

TRANSCRIPT: EXCERPTS FROM ALLEN'S AND GORDON'S EXAMINATION DURING UNEMPLOYMENT COMPENSATION HEARING: *McArn v. Allied Bruce-Terminix Co., Inc.*, 626 So.2d 603 (Miss.,1993) - Whether or not there is written contract, there should be public policy exceptions to employment-at-will doctrine for employee who refuses to participate in illegal act or employee who reports illegal act of his employer; these exceptions will apply even where there is "privately made law" governing employment relationship, or where illegal activity either declined by employee or reported by him affects third parties among general public, though they are not parties to lawsuit. (n. 3) Employer's alleged statement to Employment Security Commission that employee was terminated for a "bad attitude" was privileged and could not be basis for libel suit, absent proof that such statements were false or maliciously made.¹

THE TESTIMONY/INFORMATION IS A MATTER OF PUBLIC RECORD AND CAN BE FOUND IN
HINDS COUNTY CIRCUIT COURT RECORDS.

Newsome	56	2-4	Okay, so my December 1, 2004 e-mail in regards to harassment incident, was not out of the ordinary. I have submitted complaints in the past in regards to Mr. Gordon's behavior, is that correct?
Allen	56	5	You have.
Newsome	56	6-8	At any time during my employment, did I mention to you that I felt that Mr. Gordon's treatment, or his behavior, and conduct in regards to me was hostile?
Allen	56	9	You did.
Newsome	56	10	Okay, was this before your June 7 th Memorandum or after?
Allen	56	11	I don't recall.
Newsome	56	16-18	And the complaint that I submitted to OSHA, OSHA contacted the firm, you were to respond, if I'm not mistaken, by June 8, 2004. Is that correct?

¹ [3] McArn argues that the Mississippi Employment Security Commission was falsely told that he was terminated for a bad attitude and not told the true reason for his firing. McArn argues that Miss.Code Ann. § 71-5-131 (1972) permits a claim for defamation whenever the employer makes statements to the Commission which are "false in fact and maliciously ... made for the purpose of causing a denial of benefits."

There is no question but that Miss.Code Ann. § 71-5-131 provides that communications between an employer and the Commission are privileged and "when qualified privilege is established, statements or written communications are not actionable as slanderous or libelous absent bad faith or malice if the communications are limited to those persons who have a legitimate and direct interest in the subject matter." *Benson v. Hall*, 339 So.2d 570, 573 (Miss.1976).

In his complaint, McArn charged that Terminix maliciously defamed him before the Mississippi Employment Security Commission by stating he was fired for a "bad attitude." At trial, McArn testified that Terminix's contention that he was insubordinate was false. That is the extent of McArn's evidence of defamation.

Allen	56	19-20	I don't know the exact date. We did respond within the time limits they asked us to.
Newsome	57	1-4	Okay, the date of that Memorandum . . . was June 7, 2004, the response, if I'm not mistaken, because like I said, I wasn't aware this was coming up, was due on June 8, 2004. That e-mail or that Memorandum came out the day prior. Did that have anything to do?
Allen	57	5-6	Absolutely not, that's why I stated in here, you could do all you wanted about, with, with agencies.
Newsome	57	7-10	But also in regards to the complaints that I had submitted to the firm, have I ever submitted any complaints of harassment, discrimination, or anything to the attention of Mitchell, McNutt & Sams in regards to Bob Gordon?
Allen	57	11	Discrimination, harassment, yes, you've used that word several times.
Newsome	57	12-14	Okay, and did I ever mention to you that I felt that I was discriminated or either in the handling of my complaints being discriminative in any nature?
Allen	57	15-16	You asked me to follow through with going to the Board, is that what you're referring to?
Newsome	57	17-20	No, I'm asking did you ever receive any e-mail correspondence from me in regards to complaints I submitted to the firm, that I felt I was being subjected to certain treatment?
Allen	57	20	Discriminatory.
Newsome	58	1	Discriminative treatment?
Allen	58	2	You're, I believe you sent me one like that, yes.
Newsome	58	3-5	Okay, so you were, so Mitchell, McNutt & Sams was made aware prior to November 30 th on several occasions that I had filed complaints in regards to Mr. Gordon's behavior?
Allen	58	6	Yes.
Newsome	58	7-9	Did Mitchell, McNutt & Sams at any time prior to November 30, 2004 submit in writing to me, written responses to my complaints in regards to Mr. Gordon's behavior?

Allen	58	10-12	Let's see, we, we talked about it at the Board, and talked to Mr. Gordon about it, and I'm trying to think if, what happened from that point forward. I don't recall if we sent anything to you, if I did.
Newsome	58	13-15	Okay, so I can, it, it is your testimony that I submitted several complaints, but the firm never responded to me in writing in regards to my complaints on Mr. Gordon's behavior.
Allen	58	16	I responded back to you.
Newsome	58	17	In regards to Mr. Gordon's behavior?
Allen	58		Uh hum.
Newsome	58	17-18	Do you have any documentation?
Allen	58	19-20	Oh, I tried, I may have some e-mails that we had through correspondence commenting back on.
Newsome	59	1-3	Okay, did Mr. Gordon ever receive an elaborate e-mail or Memorandum such as . . . that you forwarded to me in regards to the complaints I submitted in regards to him?
Allen	59	4	Did he receive one?
Newsome	59	5-9	Did Mr. Gordon, I submitted a complaint in regards to harassment or discrimination like I said, I don't have them all, but I submitted my complaints to the firm in regards to Mitchell, McNutt & Sams conduct and behavior as well as Mr. Gordon, did you ever follow up with an e-mail or memorandum as you June 7, 2004?
Allen	59	10	To Mr. Gordon?
Newsome	59	11	To Mr. Gordon?
Allen	59	12	No.
Newsome	59	13-14	So Mitchell, McNutt & Sams did nothing to deter or discourage Mr. Gordon's behavior?
Allen	59	15-16	I don't know if there was, there was some discussions with, that, that we had.

Another example:

Newsome	144	19-20	Yes, just a moment. It was the incident that I went out to lunch with Attorney Mike Farrell and Ladye Margaret?
Gordon	146	7-13	She was gone for, what to me was an inordinate of the time to get something to pick up, to pick something up to bring it back. My recollection is that she was gone approximately forty-five minutes or so, and then she returned and at that time I criticized her for having gone and eaten out when I had told her that she needed to work through the lunch hour, and if she was going to get something to eat, go get it, and bring it back.
Newsome	146	14-15	So you said it was about forty-five minutes. For the record, can you explain your conduct when I did return, your behavior?
Newsome	147	1-2	So would you say your behavior, for instance stomping around and slamming the door is acceptable?
Gordon	147	3-4	I don't know that I stomped around and slammed the door, but I, yes, I was very upset.
Newsome	147	5	Okay, would you say you were hostile?
Gordon	147	6	Yes.
Newsome	147	8-9	Were you aware that your behavior was noticed by other employees at Mitchell, McNutt & Sams?
Gordon	147	10	Yes.
Newsome	147	11	Are you aware that I reported that behavior to Mr. Allen?
Gordon	147	12	Sitting here right now, I don't, I do not recall being aware of that.
Newsome	148	1-2	You, were you aware that when I went to lunch, that I was not driving, that I did go with Mr. Farrell and Ladye Margaret?
Gordon	148	3-4	You told me that when you returned, you did not tell me that before you were going.

Newsome	148	5-6	Prior to leaving. Were you aware that the lunch break was only about probably thirty-five minutes?
Gordon	148	7	It occurred, it appeared to me it was around forty-five minutes.
Newsome	148	16-17	Did that thirty-five minutes, or if you say forty-five minutes, did that preclude or prevent you from getting that Pleading filed in time?
Gordon	148	18-20	We got the Pleading filed on that day, but while you were out, a revision or revisions to that Pleading were sitting at your desk and not being done.
Newsome	149	14-16	And are you aware that your conduct affected the work of another attorney, who was wondering whether or not you had calmed down that day after that particular incident?
Gordon	149	17	No.
Newsome	150	2	So Mr. Gordon, you would say your conduct was hostile?
Gordon	150	3	That's what I, yes, I said that.
Newsome	150	4-5	Did Mitchell, McNutt & Sams ever notify you of your conduct of being you know, you being a hostile employee?
Gordon	150	6	No.
Newsome	150	13-14	Are you aware that I have, that I submitted complaints in regards to your conduct to Mitchell, McNutt & Sams?
Gordon	150	15	You have submitted complaints or e-mails alleging harassment.

1 A Yes.

2 Q Okay, so my December 1, 2004 e-mail in regards to harassment

3 incident, was not^{out} of the ordinary. I have submitted complaints in the past in
4 regards to Mr. Gordon's behavior, is that correct?

5 A You have.

6 Q At any time during my employment, did I mention to you that I felt

7 that Mr. Gordon's treatment, or his behavior, and conduct in regards to me
8 was hostile?

9 A You did.

10 Q Okay, was this before your June 7th Memorandum or after?

11 A I don't recall.

12 Q "~~Employer~~ Exhibit #9," the one I objected to, the June 7, 2004

13 Memorandum, you state that in that Memorandum, just paraphrasing

14 because I don't have a copy of it before me, in regards to filing complaints

15 with agencies, you mentioned also in your testimony something about

16 OSHA. And the complaint that I submitted to OSHA, OSHA contacted the

17 firm, you were to respond, if I'm not mistaken, by June 8, 2004. Is that

18 correct?

19 A I don't know the exact date. We did respond within the time limits

20 that they asked us to.

1 Q Okay, the date of that Memorandum in "Employer Exhibit #9" was
2 June 7, 2004, the response, if I'm not mistaken, because like I said, I wasn't
3 aware this was coming up, was due on June 8, 2004. That e-mail or that
4 Memorandum came out the day prior. Did that have anything to do?

5 A Absolutely not, that's why I stated in here, you could do all you
6 wanted about, with, with agencies.

7 Q But also in regards to the complaints that I had submitted to the firm,
8 have I ever submitted any complaints of harassment, discrimination, or
9 anything to the attention of Mitchell, McNutt & Sams in regards to Bob
10 Gordon?

11 A Discrimination, harassment, yes, you've used that word several times.

12 Q Okay, and did I ever mention to you that I felt that I was discriminated
13 or either in the handling of my complaints being discriminative in any
14 nature?

15 A You asked me to follow through with going to the Board, is that what
16 you're referring to?

17 Q No, I'm asking, did you ever receive any e-mail correspondence from
18 me in regards to complaints I submitted to the firm, that I felt I was being
19 subjected to certain treatment?

20 A Discriminatory.

1 Q Discriminative treatment?

2 A You're, I believe you sent me one like that, yes.

3 Q Okay, so you were, so Mitchell, McNutt & Sams was made aware
4 prior to November 30th on several occasions that I had filed complaints in
5 regards to Mr. Gordon's behavior?

6 A Yes.

7 Q Did Mitchell, McNutt & Sams at any time prior to November 30,
8 2004 submit in writing to me, written responses to my complaints in regards
9 to Mr. Gordon's behavior?

10 A Let's see, we, we talked about it at the Board, and talked to Mr.
11 Gordon about it, and I'm trying to think if, what happened from that point
12 forward. I don't recall if we sent anything to you, if I did.

13 Q Okay, so I can, it, it is your testimony that I submitted several
14 complaints, but the firm never responded to me in writing in regards to my
15 complaints on Mr. Gordon's behavior.

16 A I responded back to you.

Allen: Unhum

17 Q In regards to Mr. Gordon's behavior? Do you have any
18 documentation?

19 A Oh, I tried, I may have some e-mails that we had through
20 correspondence [?]commenting back on.

1 Q Okay, did Mr. Gordon ever receive an elaborate e-mail or
2 Memorandum such as "Employer Exhibit #9" that you forwarded to me in
3 regards to the complaints I submitted in regards to him?

4 A Did he receive one?

5 Q Did Mr. Gordon, I submitted a complaint in regards to harassment or
6 discrimination like I said, I don't have them all, but when I submitted my
7 complaints to the firm in regards to Mitchell, McNutt & Sams conduct and
8 behavior as well as Mr. Gordon, did you all ever follow up with an e-mail or
9 memorandum as your June 7, 2004?

10 A To Mr. Gordon?

11 Q To Mr. Gordon?

12 A No.

13 Q So Mitchell, McNutt & Sams did nothing to deter or discourage Mr.
14 Gordon's behavior?

15 A I don't know if there was, there was some discussions with, that, that
16 we had.

17 Q May I ^{hold} have "Employer Exhibit #5?" I would like to look at, looking at
18 104 Business Ethics and Conduct. According to the information provided to
19 the Unemployment Commission in regard to the false you know, my
20 accusation of accusing Bob of false information, if indeed that information is

for the claimant

1 Referee: For the record I'm going to call this "Claimant Exhibit #5." It is
2 objected to on relevancy and authenticity. Now this is signed by a Jane
3 Hedglin?

4 Q Yes.

5 Referee: She works for Staffers?

6 Q That's correct. It's one of the agencies I'm registered with.

7 Referee: I'll make a copy of that, and give that back to you as well.

8 Q Okay.

9 Referee: Any other questions for?

10 Q Yes, I do, because the, like I said, at, at question here is that I
11 submitted in the e-mail to deflect from my own Performance Evaluation.

12 And it's basically to establish the accuracy, and the reason why I would not
13 sign. During my employment, although it didn't come up, Mr. Gordon, I
14 mean there was an incident in regards to your asking me to come, to
15 interrupt my lunch and return to work on a pleading that you needed to get
16 that day. Is that correct?

17 A Which incident, what, can you be more specific as to when you're
18 referring to?

19 Q Yes, just a moment. It was the incident that I went out to lunch with
20 Attorney Mike Farrell and Ladye Margaret?

1 anything to eat, but if you're going to get something to eat, go get it, and
2 bring it back, and eat it at your desk when you have time. So that we can
3 continue working on that Pleading. She objected. I told her it's just going to
4 be necessary to do, because we've got to be sure we get our Pleading out
5 that day. And she then told me that she's leaving going with Mike Farrell
6 and Ladye Margaret Townsend to get something to eat, and would be
7 bringing it back, and I said that's fine. She was gone for, what to me was an
8 inordinate of the time to get something to pick up, to pick something up to
9 bring it back. My recollection is that she was gone approximately forty-five
10 minutes or so, and then she returned and at that time I criticized her for
11 having gone and eaten out when I had told her that she needed to work
12 through the lunch hour, and if she was going to get something to eat, go get
13 it, and bring it back.

14 Q -So you said it was about forty-five minutes. For the record, can you
15 explain your conduct when I did return, your behavior?

16 A Because you had acted in a defiant and insubordinate manner, and
17 going out, in my, in my judgment, in going out to get lunch, and eating out
18 when I told you you needed you needed to work through the lunch hour, and
19 or just needed to go out and get the lunch and bring it back and eat at your
20 desk so we could complete work.

1 Q So would you say your behavior, for instance stomping around and
2 slamming the door is acceptable?

3 A I don't know that I stomped around and slammed the door, but I, yes,
4 I was very upset.

5 Q Okay, would you say you were hostile?

6 A Yes.

7 Q Okay, for the record, let me find which exhibit it is, just a minute, I
8 would like to enter, because, let me ask this question. Were you aware that
9 your behavior was noticed by other employees at Mitchell, McNutt & Sams?

10 A Yes.

11 Q Are you aware that I reported that behavior to Mr. Allen?

12 A Sitting here right now, I don't, I do not recall being aware of that.

13 Q Okay.

14 A I, I may.

15 Q So Mr. Allen, did I make you aware of that submitted your conduct,
16 that incident rather, that incident to his attention?

17 A He may have, I just don't recall it right now. And if you did it by way
18 of an e-mail, he may have forwarded a copy of the e-mail to me. I just, just
19 don't recall.

1 Q You, were you aware that when I went to lunch, that I was not
2 driving, that I did go with Mr. Farrell and Ladye Margaret?

3 A You told me that when you returned, you did not tell me that before
4 you were going.

5 Q Prior to leaving. Were you aware that the lunch break was only about,
6 probably thirty-five minutes?

7 A It occurred, it appeared to me it was around forty-five minutes.

8 Q Okay, even if it were forty-five minutes, was I in violation of any of
9 the policies in regards to meals, breaks, lunch, of Mitchell, McNutt & Sams?

10 A In my judgment, yes, because even though you do have an hour lunch
11 break, that hours lunch, had taken that hour lunch is always subject to the
12 needs of the work that, that, this is in the office, and the need to get the work
13 out in a timely and proper manner , and so that on occasions when that does
14 arise, yes, that lunch hour is subject to, to being taken early, or deferred, late
15 shortened, or even missed all together.

16 Q Did that thirty-five minutes, or if you say forty-five minutes, did that
17 preclude or prevent you from getting that Pleading filed in time?

18 A We got the Pleading filed on that day, but while you were out, a
19 revision or revisions to that Pleading were sitting at your desk and not being
20 done.

1 Q But I am entitled to a break, right?

2 A Subject to the demands of the workplace, yes.

3 Q At this time, I would like to, I do need a copy of this back to show that
4 it was only thirty-five minute lunch, and we will look at your evaluation
5 saying it was forty-five minutes.

6 Allen: That's my assistant.

7 Ardelean: Okay.

8 Referee: Any objection, Ms. Ardelean?

9 Ardelean: Relevancy.

10 Referee: This will be "~~Claimant~~ Exhibit #6." ^{for the claimant} It is an e-mail from Ms.

11 Newsome to Rosonna Murray, and a copy to Jim Allen, TIMECLOCK, it is
12 objected to in regards to relevance, and that is "~~Claimant~~ Exhibit #6." Any
13 other questions, Ms. Newsome?

14 Q Yes, I do. And are you aware that your conduct affected the work of
15 another attorney, who was wondering whether or not you had calmed down
16 that day after that particular incident?

17 A No.

18 Q At this time, I would like to enter this in regards to the e-mail that was
19 sent in regards to Mr. Gordon's behavior that day.

20 Referee: Any objection to that, Ms. Ardelean?

1 Ardelean: I have an objection on relevancy.

2 Q So Mr. Gordon, you would say your conduct was hostile?

3 A That's what I, yes, I said that.

4 Q Did Mitchell, McNutt & Sams ever notify you of your conduct of
5 being you know, you being hostile towards an employee?

6 A No.

7 Q Were you aware that there were complaints submitted in regards to
8 your conduct to Mitchell, McNutt & Sams?

9 Ardelean: Could you get to the point because I'm not sure what complaints
10 you're referring to?

11 Q I, I'm asking, are you aware?

12 A By whom or, and of what?

13 Q Are you aware that I have, that I submitted complaints in regards to
14 your conduct to Mitchell, McNutt & Sams?

15 A You have submitted complaints or e-mails alleging harassment.

16 Referee: Let me enter this document. This will be "Claimant Exhibit #7."

17 It is objected to on relevance. It is a series of e-mails from Ms. Townsend to

18 Ms. Vogel and back. Okay, that is "~~Claimant~~ Exhibit #7" that's objected to

19 regarding relevancy.

20 Q Okay, in regards, and this was about February 2004, for the record?