

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT ALERT *August 2011*

NLRB Issues Report on Social Media Cases

On August 18, 2011, the National Labor Relations Board's ("NLRB") Acting General Counsel released a report addressing social media issues. The report details the outcomes of 14 cases involving social media and employers' social/general media policies. Importantly, the report highlights the outcomes of cases involving employees' use of Facebook and Twitter, including whether such use may be a "protected concerted activity."

The report is available at the following link: [NLRB Report](#).

Eleventh Circuit: Employer Avoids Attorney's Fees Award in FLSA Case

On July 28, 2011, the Eleventh Circuit issued an opinion in Dionne v. Floormasters Enterprises, Inc. (Case No. 09-15405) holding that an employer can avoid paying Plaintiff's attorney's fees by tendering the full amount of claimed damages and then successfully moving to dismiss the complaint as moot. Specifically, the Court addressed "whether an employer, who denies liability for nonpayment for overtime work, must pay attorney's fees and costs pursuant to 29 U.S.C. § 216(b) of the Fair Labor Standards Act ("FLSA") if he tenders the full amount claimed by an employee where the trial court grants the employer's motion to dismiss the employee's complaint on mootness grounds." Ultimately, the Court held that under such circumstances, the employer is not responsible for payment of Plaintiff's attorney's fees and costs.

The opinion is available at the following link: [Dionne v. Floormasters Enterprises, Inc.](#)

Dismissal of Employee's Claim for Tortious Interference with Advantageous Business Relationship Against Immediate Supervisor Reversed on Appeal

In Alexis v. Lilliam Ventura Arbor E&T (Case No. 3D10-2879), Plaintiff sued her immediate supervisor alleging tortious interference with an advantageous business relationship after Plaintiff's termination. The trial court dismissed the action for failure to state a claim based on its determination a supervisor could not be a "third party" for such a claim. The Third District Court of Appeal reversed the dismissal, noting that although the general rule prevents an action against the terminating employee, there is a recognized exception when an allegation is asserted that the individual was not acting on the employer's behalf or to its detriment. Applying this standard, the Court concluded that Plaintiff stated a claim against her immediate supervisor.

The opinion can be found at the following link: [Alexis v. Lilliam Ventura Arbor E&T](#).

Unilateral Modification of Healthcare Coverage Constitutes Unfair Labor Practice

The Second District Court of Appeal recently affirmed a PERC ruling that the School District of Polk County engaged in an unfair labor practice. The unfair labor practice occurred when the Board voted on health insurance options without affording the union an opportunity to collectively bargain on the issue. Faced with a budget shortfall, the Board sought to modify its health coverage and in the process developed two subcommittees to select potential options.

Representatives of the Polk Education Association (PEA) were members of the committees and assisted in the selection of three possible substitute plans. However, the Board further modified the plan terms before approving them and offered two additional plans without consulting PEA. PEA opposed the measure because its members were not afforded an opportunity to collectively bargain as to the modifications. PERC determined the failure to allow for bargaining was not supported by exigent circumstances, and PEA's participation on the subcommittees did not represent a waiver of its bargaining rights. The appellate court affirmed PERC's ruling.

The opinion is available at the following link: [School District of Polk County, Florida v. Polk County Non-Industrial Employees Union, Local 227, AFSCME, AFL-CIO.](#)

DOL Sues Texas State Agency for Failing to Pay Overtime

The Department of Labor recently filed a lawsuit against the Texas Department of Family and Protective Services' Child Protective Services Division for allegedly failing to pay 800 investigators and case workers overtime compensation as required by the Fair Labor Standards Act. The suit seeks back wages of more than \$1 million plus liquidated damages. DOL previously filed a suit against the Division in 2000 resulting in a \$2 million settlement to resolve the matter.

The DOL press release can be found at the following link: [DOL Sues Texas State Agency.](#)

Employer Prevails in Claims Brought by Undocumented Worker

In [Salas v. Sierra Chemical Co.](#) (Case No. C064627), a California appellate court affirmed summary judgment in favor of an employer who unknowingly employed an illegal immigrant. Following his termination, the former employee brought claims of disability discrimination and workers compensation retaliation. During the case, the employer discovered the employee used fraudulent documentation to secure employment and sought summary judgment in part based on this violation. The Court upheld that trial court's ruling that the after-acquired evidence rule barred the employee's claims under California's Fair Housing and Employment Act. In addition, the Court held that the doctrine of unclean hands barred the employee's claims because he subjected the employer to penalties for submitting false documents and statements.

The opinion can be found at the following link: [Salas v. Sierra Chemical Co.](#)

Federal Common-Law Rule Applies to Accrual of COBRA Benefits

On August 22, 2011, the Eleventh Circuit applied federal common-law to determine that a former employee's claim for improper notice of rights under COBRA did not begin to accrue until the former employee learned that he should have received notice of his right to such benefits. In [Cummings v. Washington Mutual](#) (Case No. 10-10706), the Court recognized that generally a one-year statute of limitations applies to COBRA improper notice claims. In this case, however, Plaintiff did not become aware of Defendant's failure to send COBRA information for ten months and filed suit four months later. The trial court awarded summary judgment in favor of Defendant under the theory that the statute of limitations had expired at the time the lawsuit was filed. On appeal, the Eleventh Circuit held that the statute does not begin to run until the party knows or should know the facts necessary to bring the improper-notice claim and reversed the summary judgment.

The opinion can be found at the following link: [Cummings v. Washington Mutual.](#)

Statutory Language Not Necessary to Make Non-Compete Agreement Enforceable

In Patel v. Boers (Case No. 5D09-4250), the Fifth District Court of Appeal reversed a trial court's dismissal of a claim of breach of a non-compete agreement. The Plaintiff filed a multi-count complaint alleging that Defendant violated numerous provisions of a non-compete agreement which had been assigned to Plaintiff. Defendant argued that the assignment did not contain language which "expressly authorized enforcement" by the assignee, and the trial court agreed. On appeal, the Fifth District held that the assignment, which stated that "all right, title, and interest" in the assets of the business, including the professional services contract with Defendant, were transferred to Plaintiff. The Court further held that despite lacking the explicit statutory language, the assignment was sufficient to constitute the requisite "express authorization of enforcement" by an assignee.

The opinion can be found at the following link: [Patel v. Boers](#).

FLSA Amended to Require Employers to Provide Break Time for Nursing Mothers

The Fair Labor Standards Act ("FLSA") was amended by the Patient Protection and Affordable Care Act (P.L. 111-148) to require employers to provide a nursing mother reasonable break time to breastfeed. The amendment became effective on March 23, 2010. Employers with fewer than 50 employees are not subject to the FLSA break time requirement if compliance with the provision would impose an undue hardship. Furthermore, only employees who are not exempt from section 7, which includes the FLSA's overtime pay requirements, are entitled to breaks to express milk. The amount of break time that employers are required to provide is a "reasonable" amount of time to express milk as often as needed by the nursing mother, thus the frequency of breaks needed to express milk as well as the duration of each break will likely vary. The location of the break is also covered by the amendment and must be functional as a space for expressing breast milk. A bathroom, even if private, is not a permissible location under the Act. A space temporarily created or converted into a space for expressing milk or made available when needed by the nursing mother is sufficient provided that the space is shielded from view and free from any intrusion from co-workers and the public.

The Department of Labor's guidance may be found at the following link: [DOL Guidance](#).

Continued WHD Enforcement Results in Fines to Two Jacksonville, Florida Restaurants

The Wage and Hour Division ("WHD") of the Department of Labor ordered two La Nopalera restaurants to pay more than \$930,000.00 in wages and penalties based on a consent judgment between the parties. Investigators found that kitchen employees were improperly classified as exempt from overtime pay and were consequently paid salaries that did not include compensation for hours worked over 40 in a week. Additionally, while tipped employees received their tips plus a paycheck that together equaled the minimum wage, restaurant management subsequently required the employees to sign and return their paychecks. Thereafter, restaurant management would cash the checks and put the money back into the restaurant. Through this process, while it appeared that the owners were paying wages, the employees actually were allowed to keep only their tips.

The WHD press release can be found at the following link: [WHD Press Release](#).

Firm News

Robert J. Sniffen was unanimously elected as Chairman of the Florida Commission on Ethics for

the 2011-2012 term (beginning July 1, 2011). Mr. Sniffen was appointed to the Florida Commission on Ethics in 2008 by Senate President Ken Pruitt and reappointed by Senate President Jeff Atwater in 2010.

Robert J. Sniffen and **Michael P. Spellman** have again been named to *Florida Trend* magazine's "Legal Elite" in Labor and Employment Law. *Florida Trend* magazine's Florida Legal Elite recognizes the top tier of attorneys practicing in Florida as chosen by their colleagues.

Robert J. Sniffen and **Michael P. Spellman** were both selected again by *Super Lawyers* magazine as top attorneys in Employment & Labor Law. This marks the fifth consecutive year each has been named to this impressive list of Florida lawyers. *Super Lawyers* magazine names attorneys in each state who received the highest ranking through peer nominations, evaluations and third party research. Only five percent of lawyers in Florida are selected for inclusion in *Super Lawyers*.

Past Issues of the Labor and Employment Alert Posted on Website

You may view past issues of the Labor and Employment Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page.

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