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$1.26-Million Dollar Verdict Affirmed by Alabama's Highest Court – in a Retaliatory Discharge Case

John David Blair

EFFECTIVE March 1, 2019, the Supreme Court of Alabama affirmed a jury verdict of $1,259,451.52 in a retaliatory discharge case that had been made the judgment of the Circuit Court of Mobile County. The verdict was for only $314,862.88 in compensatory damages. The remainder of the verdict – an enormous $944,588.64 – was for punitive damages designed to punish the employer for terminating an injured employee in retaliation for seeking workers' compensation benefits.

A. Only Damages, and not Liability, was Contested on Appeal.

It is extremely important to note that, while it defended liability at trial, on appeal the Employer "…does not contest liability." The Employer only appealed the jury's verdict as to the damages imposed. As such, the Court could not analyze the liability defenses raised at trial; therefore, this opinion does not actually address whether the Employer terminated the Employee/Claimant in retaliation for his workers' compensation claim. Accordingly, this opinion makes no new rules or precedents concerning the underlying tort of retaliatory termination.

B. Factual Background.

The Employee/Claimant was Denny Rice. His Employer, Merchants FoodService, appealed the verdict to the Supreme Court of Alabama in the case of Merchants FoodService v. Denny Rice, Docket No. 1170282 (which can be read online at Merchants FoodService v. Denny Rice). The Claimant worked for Merchants as a wholesale food delivery driver. The Claimant was unloading a food delivery at Murphy High School in Mobile using a delivery ramp secured with straps when one of the straps broke loose, causing both the Claimant and the ramp to hit the ground. The Court found that the awkward landing resulted in an injury to the Claimant's back. The Claimant tried to work the next day but was unable, so he reported to a physician. The physician placed the Claimant on restrictions resulting in a one-month leave from work during which time the Claimant received full workers' compensation benefits.

This case appears to be Alabama's new record-high verdict for a retaliatory discharge claim (the Employer argued on appeal that the punitive damages was the highest verdict affirmed on appeal in 20 years, as historically many were reversed or reduced following an appeal). The Court reviewed extensive testimony and evidence received by the trial court (retaliatory discharge claims are inherently fact-intensive by their nature). The following are some of the factors that the Supreme Court seemed to consider particularly significant in its recitation of the facts and evidence:

- The Employer's corporate representative, Ms. Farve, did not testify consistently with company policies (in fact, she initially denied the existence of a policy on returning to work that was later entered into evidence);

- The Employer's return from leave policy was different for employees on FMLA vs. workers' compensation leave;

- The Employer's return from leave policy was not followed as written in this case in any event;

- An email from Employer Representative Farve to other supervisors was produced by the Claimant as evidence and seemed to admit that the Employer had erred in terminating someone immediately coming off of workers' compensation leave ("this one will probably come back to bite us…") and encouraging supervisors to wait, "find something for them to do," and to "work the process" before terminating employees returning from WC leave;

- Testimony and emails were entered into evidence to the effect that the Employer was actively recruiting in "all markets," contradicting the Employer's position that there was simply no longer any work available for the Claimant;

- The Employer did not move, after all evidence was closed, for judgment as a matter of law before the case went to the jury; AND

- The Employer failed to insist upon a special verdict form apportioning/categorizing the jury's verdict beyond the categories of "punitive" and "compensatory" damages, and so the courts were unable to consider the Employer's request that the verdict be reduced as excessive.

C. Lessons/Takeaways for Employers & Their Insurers.

1. It is critical for employers to adopt written workers' compensation leave, sick leave, and FMLA leave policies that are legally-compliant and then to implement and follow them (the Employer in this case admitted, on appeal, that it did not follow its own policy of offering an open position the Claimant when he returned from WC leave).

2. When trying these cases, it is critical to move the Court to require a "special verdict form" be completed by the jury thoroughly categorizing any compensatory damages

awarded to the employee (otherwise neither the trial court nor the court on appeal can evaluate the reasonableness of the damages awarded by the jury on a "general" or uncategorized basis).

3. Courts do not consider only "annual" earnings when evaluating "loss of earning capacity" damages – the Claimant in this case earned more in a subsequent job annually, but he had to work significantly more hours, and he was not earning the same amount on an hourly basis ($4.15 less per hour, in fact), so even though his annual earnings were higher, his earning capacity was lower (according to the Court's findings based on established precedents rather than on a plain English reading of "loss of earning capacity").

D. Lesson/Takeaway for Attorneys.

Lastly, the Court found that the Employer failed to timely move for judgment as a matter of law on the question of the Claimant's eligibility for damages, and so the Court's "hands were tied," as a procedural matter. This is a good reminder for attorneys that, while it is certainly important to focus on the facts and striking a good chord with jurors, it is critical to remain meticulous and exacting where legal and procedural matters are concerned. The Supreme Court was careful to note that it would have denied the appeal even if the motion had been timely made for other reasons, but this procedural misstep meant it would not have been able to rule for the Employer regardless.

E. Final Thoughts: Don't Overcorrect.

It would be an easy mistake for employers and insurers alike to react to the staggering amount of this verdict by overcorrecting when budgeting to settle future retaliatory discharge claims; however, I do not think this case was typical, and so it is not necessarily a particularly good predictor of the potential verdict range for other cases even in the same venue. I would caution restraint against overvaluing subsequent retaliatory discharge claims based on the facts of this case (unless the facts are similar to these), as there is a danger in reading too much into the numbers alone.

This Employer was caught contradicting its own established leave policy, which is a mistake that is neither common nor rare. It is an issue that can easily arise when companies experience a period of rapid growth without consulting an employment attorney to ensure their policies and practices remain compliant despite that growth. The larger the workforce, the greater the exposure and more frequently such procedures/practices should be reviewed (confidentially) by counsel to avoid exposure to litigation and, by extension, to excessive verdicts. Companies with a workforce exceeding 10 employees really should have an employment attorney audit their employment policies and practices at least every few years.

However, the Employer in this case initially denied the very existence of the leave policy in question (a policy that treated employees on workers' compensation leave differently from other disabled workers, which raises several red flags). Then, the Employer's very sensitive and damning internal email correspondence was entered into evidence – correspondence that should

have been kept confidential. That correspondence all but admitted fault and encouraged company supervisors to "game the system" in order terminate the Employee. Lastly, the Court believed that the Employer falsely told the Claimant there was no work available during a period it was actively recruiting. To be sure, this is hardly a typical set of circumstances and can easily be avoided.