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This week we present for your consideration, an Eleventh Circuit Court of Appeals opinion concerning retaliation claims, and Alabama Supreme Court decision concerning business income under the Multistate Tax Compact. Last week's decisions from the Alabama Court of Civil Appeals were of lesser significance for our clients.

#### ELEVENTH CIRCUIT COURT OF APPEALS

**Lewis v. U.S. Department of Labor, Administrative Review Board, No. 08-12114 (11th Cir. Feb. 24, 2010) (No hostile work environment claim when the defendant had no supervisory authority over the plaintiff and the employer took prompt action to discipline the defendant.)** The plaintiff prepared an article in which he concluded that there was a link between land application of sewage sludge and risks to public health that should be more thoroughly investigated. The plaintiff also agreed to serve as an expert witness in a case in which he would offer the same opinion, but not as an employee of the EPA. The position of the plaintiff's article and testimony was adverse to the position of his employer, the EPA, which was working to promote the application of sewage sludge. In conducting a peer review of the plaintiff's article, a co-employee performed an improper review by relying upon someone else's opinion, conferring with the defendant in the lawsuit in which the plaintiff was offering testimony, and taking numerous other actions which aimed to discredit the plaintiff's research and reputation.

The plaintiff filed whistleblower complaints against his employer based upon the theory that his employer was liable for his co-employee's retaliatory actions. The plaintiff based his retaliation claim upon a hostile work environment.

The Eleventh Circuit noted that some jurisdictions have held that subjecting an employee to a hostile work environment in retaliation for engaging in a protected activity constitutes adverse employment action. The Court did not adopt this holding, however, because it determined that the plaintiff failed to make an actionable hostile work environment claim. The plaintiff's claim failed because the co-employee responsible for retaliating against the plaintiff had no supervisory authority over the plaintiff and because the EPA took prompt disciplinary action against the co-employee. Consequently, there was no basis for holding the EPA liable for the co-employee's actions.

#### ALABAMA SUPREME COURT DECISION

**Ex parte Alabama Department of Revenue, No. 1070925 (Ala. October Term 2009-2010) (The sale of the company's Coosa timberland for \$600 million constituted "business income" under Alabama Code Section 40-27-1.1.)** The defendant paper company decided to shift its corporate strategy that would emphasize its consumer products rather than its manufacturing and processing of raw materials. In furtherance of that strategy, the company sold its Coosa properties for \$600 million. The question before the Supreme Court was whether or not the sale of the Coosa properties was "business income" within the meaning of Alabama Code Section 40-27-1.1.

Alabama courts follow the "transaction test" in defining business income, which means that the "controlling factor by which business income [is defined] is the nature of the particular transaction giving rise to the income." Looking at the nature of the sale of the Coosa properties, the Court noted that the sale was indicative of an alteration in the nature of the defendant's business. "The size and scope of the transaction at issue here, especially when considered in conjunction with [the company's] announced shift in corporate strategy, is indeed indicative of the 'nature' of the transaction, i.e., as a sale of part of its business rather than a transaction in the normal course of its business." The court therefore held that the gain from the sale of the Coosa properties could not be categorized as "business income" under Ala. Code Section 40-27-1.1, and reinstated the Alabama Department of Revenue's final multi-million dollar assessments against the company and its subsidiary.



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