

# SNIFFEN & SPELLMAN, P.A.

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## **LABOR AND EMPLOYMENT ALERT** *July 2011*

### **Sniffen & Spellman, P.A. Successful in Overturning \$1,010,000.00 Jury Verdict on Appeal of Discrimination and Whistle-Blower Suit**

In a case argued by Sniffen & Spellman, P.A.'s Todd D. Engelhardt, the Fourth District Court of Appeal overturned a \$1,010,000.00 jury verdict awarded to a Plaintiff on her claims of racial and religious discrimination, hostile work environment, and retaliation for engaging in activity protected by Florida's Public Whistle-blower's statute. In Florida Department of Children and Families v. Gerolyn Shapiro (Case No. 4D10-741), Plaintiff alleged she was terminated for grand jury testimony given five years earlier which was negative towards a particular employee of the Department. Years later that employee became the direct subordinate of the Plaintiff. The Fourth District Court of Appeal held that Plaintiff failed to put forth enough evidence to meet the "severe and pervasive" standard required for hostile work environment; had failed to show that Plaintiff's race and/or religion was a reason for her termination; had failed to show the requisite temporal connection between her grand jury testimony and termination; and had failed to establish during her case-in-chief that the decision-maker responsible for the termination had any knowledge of the grand jury testimony.

The opinion can be found at the following link: [Florida Department of Children and Families v. Gerolyn Shapiro](#).

### **Illegal Immigrant Entitled to Workers' Compensation Benefits in Florida**

The First District Court of Appeal issued an opinion on June 28, 2011, holding that an employer was precluded from raising an employee's illegal status as a defense to paying him workers' compensation benefits when it knew or should have known that he was an undocumented worker. HDV Construction Systems, Inc. v. Aragon (Case No. 1D10-6401). The employee was employed as a framer and fell thirty feet suffering extensive and permanent injuries. The employee had no documentation that would allow him to work legally, no driver's license, a limited education, an inability to speak, read or write in English, and had no transferrable skills which would assist him in obtaining lighter employment. The employee sought permanent total disability benefits which the employer denied on the basis that the employee was physically capable of sedentary work and was unemployable because of his illegal status.

The Court held in favor of the employee and stated that the Florida Legislature has "expressed an unyielding, textual intent that aliens, including those who are illegal and unlawfully employed, be covered and compensated under the Florida Workers' Compensation Law." The Court further noted that the legislature has recognized that while employment of illegal aliens is a violation of law, the cost of injuries sustained by unlawful workers should be borne by the industry giving rise to the risk and not the general taxing public.

The opinion can be found at the following link: [HDV Construction Systems, Inc. v. Aragon](#).

### **United States Supreme Court Addresses First Amendment Retaliation Claim**

In Borough of Duryea v. Guanieri (Case No. 09-1476), Plaintiff alleged the Borough took improper retaliatory action against him by issuing eleven directives and withholding \$338.00 in overtime pay. Plaintiff alleged the Borough took these actions after his dismissal and subsequent successful effort to overturn the dismissal through his union process. Plaintiff won a jury verdict on his claim that the actions were in retaliation for filing his grievance in violation of the 1st Amendment “right ... to petition the government for a redress of grievances.” The Third Circuit Court of Appeals affirmed the jury verdict.

Ultimately, the U.S. Supreme Court vacated the verdict and remanded the case, holding that a government employer’s alleged retaliatory actions do not give rise to liability under the Petition Clause unless the employee’s petition relates to a matter of public concern. The Court stated that suits under the Petition Clause are subject to the same “public concern” test as suits brought under the Speech Clause. Plaintiff’s claim did not meet the standard for a matter of public concern.

The opinion can be found at the following link: [Borough of Duryea v. Guanieri](#).

### **Failure of Court to Review Complete Transcript Violated Employer’s Due Process Rights**

In Miami v. Hervis (Case No. 3D11-442), Plaintiff, who suffered from Parkinson’s disease, alleged disability discrimination against the City for failure to appoint him to neighborhood enhancement team commander. After the County Commission on Human Rights (CCHR) found in Plaintiff’s favor, the City appealed the determination to Circuit Court. However, the record CCHR provided to the Circuit Court did not include some portions of witnesses’ testimony. Despite this omission, the Circuit Court reviewed the record and affirmed CCHR’s determination.

On appeal, the City argued it was denied due process because an incomplete transcript of the hearing was provided to the Circuit Court. The Court agreed, stating that in order for the trial court to provide meaningful review of CCHR's findings, the entire record must be reviewed. The Court concluded that the employer was deprived of the most basic due process protections and remanded the matter to the Circuit Court.

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

### **Bill Targets Workplace Bullying**

Lobbyists have begun pushing for a bill to address workplace bullying. Dr. Gary Naime, national director of the Healthy Workplace Campaign, developed a Healthy Workplace Bill which was introduced in 21 states. The bill would define an abusive work environment and require a claimant to present proof of health-related harm by licensed professionals. Further, employers would receive rewards for addressing bullying voluntarily in the form of not being subject to liability for the bullying person’s actions (similar to other harassment concepts). The bill would allow a victim to sue a workplace bully directly.

More information related to the Healthy Workplace Campaign is available at the following link: [The Healthy Workplace Campaign](#).

### **Failure to Hire During Pendency of Case Gives Rise to Retaliation Claim**

In Bobreski v. J. Givoo Consultants, Inc. (ARB No. 09-057), Complainant was terminated in 1999 after reporting safety concerns. Shortly following his termination, Complainant filed a whistleblower claim against Respondent’s contractor (District of Columbia Water and Sewer

Authority or “WASA”). In July of 2005, Respondent obtained a liability verdict against WASA. WASA continued to contract with Respondent following the verdict. The parties subsequently resolved the remedies portion of the case in September of 2006. However, prior to the resolution, Complainant applied for a temporary job opening with Respondent. He was not selected for the position and later filed another whistleblower complaint. An ALJ found a lack of a causal link between the protected activity in 1999 and Respondent’s decision not to hire him.

On appeal, the ARB determined the ALJ erred by too narrowly defining the protected activity and ruled that the failure to hire, based on the ongoing litigation, could represent an actionable claim by itself. The ARB remanded the case to the ALJ to more fully address the evidence on that issue.

The ARB’s decision can be found at the following link: [Bobreski v. J. Givoo Consultants, Inc.](#)

### **\$4.2 Million in Back Wages to P.G. County Public School Workers**

The Department of Labor’s Wage and Hour Division has obtained an agreement from Maryland’s Prince George County’s Public Schools system to pay more than \$4.2 million in back wages to 1,044 workers, resolving alleged violations of the H-1B temporary foreign worker program. DOL investigators found that PGCPs illegally reduced the wages of the H-1B workers by requiring them to pay fees that the school system was required to pay. Due to the willful nature of some of the violations, PGCPs also has agreed to pay \$100,000.00 in civil money penalties and will be debarred for two years from filing new petitions, requests for extensions, or requests for permanent residency for foreign workers under any employment-based visa program.

The DOL press release can be found at the following link: [PGCPs](#).

### **Department of Labor Enforcement Updates**

As part of our continuing effort to keep employers apprised of the DOL’s greater enforcement efforts of FLSA violations, the following information was publicized by the DOL this month:

- **Focus on Back Wages Begins in South Florida Fields** - The Wage and Hour Division is conducting an enforcement initiative focusing on the agricultural industry, beginning in South Florida and continuing up the East Coast. The effort began in March, during the green bean harvest, and already has recovered \$670,770.00 in back wages for about 590 agricultural workers, and assessed nearly \$130,000.00 in penalties.
- **Florida Electrical Contractor to Pay 85 Employees Back Wages** - Industrial Energy Services in Pensacola, Fla., has agreed to pay \$174,719.00 in back wages to 85 employees following an investigation that found violations of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act.
- **Nearly \$56,000.00 in Pay Recovered for Florida Auto Dealership Workers** - The Wage and Hour Division recovered \$55,807.00 in back wages for 17 employees of McKenzie Motors, a Buick GMC dealership in Milton, Fla., following an investigation that found 15 sales people were paid weekly and monthly commissions regardless of the number of hours they worked. Two other employees were improperly classified as exempt from overtime and, as a result, did not receive proper compensation.

### **Firm News**

Jason C. Taylor drafted an article titled, "Protecting Your Business, One Former Employee/Future Competitor at a Time." The article, which addresses noncompete issues, was published in DRI's Summer 2011 *In-House Defense Quarterly*. The article is available at the following link: [Protecting Your Business, One Former Employee/Future Competitor at a Time](#).

**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](http://www.sniffenlaw.com). After entering the Firm's website, click on the "Publications" page.

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