

1 SB405
2 95185-2
3 By Senators Bedford, Smitherman, Ross, Lindsey, Benefield,
4 Coleman, McClain, Little (Z), and Mitchem
5 RFD: Judiciary
6 First Read: 19-FEB-08

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8 SYNOPSIS: Under existing law, certain corporate
9 employers are treated differently than sole
10 practitioners and partnerships relating to actions
11 against third parties under the Workers'
12 Compensation Law.

13 This bill would provide further for actions
14 against third parties jointly liable with employers
15 for injury or death and for injury or death
16 resulting from willful conduct, would provide
17 further for attorney's fees, and would provide that
18 an employee may not be terminated due to the
19 employee instituting a claim against the employer.

20
21 A BILL
22 TO BE ENTITLED
23 AN ACT
24

25 To amend Sections 25-5-11 and 25-5-11.1, Code of
26 Alabama 1975, relating to the Workers' Compensation Law, to
27 provide further for actions against third parties jointly

1 liable with employers for injury or death and for injury or
2 death resulting from willful conduct; to provide further for
3 attorney's fees; and to provide that an employee may not be
4 terminated due to the employee instituting a claim against the
5 employer.

6 BE IT ENACTED BY THE LEGISLATURE OF ALABAMA:

7 Section 1. Sections 25-5-11 and 25-5-11.1, Code of
8 Alabama 1975, are amended to read as follows:

9 "§25-5-11.

10 "(a) If the injury or death for which compensation
11 is payable under Articles 3 or 4 of this chapter was caused
12 under circumstances also creating a legal liability for
13 damages on the part of any party other than the employer,
14 whether or not the party is subject to this chapter, the
15 employee, or his or her dependents in case of death, may
16 proceed against the employer to recover compensation under
17 this chapter or may agree with the employer upon the
18 compensation payable under this chapter, and at the same time,
19 may bring an action against the other party to recover damages
20 for the injury or death, and the amount of the damages shall
21 be ascertained and determined without regard to this chapter.
22 If a party, other than the employer, is a workers'
23 compensation insurance carrier of the employer or any person,
24 firm, association, trust, fund, or corporation responsible for
25 servicing and payment of workers' compensation claims for the
26 employer, or any officer, director, agent, or employee of the
27 carrier, person, firm, association, trust, fund, or

1 corporation, or is a labor union, or any official or
2 representative thereof, or is a governmental agency providing
3 occupational safety and health services, or an employee of the
4 agency, or is an officer, director, agent, or employee of the
5 same employer, or his or her personal representative, the
6 injured employee, or his or her dependents in the case of
7 death, may bring an action against any workers' compensation
8 insurance carrier of the employer or any person, firm,
9 association, trust, fund, or corporation responsible for
10 servicing and payment of workers' compensation claims for the
11 employer, labor union, or the governmental agency, or person,
12 or his or her personal representative, only for ~~willful~~
13 deliberate or intentional conduct which results in or
14 proximately causes the injury or death. In all cases involving
15 the intentional act of an employer that contributes to the
16 injury of a worker, the injured employee, or in the case of
17 death, his or her dependents, may pursue a civil action
18 against the employer to recover damages. In cases of
19 deliberate or intentional conduct where two or more managers,
20 supervisors, or policy makers of the employer's business
21 engage in such conduct, as defined herein, that contributes to
22 the injury of a worker, then the employee shall have a cause
23 of action against the employer, in addition to the employees
24 engaged in such conduct, based upon the doctrine of respondeat
25 superior. If the injured employee, or in case of death, his or
26 her dependents, recovers damages against the other party, the
27 amount of the damages recovered and collected shall be

1 credited upon the liability of the employer for compensation,
2 except in cases where the employer or co-employee is found
3 liable for a deliberate act that contributes to the injury to
4 the employee. If the damages recovered and collected are in
5 excess of the compensation payable under this chapter, there
6 shall be no further liability on the employer to pay
7 compensation on account of the injury or death. To the extent
8 of the recovery of damages against the other party, the
9 employer shall be entitled to reimbursement for the amount of
10 compensation theretofore paid on account of injury or death.
11 If the employee who recovers damages is receiving or entitled
12 to receive compensation for permanent total disability, then
13 the employer shall be entitled to reimbursement for the amount
14 of compensation theretofore paid, and the employer's
15 obligation to pay further compensation for permanent total
16 disability shall be suspended for the number of weeks which
17 equals the quotient of the total damage recovery, less the
18 amount of any reimbursement for compensation already paid,
19 divided by the amount of the weekly benefit for permanent
20 total disability which the employee was receiving or to which
21 the employee was entitled. For purposes of this amendatory
22 act, the employer shall be entitled to subrogation for medical
23 and vocational benefits expended by the employer on behalf of
24 the employee; however, if a judgment in an action brought
25 pursuant to this section is uncollectible in part, the
26 employer's entitlement to subrogation for such medical and
27 vocational benefits shall be in proportion to the ratio the

1 amount of the judgment collected bears to the total amount of
2 the judgment.

3 "(b) If personal injury or death to any employee
4 results from the ~~willful~~ deliberate conduct, as defined in
5 subsection (c) herein, of any officer, director, agent, or
6 employee of the same employer or any workers' compensation
7 insurance carrier of the employer or any person, firm,
8 association, trust, fund, or corporation responsible for
9 servicing any payment of workers' compensation claims for the
10 employer, or any officer, director, agent, or employee of the
11 carrier, person, firm, association, trust, fund, or
12 corporation, or of a labor union, or an official or
13 representative thereof, the employee shall have a cause of
14 action against the person, workers' compensation carrier, or
15 labor union. In cases of deliberate or intentional conduct
16 where two or more managers, supervisors, or policy makers of
17 the employer's business engage in such conduct, as defined
18 herein, that contributes to the injury of a worker, then the
19 employee, or in the case of death, his or her dependents,
20 shall have a cause of action against the employer, in addition
21 to the employees engaged in such conduct, based upon the
22 doctrine of respondeat superior.

23 "(c) As used herein, "~~willful~~ deliberate conduct"
24 means any of the following:

25 "~~(1) A purpose or intent or design to injure~~
26 ~~another; and if a person, with knowledge of the danger or~~
27 ~~peril to another, consciously pursues a course of conduct with~~

1 ~~a design, intent, and purpose of inflicting injury, then he or~~
2 ~~she is guilty of "willful conduct."~~

3 "(1) Conduct which is carried on with a reckless or
4 conscious disregard of the rights or safety of others.

5 "(2) The willful ~~and~~ or intentional removal from a
6 machine of a safety guard or safety device provided by the
7 manufacturer of the machine with knowledge that injury or
8 death would likely or probably result from the removal;
9 provided, however, that removal of a guard or device shall not
10 be ~~willful~~ deliberate conduct unless the removal did, in fact,
11 increase the danger in the use of the machine and was not done
12 for the purpose of repair of the machine or was not part of an
13 improvement or modification of the machine which rendered the
14 safety device unnecessary or ineffective.

15 "(3) The intoxication of another employee of the
16 employer if the conduct of that employee has wrongfully and
17 proximately caused injury or death to the plaintiff or
18 plaintiff's decedent, but no employee shall be guilty of
19 ~~willful~~ deliberate conduct on account of the intoxication of
20 another employee or another person, unless the first employee
21 provides an intoxicating substance to the wrongful employee.

22 "(4) ~~Willful and~~ The deliberate or intentional
23 violation of a specific written safety rule of the employer
24 ~~after written notice to the violating employee by another~~
25 ~~employee who, within six months after the date of receipt of~~
26 ~~the written notice, suffers injury resulting~~ or a specific
27 state or federal safety regulation by an employee who causes

1 injury to another employee which results in death or permanent
2 total disability as a proximate result of the ~~willful and~~
3 deliberate or intentional violation.

4 "(5) In situations where the employer receives
5 written notice of the violation of a safety rule or state or
6 federal safety regulation and the employer fails to take
7 appropriate and timely action to remedy the hazard, any
8 employee injured thereby, or in the case of death, his or her
9 dependents, shall have a cause of action against the employer
10 for injury or wrongful death from the violation of the safety
11 rule or regulation. The written notice to the ~~violating~~
12 ~~employee~~ employer shall state with specificity, as best as may
13 be given, all of the following:

14 "a. The identity of the violating employee.

15 "b. The specific written safety rule or regulation
16 being violated and the manner of the violation.

17 "c. That the employer or the violating employee has
18 repeatedly and continually violated the specific written
19 safety rule referred to in b. above with specific reference,
20 as best as may be given, to previous times, dates, and
21 circumstances. If the potential consequences of the violation
22 of the safety rule or regulation are determined to constitute
23 a risk of injury or death, only a single violation by the
24 violating employee need be reported.

25 "d. That the violation places the notifying employee
26 at risk of ~~great~~ injury or death.

1 "A notice that does not contain all of the above
2 elements shall not be valid notice for purposes of this
3 section. An employee or employer shall not be liable for the
4 ~~willful~~ deliberate conduct if the injured employee himself or
5 herself violated a written safety rule, or otherwise
6 contributed to his or her own injury. ~~No employee shall be~~
7 ~~held liable under this section for the violation of any safety~~
8 ~~rule by any other employee or for failing to prevent any~~
9 ~~violation by any other employee.~~

10 "(6) If a policy maker or a member of management or
11 supervision deliberately violates a specific written safety
12 rule or a state or federal safety regulation, or causes
13 another employee to violate the same, and the violation
14 contributes to the injury of an employee, then the employee,
15 or in the event of death, his or her dependents, shall have a
16 cause of action against his or her employer based on the
17 doctrine of respondeat superior.

18 "(d) In the event the injured employee, or his or
19 her dependents, in case of death, do not file a civil action
20 against the other party to recover damages within the time
21 allowed by law, the employer or the insurance carrier for the
22 employer shall be allowed an additional period of six months
23 within which to bring a civil action against the other party
24 for damages on account of the injury or death. In the event
25 the employer or the insurance carrier has paid compensation to
26 the employee or his or her dependent, or in the event a
27 proceeding is pending against the employer to require the

1 payment of the compensation, the civil action may be
2 maintained either in the name of the injured employee, his or
3 her dependent in case of death, the employer, or the insurance
4 carrier. In the event the damages recovered in the civil
5 action are in excess of the compensation payable by the
6 employer under this chapter and costs, attorney's fees, and
7 reasonable expenses incurred by the employer in making the
8 collection, the excess of the amount shall be held in trust
9 for the injured employee or, in case of death, for the
10 employee's dependents. If the injured employee has no
11 dependent, the personal representative, in the event of death,
12 may bring a civil action against the other party to recover
13 damages without regard to this chapter.

14 "(e) In a settlement made under this section with a
15 third party by the employee or, in case of death, by his or
16 her dependents, the employer shall be liable for that part of
17 the attorney's fees and expenses incurred in the settlement
18 with the third party, with or without a civil action, in the
19 same proportion that the amount of the reduction in the
20 employer's liability to pay compensation bears to the total
21 recovery had from the third party. For purposes of the
22 subrogation provisions of this subsection only, "compensation"
23 includes medical expenses, as defined in Section 25-5-77, if
24 and only if the employer is entitled to subrogation for
25 medical expenses under subsection (a) of this section.

26 "(f) For the purpose of this section, a carrier,
27 person, firm, association, trust, fund, or corporation

1 includes a company or a governmental agency making a safety
2 inspection on behalf of a self-insured employer or its
3 employees, and an officer, director, agent, or employee of the
4 company or a governmental agency.

5 "§25-5-11.1.

6 ~~"No employee shall be terminated by an employer
7 solely because the employee has instituted or maintained any
8 action against the employer to recover workers' compensation
9 benefits under this chapter or solely because the employee has
10 filed a written notice of violation of a safety rule pursuant
11 to subdivision (c)(4) of Section 25-5-11.~~

12 "(a) Any employer who takes any adverse employment
13 action listed in subdivision (1) against an employee or
14 applicant for employment because of any event listed in
15 subdivision (2) shall be liable in tort to that employee or
16 applicant for any and all damages proximately caused by the
17 employer's adverse employment action.

18 "(1)a. Terminating the employment of the employee.
19 As used in this subdivision, the term terminating shall
20 include both actual and constructive termination.

21 "b. Refusing or failing to employ an applicant for
22 employment.

23 "c. Reducing or removing any of an employee's
24 compensation, terms, conditions, or privileges of employment.

25 "(2)a. The employee or applicant sought benefits
26 pursuant to this chapter.

1 "b. The employee or applicant assisted or
2 participated in any manner in an investigation, proceeding,
3 hearing, or trial of any workers' compensation claim of a
4 co-employee.

5 "c. The employee or applicant gave notice of a
6 violation of a safety rule pursuant to Section 25-5-11(c)(4).

7 "(b) It shall be a violation of subsection (a) if an
8 event listed in subdivision (2) was a motivating factor in the
9 employer's decision, even if other factors were considered."

10 Section 2. This act shall become effective
11 immediately following its passage and approval by the
12 Governor, or its otherwise becoming law.