

# SNIFFEN & SPELLMAN, P.A.

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## **LABOR AND EMPLOYMENT ALERT** *March 2011*

### **U.S. Supreme Court Addresses “Cat’s Paw” Theory of Liability in USERRA Case**

The United States Supreme Court issued a decision in Staub v. Proctor Hospital on March 1, 2011, applying the “Cat’s Paw” theory of liability to the Uniformed Services Employment and Reemployment Rights Act (“USERRA”), which prohibits discrimination towards employees based on military service and obligations. The Plaintiff in Staub claimed his supervisors were hostile to his military service obligations and created false reports based on that hostility that led to his termination by the human resources department of the Defendant. A jury ruled in favor of the Plaintiff, but the Seventh Circuit Court of Appeals reversed the award, stating the Defendant conducted an independent investigation into the Plaintiff’s personnel file before the termination. The Supreme Court reversed the Seventh Circuit and allowed for liability against an employer where the actions of the Plaintiff’s supervisors resulted in the “independent” decision-maker terminating Plaintiff, particularly where the decision-maker relied on information from such supervisors. The Court further stated it would not create a bright line rule against employer liability even if the independent decision-maker conducted his or her own investigation; however, the depth of the investigation could affect whether the alleged discriminatory animus was a motivating factor. This decision is based on the Court stating that Federal torts adopt general tort law related to proximate cause and it is likely this decision will have persuasive authority beyond USERRA, and to all similar discrimination actions.

The Staub opinion is available at the following link: [Staub v. Proctor Hospital](#).

### **Labor Broker Required to Produce Records to the Department of Labor**

The First Circuit Court of Appeals determined labor broker, Operation Management Group, Inc., was required to comply with a Department of Labor subpoena seeking records related to employees provided to several restaurants pursuant to DOL’s Wage and Hour division investigation. Operation Management Group asserted it was not subject to the DOL’s authority as a labor broker, instead of an employer, and refused to comply with the subpoena. The First Circuit affirmed the Order compelling Operation Management Group to comply and awarded sanctions against the corporation.

A press release related to the First Circuit’s decision is available at the following link: [March 2, 2011, press release](#).

### **WARN Act Plaintiff Not Entitled to Jury Trial**

In Bledsoe v. Emory Worldwide Airlines, the Sixth Circuit Court of Appeals affirmed a determination in favor of the employer based on a lawsuit the Plaintiff filed pursuant to the Worker Adjustment and Retraining Notification (“WARN”) Act, which requires certain employers to notify employees in advance of large-scale reductions in force. The Plaintiff appealed the decision, asserting in part that the WARN Act provided for a jury trial. The Sixth Circuit ruled the WARN Act did not provide for a jury trial because any amounts to be paid to an employee were in the form of restitution, the statute placed the authority to determine liability entirely in the trial

court's discretion and the Act did not provide for separate damages and equitable remedies, unlike actions under the Family Medical Leave Act or the Fair Labor Standards Act.

The Sixth Circuit's decision can be found at the following link: [Bledsoe v. Emory Worldwide Airlines](#).

### **EEOC Publishes Final Regulations Implementing ADA Amendments Act (ADAAA)**

On March 24, 2011, the EEOC issued a press release announcing that the final regulations implementing the ADA Amendments Act (ADAAA) are publicly available online. The purpose of the regulations is to "simplify the determination of who has a 'disability' and make it easier for people to establish that they are protected by the Americans with Disabilities Act (ADA)." Importantly, the final regulations "clarify that the term 'major life activities' includes 'major bodily functions,' such as functions of the immune system, normal cell growth, and brain, neurological, and endocrine functions." The final regulations also "make it easier for individuals to establish coverage under the 'regarded as' part of the definition of 'disability.'"

The EEOC's press release contains a link to the final regulations, a Question-and-Answer document for businesses, and a fact sheet. The press release is available at the following link: [March 24, 2011, press release](#).

### **Potential for Credit History to be Invalid Criteria in Hiring**

Senate Bill 1562 filed in March of 2011, if approved, will result in a prohibition against the use of personal credit history in Florida employer's hiring decisions. This proposed bill provides an exception to this prohibition where the person's credit history is directly related to the position sought, but even then the applicant's credit history cannot be the determining factor in whether the applicant is hired. If approved, the effective date of this bill is July 1, 2011.

More information on SB 1562 is available at the following link: [SB 1562](#).

### **Employer Presumption Against Negligent Hiring May be Eliminated**

House Bill 449, "Jim King Keep Florida Working Act," proposes to eliminate the provision in Florida Statute §768.096 that provides employers a presumption against negligent hiring when the employers engages in one or more pre-employment background investigations that failed to "reveal any information that reasonably demonstrated the unsuitability of the prospective employee for the particular work to be performed or for the employment in general." If approved, the effective date of this bill is July 1, 2011.

More information on HB 449 is available at the following link: [HB 449](#).

### **State Agencies May be Barred from Deducting Union Dues and Political Contributions from Public Employee Paychecks**

On March 25, 2011, the Florida House of Representatives voted 73-40 in favor of passing HB 1021. HB 1021 prohibits state agencies from deducting dues, uniform assessments, fines, penalties, or special assessments of an employee organization from public employee paychecks. The bill also prohibits, among other things, deductions for contributions made for purposes of political activity. If approved, the bill would become effective July 1, 2011. A similar bill (SB 830) has also been filed in the Senate.

More information on HB 1021 and SB 830 is available at the following link: [HB 1021](#) and [SB 830](#).

### **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 awards and settlements were publicized by the DOL this month:

- In addition to seeking \$1.4 million in back wages, the Department is attempting to debar Lettire Construction Corp, a New York City general contractor, from working on federally funded projects for a period of three years, following an investigation by the Department's Wage and Hour Division that found Lettire failed to properly monitor lower tier subcontractors and the wages such subcontractors paid;
- The Jacksonville District Office of the Wage and Hour Division agreed to an offer by All American Air & Electric, Inc. to pay 61 workers approximately \$56,000.00 in back wages after the WHD determined the company was using an improper "per call" payment method to pay its telemarketers and was not keeping track of the hours worked;
- An Administrative Review Board required Pythagoras General Contracting Corp. to pay \$792,396.00 in back wages to 79 employees and be debarred from working on future federally funded contracts for three years after the company and its president Stanley Petsagourakis willfully failed to pay some employees at the prevailing wage rate, and routinely failed to pay some employees for all hours worked on a construction project; and
- Levi Strauss and Co. has agreed to pay \$1,011,413.00 in overtime back wages to 596 employees nationwide after the U.S. Department of Labor found that the company violated overtime and recordkeeping provisions of the federal Fair Labor Standards Act.

### **Firm News**

#### **Firm Successfully Defends § 1983 Claim Brought Against the Department of Corrections**

On March 16, 2011, the United States District Court for the Northern District of Florida rendered a verdict in favor of Secretary Walter McNeil, in his official capacity as Secretary of the Department of Corrections, following a three-day bench trial. The trial was the culmination of the lawsuit brought against the Department pursuant to Section 1983, in which the Plaintiff claimed the Department violated his First Amendment rights.

The Sniffen & Spellman, P.A. trial team consisted of Jason C. Taylor, Heather Tyndall-Best and Nance Nadeau, along with the numerous Department of Corrections employees that assisted in the defense of this case.

#### **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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