

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT ALERT *June 2011*

Supreme Court to Hear Argument on States' 11th Amendment Immunity Under Self-Care Provision of the FMLA

The United States Supreme Court will decide in Coleman v. Court of Appeals of Maryland (Case No. 10-1016) whether Congress can abrogate States' 11th Amendment immunity through the self-care provision for leave under the Family Medical Leave Act (FMLA). The appeal is based on the opinion of the Fourth Circuit Court of Appeals that Congress is not permitted to do so. In the Fourth Circuit Court of Appeals' opinion, it noted that the four other Circuits (Fifth, Sixth, Seventh and Tenth) to consider this issue have ruled the self-care provision does not abrogate States' 11th Amendment immunity.

The Supreme Court is expected to hear oral argument on this case in the Fall of 2011. The Coleman docket can be accessed [here](#). A copy of the Fourth Circuit's opinion can be found [here](#).

Update Regarding Unemployment Benefits in Florida

On June 27, 2011, Governor Rick Scott signed into law a bill that will significantly change unemployment compensation benefits in Florida. The bill (HB 7005) immediately scales back the number of weeks for state unemployment benefits from 26 weeks to 23 weeks, causing emergency federal benefits to kick in more quickly and essentially shaving three weeks off the total run of benefits. Under the measure, the number of weeks of unemployment insurance available would gradually decline further once the unemployment rate dips below 10.5 percent, bottoming out at 12 weeks if the unemployment rate hits 5 percent. The bill also makes it more difficult for Floridians who lose their jobs to qualify for unemployment benefits to begin with. The current maximum unemployment benefit dollar amount stays the same under the measure, at \$275 a week, already near the bottom of states. Federal statistics show the state's average weekly benefit is just over \$230.

More information pertaining to CS/CS/HB 7005 is available at the following link: [CS/CS/HB 7005](#).

DOL Updates Procedures for Federal Workers' Compensation Act Claims

On June 28, 2011, DOL's Office of Workers' Compensation Programs released a final rule that revises and modernizes the procedures used in administering claims under the Federal Employees' Compensation Act. The rule is designed to increase fairness and efficiency, update the regulations to account for recent statutory changes and incorporate advances in technology that preserve administrative resources. The administrative and procedural changes include requiring employing agencies to file claims electronically by the end of 2012 and allowing for the use of video and teleconferences in hearings, as well as changes to the medical approval and procurement procedures. The new rule also adds skin as a covered organ retroactive to Sept. 11, 2001, under the Act's schedule award provision, providing up to 205 weeks of compensation for burns, cancers and other medical conditions that impair the skin's function.

The final rule can be viewed at the following link: [Federal Register](#).

DOL to Provide \$20 Million to Assist State Agencies with Employing Disabled Workers

DOL announced through its Office of Disability Employment Policy (“ODEP”) and Employment and Training Administration (“ETA”) it will make approximately \$20 million in funding available through cooperative agreements with state agencies administering the Workforce Investment Act (“WIA”) for the purpose of developing and implementing a plan for improving participation of persons with disabilities in the workforce. The focus of these funds is to improve education and training. Grants will be awarded based on a three-year period of performance. It is not clear whether additional enforcement measures will also be supported by this funding.

Additional information regarding the funding can be found at the following link: [DOL Assistance](#).

Employer’s Defense of “Existing Procedure to Report Harassment” Fails Due to Lack of Lasting Improvement in Work Situation

In [Aponte-Rivera v. DHL Solutions](#) (Case No. 10-1655), Plaintiff sued her employer for violation of Title VII alleging gender-based discrimination and hostile work environment. The employer asserted it had a procedure for reporting harassment and discrimination and that it took action once Plaintiff reported the alleged discrimination. Plaintiff asserted the employer did not take sufficient action to prevent continuing harassment. The trial court allowed this issue to go to the jury and the jury found in Plaintiff’s favor.

The First Circuit Court of Appeals affirmed the jury verdict, ruling that a reasonable jury could have determined that Plaintiff’s supervisors subjected her to discriminatory intimidation, ridicule, and insult sufficiently pervasive to alter the condition of her employment and create a hostile work environment. Further, focusing on the continued actions after Plaintiff availed herself of the employer’s corrective opportunities, the Court ruled a jury could have found Plaintiff’s attempt to report the discrimination did not result in a lasting improvement in her work situation.

The First Circuit’s opinion is available at the following link: [Aponte-Rivera v. DHL Solutions](#).

Tenth Circuit Court of Appeals Clarifies Application of “Cat’s Paw” Liability in ADEA Cases

In [Simmons v. Sykes Enterprises, Inc.](#) (Case No. 09-1558), the Tenth Circuit Court of Appeals addressed Plaintiff’s claim that Sykes terminated her in violation of the Age Discrimination in Employment Act (“ADEA”). Sykes terminated Plaintiff, a 62 year old, ten year employee, following an investigation indicating Plaintiff, a human resources assistant, had disclosed the protected health information of another employee. Plaintiff claimed the termination was based in part on the discriminatory animus based on her age her immediate supervisors allegedly demonstrated in statements to her. Both supervisors participated in the investigation, but did not make the decision to terminate Plaintiff. Plaintiff asserted the “cat’s paw” theory of liability, recently affirmed by the U.S. Supreme Court in [Staub v. Proctor Hospital](#), 131 S. Ct. 1186 (Mar. 1, 2011), applied to her termination. The Court noted that in Title VII or USERRA actions for discrimination, the acts of discrimination need only be the motivating cause of the employment action. By contrast, under the ADEA the acts of age discrimination must be the “but-for” cause of the employment action. Applying [Staub](#) directly to an age-discrimination case would result in application of a lesser standard of proof for subordinate bias liability (motivating factor v. but-for cause). Based on this higher standard for the ADEA, the Court affirmed the summary judgment in favor of the employer.

The Tenth Circuit’s opinion is available at the following link: [Simmons v. Sykes Enterprises, Inc.](#)

Ninth Circuit Court of Appeals Supports Employer's Position that FMLA Documentation was Insufficient

The Ninth Circuit Court of Appeals affirmed summary judgment in favor of an employer who terminated an employee for job abandonment after the employee failed to provide adequate documentation of a serious medical condition to receive leave under the FMLA. In Lewis v. USAF (Case No. 10-35624), Plaintiff sought leave under the FMLA due to post-traumatic stress syndrome and provided a general statement from her physician that the leave was necessary and a medical certification form from DOL (Form WH-380). Plaintiff's supervisor ultimately terminated Plaintiff for job abandonment after Plaintiff failed to provide additional documentation. The Court found that Plaintiff's documentation was insufficient because it failed to state appropriate medical facts within the knowledge of the physician to support the diagnosis or the basis for the required leave.

A copy of the Ninth Circuit's opinion is available at the following link: [Lewis v. USAF](#).

EEOC Proposes Record-Keeping Rule for Genetic Information Nondiscrimination Act

The EEOC issued a proposed rule under which employers would be required to maintain all relevant employment and personnel records until any charge filed under the Genetic Information Nondiscrimination Act ("GINA") is resolved. This requirement currently exists with respect to Title VII and the ADA claims. The proposed regulation would extend those same requirements to records relevant to any GINA charge. Comments to the proposed rule are due by August 1, 2011.

More information regarding the proposed rule is available at the following link: [Federal Register](#).

Employer Settles EEOC Sexual Harassment and Retaliation Lawsuit for \$2 Million

The EEOC recently settled a lawsuit filed against a Sonic Drive-In and its owners alleging the employees suffered from substantial sexual discrimination and harassment as well as retaliation for reporting these issues. The suit alleged that one of the store's managers subjected female employees to sexual harassment, including comments and innuendo as well as unwanted touching. The lawsuit also alleged that women who asked the manager to stop or reported the harassment suffered reductions in hours or were forced to quit their jobs. The \$2 million settlement resolves the claims of over seventy women currently or formerly employed at Sonic. Further, as part of the settlement, the employer is required to maintain policies and practices ensuring that the work environment will be free of discrimination and retaliation, provide its employees with anti-discrimination training and notice of the settlement, and report other complaints to the EEOC.

The EEOC press release is available at the following link: [Sonic Settlement](#).

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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