

poverty law **Report**

A REVIEW OF ADVANCES IN THE LEGAL RIGHTS OF THE POOR

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Two inmates being punished without a disciplinary hearing in an Alabama prison pass a sweltering July afternoon in "the pen." The use of summary punishment, not to mention these conditions of confinement, violates a federal court order.

Governor approves

Prisons admit punishment of inmates without hearing

MONTGOMERY — Alabama prison officials are disciplining inmates this summer at one state institution by putting them outdoors in a shadeless, fenced-in pen all day with just two sandwiches and two glasses of water and no toilet privileges as an incentive to "get their thinking straight," Prison Commissioner Robert Britton says.

The punishment, which is handled summarily without a disciplinary hearing, has been given in most cases to inmates refusing to work in the fields on a prison farm. In one instance, though, a prisoner who missed school because of illness was kept in the pen for 13 hours one day.

Governor "Fob" James, the temporary receiver of the prison system, has explicitly approved the new punishment,

which is one reason, among many, that attorneys of the Poverty Law Center, the National Prison Project of the ACLU and the U.S. Justice Department have asked a federal judge to remove him from the position.

Hearings are scheduled for October on whether Alabama prisons are in compliance with an eight-year-old court order requiring system-wide improvements.

Britton, who was hired by James, was a key witness in an Arkansas prison conditions suit in the early 1970s.

A federal judge singled him out later for personally using excessive force on inmates.

A prison chaplain testified he heard Britton use a racial slur in giving orders to a black prisoner.

Supreme Court voids, in part, state death law

The U.S. Supreme Court has found unconstitutional a narrow, but integral, part of Alabama's death penalty law, delaying an execution under it probably for years, and perhaps for good.

The stricken provision, which the Court pointed out is unique in American criminal law, gives a jury in a capital case only two possible verdicts: guilt — with the automatic sentence of death that comes with it — or acquittal.

Alabama lawyers refer to this feature as the "kill 'em or let 'em go" provision, because it precludes conviction on a lesser included offense even if the facts call for it, as they did in the case of Gilbert Beck, on which the Court's ruling is based.

Beck was found guilty in 1978 of the robbery-murder of a neighbor. He automatically received the death penalty, despite testimony that an accomplice killed the victim and in spite of the fact he had never been convicted of a felony before.

The trial judge, who had authority to reduce the punishment to life-without-parole, upheld the jury's sentence.

The Court found this process unacceptable.

"While we have never held that a defendant is entitled to a lesser included offense instruction as a matter of due process," Justice Stevens wrote for the majority, "the nearly universal acceptance of the rule in both state and federal courts establishes the value to the defendant of this procedural safeguard."

"That safeguard would seem to be especially important in a case such as this. For when the evidence unquestionably establishes that the defendant is guilty of a serious, violent offense — but leaves some doubt with respect to an element that would justify conviction of a capital offense — the failure to give the jury the "third option" of convicting on a lesser included offense would seem inevitably to enhance the

risk of an unwarranted conviction.

"Such a risk cannot be tolerated in a case in which the defendant's life is at stake."

Following this line of reasoning the Court reversed Beck's conviction, and later it vacated the convictions of 10 other Death Row inmates whose cases were before it on *certiorari*, strongly suggesting that the justices view the statute as irreparably flawed.

But for the time being they left that question up to the lower courts, and they are now studying how to apply *Beck* to the cases of the 44 other defendants currently on Death Row.

(Two other individuals on Death Row are currently on appeal.)
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Prisoner sues over beating on Death Row

HOLMAN STATION, Ala. — When Charles Bracewell came to, he was lying fully clothed in the shower, in handcuffs, his body bloodied and sore from being clubbed with nightsticks and baseball bats, the blinding sting of mace still in his eyes.

Then his attackers beat him up again, and he lapsed back into unconsciousness.

Bracewell, who is a prisoner on Death Row here, has sued his assailants, nine prison guards, for \$825,000 for the beating. He is represented in the lawsuit by the Southern Poverty Law Center.

"A couple of them kept saying how they were enjoying it," Bracewell later said. "I just couldn't understand that."

The assault happened May 30, beginning over a guard's refusal to give Bracewell his regular walk on the yard.

Bracewell complained, and then picked up a piece of iron pipe inadvertently left in front of his cell by a repairman and started beating on the cell

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LEGAL AID

Piercing the shield of 'workmen's comp'

By Dennis N. Balske

At common law, injured workers could recover compensatory damages if they established negligence on the part of their employer. This often proved to be a bladeless sword, both because many injured workers did not have the resources to bring a lawsuit against their employers and because common law doctrines, such as contributory negligence, the fellow-servant doctrine and assumption of risk, often shielded the employer from liability. Neither the workers, who rarely received just compensation, nor the employers, who worried about tort liability, were satisfied with this system.

This led to the proposal of the first social insurance system in the United States — workmen's compensation — a system under which employers are shielded from tort liability while employees are granted a remedy for industrial injury regardless of the fault of either party.

This no-fault system reflects the striking of a bargain. The worker, to obtain the no-fault remedy, gave up his existing remedy, the right to a tort action against his employer for a negligent injury. The employer, to escape tort liability, gave up its common law defenses. This bargain is known as the *quid pro quo*.

Unfortunately for the worker, due to the inadequacies of the workmen's compensation system, this *quid pro quo* has proved to be illusory.

The worker has never really received all that he supposedly bargained for. Compensation payments bear little relationship to the actual need of the injured and his family. Coverage as to types of employment, injury and disease, while having been extended over the years, is still not sufficiently inclusive. Moreover, in spite of the fact that workmen's compensation was a great step forward and has been improved in many respects over its seventy years, its present status does not encourage the view that it will ever amount to a complete and adequate answer to the problem

of industrial injuries.

While this suggests that the system needs to be changed, such change will take time and will not benefit workers who are injured next week or next year.

This article describes some of the arguments available to attorneys who want to join in the fight for common law tort recoveries and, more importantly, for safer working conditions.

The arguments supporting common law tort recoveries, including punitive damages, fall into three categories: (1) third-party liability; (2) intentional tort; and (3) non-disability injury. More specifically: (1) insurance carriers, company physicians and certain company and non-company safety personnel are not protected by the exclusive-remedy provisions of compensation acts because they are third parties; (2) when the injury is intentionally inflicted, employers, as well as third-parties, will not be entitled to exclusive remedies' protection for their torts; and (3) when the injury inflicted causes no physical disability, such as when disabled workers forego workmen's compensation due to a scheme to defraud them out of compensation benefits, a non-physical injury has occurred which is not covered by the compensation act.

The legal theories supporting these arguments are set forth separately below.

Third Party Liability

While the employer is generally immune from liability beyond workmen's compensation for injuries caused by his negligence, most jurisdictions allow a worker to sue a third party for negligence in causing the injury, even if the worker has already applied for the received workmen's compensation benefits for the same injury.

Which parties constitute third parties within the meaning of a state's workmen's compensation statute has been the subject of intense debate both within and outside the courtroom for many years, and a number of jurisdic-

tions have taken opposing positions based upon essentially similar statutes.

Third parties can include the employer's workmen's compensation carrier and/or other insurer or inspector who carried out safety inspections; independent or company physicians who provided medical advice or treatment to the workers; and safety personnel, including high-ranking corporate policy-making officers.

In a few jurisdictions the employer itself can be sued as a third party, not in its capacity as "employer," but in its "dual capacity" as provider of medical services or property owner.

Two lawsuits the Center recently filed against textile manufacturers, their safety personnel, and their insurers and doctors, demonstrate the considerations which must be taken into account in deciding who can be sued as a "third party."

Many textiles workers are exposed to excessive levels of cotton dust. This fact is well known to the mills and their company doctors, as well as by the respective workmen's compensation insurance carriers.

The workers are never warned that this exposure can cause them permanent disability. When they become sick from the exposure — by contracting a chronic obstructive pulmonary disease, usually byssinosis or "brown lung" — they are not told that their sickness is related to their work. Instead they are encouraged to keep on working.

Eventually they become too sick to work, at which time they are "put out to pasture." Many are then actively encouraged to obtain social security benefits and are actually helped in filling out the forms by company personnel. None is told he or she is eligible for workmen's compensation.

Those few who have heard that "brown lung" is caused by cotton dust inhalation and experience the disease's

symptoms are often lied to by the company doctor when they inquire about the cause of their condition. Thus, not only are many workers disabled by action of the company, they are defrauded out of their compensation by it as well.

The first common-law action the Center filed, brought in Alabama, named all safety personnel, the company president, company doctors and the company's workmen's compensation carrier as "third party" defendants. This was done in light of a unique Alabama Supreme Court case which struck down a statute prohibiting common law suits against such "third parties."

The second suit was brought in South Carolina. South Carolina decisions explicitly preclude third party actions against fellow employees, company officers, and the company itself in its "dual capacity." See, e.g., *Thompson v. J.A. Jones Construction Co.*, 19 S.E. 2d 226 (S.C. 1942); *Noland v. Daley*, 73 S.E. 2d 449 (S.C. 1952). Accordingly, in contrast to the Alabama suit, only the employer's compensation carrier and company physicians were

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Balske

Judge doing 'Good Lord's will' prohibits interracial marriage

BIRMINGHAM — On May 14 Edward Sharpley and his fiance, Thalia Odom, were told by the probate judge of Colbert County that they could not be legally married in Tusculum, Ala., because of their race. Sharpley is black; Odom is white.

"I told him (Sharpley) I was obeying the Good Lord's will. Down in my heart, I don't think it's right," Judge Felix Felton later told a newspaper reporter.

Sharpley and Odom had gone to the judge's office that day, presented blood test certificates, and asked for a marriage license.

But a deputy clerk waiting on them, Josephine Rhodes, hesitated at the request and, after verifying that the applicants were of different races, departed the room and disappeared into the judge's office.

She returned shortly to announce, "We can't sell licenses to interracial couples."

Sharpley then asked for, and received, an audience with the judge, who explained that while no law forbade the marriage of interracial couples in Colbert County, it was against his personal policy.

Staff attorney Ira Burnim has filed suit in federal court here on behalf of Sharpley and Odom, asking that Judge Felton be enjoined from refusing to issue them a marriage license on account of their race.

The lawsuit also seeks \$15,000 each in damages from the judge and his clerk. Alabama law forbade interracial marriages until 1970, when a federal judge ordered state officials to stop enforcing the statute.

Since the filing of the suit, a pickup truck belonging to Odom has been set afire and destroyed as it sat in Sharpley's driveway while the couple was away.

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Magistrate gives judge flawed report on Moultrie

COLUMBIA, S.C. — Clemmie Moultrie's chance for a new trial now depends partly on whether a federal judge accepts the recommendations of a flawed report that was prepared for him by a magistrate assigned to review Moultrie's habeas corpus petition.

The report is supposed to state the salient facts of the case, summarize the legal arguments, and carry recommendations on the relief sought by the appellant in light of current law. It is designed to expedite the administration of justice.

But the report on Moultrie's habeas corpus petition contains a number of simple misstatements of fact and inaccurate applications of law.

Dennis Balske, who tried Moultrie's case for the Center and is handling the appeal, has pointed out the errors in a brief in opposition to the magistrate's recommendation that the petition be denied.

The petition, which was filed last year, challenges Moultrie's conviction on the ground that blacks were systematically excluded from the grand jury that indicted him, as well as from grand juries in previous years, forming a pattern of intentional discrimination.

On the average, blacks were under-represented by more than 12 percent on grand juries from 1971-77, and 21 percent in 1977 itself, the year of Moultrie's indictment for killing a lawman.

The Fourth Circuit Court of Appeals, which has jurisdiction over South

Carolina, has held in another South Carolina case that these figures are sufficient evidence to establish a *prima facie* case of discrimination, given South Carolina's jury selection procedures.

Jury commissioners here are supposed to compile jury pools each year by taking the county's list of registered voters and removing the names of only those people known to have moved out of the county, or who are deceased or infirm or exempted by statute.

But each name on the list of registered voters is identified by race, tainting the selection procedure.

Although the federal courts have ruled that a moderate discrepancy in representation of blacks on juries in combination with a selection method open to abuse establishes a *prima facie* case of discrimination, the magistrate here determined that no *prima facie* case had been made.

The magistrate also misstated the testimony of the jury commissioners who assembled the 1977 jury pool, and included as "findings of fact" simple assertions by the commissioners that they had never removed potential jurors on account of race.

Finally, the magistrate mistakenly concluded that the commissioners' denials of discrimination were, in themselves, sufficient to rebut a *prima facie* case even if one had been made in accordance with his standards.

Ample U.S. Supreme Court case



There was great relief when Clemmie Moultrie's 1978 trial ended in a manslaughter conviction, since he could have been put to death. (L to R, SPLC attorney Balske, Moultrie, local counsel Mike Macloskie, and jury-selection expert Cathy Bennett.)

law exists to refute that holding.

Moultrie, a 64-year-old black man, received a 30-year sentence in 1978 for shooting a popular young sheriff's deputy in Walterboro. He was charged with capital murder but convicted of manslaughter.

The deputy was killed when he, along with a number of other lawmen, tried to arrest Moultrie at his home. Moultrie thought the officers had come to evict him on the orders of his land-

lord, who had deceived him into thinking his monthly rent was actually going toward the purchase of the house.

The landlord had previously sent workers out to tear the house down, even though Moultrie was still living there. When Moultrie drove the workers away with his shotgun, the landlord had an arrest warrant issued against him, figuring an arrest would be a quicker and easier way to get rid of Moultrie than formal eviction.

'Workmen's comp' inadequate for intentional injury

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joined as "third party" defendants.

Therefore, when preparing an action of this nature, be sure to carefully research your state's case law relating to common law liability of third parties. You should be able to find something upon which you can base your argument for a common law recovery. Then supplement your research with leading cases from other jurisdictions, as well as favorable law review articles and treatises. The following paragraphs summarize some of these materials.

First, with respect to whether compensation carriers can be held liable as third parties, Professor Larson, the leading authority on workmen's compensation law, favors holding compensation carriers for their negligent safety inspections. In his treatise he states that:

"The solution here suggested is this: A distinction should be drawn between the carrier's function of *payment* for benefits and services, on the one hand, and on the other, any function it assumes in the way of direct or physical performance of services related to the action. For negligent performance of the latter it should be liable in tort as a "person other than the employer." (emphasis in original). 2A Larson, Workmen's Compensation Law, § 72.90 at 14-151.

Nevertheless, many jurisdictions have refused to extend liability to compensation carriers, either because of a particular provision in the compensation-act or because they believe carriers will discontinue safety inspections if they are held liable for their negligence. This reasoning is spurious. Carriers con-

duct safety inspections to cut costs and increase their own profits. See *Ray v. Transamerica, Inc.*, 158 N.W. 2d 786 (Mich. 1968).

Many carriers utilize such inspections as major advertising and selling features. *Nelson v. Union Wire Rope Corp.*, 199 N.E. 2d 769 (Ill. 1964). Moreover, no safety inspection is better than a negligent one, because workers will rely upon a negligent inspection to their detriment. Last, public policy does not favor relieving tortfeasors of paying for the consequences of their actions. 2A Larson, *supra*. Therefore, compensation carriers should be held liable for their negligence.

Second, with respect to company doctors as third parties, case law regarding the liability of company physicians is fairly evenly split. Decisions in four states, New York, New Jersey, Michigan and Illinois, do not allow full-time company physicians or their equivalent to be held liable as third parties. See, e.g., *Garcia v. Iserson*, 309 N.E. 2d 420 (N.Y. 1974).

Decisions in three states, California, Pennsylvania and Indiana, have permitted such recoveries against full-time physicians. See, e.g., *Lazar v. Falor*, 118 Pitt. L.J. 299 (Pa. 1970).

Cases from three others, Virginia, Georgia and Ohio, might permit such recoveries. See, e.g., *Guy v. Thomas*, 55 Ohio St. 2d 183 (1978).

As with insurance carriers, Professor Larson favors recoveries against physicians, and other legal commentators are in accord. Note, *The Malpractice Liability of Company Physicians*, 53 Ind. L.J. 585 (1978). Previously, most courts applied what Larson calls

the "right-to-control test." Under this test, if the physician was paid, equipped and supervised by a company, the company had the "right of control" and the physician could not be held liable as a third party. See *Cordova Fish v. Estes*, 370 p.2d 180 (Alaska 1962). Professor Larson had criticized this test and proposed an alternative "relative-nature-of-the-work" test. 1A Larson, § 43.30-45.53. Under this test, courts would take into consideration whether the work done is an integral part of the employer's regular business and whether the worker, in relation to the employer's business, is in a profession of his own.

Since most employers are not engaged in the business of medicine, and because doctors practice a profession in which they exercise independent medical judgment, under this test it is easier to establish that a company physician should be treated as a third party.

At least three states, New York, New Jersey and Alaska, have adopted this more modern and better approach, and four others, Wisconsin, Minnesota, Tennessee and Louisiana, have expressed views favoring this test. Knight, *The Test for the Employment Relationship Under Workmen's Compensation*, 1 U.C.L.A. — Alaska L. Rev. 40, 41 (1971); See, e.g., *Hannigan v. Goldfarb*, 147 A.2d 56 (N.J. 1958).

Policy arguments also support the position that company physicians should be held liable as third parties. The company physician plays no part in the *quid pro quo*. That is, because it is highly unlikely the physician would ever be injured by a fellow employee, he gives up no right to bring suit in return for his own immunity from suit.

Second, because the company physician is a non-laborer, a judgment against him will not cause industrial discord among the workers.

Last, whereas judgments against negligent co-employees would rarely be satisfied, the company doctor would more likely be able to pay the price of his negligence.

Intentional Tort

Although exclusive remedies provisions insulate the employer from liability for its negligence, even if gross or wanton, it will not protect the employer that intentionally injures its employee. 2A Larson, § 68.13.

However, most courts have been very strict in requiring an actual intent to injure before permitting such actions to proceed at common law. *Id.* § 68.13 at 13-8. Thus, an injured worker seeking this avenue of relief must both claim, and be able to make, strong arguments that the facts of his or her case meet the stringent intent requirement of the particular state law.

Professor Larson adamantly opposes a common law cause of action for conduct short of demonstrating an actual intent to injure. He explains that because the legal justification for a common law action is the non-accidental character of the injury from the standpoint of the defendant-employer, the common law liability of an employer cannot be stretched to include accidental injuries caused by any form of gross, wanton or intentional negligence, breach of statute or other forms of employer misconduct short of intentional injury. *Id.* at § 13.5.

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Industry abuses compensation laws

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Larson's reasoning and selection of supporting cases, however, fail to show that constructive intent to injure should not be sufficient.

There are several sources supporting the argument that intent-to-injure can be constructively supplied. Not only are there several cases which support this position, but the Restatement (Second) of Torts and Prosser support this view.

According to the Restatement (Second) of Torts, § 8A, "intentional"

denotes "that the actor desires to cause consequences of his act, or that he believes that the consequences are substantially certain to result from it." Prosser is in accord. Prosser, *Handbook of the Law of Torts*, 4th Ed., pp. 31-2 (1971). This "substantial certainty" test was recently adopted by the highest court of West Virginia. *Mandolidis v. Elkins*, 246 S.E. 2d 907 (W. Va. 1978).

A similar test has been employed in South Carolina. *Stewart v. McLellan's Stores Co.*, 9 S.E. 2d 35, 37 (S.C. 1940) ("could be reasonably anticipated").

See *Cummings v. McCoy*, 7 S.E. 2d 222 (S.C. 1940).

This "substantial certainty" standard is consistent with the purpose of workmen's compensation. The threat of workmen's compensation benefits has done little to deter employers from intentionally violating dozens of safety standards in a calculated saving of expense at the expense of their employee's health. If the courts fail to adopt the "substantial certainty standard of intent," they will be placing a nearly impossible burden of proof on the employees, a standard stricter than in a felony-murder capital case.

Application of this standard to the textile industry example illustrates the compelling need for holding employers to the standard. There is no doubt the mills knew that cotton dust was dangerous and was causing the workers to become sick.

Nevertheless, the mills not only refused to tell their workers of the hazards, but also deceived workers concerning the results of the medical examinations. These examinations, the results of which were kept from the workers, revealed that many of them had become sick from inhaling cotton dust. When the mills and their medical personnel allowed these sick individuals to continue working under the same dusty conditions without available protection or warning, it was, "substantially certain" that they would eventually become disabled.

Nevertheless, Professor Larson would not permit the mills to be held liable. He would require a specific intent to injure each employee. His reasoning flies in the face of established principles of tort law. See Restatement (Second) of Torts and Prosser, both *supra*.

Thus, it should be argued that the "substantial certainty" text is the correct one, because it is consistent with long-established tort principles and because it serves the policies of promoting the worker's physical safety, deterring such actions in the future, and providing a remedy for such a wrong.

In support of this argument cases such as *Boek v. Wong Hing*, 231 N.W. 233 (Minn. 1930), and *Stewart v. McLellan's Stores Co.*, 9 S.E. 2d 35 (1940), should be cited.

Last, it should be stressed that the workmen's compensation system was not intended to allow those who intentionally commit grievous acts to use the system as a shield.

Ed. note — Balske, an SPLC staff attorney since 1978, will conclude the article in the next PLR with a discussion of the problems met by workers seeking common-law damages for non-disability injuries.

Death law partly scrapped, but use still open to debate

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Row in Alabama were sentenced under a 19th century law with a mandatory sentencing procedure of its own, an automatic death sentence for any inmate participating in a killing while serving a life sentence.)

There are two positions as to what the lower courts should do with the 44 other cases, according to Center staff attorney Dennis Balske.

The first, held by Center attorneys, is that every person tried under the law — all 45 Death Row inmates plus about 25 other defendants whose jury-imposed death sentences were reduced to life-without-parole by the trial judges — is entitled to a new trial. The severest possible punishment that could be given in these trials would be life in prison.

The second view, advocated by the state attorney general, is that the Court should decide on a case-by-case basis whether there is sufficient merit under the authority of *Beck* to grant a new trial.

In the case of defendants who have plead guilty or where the Court does not find reason to believe a jury would have convicted on a lesser included offense, no new trial should be required, this position holds.

The attorney general has said he will ask the state supreme court to remove or "sever" the unconstitutional provision from the law so that the defendants can be tried under the death penalty again.

Alabama's death penalty statute is one of the last of the unamended post-*Furman*, pre-*Gregg* laws on the books, and for that reason it is out-of-balance on the side of denying juries appropriate discretion to decide which defendants "deserve" death and which deserve less severe sentences.

The *Furman* decision invalidated all existing death penalty laws in 1972 because the statutes of that era, and ear-

lier, gave juries unduly broad leeway in sentencing.

Most states which adopted new death penalty laws in response to *Furman* then erred in the opposite direction, making the death penalty mandatory for certain crimes.

But some states wrote into their statutes the principle of guided discretion, which developed categories of murders for which the death penalty was authorized but managed to give to juries sufficient freedom to take into consideration the mitigating circumstances that might exist.

In 1976 the Supreme Court sanctioned the use of guided discretion, in *Gregg v. Georgia*, and expressed constitutional objections to mandatory sentencing in *Woodson v. North Carolina*.

Again many states wrote, or rewrote, their death penalty laws, keeping these parameters in mind. Alabama did neither, and so it continued to fill up its Death Row in accordance with its perception of what the *Furman* decision demanded.

Finally, the Supreme Court decided last October to review the Alabama law in *Beck*, and struck it down in June.

Meanwhile, the attorney general of Alabama, who won office in 1978 on a promise to "fry 'em till their eyes pop out and smoke pours out their ears," is developing a new death penalty statute for the state.

It will be modeled, he says, after the court-tested laws of Georgia and Florida, where John Spenklink was executed last year.

"Regardless of what new death penalty law is enacted," Center Legal Director John Carroll says, "there will be the same old problems with the system — the poor get rotten representation and blacks and other minorities get discriminated against."



Alabama's Death Row, where nine guards viciously beat Charles Bracewell in May.

Inmate beaten on Death Row

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bars with it.

An officer responded and ordered Bracewell to turn over the pipe, but he refused, so the guard went for reinforcements.

He came back with eight other officers, all armed with either nightsticks, belts, or baseball bats from the inmate softball teams. One even had a pitchfork, several inmate witnesses have said.

When Bracewell refused another request to relinquish the pipe, the guards sprayed two cans of mace into his cell.

Bracewell was immobilized by the mace, and the pipe fell from his hands, landing in the corridor outside the cell.

Without justification the guards then entered his cell, handcuffed him, and began kicking and beating him in the head and body with their weapons.

Incapacitated by the mace and knocked cold by the blows, Bracewell was dragged down to the showers, past the cells of 10 or 12 other Death Row inmates, and revived.

When he regained consciousness the officers beat him again. Finally they took him to the prison hospital.

There he was given some eye medication, and a reading of his blood pressure was taken.

In view of at least one medical technician Bracewell was struck several more times in the hospital.

Eventually he was taken to the office of a free-world doctor for further treatment. He was hospitalized overnight in the prison infirmary here out of fear his injuries might hemorrhage.

He has now recovered almost completely.

Judge rules 'brown lung' victims can't sue mill

OPELIKA, Ala. — The first attempt to win compensation for "brown lung" victims outside the provisions of state workmen's compensation laws has been rejected by a state court judge, who has dismissed a \$15 million class-action suit brought by a former employee of a textile mill.

But Poverty Law Center attorneys, who represent the plaintiff, have asked the Alabama Supreme Court to overturn the judge's decision in a case styled *Wilkins v. West Point Pepperell*.

The lawsuit was filed against the textile mill last fall by Nat Wilkins, who contracted bysinossis, or brown lung, while working in an area of high levels of cotton dust for many years.

Also named as defendants are Liberty Mutual Insurance Company, the mill's workmen's compensation carrier; the mill's medical director and other health and safety personnel.

The suit states that company officials knew of Wilkins' condition for several years before he was fired in 1978

for being too sick to work at his strenuous job in the card room of the Opelika mill, but they never informed him of its cause, nor even offered him a less strenuous job.

As a consequence, Wilkins became totally disabled and, unaware of the cause of his disability, never applied for workmen's compensation.

He now lives on social security benefits which he was helped in obtaining by West Point officials, though their motives were self-serving.

The costs to West Point of paying a share of Wilkins' social security benefits are less than those of workmen's compensation.

But Judge Thomas Gullege ruled Wilkins did not have a cause of action outside workmen's compensation, resting his decision on bad or anti-worker precedent in Alabama case law.

He followed less closely the more progressive case law regarding the right to sue third parties and co-employees in dismissing Liberty Mutual and the other co-employee defendants in the suit.