



# HR CORNER

FEES & BURGESS, P. C.



Volume 5, Issue 5

May 2009

## Eleventh Circuit Analyzes Pre-employment Medical Testing

**Fees & Burgess, P.C., Emphasizes:**

After the bombing of the Oklahoma City federal building, the U.S. Marshall Service (Service) revised its hiring procedures for safety purposes. As part of this revision, it lists minimum physical requirements necessary to perform the functions for the security guard positions. Among these requirements is the ability to hear without the use of a hearing aid. More specifically, the Service determined that, because of the emergency-response requirements of its security force, officers should be able to hear their supervisor’s instructions in an emergency. In addition, officers must be able to hear sounds that may require further investigation. The Service worried that hearing aids may not always work, they may become dislodged, or they may experience interference. The safety requirements of the job leave no room for such error.

**General Civil Litigation**

**Commercial Law & Litigation**

**Municipal Law & Litigation**

**Police Civil Liability Defense**

**Employment Law & Litigation**

**Construction Litigation**

**Corporate Law & Government Contracting**

**Insurance Defense**

**Railroad Law**

**Corporate Counsel Services**

Security officers were required to take a pre-employment hearing test. Wilbur Allmond failed the hearing test since he was not allowed to use his hearing aid, and he sued the Service for violations of the Americans with Disabilities Act and the Rehabilitation Act. Allmond argued that the prohibition on use of a hearing aid expressly violated the listed statutes by specifically screening out individuals with disabilities. However, the Eleventh Circuit Court of Appeals (covering Alabama) disagreed.

The court notes the business-necessity defense to such problematic application procedures. The court stated that because the hearing requirements were job-related and consistent with business necessity, they were not in violation of the cited statutes. Generally, this exception is a high burden for employers to meet, and employer’s physical requirements are often struck down in the courts. However, the court noted that the employer burden was lowered in this case because the security guard position required “a high degree of skill and the economic and human risks involved in hiring an unqualified applicant are great.”

While some courts treat the “job-related” and “consistent with business necessity” tests as the same, the court notes a difference. “Job-related” means that the criteria are used specifically in connection with the requirements for a particular position. “Business necessity” has a broader scope and analyzes whether “there is a business reason that makes necessary the use by an employer of a test or criteria in hiring or promotional decision making.” The court held that the hearing criteria is job-related as it relates specifically to the essential functions of the security positions. As for business necessity, the court cites the risk of hearing-aid malfunction and notes the tremendous harm that might result from ineffective hearing. As such, the court considers the criteria legitimate and consistent with business needs.

The case is Wilbur Allmond v. Akal Security, Inc., 558 F. 3d 1312 (11th Cir. 2009).

. . .



## Federal Courts Help Limit Employer WARN Liability

In January, the Tenth Circuit Court of Appeals (governing several western states) helped define the “unforeseeable business circumstances” exception to the WARN Act requirements. Generally, the WARN Act requires employers to provide sixty days’ notice of any plant closing or mass layoff, to allow affected workers to seek new employment or make post-layoff plans. However, there are several exceptions to the notice requirement, including the unforeseen business circumstances exception. This exception is somewhat vague, and normally requires a case-by-case analysis. This Tenth Circuit case provides a good example of application of the exception, and it should provide some relief to employers who may unexpectedly have to close their doors in this volatile economy.

This case involved a wholesale grocer (Hale) who supplied products to supermarkets in Texas. Due to Hale’s inability to provide consistent stock order, its largest customer abruptly ended its relationship with Hale and announced it would no longer be using the grocer as its primary supplier. As a result, Hale could not survive as a company. Hale immediately notified its employees that it would be shutting down. Clearly, Hale’s employees did not receive sixty days’ notice. The court held that, sixty days’ prior to the shutdown, Hale could not foresee that it would lose the major contract. As such, because of the abrupt cancellation of its customer contract, Hale was unable to provide the appropriate notice and was protected by the unforeseen business circumstances exception to the WARN Act’s requirements.

The case is Gross v. Hale-Halsell Co., 554 F.3d 870 (10th Cir. 2009).

## Fees & Burgess, P.C.—Calendar of Events

Fees & Burgess, P.C., is proud to present, or participate in the presentation of, the following upcoming seminars:

June 3, 2009—Huntsville, Alabama

*HR Update*, presented to the Huntsville chapter of Associated Builders and Contractors

June 10, 2009—Decatur, AL

*Conducting Effective Investigations in the Workplace*, presented to the Decatur chapter of Society for Human Resource Management

June 11, 2009 – National Contract Management Association Audio Seminar Series

*Uniform Commercial Code*

September 9, 2009 – Birmingham, Alabama

*Wage & Hour Master Class*, presented for, and sponsored by M. Lee Smith Publishing, Inc.

For more information on these and other seminars, please go to [www.feesburgess.com](http://www.feesburgess.com)



**SPEAKERS**

Fees & Burgess, P.C., provides speakers, training programs, seminars, and webcasts for various trade associations; business groups; and clients. For information regarding a program contact Donna Stoddart at [dstoddart@feesburgess.com](mailto:dstoddart@feesburgess.com)

**NEWSLETTERS**

Fees & Burgess, P.C., also publishes *F&B Quarterly Bytes*, focusing on multiple practice areas; and *F&B SCM Memo*, focusing on the supply chain management industry. To receive any of these e-newsletters, please e-mail Donna Stoddart at [dstoddart@feesburgess.com](mailto:dstoddart@feesburgess.com) with your contact information.

To remove your name from our mailing list, please e-mail [dstoddart@feesburgess.com](mailto:dstoddart@feesburgess.com).

**Michael L. Fees**  
[mfees@feesburgess.com](mailto:mfees@feesburgess.com)

**C. Gregory Burgess**  
[gburgess@feesburgess.com](mailto:gburgess@feesburgess.com)

**Allen L. Anderson**  
[anderson@feesburgess.com](mailto:anderson@feesburgess.com)

**Jeffrey L. Roth**  
[jroth@feesburgess.com](mailto:jroth@feesburgess.com)

**FEES & BURGESS, P.C.**  
213 Green Street  
Huntsville, Alabama 35801

Telephone (256) 536-0095  
Facsimile (256) 536-4440

[www.feesburgess.com](http://www.feesburgess.com)

**Stacy L. Moon**  
[smoon@feesburgess.com](mailto:smoon@feesburgess.com)

**Leah M. Green**  
[lgreen@feesburgess.com](mailto:lgreen@feesburgess.com)

**Nori D. Horton**  
[nhorton@feesburgess.com](mailto:nhorton@feesburgess.com)

**Ryan G. Blount**  
[rblount@feesburgess.com](mailto:rblount@feesburgess.com)

*HR Corner* should not be construed as legal advice or a legal opinion on any specific facts or circumstances. The contents are intended for general information purposes only. Anyone needing specific legal advice should consult an attorney.

“No representation is made that the quality of legal services to be performed is greater than the quality of legal services performed by other lawyers.”