Federal Jury Verdict Reporter

The Most Current and Complete Summary of Federal Jury Verdicts

January 2006 **Nationwide Federal Jury Verdict Coverage** **2 FedJVR 1**

Notable Verdicts in The January 2006 Issue

Verdict of the Month

PRODUCTS LIABILITY

New Jersey District - Newark

Plaintiff suffered a traumatic brain in a 1987 Ford Bronco II rollover

Caption: *Valentini v. Ford Motor Company*, 2:97-3365

Plaintiff: Jeffrey W. Moryan, Gregory E. Peterson and John P. Lacey, *Connell Foley*, Roseland, NJ

Defense: James S. Dobis, *Dobis Russell & Peterson*, Livingston, NJ and Frank Nizio, *Wright Robinson & Tatum*, Detroit, MI

Verdict: $20,513,327 for plaintiff

Judge: Jose L. Linares

Date: December 23, 2005

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Index by State

Bad Faith - Beyond denying its commercial fire claim, plaintiff's insurer suggested the plaintiff had set the fire

Foreign Auto Parts v. Cincinnati Insurance, 1:99-552

Plaintiff: Stephen M. Tunstall, Mobile, AL
Defense: Michael B. Beers, William F. Patty and Angela C. Taylor, *Beers Anderson Jackson Patty & Van Heest*, Montgomery, AL
Verdict: Defense verdict on liability
Court: **Alabama Southern - Mobile**
Judge: William H. Steele
Date: 11-10-05

Starting in 1997, Matthew Cochran operates two business, Foreign Auto Parts of Mobile and Professional Engine Services (hereinafter Foreign Auto Parts), out of a single building in Mobile on Holcombe Ave. The property was severely damaged in an 11-13-98 fire. Foreign Auto Parts made a claim for coverage with its insurer, Cincinnati Insurance.

Cincinnati Insurance responded and sent an investigator to look into the claim. The investigator concluded that an accelerant had been used – this coupled with the fact that Cochran was present when the fire began, led the investigator to conclude the fire was intentionally set either by its insured or at his direction. Cincinnati Insurance denied the claim.

Beyond denying the claim, the insurer was also in contact with law enforcement. Cochran faced charges related to the fire. They were later dismissed when there was evidence tending to discredit the insurer's investigator. Namely, this investigator had a history of altering fire scenes.

With the dispute rumbling, Cincinnati Insurance fired the first shot and filed this declaratory action. Its posture was simple – the evidence supported a conclusion that either Cochran set the fire or made misrepresentations regarding the loss. In light of that, coverage was properly denied.

Foreign Auto Parts counterclaimed alleging three counts, (1) breach of contract, (2) bad faith, and (3) conspiracy. The case alleged Cincinnati Insurance relied on a reckless investigation by a discredited investigator, all designed to reach a manipulated result. To the fire itself, Cochran admitted he was present, but denied being involved – his proof indicated the fire was electrical in nature. Beyond the value of the fire loss claim, some $350,000, Foreign Auto Parts also sought other compensatory damages related to the denial of the claim as well as the imposition of punitives.

The verdict was for Cincinnati Insurance on the contract count and having so found, it then did not reach bad faith or conspiracy. A defense judgment followed. [While originally files as *Cincinnati Insurance v. Foreign Auto Parts*, we reversed the order for purposes of this verdict report.]

Employment Retaliation - A civilian engineer at the Redstone Arsenal alleged she received a downgraded evaluation because of a prior sexual harassment claim

Gibson v. Secretary of the Army, 5:04-726

Plaintiff: John R. Benn, *John Benn & Associates*, Sheffield, AL
Defense: Edward Q. Ragland, *Assistant United States Attorney*, Huntsville, AL
Verdict: Defense verdict on liability
Court: **Alabama Northern - Huntsville**
Judge: U.W. Clemon
Date: 10-17-05

Teresa Gibson was hired in February of 2003 as a civilian engineer at the Redstone Arsenal. [It is operated by the U.S. Army.] By June of that year, Gibson complained of sexual harassment by a co-worker.

At the same time, she was due for a performance evaluation. Gibson thought she had done well, meeting the goals that had been established for her. A supervisor agreed and rated Gibson a 93.

That was not the end of the story. A second senior grader also had to sign off the evaluation. A Colonel evaluated Gibson and was less impressed with her performance. He gave her a score of 80. The difference affected Gibson's bonus and raise structure.

From the perspective of the Army, the Colonel's decision was based on solely on merit – he concluded she was not meeting performance goals. Gibson disagreed.

Citing that she had met performance goals, Gibson alleged in this lawsuit that the Army retaliated against her for having earlier alleged sexual harassment. [This was not a sexual harassment case.] In developing retaliation, Gibson noted (1) the timing of the downgrade, just after her harassment allegation, (2) that she was excelling in her position, her supervisor grading her highly, and finally, (3) the Colonel wasn't familiar with her performance. The Army defended that the Colonel in question made a careful and considered decision, retaliation having nothing to do with the downgrade.

The verdict was for the Army, a Huntsville jury rejecting the retaliation claim. A defense verdict followed.

Excessive Force - A deputy sheriff allegedly beat a suspect after arresting him

Lavender v. Tuscaloosa County Sheriff, 7:02-1238

Plaintiff: William M. Acker, III, Birmingham, AL
Defense: Michael D. Smith and Travis R. Wisdom, *Hubbard Smith McIlwain Brakefield & Browder*, Tuscaloosa, AL
Verdict: Defense verdict on liability
Federal: **Alabama Northern - Tuscaloosa**
Judge: Virginia E. Hopkins
Date: 9-23-05

On the evening of 8-25-01, Helen McMullen was driving with her friend, Scott Lavender, when they came to a roadblock. It was operated by the Tuscaloosa County Sheriff's office. At this roadblock, the government was simply checking the driver's license of any citizen who passed.

A deputy sheriff, Jeff Holloway, interrogated McMullen. Outside the car, he ran a battery of intoxication tests. He concluded she was drunk and arrested her. At the same time, he asked if Lavender had a license – Holloway intended to let him

drive the car away.

Lavender didn't have one and Holloway had no choice but to impound the car. Holloway thought the arrest event was over and gathered some of McMullen's belonging as he walked away. The deputy was far from finished and told Lavender to remain.

A brief ensued and Lavender was arrested. After the handcuffs were applied, Lavender recalled that Holloway (1) kicked him in the ribs, and (2) told him to "Get up Nigger."

Arriving at jail, Lavender was treated for broken ribs. He stayed in jail for seven days until he finally bonded out. The government's criminal prosecution against Lavender failed and charges were dismissed. He had faced counts of public intoxication and resisting arrest. [He was in fact stone-cold sober.]

From this fact set, Lavender alleged both false arrest and excessive force. If prevailing, he sought compensatory and punitive damages. Holloway defended (1) that the arrest was reasonable, and (2) that in effectuating it, he exercised reasonably force to bring the non-compliant Lavender under control.

McMullen also presented a false arrest claim. While charged with DUI, when taken to the police station, she blew a 0.0. [Despite that, the local sheriff still held her until the next day.] It was her position there was no basis for Holloway to arrest. The trial court (Judge Clemon writing) agreed and denied summary judgment.

Holloway took an interlocutory appeal. The 11th Circuit reversed as to McMullen, finding as a matter of law that her arrest was lawful. It affirmed regarding Lavender. Thus back to the trial court, only Lavender's suit advanced to a jury trial.

The court directed a verdict on Lavender's false arrest claim. A jury in Tuscaloosa rejected the remaining excessive force claim, plaintiff taking nothing. He subsequently moved for a new trial, arguing the verdict was against the weight of the evidence. The motion was denied.

National Guard Discrimination - Plaintiff alleged he was fired because of his employer's hostility to his National Guard service

Brinkley v. Dialysis Clinic, 1:04-184

Plaintiff: Banks T. Smith and Robert I. Hinson, *Hall Smith Primm & Freeman*, Dothan, AL

Defense: J. Davidson French and Robert W. Horton, *Bass Berry & Sims*, Nashville, TN

Verdict: Defense verdict on liability

Court: **Alabama Middle - Dothan**

Judge: Myron H. Thompson

Date: 11-15-05

Willie Brinkley, who is also in the Army National Guard, started working in June of 1999 for the Dialysis Clinic – employed as a technician for the non-profit company, he stripped patients and moved patients. He did well in his position.

In February of 2003, the Dialysis Clinic laid him off. It explained the firing was based on financial considerations – costs had to be trimmed and the company started first with Brinkley, a part-time employee. As a part of the cost-cutting, more employees were fired throughout 2003.

Brinkley thought these explanations were a pretext to hide the real reason for the firing – the company, he believed, was hostile to his National Guard service. He recalled that when he'd go off for his weekend service every other week, there would be remarks that others would have to pick up the slack.

Then to the firing, he cited it occurred just as the Iraq War was beginning – Brinkley recalled company officials were concerned about the effect of a call-up. That the concern was widespread, he questioned why the Dialysis Clinic had prepared an internal memo that identified all National Guard employees.

In diminishing the pretext, he also discounted the notion he was a part-time – he almost always worked forty hours a week. These claims were presented in a 38 USC 4311 lawsuit – this statutory action permitted Brinkley to recover lost wages for the alleged discrimination. If he proved the firing was willful, liquidated damages would be assessed.

The Dialysis Clinic defended its firing decision as noted above. There was also proof developed that rather than being hostile to National Guard service, the company embraces and honors soldiers – it was specifically referenced in the company handbook and after 9-11-01, National Guard employees received supplemental pay. More particularly as applied to Brinkley, the defense argued his drill service was also accommodated.

This case was resolved on the first inquiry, a Dothan jury finding that Brinkley's National Guard service was not a motivating factor in the decision to fire. That ended the deliberations and there was no award of damages.

RACE DISCRIMINATION

Alabama Southern - Mobile

A black deputy sheriff alleged his promotion was blocked because of his race – a Mobile jury agreed, but rejected the claim finding the apparently racist sheriff would have not promoted for other reasons anyway

Caption: *Gardner v. Mobile County Sheriff*, 1:04-1044

Plaintiff: Jerry Roberson, *Roberson & Roberson*, Birmingham, AL

Defense: K. Paul Carbo, *The Atchison Firm*, Mobile, AL

Verdict: Defense verdict on liability

Judge: Callie V.S. Granade

Date: November 9, 2005

Facts: Jimmie Gardner started working in 1990 for the Mobile County Sheriff, Jack Tillman – he was first assigned to the jail. Gardner did well and in 2000, he was promoted to the rank of Corporal. His service was honored and in 2001, he received the prestigious Deputy of the Year award.

Things began to take a dark turn in 2003 for Gardner. That August he alleged a pattern of race discrimination within the sheriff's office. To bolster his claim, Gardner began to secretly tape-record his co-workers.

When this was discovered, sheriff bigwigs weren't happy. Gardner was investigated and ultimately suspended for fifteen days for unprofessional conduct. Gardner appealed and the suspension was cut to five days.

In the next year, Gardner applied five times for promotion to Lieutenant. On all five occasions, he was passed over. Gardner thought race was the reason, citing that less qualified and lower rated whites were made Lieutenant. In this federal lawsuit, Gardner alleged he was not promoted because of his race.

In proving race discrimination, Gardner pointed to proof that Sheriff Tillman regularly used racial slurs. The sheriff denied this and defended that the failure to promote was all about merit.

In that regard, a majority of those promoted were more highly ranked than Gardner. With respect to the lower ranked applicants, the sheriff also had an explanation – Gardner was the only applicant for promotion who had been suspended in the last year. Thus it was the suspension for the secret tape-recording that nixed Gardner's promotion.

This argument formed the basis of a motion for summary judgment. It was denied, the trial court finding that Gardner's proof of racial animus was enough to tip the scales. The sheriff conceded that even if these remarks were true, (he denied they were), they were limited to just three remarks over several years, an infrequency that defeated any suggestion discrimination was involved. In fact, it was Sheriff Tillman who had promoted Gardner in the first place to the position of Corporal – then to the promotion decision, several black corporals were promoted over Gardner.

While the allegations of race discrimination, the taping and the suspensions as discussed above, were not directly related to the gravamen of this lawsuit, they set the table for Gardner's race-based denial of promotion claim. In this regard, he defended the tape-recording, explaining sheriff bigwigs had ignored his initial race discrimination claim. Thus it was postured the trumped up suspension for the tape-recording (something other deputies had done without suffering a consequence) permitted the sheriff to continue the discrimination and then use Gardner's efforts to oppose that discrimination to further discriminate in denying promotion. In his closing arguments, Gardner's lawyer called the sheriff unaccountable and drunk with power.

Jury Instructions/Verdict: The verdict in this case was mixed. While the jury found that Gardner's race was a substantial and motivating factor in the decision not to promote, it further exonerated the sheriff, finding the promotion would have been denied for other reasons. Having so found, damages were not reached and a defense judgment followed.

Post-Trial Motions: Despite the verdict and the judgment, Gardner has since moved for an award of attorney fees of sum $38,000. He has argued that he partially prevailed having proved race discrimination – Gardner explained that unless attorney fees were assessed, the sheriff would be emboldened to continue his racist ways. The motion was pending when reviewed by the FedJVR.

Fair Housing/Race Discrimination - A Hispanic apartment dweller alleged he was evicted because of his national origin – the landlord countered it was because he bounced a check and appeared to abandon the apartment

Gonzalez v. Consolidated Management et al, 2:03-458

Plaintiff: Pro se

Defense: Scott M. Clark, *Law Offices of Scott Clark*, Phoenix, AZ for Consolidated Management
W. Lloyd Benner, *Brady Vorwerck Ryder & Caspino*, Scottsdale, AZ for Jose Leon Trust

Verdict: Defense verdict on liability

Court: **Arizona - Phoenix**

Judge: James A. Teilborg

Date: 10-28-05

In the summer of 2002, Miguel Gonzalez rented an apartment within the Executive Plaza Apartments in Phoenix on East Earl Drive. This case implicated two defendants, the first owner of the property, Consolidated Management and a second owner who took over in January of 2003, the Jose Leon Trust. For purposes of this case, their identities were indivisible.

Gonzalez's lease was for six months – the rent was $545 per month. Gonzalez, who is a minister, used the apartment both as an office and for temporary housing for his parishioners when needed. In January of 2003, Gonzalez alleged he was improperly ousted from his apartment without notice.

In this lawsuit, he alleged that ouster represented both race discrimination and a fair housing violation. [Gonzalez is Hispanic.] Plaintiff also presented a state-law ouster claim. If prevailing, he sought compensatory and punitive damages.

The defendants denied racism had anything to do with its decision. The trouble started, they thought, with Gonzalez bouncing a rent check. Thereafter the apartment appeared to be unoccupied. Putting those two things together, the defendants concluded Gonzalez abandoned the apartment.

The verdict in Phoenix was for the defendants on all three claims, race discrimination, fair housing and state-law ouster. Having so found, the pro se Gonzalez took nothing. A defense judgment followed.

Medical Negligence - Taken to the hospital after being shot in a shoot-out with the police, plaintiff alleged an indifferent nurse callously lifted him so that the police could photograph his wounds – when he cried out in pain, the nurse's movement leading to paralysis, the nurse purportedly called him a "pussy"

Yoder v. Maricopa County, 2:02-754

Plaintiff: Joel B. Robbins, *Robbins & Curtin*, Phoenix, AZ and Kristen M. Curry, *Curry Pearson & Wooten*, Phoenix, AZ

Defense: Daniel P. Jantsch and Sarah L. Sato-Brown, *Olson Jantsch & Bakker*, Phoenix, AZ

Verdict: Defense verdict on liability

Court: **Arizona - Phoenix**

Judge: Stephen M. McNamee

Date: 11-9-05

12-30-00 was a bad day for Gary Yoder. It started with his involvement in a commercial burglary. Several police from Apache Junction apprehended him. They did so only after a

gunfight – Yoder was hit several times. From the scene of the shooting, he was taken to the ER at Maricopa County Hospital.

Upon arrival, while badly hurt, Yoder seemed stable. Police officers arrived in his room to take pictures of his wounds. To accomplish this, he had to be rotated and moved. Yoder resisted this process and explained it was painful.

A hospital nurse, Chris Vincent, was not much impressed with his complaints. She told him to stop being a baby – this remark was confirmed by a police officer in the room. The nurse also purportedly told Yoder to stop being a "pussy."

Vincent proceeded to lift Yoder, in the process remarking off-hand that "I hope I don't hurt your back." In fact she did. Yoder has since suffered from paralysis. In this lawsuit, Yoder linked that permanent injury to a combination of negligence and outrage.

The negligence constituted hospital staff failing to perform a CT scan or otherwise institute precautions to avoid a spinal cord injury. Vincent was targeted for outrage, her incredibly insensitive attitude and conduct resulting in Yoder being moved. The hospital defended the case and focused on two facts, (1) Yoder appeared stable and there was no reason to have concern for a spinal cord injury and (2) that the injury was related to the shooting, not Vincent having moved him.

The verdict was for the defense on both the negligence and outrage claims, Yoder taking nothing. A defense judgment followed this seven day trial.

SEXUAL HARASSMENT

Arizona District - Phoenix

A sales representative for a phone company alleged she was sexually harassed by a co-worker – the harassment was so bad that the plaintiff suffered a permanent emotional disability

Caption: *Sorkilmo v. Qwest Corporation*, 2:02-2467

Plaintiff: Marshall A. Martin, *Law Offices of Marshall Martin*, Scottsdale, AZ

Defense: Kandace B. Majoros and Stephen B. Coleman, *Perkins Coie Brown & Bain*, Phoenix, AZ

Verdict: $2,900,750 for plaintiff

Judge: James A. Teilborg

Date: November 10, 2005

Facts: Kimberly Sorkilmo started working in 1990 in Minnesota as an directory assistance operator for the Qwest Corporation. In 1996 she was transferred to Phoenix where she moved to a sales position. She earned approximately $80,000 a year.

Her trouble started in July of 2001. She was suspended for her handling of a customer order. Reinstated a week later, Sorkilmo immediately took FMLA leave – when that had exhausted, she went on the company's short-term disability plan.

For the next year, she received 60% of her salary – Sorkilmo has since shifted to the company's long-term disability program. She will draw a percentage of her salary until she turns 65. Sorkilmo has not returned to work.

Months after taking her leave in November of 2001, Sorkilmo made her first complaint of sexual harassment. It was her allegation that a manager, Richard Auner, had engaged in a lengthy pattern of harassing behavior. It included suggestive voice-mails and comments, all implicating a quid pro quo that would benefit Sorkilmo's career if she submitted. [Sorkilmo recorded some of Auner's remarks for posteriority.]

Sorkilmo also alleged that she made several complaints to Qwest bigwigs, but nothing was done – it got so bad, she developed, it led to her permanent emotional disability that ended her career. In this federal lawsuit, Sorkilmo alleged a hostile sexual environment existed in her workplace. If prevailing, she sought both compensatory and punitive damages.

Qwest defended on several fronts. It first flatly denied there was any sexual harassment. Even if Sorkilmo's allegations were true, the company described the conduct as sporadic and non-threatening. Finally and raising fact disputes, Qwest postured that as soon as it learned of her allegations, it commenced a prompt investigation – that investigation was impeded, it further developed, by Sorkilmo's failure to cooperate. The company also diminished the claimed emotional injury, relying on a psychiatric IME, Dr. Jill Hammer, Phoenix, AZ.

Just as the trial was to begin, Sorkilmo moved to continue it – her motion explained her mental condition had regressed to the point where she could not participate. Qwest objected – it wanted its day in court. The motion was denied and Qwest got what it wanted.

Jury Instructions/Verdict: Sorkilmo prevailed at trial on the hostile environment sexual harassment claim. She took compensatory damages of $600,000, plus $200,750 in backpay. Punitives were assessed in the sum of $2.1 million. The verdict totaled $2,900,750. A month after this seven day trial, a judgment had not been entered, nor had any post-trial motions been filed.

AGE DISCRIMINATION

Arkansas Eastern District - Little Rock

A long-time hanger manager for an airplane company was demoted within days of a new younger supervisor coming on board – the manager alleged he was a victim of age discrimination – the airplane company countered that while the manager had good technical skills, he was a poor leader

Caption: *Dudley v. Dassault Falcon Jet*, 4:04-960

Plaintiff: Morgan E. Welch and Lloyd W. Kitchens, III, *Welch & Kitchens*, Little Rock, AR

Defense: Russell A. Gunter and Danna J. Young, *Cross Gunter Witherspoon & Galchus*, Little Rock, AR

Verdict: Defense verdict on liability

Judge: William R. Wilson, Jr.

Date: November 17, 2005

Facts: Richard Dudley, now age 50, started working in 1975 for Dassault Falcon Jet. From 1998 to 2004, he was the co-manager of one of jet company's hangers. During that time, he enjoyed good evaluations and regular raises. That all changed in April of that year when Gervais LeBlanc became his supervisor. [LeBlanc was many years Dudley's junior.]

Almost immediately, Dudley was demoted – his pay was cut from $76,000 to $57,000. He recalled LeBlanc told him after all these years on the job, being manager was just too much for him. Dudley didn't think it was fair and he quit after a short vacation. Dassault replaced him with a manager that was 43.

Dudley believed this course of conduct represented illegal age discrimination. He cited that LeBlanc created a hostile work environment based on his age and second that he was demoted because of his age. If prevailing, the jury could award him compensatory damages.

Dassault defended the case and cited Dudley's eight evaluations from 1998 to 2004 – all indicated he needed improvement in leadership and management. That then went to the demotion. While Dudley had good technical skills, he was a poor manager. Dassault denied that Dudley's age had anything to do with its decision. Dudley countered that when younger workers had performance problems, they were not demoted, nor was their pay cut.

Jury Instructions/Verdict: The verdict in Little Rock was for Dassault on both the hostile environment and demotion claims. Dudley took nothing. A defense judgment followed.

Civil Rights/Due Process - Plaintiff was promised by a city councilman that his property would be removed from a list to be considered for demolition at a council meeting – plaintiff relied on the promise and only learned there was a mistake when his property was demolished four months later

Ingram v. City of Pine Bluff, 4:02-808

Plaintiff: M. Stephen Bingham, *Cross Gunter Witherspoon & Galchus*, Little Rock, AR

Defense: W. Keith Wren, *Wren Law Firm*, Little Rock, AR

Verdict: Defense verdict on liability

Court: **Arkansas Eastern - Little Rock**

Judge: J. Leon Holmes

Date: 10-26-05

In March of 1997, Larry Ingram received a notice from the City of Pine Bluff, AR, that a property he owned was slated for demolition. Ingram immediately had his real estate agent, Bill Price, make contact with Dale Dixon, a city councilman. Dixon gave Price assurances the property would be taken off the agenda. Ingram thought no more about the matter.

In fact the city meeting was conducted several hours later. The property was on the agenda and the city voted to demolish it. Ingram never received another notice. Four months later and unknown to Ingram, the property was demolished.

Because of the demolition without notice, Ingram was unable to salvage anything from the property. In this lawsuit, he alleged a variety of counts – only one advanced to trial. It was Ingram's allegation that his due process rights were violated – that is, Dixon assured him the property would not be on the agenda and as importantly, that Ingram relied on that promise. Also alleging reckless conduct, Ingram sought an award of punitive damages.

Dixon defended the case and cited fact disputes. Namely, he denied making any promise to Ingram's agent. Apparently the agent had a conversation with Larry Woodrome, a city inspector, who was in Dixon's office – at the time the conversation occurred between Woodrome and the agent, Dixon was on the phone. Dixon further defended that he never would have made such a decision unilaterally without consulting the rest of the council.

The first instruction asked if Ingram was assured by Dixon that his property wouldn't be destroyed. The jury said no and then didn't reach whether Ingram relied on that promise and was damaged. A defense judgment followed.

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