers' compensation claim.

In its application of the "solely" requirement, the Alabama Supreme Court in Aldridge discussed how the requirement would specifically affect a plaintiff and defendant involved in a retaliatory discharge case. The court stated that the plaintiff has the burden of presenting "sufficient evidence indicating that the plaintiff was discharged because he or she filed a claim for workers' compensation benefits". Aldridge, 854 So. 2d at 568. However, the court noted that "if there is uncontradicted evidence of an independently sufficient basis for the discharge, then the defendant is entitled to a judgment as a matter of law." Id.; see also Coca-Cola Bottling Co. v. Hollander, 885 So. 2d 125 (Ala. 2003). Thus, the court's language suggests that courts applying Alabama law will not allow juries to choose between competing reasons for the plaintiff's termination unless the plaintiff can produce evidence directly contradicting the employer's explanation for the

employee's discharge. Id. The modification of the "solely" requirement seemingly benefits the employer because now a legitimate, uncontradicted justification for terminating a plaintiff should suffice to defeat a plaintiff's retaliatory discharge claim. This is illustrated by the fact that Alabama courts recently reversed a large verdict for a plaintiff, holding that the employer had an independent sufficient basis for firing the plaintiff and this basis was not required to be the only reason for the plaintiff's termination. Coca-Cola Bottling Co. v. Hollander, 885 So. 2d 125 (Ala. 2003).

In its application of the "solely" requirement, the Alabama Supreme Court in Aldridge discussed how the requirement would specifically affect a plaintiff and defendant involved in a retaliatory discharge case.

V. What Evidence Must a Plaintiff Produce to Show Sole Causation?

Now that a plaintiff must demonstrate that his or her filing a workers' compensation action was the *sole* cause of his or her termination, the relevant inquiry becomes what sort of evidence is necessary to prove *sole* causation. The Alabama Supreme Court has stated that the following may

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be sufficient to make this showing:

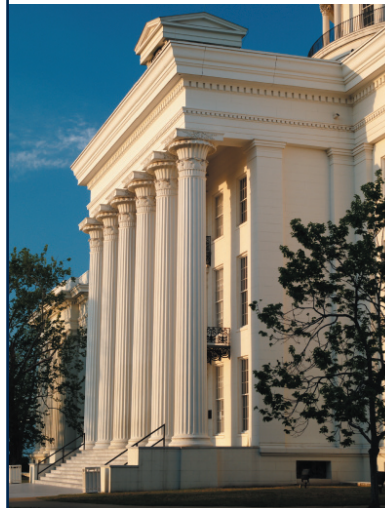
- (1) that the stated basis of termination has been discriminatorily applied against those filing compensation claims,
- (2) that the stated basis conflicts with express company policy on grounds for discharge, or
- (3) that the employer has disavowed the stated reason or otherwise acknowledged its pretextual status.

Now...the relevant inquiry becomes what sort of evidence is necessary to prove *sole* causation.

854 So.2d at 568. But no one piece of evidence listed above is necessarily dispositive. For example, in Walker v. DCH Regional Medical Center, the court ruled that the employer's failure to follow its own policy on several occasions and the subsequent termination of plaintiff did not provide substantial evidence of pretext. 853 So. 2d 221, 226-28 (Ala. 2002). The court found that the employer had a legitimate nondiscriminatory reason for not following its own policy each time and, because of this, the deviation from policy did not constitute pretext by the employer. Id. The case suggests that even with substantial evidence presented by the plaintiff of the kind listed above, the

employer may still defeat the plaintiff's retaliatory discharge claim if it can supply legitimate reasons for its actions.

Notably absent from the above list of possible evidence is the sheer proximity in time between the compensation claim and termination, which many plaintiffs rely upon as their sole evidence of retaliation. Alabama courts have held that temporal proximity between the filing of a workers' compensation claim and the employee's discharge is not dispositive as to whether or not the employee was terminated because he filed a workers' compensation action. See Aldridge, 854 So. 2d at 565 (quoting Rebarchek v. Farmers Coop. Elevator & Mercantile Ass'n, 35 P.3d 892, 899 (Kan. 2001)(proximity in time was "a typical beginning point...[but] not the sole means of showing a causal connection").



However, it must be noted that most courts will take into account temporal proximity when assessing a retaliatory discharge claim. For even the Aldridge court noted that "[m]any [other] states also consider '[p]roximity in time between the filing of the workers' compensation claim

and discharge' a persuasive factor in establishing a causal connection." 854 So. 2d at 565 (quoting Rebarchek, 35 P.3d at 899). Yet, temporal proximity alone is not enough to satisfy the plaintiff's burden of proving sole causation or demonstrating that the employer's legitimate non-discriminatory reasons for discharging the employee are pretext. 854 So.2d at 568. The Alabama Supreme Court reversed a judgment for plaintiff for \$150,000 compensatory and \$250,000 punitive damages and remanded with instructions to enter judgment for defendant. Hollander, 885 So. 2d 125. The court held that temporal proximity between an application for worker's compensation benefits and termination is not sufficient evidence of prohibited retaliation. Id.

VI. What Role Does the Employer's Knowledge Play in Establishing Causation?

In addition to sole causation, an employee must demonstrate that the employer actually knew that the plaintiff had filed a workers' compensation claim. In Tyson Foods, Inc. v. McCollum, the Alabama Supreme Court held that substantial evidence is required to show a direct and distinct causal link between one having knowledge of the plaintiff's workers' compensation claim and the termination. 881 So. 2d 976 (Ala. 2003). The court stated:

The narrow language in 25-5-11.1 makes it clear that a cause of action brought under that section cannot be based merely on facts that show that the plaintiff was

terminated at some point after that plaintiff had filed a claim for or received workers' compensation benefits... Instead, § 25-5-11.1 demands that there be specific knowledge of the plaintiff's claim for benefits on the part of the one who terminated the plaintiff, and that that knowledge be the sole motivating force behind the termination.

Id. at 983 (emphasis in the original). Thus, a plaintiff must prove that the decision-maker who actually decided to terminate plaintiff's employment *knew* that plaintiff filed a workers' compensation claim and that this claim was the *sole motivating force* behind this termination decision. In the above quoted case, the plaintiff could not show that the manager who fired her had any knowledge of her workers' compensation claim, so the court found for defendant. *Id.* Consequently, a plaintiff is required to produce some concrete evidence linking his or her discharge to specific knowledge of his or her workers' compensation claim if the plaintiff wishes to recover under this statute.

VII. What Constitutes an "Action"?

Alabama Code Section 25-5-11.1 was designed to prohibit employers from terminating an employee in retaliation for a decision to file a claim for worker's compensation benefits. The rationale behind this provision is to allow employees to exercise their right to be compensated for work-related injuries in an unfettered fashion without being subject to reprisal. McClain v. Birmingham Coca-Cola Bottling Co., 578 So. 2d 1299 (Ala. 1991). Thus, Alabama courts have



determined that the cause of action should not be restricted to cases where the employee is terminated in retaliation for his or her decision to file an actual lawsuit, as opposed to merely filing a workers' compensation claim to recover workers' compensation benefits. *See id.*

Although the Alabama Supreme Court stated that an "[a]ction' in its legal sense 'means a lawsuit brought in a court; a formal complaint within the jurisdiction of a court of law'", it has interpreted § 25-5-11.1 as covering "even the filing of a claim for workers' compensation benefits." Tyson Foods, 881 So. 2d at 928 (quoting Black's Law Dictionary 953 (6th ed. 1990)). Thus, an employee need not have filed a complaint with the court for his workers' compensation claim to constitute an "action" under the statute. This language also suggests that an employee at the very least must have an actual claim for worker's compensation benefits to satisfy the "action" requirement. This assertion is further supported by the Allen v. Albrecht Enterprises decision where the Alabama Civil Appeals Court found that the fact that employer terminated a worker before she filed her claim for

workers' compensation benefits meant that she did not satisfy a necessary requirement for establishing a retaliatory discharge claim. 675 So. 2d 428 (Ala. 1996). The court stated that the necessary requirements for a retaliatory discharge claim include that the complaining worker *actually file* a workers' compensation claim. *Id.* Therefore, simply complaining about an injury or threatening to file a workers' compensation claim will not constitute an "action" under 25-5-11.1.

An employee need not have filed a complaint with the court for his workers' compensation claim to constitute an "action" under the statute.

VIII. What is a Termination?

In addition to proving sole causation, that the employer had specific knowledge of the plaintiff's claim, and that the plaintiff has at least filed a claim for workers' compensation benefits, the plaintiff must also demonstrate that he or she was in fact *terminated* after he or she was injured on the job. An employee is "terminated" if he or she is either terminated or "constructively discharged." Twilley, 536 So. 2d at 1368; *see also* Ala. Code § 25-5-11.1. Under Alabama law, to establish a claim of "constructive discharge," an employee must present substantial evidence that his or her "employer deliberately [made] [the] employee's

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working conditions so intolerable that the employee [was] forced into an involuntary resignation."

Irons v. Service Merchandise Co., 611 So. 2d 294, 295 (Ala. 1992).

A plaintiff must demonstrate that he or she was either fired or constructively discharged in order to successfully prove a retaliatory discharge claim. Based on the fact that the courts have outlined only these two situations as amounting to a "termination" under the statute, there is some argument that a lay-off does not equal a "termination" under Section 25-5-11.1. However, there is no case law that explicitly states this proposition to be true.

IX. Conclusion

Despite Alabama's workers' compensation exclusivity provision, an employer can be held liable for terminating an employee solely because he or she has filed a claim for workers' compensation benefits. Although it has seemingly become more difficult for the plaintiff to maintain a retaliatory discharge action, especially in light of the "sole causation" requirement, an employer should be cognizant of the fact that such claims exist and could expose them to a claim for damages. ☉

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NO PLACE FOR BUSINESS



Ed Cotter

The elimination of unnecessary risks is vital to the continuation and growth of all businesses. Accordingly, the American Tort Reform Association's annual list of "Judicial Hellholes" is a must-read.

The list of "Judicial Hellholes" for 2006 are: West Virginia; South Florida; Rio Grande Valley and Gulf Coast, Texas; Cook County, Illinois; Madison County, Illinois; and St. Clair County, Illinois. The American Tort Reform Association's "Watch List" includes: Miller County, Arkansas; Los Angeles County, California; Philadelphia, Pennsylvania; Orleans Parish, Louisiana; and the State of Delaware.

Egregious incidents and awards which show the plaintiff bias present in these jurisdictions abound. For example, Dr. Ray Harron of Bridgeport, West Virginia made 75,000 diagnoses of asbestosis before being held accountable. This is not surprising considering that the former Chief Justice of the West Virginia Supreme Court of Appeals, Honorable Richard Neely, admitted that he did not give out-of-state defendants a fair shake according to the American Tort Reform Association: "As long as I am allowed to redistribute wealth from out of state companies

to in-state plaintiffs, I shall continue to do so."

In 2005, a South Florida jury awarded \$31 million to an automobile mechanic due to his alleged exposure to asbestos as a result of working on friction breaks, the largest individual award for asbestos exposure ever. Moreover, a Palm Beach County jury awarded entrepreneur Ron Pearlman \$1.58 billion in damages against Morgan Stanley for allegedly concealing the health of a business Pearlman purchased.

Mammoth verdicts against out-of-state corporations have been awarded recently in South Texas. The first Vioxx case to go to trial in the United States was in Brazoria County, Texas and resulted in an award for the plaintiff of \$253 million. In nearby Nueces County, Texas, a plaintiff was awarded \$29.5 million in damages as a result of her sports utility vehicle rolling over when her 11-year old spare tire blew. The trial judge denied defendant Ford's request to present evidence that the plaintiff was not wearing a seat belt at the time of the accident, which likely would have decreased her damages significantly.

The above shows that an area's legal climate must be taken into account when considering the expansion or relocation of any business. Consulting with an attorney knowledgeable about this subject matter can literally save millions. ☉

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