Federal Jury Verdict Reporter

The Most Current and Complete Summary of Federal Jury Verdicts

May 2006 **Nationwide Federal Jury Verdict Coverage** **2 FedJVR 5**

Notable Verdicts in The May 2006 Issue

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Wrongful Death/Civil Rights - *Arizona (Phoenix)* - A retarded inmate suffocated in a restraint chair - $10,000,009 p. 8

Verdict of the Month

DISABILITY DISCRIMINATION

Missouri Eastern District - St. Louis

A Turkish customer service representative with a congenital bone defect had trouble getting to work on time because he didn't have a reserved parking spot – after he was fired for continual tardiness, he sued and alleged his employer failed to accommodate his disability

Caption: *Demirelli v. Convergys Customer Management*, 4:04-846

Plaintiff: Barbara A. Seely and Robert G. Johnson, *EEOC*, St. Louis, MO and Michael J. Fagras, *Lampkin & Kell*, St. Peters, MO

Defense: Laura M. Jordan and Mary M. Bonacorsi, *Thompson Coburn*, St. Louis, MO

Verdict: $114,622 for plaintiff

Judge: Charles A. Shaw

Date: April 14, 2006

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EMPLOYMENT RETALIATION

Alabama Northern - Huntsville

A female crane operator at a lumber finishing company alleged gender discrimination and then that she was fired in retaliation for having complained

Caption: *Chambless v. Louisiana Pacific*, 5:02-3146

Plaintiff: C. Michael Quinn, Samuel Fisher & Mintrel D. Martin, *Wiggins Childs Quinn & Pantazis*, Birmingham, AL

Defense: Charles A. Stewart, III, Montgomery, AL and Kimberly Bessiere Martin and Jonathan A. Hardage, both of Huntsville, AL, all of *Bradley Arant Rose & White*

Verdict: Defense verdict on liability

Judge: Robert R. Armstrong

Date: January 26, 2006

Facts: Beverly Chambless started working in 1994 as a laborer for Louisiana Pacific at its lumber manufacturing facility in Hanceville, AL. By 1999, Chambless had been promoted to the position of crane operator.

In July of 2000, Chambless sought a promotion to Shipping Supervisor – she was not hired, Louisiana Pacific instead selecting a male candidate. It explained that Chambless was passed over for having had several write-ups related to attendance in the past 180 days.

Chambless thought the attendance excuse was just a pretext to mask age and gender discrimination – she noted that while off work several days, it was because of an on-the-job injury. Coupled with her proof that the hired male was less qualified, Chambless filed a federal lawsuit in 2000.

During the pendency of this initial lawsuit, Louisiana Pacific fired Chambless on 4-6-02. It blamed her for violating the company's smoking policy – she was caught smoking in the cab of a crane. The company explained the strict application of the policy was because the plant's processes created flammable dust.

Following her dismissal, Chambless instituted a new lawsuit, alleging her firing represented retaliation for pursuit of the earlier case. It was her proof the smoking policy was a sham – it was routinely ignored and while Louisiana Pacific used it to fire her, no one else was canned for similar violations. Louisiana Pacific countered as above – Chambless was let go because of the smoking violation, retaliation having nothing to do with it.

Jury Instructions/Verdict: Tried to a federal jury in Huntsville, Louisiana Pacific prevailed on both age and gender discrimination – the retaliation claim was also rejected, Chambless taking nothing. A defense judgment followed and Chambless has appealed. [The court had previously granted summary judgment on plaintiff's sexual harassment claim.]

Excessive Force - While fleeing a police officer, the plaintiff crashed into a fence – when perceiving the plaintiff was going to run him over, the officer shot and killed him

Pittman v. City of Dothan, 1:00-1527

Plaintiff: Willie J. Huntley and Matthew P. Simpson, *The Huntley Law Firm*, Mobile, AL
Defense: Alan C. Livingston and William W. Nichols, *Lee & McInish*, Dothan, AL
Verdict: Defense verdict on liability
Court: **Alabama Middle - Dothan**
Judge: W. Harold Albritton, III
Date: 3-1-06

After midnight on 1-5-00, John Pittman was at his girlfriend's house in Dothan. After fighting with his girlfriend, Pittman drove away in a rental car. Girlfriend had rented it and she wasn't happy. She called the police, seeking their interdiction to have it returned.

The call went out and a Dothan police officer, David Driskell, intercepted Pittman. A short pursuit followed. It ended when Pittman ran off the road and into a fence.

Driskell exited his police cruiser and ordered Pittman out of his car. Rather than comply, Driskell recalled that Pittman tried to back up – the car was tangled in the fence, the wheels continuing to spin. Fearing for his safety, Driskell fired into the car, mortally wounding Pittman.

While the shooting was regrettable, Driskell explained that he had no choice but to shoot. He also explained Pittman's odd behavior that night, noting he was both on probation and later tested positive for cocaine.

The Pittman estate countered this version of events and alleged the shooting represented excessive force. That is at the moment of the shooting, his vehicle was stuck in the fence and wasn't going anywhere. There then was no reason for Driskell to shoot him five times. Driskell countered as above that even if mistaken, he acted reasonably in light of the circumstances.

The case went to a jury on a single excessive force claim. It was rejected and the Pittman estate took nothing. A defense judgment followed.

FMLA - A cabinetmaker with pancreatitis was fired after numerous absences – the worker countered that the company had notice of the absences and the firing represented FMLA interference

Wilson v. NHB Industries, 1:03-2284

Plaintiff: Heather N. Leonard, Birmingham, AL
Defense: Mark J. Romaniuk and Craig M. Borowski, *Baker & Daniels*, Indianapolis, IN
Verdict: $9,365 for plaintiff
Court: **Alabama Northern - Anniston**
Judge: Karon Owen Bowdre
Date: 1-25-06

Levoyer Wilson started in 1997 on the production line for NHB Industries – the company makes cabinets. Beginning in October of 2001, Wilson began to take FMLA leave related to pancreatitis.

Over the next year, Wilson took FMLA on several occasions, including in October of 2002 when his gallbladder was removed. He continued to miss days of work – in December of 2002, he

was off four days.

NHB calculated that Wilson had accrued too many points in violation of its attendance policy. It fired him on 1-16-03. The company explained he was let go solely because of attendance.

Wilson thought otherwise and alleged FMLA interference in this lawsuit. That is, he was eligible for FMLA leave and gave proper notice. While his absences were sporadic and sometimes sudden because of unforeseen problems, at all times, NHB bigwigs knew of his condition – it was so argued because of his history of prior leave. NHB countered that at the time of the firing, Wilson was not on FMLA leave and thus the absences were not excused.

Wilson prevailed at trial on the FMLA claim, the jury awarding lost wages of $9,365. The court doubled that award with liquidated damages. Wilson also took attorney fees of $36,544. A consistent judgment followed.

Pending is NHB's motion for a new trial. It argued that Wilson's counsel misstated the law in closing argument when it indicated that NHB could have confirmed Wilson's condition by calling his doctors. NHB explained that the company could not have lawfully made an ex parte contact with his doctors. NHB has also appealed.

FMLA - While off work on FMLA leave having heart surgery, a truck driver was fired

Smith v. Boyd Brothers Transportation, 2:04-1063

Plaintiff: Penny D. Hays and Charles J. Lorant, *Alabama Injury Lawyers*, Birmingham, AL
Defense: Jennifer Joe McGahey and Jay St. Clair, *Bradley Arant Rose & White*, Birmingham, AL
Verdict: $11,315 for plaintiff
Court: **Alabama Middle - Montgomery**
Judge: Myron H. Thompson
Date: 1-25-06

Gregory Smith started working in September of 2000 as a commercial truck driver for Boyd Brothers Transportation. On 10-3-02 and while delivering a load, Smith suffered a cardiac event. The next day he was placed on medical leave. Ten days later, his company's medical leave was replaced with FMLA leave.

By 11-4-02, Smith's original thirty-day company leave had ended. Company bigwigs noticed his absence and fired him on 11-13-02. A simple proposition for Boyd Brothers, he didn't return after thirty days.

What Boyd Brothers didn't factor into the equation was that as of 11-4-02, Smith was on FMLA leave, not the original thirty-day leave provided by the company. In fact, just two days after being fired, he underwent a heart procedure. Only after Smith was released to work on 11-21-02 did he learn he'd been fired.

In the meantime, Boyd Brothers realized its mistake. It reinstated Smith on 12-2-02 and acknowledged he was on FMLA leave. However it didn't bother to tell Smith. A week later, Smith took a job with another company. A last event occurred on 12-23-02, Boyd Brothers firing him (for a second time), citing that he'd taken another job.

In this lawsuit, Smith alleged both FMLA interference and retaliation. The trial court granted a judgment for Smith as a matter of law on the interference claim. The jury only considered retaliation.

Boyd Brothers defended at trial and denied any retaliation – at best its conduct represented a mix-up, the key decision-maker not knowing Smith was on FMLA leave. Plaintiff countered that retaliation was behind the conduct, relying primarily on the temporal proximity between the exercise of leave and the adverse employment action.

The jury first rejected Smith's retaliation claim – the case still went to damages on interference. Smith took an award of lost wages of $11,315, the jury further rejecting an interrogatory that asked if the firm acted in bad faith. Before a judgment could be entered, the parties entered an agreement settling the matter.

Race Discrimination - A white applicant for a federal agriculture position alleged reverse race discrimination – he noted the Department was filling 15 spots and despite having qualified white male candidates, only 1 of the hired 15 was a white male

Moncus v. Dept. of Agriculture, 2:03-416

Plaintiff: Dawn Wiggins Hare, *Hare & Hare*, Monroeville, AL and Cecelia J. Collins, *Johnstone Adams Bailey Gordon & Harris*, Mobile, AL
Defense: Stephen M. Doyle and James J. DuBois, *Assistant U.S. Attorneys*, Montgomery, AL
Verdict: Defense verdict on liability
Court: **Alabama Middle - Montgomery**
Judge: Lyle E. Strom
Date: 3-16-06

In January of 1998, the Department of Agriculture (DOA) was in the process of filling fifteen spots. The job was a Program Complaint Specialist at the Farm Service Agency. This position involves resolving complaints about farm loans.

In a first round of applicants, there were twelve that were considered qualified – John Moncus, a white male, was among those twelve. When the hiring decision was made, DOA only filled seven spots. Of those seven, not a single white male was hired. The other eight spots were left open.

Several months later, the position was readvertised. Because of his prior application, Moncus was automatically reconsidered. Again he was considered qualified. The eight spots were filled and Moncus was again passed over. Of the eight hired, only one was a white male – in this second group, six of the hires were black males.

Moncus sued in this federal action and alleged reverse race and gender discrimination. A simple case, only discrimination could explain why DOA hired a disproportionately low number of white males. [Only 1 of the hired fifteen employees was a white male – by contrast, nine were black.]

DOA defended that there was no discrimination. While Moncus was qualified for the spot, it considered him the lowest-rated of the initial applicants. That coupled with the fact it wasn't required to fill all the spots immediately led the DOA to readvertise the positions again. Then to the second round of hiring, DOA again postured that Moncus was not the most qualified applicant.

Resolved over four days in Montgomery, this jury rejected both race and gender discrimination. A defense judgment followed.

Employment Retaliation - A UPS driver alleged retaliation after asserting ADA discrimination regarding being forced to work in a vehicle without air-conditioning

Gribben v. UPS, 2:04-2814

Plaintiff: Daniel L. Bonnett and Jennifer L. Kroll, *Martin & Bonnett*, Phoenix, AZ
Defense: Carrie M. Francis and David T. Barton, *Quarles & Brady Streich Lang*, Phoenix, AZ
Verdict: Defense verdict on liability
Court: **Arizona - Phoenix**
Judge: Frederick J. Martone
Date: 4-14-06

Charles Gribben worked as a driver at the Desert Mountain UPS facility in Phoenix. His job as a shifter included moving trailers around the premises. In August of 2002, he complained about being forced to work in a vehicle that didn't have air-conditioning. Besides Arizona being hot in August, Gribben also had a medical condition.

UPS declined an accommodation. Thereafter Gribben refused to work in the hot vehicle. UPS fired him for insubordination. The firing was grieved and Gribben was later reinstated.

In this lawsuit, he alleged UPS engaged in both ADA discrimination and retaliation for his having complained. Summary judgment was granted on the discrimination claim, leaving the jury only to consider retaliation. Gribben noted he was canned within a month of receiving an EEOC investigation letter.

UPS denied any retaliation and focused on plaintiff's insubordination in refusing to work in the hot vehicle as directed. It also diminished the notion there were damages, pointing out that after being fired, Gribben was ultimately reinstated.

The verdict in Phoenix was for UPS and Gribben took nothing. A defense judgment followed.

WRONGFUL DEATH/CIVIL RIGHTS

Arizona District - Phoenix

A mentally retarded man asphyxiated in a county jail six minutes after being cuffed, hooded and placed in a restraint chair – county officials denied asphyxiation, countering that the man died of a drug overdose

Caption: *Agster v. Maricopa County et al*, 2:02-1686

Plaintiff: Michael C. Manning, Sean B. Berberian and Leslie E. O'Hara, *Stinson Morrison Hecker*, Phoenix, AZ

Defense: James M. Stipe and Brian Kaven, *Burch & Cracchiolo*, Phoenix, AZ for Maricopa County Sheriff
Richard L. Strom, Scottsdale, AZ for Nurse Betty Lewis
Daniel P. Jantsch and Michael D. Wolver, *Olson Jantsch & Bakker*, Phoenix, AZ for Maricopa County Department of Correction Health Services

Verdict: $10,000,009 for plaintiff assessed against several defendants

Judge: James A. Teilborg

Date: March 24, 2006

Facts: On 8-6-02, Charles Agster, age 33, was being taken to the hospital by his parents. Agster, who was mentally retarded with the abilities of a twelve-year old child, was intoxicated on methamphetamines. On the trip, the parents stopped at a Circle K convenience store. Agster became disruptive and the police were called.

He was arrested and taken to the Madison Street Jail run by the Maricopa County Sheriff. [The jail has since been closed.] The parents, deeply concerned about their son, drove instead to the hospital. They were thus in no position to warn jail staff of their son's significant emotional problems.

At the jail, Agster continued to be disruptive. Acting with a jail intake nurse, Betty Lewis, (an employee of the Maricopa County Health Department), Agster was placed in a restraint chair. At the jail, that meant cuffing him and tying his legs to the chair. Agster was also hooded.

For some six minutes, he was in the chair – during that time, he became unresponsive. While there would be questions about when resuscitation efforts were started, Agster did receive medical attention. Despite that intervention, he suffered brain damage and died three days later. [The jury in this case saw the video of the chaotic jail scene and was able to sort out timing and other matters on its own.]

The initial autopsy blamed Agster's death on positional asphyxia. After county lawyers met the preparers of the report, the autopsy's conclusion changed. It was decided that Agster died of a drug overdose.

In this lawsuit, Agster's parents alleged a combination of federal excessive force and state law negligence. It was argued

that jail officials should have appreciated his psychosis – instead of strapping him inhumanely to a chair, he should have been taken to a hospital. If prevailing against the Health Department, the sheriff and Lewis, the estate sought compensatory and punitive damages.

The defendants shared a common theme. Agster didn't die of suffocation – instead he died of an overdose. Testing revealed he had 17 times the legal limit of methamphetamines in his system at death. They also defended that the staff acted reasonably to restrain Agster – this was not to be cruel, but rather to prevent him from hurting himself. Sheriff defendants also pointed in part to Lewis, suggesting she ordered that Agster be placed in the chair. [Plaintiff countered that but for a lack of training to sheriff officials, they would have appreciated that Agster should not have been restrained.]

The state law claim was also defended on comparative fault. The jury was permitted to assess fault to the decedent, as well as his parents and the drug dealer. In this regard, it was noted by the sheriff that until contacting a lawyer, the parents had first blamed the drug dealer, known in the record only as Bill.

Injury: Death by asphyxia

Jury Instructions/Verdict: This case was tried for seven weeks. The jury then sorted through lengthy jury instructions for another week. The estate first prevailed on the federal excessive force claim. It took $1.00 in nominal damages (as requested in closing by plaintiff's counsel) from nine separate sheriff officials. The jury then made a general award of $6,000,000.

It was assessed 65% to the sheriff, 30% to the Health Department, 2% to the county and 3% to Lewis. The jury continued on the federal claim and assessed punitives of $2,000,000 against Lewis.

Turning to the state law claim, the estate also prevailed on negligence. It took a general award of $2,000,000. To a new fault apportionment scheme, it was assessed 10% to decedent, 30% to his parents, 10% to the drug dealer and 50% to the defendants. That 50% was then assessed in a separate finding as follows: 45% to the sheriff, 40% to the Health Department, 2% to the county and 13% to Betty. The raw verdict totaled $10,000,009 and was assessed consistently to the different defendants.

Post-Trial Motions: A flurry of post-trial motions have been filed. Lewis has asked for remittitur, the $2,000,000 punitive award representing 1111% of the compensatory damages assessed to her. The sheriff has complained the damages were excessive – it was noted Agster was only in the chair for 6 minutes, the jury valuing each minute of suffering at $1,000,000. All motions were pending when reviewed by the FedJVR.

Ed. Note - In 1999, the county settled an $8.25 million case involving Scott Norberg who died while strapped to a restraint chair. The Norberg estate was also represented by attorney Manning.

Prison Negligence **- While being transferred from New Mexico to Texas, a female federal inmate was housed overnight at a private facility in Arizona -- she alleged prison negligence in failing to protect her from male inmates whom she alleged raped her.**

Allred v. Corrections Corporation of America, Inc., 2:03-2343

Plaintiff: Brett Duke, El Paso, TX and Leon Schydlower, El Paso, TX
Defense: Daniel P. Struck and Rachel Love Halvorson, *Jones Skelton & Hochuli,* Phoenix, AZ
Verdict: Defense verdict on liability
Court: **Arizona - Phoenix**
Judge: David G. Campbell
Date: 3-29-06

On November 28, 2001, Cheryl Allred, a New Mexico inmate, was being transferred to a facility in Texas, a long trip by car. The U.S. Marshals Service ordered her to be housed overnight at Corrections Corporation of America's (CCA) Central Arizona Detention Center in Florence, which is an all-male facility. The order also called for her to be isolated because of suicidal ideations. Plaintiff alleged that during her stay the defendants left her alone and unprotected, allowing at least 2 roving "porter" or worker prisoners to rape her repeatedly. Plaintiff first made this allegation about a week later, while in the Texas federal lockup. After her release from prison she filed this 8th Amendment and state law negligence case, seeking compensatory and punitive damages for the alleged "deliberate indifference" of CCA personnel.

CCA defended the case by denying the assault took place. The prisoner intake process began at about 7:20 p.m. Because females and males are not housed together, Plaintiff was taken into a shower cell during that process, which in this case took about 20 minutes. CCA argued that a guard was within 10 feet of Plaintiff that entire time, however, an investigator's testimony allowed for the possibility she was left alone for a very short time. After intake she was escorted to a medical isolation cell for the night, where she was observed by female officers until discharge around 5:20 a.m. It was undisputed that Plaintiff did not report to any CCA personnel that she had been raped, and CCA pointed to the fact that Plaintiff's subsequent reports to medical and mental health providers, as well as to federal officials, varied considerably.

The court dismissed plaintiff's 8th Amendment claim and her state law claims for punitive damages prior to trial. The only issue presented to the jury was whether the defendant had been negligent, and the jury answered in favor of CCA.

Religious Discrimination -- A long-time employee and part-time minister alleged his employer was not accommodating his need to be off work every Sunday to practice his religion -- and earn wages as a preacher

Keener v. Domtar Industries, Inc., 4:04-4021

Plaintiff: Thomas H. Johnson, Texarkana, AR and John Hardin, *Hardin House Hultkrantz & Associates,* McKinney, TX

Defense: Louise E. Tausch and Brandon Cogburn, *Atchley Russell Waldrop & Hlavinka,* Texarkana, TX

Verdict: Defense verdict on liability

Court: **Arkansas Western - Texarkana**

Judge: Harry F. Barnes

Date: 3-30-06

Kenneth Keener has worked at the Domtar Industries, Inc., Ashdown Mill since 1973. He operates a piece of equipment called a sheeter. The plant runs 24-7 with three eight-hour shifts. For thirty years, Keener worked 3 out of 4 Sundays a month on either the day, swing or graveyard shift, and was off all day the remaining Sunday. In 1992 Keener became a preacher and began to want Sunday mornings off. It was standard policy at the Ashdown Mill for employees to agree among themselves to swap or cover one another's shifts, and Keener swapped Sunday mornings with his co-worker Mr. Ayers from 1992 until 2000. Mr. Ayers retired that year, leaving Keener to make other arrangements.

The mill could not require another employee to swap with Keener under the collective bargaining agreement, and he came up empty on volunteers -- despite the agreement's provision requiring Domtar to pay Kenner's substitute the same wage it paid Keener, the highest hourly earner in the plant due to seniority. Keener began complaining that working *any* shift on Sundays presented a conflict between his sincerely-held religious beliefs and Domtar policy. Efforts to reach a compromise failed, Domtar citing the other employees' refusal to swap and the fact that 4 other employees on Keener's shift were part-time ministers of one sort or another. Therefore, to be off every Sunday Keener could either cash in vacation days (he got 6 weeks paid each year) or allow points to accumulate against him under the company employee evaluation system.

Believing Domtar's position was contrary to Title VII of the 1964 Civil Rights Act, Keener brought suit alleging he had suffered adverse employment action because of his stated beliefs. In defense, Domtar pointed to the union rules and the undue hardship it would suffer if no one operated Keener's sheeter 3 days a month: $2.1M a year in lost revenue. In recent years, Keener was paid for his preaching, a fact Domtar stressed throughout the case. At the time he filed suit Keener made about $335 a week for preaching the Sunday morning services at a Texarkana Baptist church. Domtar maintained this was merely another paying job for Keener, and did not merit further accommodation than it had already made.

The case went to the jury on whether Keener's religious conflict was bona fide, and whether Domtar had taken an adverse employment action. The jury turned Keener away and found the defendant did not discriminate against him on the basis of his religion.

Premises Liability - Plaintiff slipped on a wet grocery store floor

Rudley v. Kroger, 4:03-860

Plaintiff: Ralph M. Cloar, Jr., Little Rock, AR

Defense: Michael J. Emerson and J. Carter Fairley, *Barber McCaskill Jones & Hale*, Little Rock, AR

Verdict: Defense verdict on liability

Court: **Arkansas Eastern - Little Rock**

Judge: George Howard, Jr.

Date: 4-13-06

Josh Rudley entered a Kroger in North Little Rock on 11-3-00. As he walked into the store, his feet flew out from under him. While Rudley wasn't sure what he slipped on, he was sure it was wet. He has since treated for a soft-tissue injury.

Rudley sued Kroger and alleged it failed to maintain its premises in a reasonably safe condition. Kroger countered that it lacked notice of the spill – a manager explained that at 7:00 p.m., he performed a safety check on the floor. Rudley fell just ten minutes later, there not being time for the spill to be detected.

The verdict on negligence was for Kroger and Rudley took nothing. A defense judgment followed.

Disability Discrimination - A psychology Ph.D. candidate was kicked out of school because of performance issues – she countered that the university failed to accommodate her emotional disabilities

Sahni v. Alliant International University, 2:03-4261

Plaintiff: Marie Ver Haar Griffin, Altadena, CA

Defense: Timothy Garfield, *Stephenson Worley Garrett Schwartz Garfield & Prairie*, San Diego, CA

Verdict: Defense verdict on liability

Court: **California Central - Los Angeles**

Judge: Ronald S.W. Lew

Date: 2-28-06

Arlene Sahni began in 1999 at Alliance International University in Alhambra, CA. [It was formerly known as the California School of Professional Psychology.] Sahni was a doctoral candidate in Alliance's psychology Ph.D. program. Before matriculating, Alliance canned her in May of 2002. It cited academic performance.

Sahni disagreed and in this lawsuit, she charged that Alliance had engaged in disability discrimination – namely, it failed to accommodate her disabilities. Those included diabetes, ADHD, and an anxiety disorder. Alliance countered the dismissal had nothing to do with disability, but rather her academics.

The verdict in Los Angeles on the discrimination claim was for Alliance and Sahni took nothing. A defense judgment ended this litigation.