



August 31, 2009

Hello Everyone,

Can you believe it? We have raced thru August like the speed of lightning and now we are into September. Where did the summer go? Hopefully, most of you have taken the time to relax and smell the roses this summer. Before you know it, October will be here and all of those beautiful flowers will be gone, so take the time while you can. Personally, I am looking forward to fall and the cooler weather, pretty leaves and perhaps more time to relax for a moment or two with family.

August was extremely busy for all of us at ESW with speaking engagements, conferences and meetings with clients out of state. Here are a few highlights of the month and upcoming events for September.

ESW AUGUST HIGHLIGHTS:

As I mentioned above, we have been very busy this month with conferences: Jamie, Matt and I attended the ASIA conference in Sand Destin and spent valuable time with a few of our clients. You know who you are and we are so happy that you all spent time with us. In addition to ASIA, Matt attended the mega Florida Conference in Orlando. Yes we are road warriors thank you.

A big thanks goes out to those of you who attended dinner events with Matt August 17th and 18th. We heard great things about each evening and that fun was had by all.

We also attended the Georgia Work Comp Conference and were joined by many of our friends/clients. We are very fortunate to have formed so many wonderful relationships with so many of you. More and more our events take on a family atmosphere and the accolades go out to each of you. Thanks for being apart of Estes, Sanders and Williams, LLC.

Litigation News: AUGUST VERDICTS:

Matt Williams tried a worker's compensation case in Tuscaloosa for a tire manufacture, where the plaintiff alleged a latex allergy as a result of exposure at the plant. We were pleased to receive a defense verdict, after the judge took the case under advisement. The plaintiff was appealed on the issue of medical causation. So keep your fingers crossed as we continue to fight.

Matt Williams, with the assistance of our new lawyer, Will Hassinger, tried a trucking case to a jury verdict in Jefferson County this month. The issue in the case was whether either driver violated the Rules of the Road. The jury deliberated for an hour and returned a defense verdict.

Many thanks, to the entire ESW family for all their hard work on both trials. We would also like to thank our clients for placing their trust in ESW and allowing us to try cases.

WELCOME ABOARD: Please join all of us at ESW in welcoming our newest Associate; Paula I. Cobia: Paula has twenty-five years experience as a civil litigator, and her primary practice area is in representing management or the employer in employment cases. This includes human resources

consulting/preventative intervention (advising clients on discipline, contracts, employee handbooks and policies, arbitrations, reductions-in-force and benefits in all types of employment and labor relations matters); general corporate defense, including worker's compensation, and working with union shops. She has also provided training to numerous clients' human resources personnel and workforces at large. She tries cases in front of federal and state courts and handles appeals before all state appellate courts and the 11th Circuit Court of Appeals. In addition, she handles claims and charges before the National Labor Relations Board and Equal Employment Opportunity Commission.

Ms. Cobia received her J.D. from the University of Alabama in 1981 where she was a member of the John A. Campbell Moot Court Board, Bench and Bar Legal Honor Society and recipient of the Hugo Black legal scholarship. She served as a law clerk/staff attorney to Justice Samuel Beatty of the Supreme Court of Alabama from 1981-1982 and as a law clerk to Federal District Judge William M. Acker, Jr., Northern District of Alabama, from 1982-1983. From January 2008 through June 2009, she took a brief sabbatical from the practice of law to serve as a staff attorney/special projects coordinator for Chief Justice Sue Bell Cobb of the Supreme Court of Alabama. Besides being admitted to practice before all courts in the State of Alabama, she is admitted to the U.S. District Courts for the Northern and Southern Districts of Alabama, the 11th Circuit Court of Appeals and the Supreme Court of the United States. She is a member of several bar associations and a recipient for over 15 years of the highest rating attainable by *Martindale-Hubbell*, "AV", a reflection of having achieved preeminent status in the areas of professional skill and integrity.

UPCOMING EVENTS FOR SEPTEMBER:

On September 10th, 2009, Jamie Sanders will be speaking at the Alabama State Conference. Jamie's presentation will be at 11:30. His topic deals with Pre-Existing Conditions and the ability to extinguish liability through successful medical treatment. It is a presentation that you won't want to miss!

ESW will be attending the Builders Insurance Golf Tournament in Atlanta on September 24th. Builders Insurance has a yearly golf event and all of the proceeds go directly to Kids Chance. Kids Chance is an organization that benefits children who have a parent that has been injured catastrophically on the job. We are proud sponsors of this event!!

DON'T FORGET TO RSVP:

If you are planning on attending the Alabama State Conference September 10th and you will be arriving on September 9th, please join us for dinner at Sweet Bones the evening of September 9th. An invitation will be coming your way shortly.

HAPPY BIRTHDAYS LEO's and VIRGO's:

All of us at ESW hope that all of you that had a birthday this month, had a wonderful day: A Special Happy Birthday to Ann Sanders, Tia Smith, Michelle Brewster, Jennifer Maher, Bernice Bush and I suppose I should not forget myself, Lisa Sanders.

HOW TO CONTACT US:

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ALABAMA WEEKLY LAW UPDATES:

Alabama Law Weekly 7/17/09, 7/24/09, 7/31/09, 8/7/09

SUPREME COURT CIVIL

No notable Supreme Court decisions in these four weeks.

COURT OF CIVIL APPEALS

WORKERS' COMPENSATION - Release. Court of Civil Appeals reverses trial court's grant of summary judgment and holds that release executed in workers' compensation case did not bar filing of action against a co-employee. Jones was injured on the job at Flowers Bakery. He settled his work comp action with Flowers and executed a settlement agreement releasing various claims associated with his injuries. Jones subsequently filed an action against a co-worker, Ruth, alleging that he caused his injuries by willfully and intentionally removing a safety guard from a machine. Ruth filed a motion to dismiss or, in the alternative, a motion for summary judgment. The trial court entered a summary judgment in favor of Ruth, concluding that he had released those claims. Jones appealed. **Reversed.** Paragraph 9(B) of the release provided that Jones released "any and all claims made or which may be made, arising under the AL Work Comp Act . . ." In *Gates Rubber Co. v. Cantrell*, 678 So.2d 754 (Ala. 1996), the Court held that a settlement of "any and all claims for comp benefits due and rehab or retraining benefits due" was conclusive of any other claims absent fraud or an express exception elsewhere in the agreement. The Court noted, however, that neither *Cantrell* nor a similar holding in *Sanders v. Southern Risk Services*, 603 So.2d 994 (Ala. 1992), concerned the effect of a workers' compensation settlement agreement on a claim against a co-employee. In *Dudley v. Mesa Industries*, 770 So.2d 1082 (Ala. 2000)[9 ALW 16-7], the Court did address the effect of a workers' compensation settlement agreement on claims under Ala. Code 1975, Sections 25-5-11(c)(1) and (c)(2), which authorize co-employee suits in certain circumstances. There, the Court held that a release of claims for comp and voc rehab benefits "arising under" the Work Comp Act did not apply to co-employee suits. Here, unlike *Dudley*, however, the release included the phrase "but not limited to." The Court pointed out that a claim for tort damages under Section 25-5-11(c) is substantively different from a traditional workers' compensation claim and would not be considered as arising under the Act even though they are contained in the Act. "Because the Sections 25-5-11(c)(1) and (c)(2) claims Jones has filed against Ruth are outside the scope of the specific language of the settlement agreement, we conclude that the trial court erred in entering the summary judgment in favor of Ruth." *Jones v. Ruth*, 18 ALW 31-1 (2080249), 7/24/09

WORKERS' COMPENSATION - Retaliatory Discharge. Court of Civil Appeals reverses judgment entered in favor of plaintiff in retaliatory discharge case; employer advanced legitimate reason for termination of plaintiff's employment which was not refuted by plaintiff. Wood was employed by Black Creek, Inc., a gun manufacturer, from 1999 until 2001 as a machinist. He claimed that his forearms were subject to repetitive stress from running the machines. He pulled a muscle loose in his left arm in February 2000. Prior to that time, he was being treated for discomfort in his arms. He had not yet made a work comp claim and his treatment was being paid for by his private health insurer. He indicated on a patient questionnaire that his injury was not work-related. After he tore the muscle, his treating physician recommended surgery. Black Creek's work comp insurance carrier requested Wood's medical records to determine whether Wood's injury was compensable. This process took approximately five weeks. Surgery was performed in May 2000. Wood was released to return to work on June 8, 2000. However, his doctor did not give this information to Wood. Instead, he told Wood that he could not return to work until after his next appointment on June 19, 2000. Melanie Tullis, Black Creek's human resources manager, contacted the doctor to clear up the

discrepancy. Wood was released to return to work on June 12, 2009.

Wood worked on June 12th until he had to leave for a physical therapy appt. He did not work on June 13th. On June 15th and 16th, he left early to attend appts. Tullis wrote up a disciplinary report because Wood violated a policy stating that employees were supposed to schedule appointments at the beginning or end of their shifts. Wood was never presented with this disciplinary warning. Wood claimed that his job duties exceeded the restrictions placed on him. Wood went to his doctor's appointment on June 19, 2000. He did not return to work after the appt. Tullis wrote up another disciplinary warning based on his failure to come back to work. Wood was not presented with it. On June 20, 2000, Wood testified that he went to work but was having difficulty. He claims that he spoke with the company's president regarding his need to see the doctor. According to Wood, the president said "do what you gotta do" and told him to tell Tullis. Wood tried to speak to Tullis but she told him that she did not have time. Wood walked off and stated: "She can just kiss my ass." Wood clocked out at 8 a.m. He made a statement to his supervisor that "if she doesn't have time to see me . . . he said he's going to slap the bitch." Wood denied making such a statement. Tullis heard about the statements made and told Tommy Marshall, the plant manager, that Wood had left work without permission. Marshall decided to discharge Wood. Wood filed a claim for retaliatory discharge and workers' compensation. The work comp claim was settled and the retaliatory discharge claim was tried. A judgment was entered in favor of Wood in the amount of \$50,000, representing \$20,000 in back wages and \$30,000 for mental anguish. Black Creek appealed. The Appellate court reversed the judgment. The Court Of Civil Appeals reasoned that in order to establish a prima facie case of retaliatory discharge, a discharged employee must show: that the employee and the employer had an employment relationship; that the employee suffered a work-related injury; that the employer knew that the employee had suffered a work-related injury; and that the employee was subsequently fired based solely on his or her filing of a workers' compensation claim arising from the work-related injury. *Massey v. Krispy Kreme Doughnut Corp.*, 917 So.2d 833, 836-37 (Ala. Civ. App. 2005) [14 ALW 26-9]. Circumstantial evidence can be used to establish that an employee was discharged because he or she filed a work comp claim. Proximity of time between the claim and the discharge, knowledge of the compensation claim by those making the decision to terminate, expression of a negative attitude toward the employee's injured condition, failure to adhere to established company policy, discriminatory treatment in comparison to similarly situated employees, sudden changes in an employee's work performance evaluations, and evidence that the stated reason for the discharge was false can be considered in determining if a retaliatory discharge took place. *Alabama Power Co. v. \pard fs21 Aldridge*, 854 So.2d 554, 564-65 (Ala. 2002)[11 ALW 50-1]. Once a discharged employee has demonstrated a prima facie case of retaliatory discharge, the burden then shifts to the employer to establish a legitimate reason for the discharge. Once this reason is advanced, the burden shifts to the employee to show that the reason is a mere pretext.

An employer is entitled to a judgment as a matter of law if the underlying facts surrounding the stated basis for the discharge are undisputed and the reason given is sufficient as a matter of law and there is no substantial evidence indicating that the stated basis has been applied in a discriminatory manner to employees who have filed workers' compensation cases, that the stated basis conflicts with express company policy on grounds for discharge, or that the employer has disavowed the stated reason or has otherwise acknowledged its pretextual status. The evidence was undisputed that Wood made the statement "she can just kiss my ass." Wood claimed that he "mumbled" the comment but he did not deny making it. Under the company handbook, the use of foul language can be grounds for discharge. Black Creek also argued that Wood never presented any evidence to show that the use of foul language toward a person in a managerial position had been applied in a discriminatory manner to employees who had filed workers' compensation actions. Wood stated that other employees used such language but he refused to give the names of these individuals. The record reveals no disavowal of the stated reason for Wood's discharge. "Because Black Creek's advanced reason is legitimate, Wood failed to present substantial evidence indicating that he was discharged solely for filing a workers' compensation claim, as he was required to do to recover under Ala. Code 1975, § 25-5-11.1." The judgment of the trial court is due to be reversed. *Black Creek, Inc. v. Wood*, 18 ALW 32-4 (2071076), 7/31/09

WORKERS' COMPENSATION - Final Judgment — Medical Treatment.

In this work comp action, the trial court entered an “interim judgment” in which it held that Margaret Cowart’s injuries had occurred within the line and scope of her employment and it ordered the employer to authorize Dr. James White to treat Cowart for those injuries. The employer appealed. **Appeal dismissed.** In *Ex parte Publix Super Markets, Inc.*, 963 So.2d 654, 661 (Ala. Civ. App. 2007)[16 ALW 11-4], the Court held that a petition for writ of mandamus was the appropriate vehicle to review this issue. **An order requiring an employer to authorize medical treatment is “in essence, a determination of compensability of the employee’s injury.” Because no other rights are determined, it is not a final judgment. Accordingly, the appeal in this case is due to be dismissed. Judge Thomas dissented, holding that under her interpretation of the Workers’ Compensation Act, an immediate appeal is afforded to an employer in situations such as this. Judge Moore concurred in the dissent. *SouthernCare, Inc. v. Cowart*, 18 ALW 32-9 (2071117), 7/31/09.**

That’s all friends. As always, I hope that you will call on us if you should have any questions regarding our newsletter or Alabama Law. We are always available and want to be of assistance.

If you are planning on traveling for Labor Day, we hope that you all will be very careful and have a terrific holiday.

Please be aware that our office will be closed on September 7th.

Take care,

Lisa, Jamie and Matt