

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT ALERT *October 2011*

Plaintiff Barred from Re-litigating Discrimination Claim in Federal Court after State Court Upheld Administrative Dismissal

Miami-Dade County was recently granted summary judgment in the Southern District of Florida in a case involving a police sergeant who claimed she was discriminated against after she was terminated for falsifying payroll records. Palmer v. Miami-Dade County, Florida, Case No. 10-23478-Civ-Cooke/Turnoff (S.D. Fla. 2011). Following her termination and before she initiated the federal court case, Plaintiff filed an administrative complaint in which she alleged disparate treatment based on her race. After a two-day hearing, the Hearing Examiner found that Plaintiff failed to identify a similarly situated employee who was treated more favorably, and that she violated County rules by failing to take reasonable steps to ensure that the payroll documents she submitted were accurate. The County Manager confirmed Plaintiff's dismissal, and she appealed the decision to state Circuit Court where the decision was affirmed. Plaintiff then filed a claim in the Southern District of Florida alleging the same violations under Title VII. The Southern District of Florida granted summary judgment, holding that the state Circuit Court judgment had a preclusive effect on Plaintiff's ability to raise her claims in federal court.

The opinion is available at the following link: [Palmer v. Miami-Dade County, Florida](#).

Appellate Court Applies New "Cat's Paw" Standard to Race Discrimination Case

The Eleventh Circuit Court of Appeals recently had the opportunity to apply the U.S. Supreme Court's landmark "cat's paw" decision from Staub v. Proctor Hospital (See, March 2011 *Labor and Employment Alert*). In Brooks v. Hyundai Motor Manufacturing Alabama, LLC, Case No. 10-14700 (11th Cir. 2011), Plaintiff alleged she was terminated due to racial discrimination based on both a hostile work environment and disparate treatment. The lower trial court had awarded judgment to the employer. On appeal, the Court summarily dismissed the hostile work environment claim but addressed Plaintiff's "cat's paw" claim by referring, for the first time, to Staub. In Brooks, Plaintiff claimed that a low-level supervisor who lacked authority to terminate her had racial animus and took actions which led to her termination. However, the Court noted that Staub would not prevent an employer from terminating an employee where the termination was "entirely justified" apart from any potentially biased recommendation by a supervisor. Where the decisionmaker does not rely at all on the supervisor's recommendation, and can independently justify the adverse action taken, the "cat's paw" does not apply.

The opinion is available at the following link: [Brooks v. Hyundai Motor Manufacturing Alabama](#).

IRS Announces New Voluntary Worker Classification Settlement Program

On September 21, 2011, the Internal Revenue Service ("IRS") initiated a program – referred to as the Voluntary Classification Settlement Program (VCSP) - that will allow some employers to resolve past worker classification issues. According to the IRS, the new program will also provide employers with the chance to "achieve certainty under the tax law at a low cost by voluntarily reclassifying their workers." The program will allow employers the opportunity to attain

compliance by making smaller payments to cover past payroll tax obligations that were not satisfied.

Eligible employers who prospectively classify and treat workers as employees may be able to secure relief from past due federal payroll taxes. To be eligible, an employer must: (1) consistently have treated the workers in the past as nonemployees; (2) have filed all required Forms 1099 for the workers for the previous three years; (3) not currently be under audit by the IRS; and (4) not currently be under audit by the Department of Labor or a state agency concerning the classification of these workers.

To apply for the VCSP, employers should file [Form 8952](#), Application for Voluntary Classification Settlement Program, at least 60 days before they want to begin treating the workers as employees. Employers who are deemed eligible for VCSP will pay an amount effectively equaling just over one percent of the wages paid to the reclassified workers for the past year. No interest or penalties will be due. Additionally, employers will not be audited on payroll taxes related to these workers for prior years. Finally, employers accepted into the program will, for the first three years of participation in the program, be subject to a special six-year statute of limitations, rather than the usual three years that generally applies to payroll taxes.

NLRB Postpones Implementation of Rule Requiring Notification of Employee Rights

As we reported in the August 2011 edition of the *Labor and Employment Alert*, the National Labor Relations Board (“NLRB”) requires that employers post a notice informing employees of their rights under the National Labor Relations Act (“NLRA”), including the right to organize and form a union. The requirement was to begin on November 14, 2011. However, the NLRB recently announced that it has postponed the implementation date until January 31, 2012, in order to allow for enhanced education and outreach to employers, particularly those who operate small and medium sized businesses.

For more information regarding the delayed implementation, please visit the following link: [Press Release](#).

Florida House of Representatives Proposes Fair Employment Opportunity Act

On October 12, 2011, House Bill 518 (“HB 518”) was filed in the Florida House of Representatives. HB 518 stands to create the Fair Employment Opportunity Act (“FEOA”) and prohibits employers from discriminating against job applicants based on past or present unemployment. Specifically, if the FEOA becomes law, employers would be prohibited from disqualifying an applicant during the hiring process based on unemployment history

More information regarding HB 518 (including the text of the bill) is available at the following link: [HB 518](#).

Florida Senate Introduces Two Bills Impacting the Hiring Process

The Florida Senate introduced two bills that could potentially impact both private and public sector employers. The first, Senate Bill 102 (“SB 102”), prohibits employers from directly or indirectly using a job applicant’s personal credit history as a hiring criterion. The proposed legislation does provide for an exception, however, for positions where credit history is directly related to the position sought by the applicant. Additionally, Senate Bill 112 (“SB 112”) is designed to prohibit a public employer from inquiring about or considering the criminal history record of an applicant for public employment until the applicant has been selected for an

interview. SB 112 does not prohibit a public employer from notifying an applicant that a law or the public employer's policy may disqualify the applicant from employment.

More information regarding SB 102 and SB 112 (including the text of the bills) is available at the following links: [SB 102](#); [SB 112](#).

Proposed Bill in Florida House of Representatives Expands Prohibitions on Discrimination

On September 30, 2011, House Bill 247 ("HB 247") was filed in the Florida House of Representatives. HB 247, titled the "Competitive Workforce Act," is designed to prohibit discrimination based on sexual orientation and gender identity or expression. Additionally, HB 247 heavily modifies portions of the Florida Civil Rights Act of 1992 (Chapter 760, [Florida Statutes](#)).

More information pertaining to HB 247 (including the text of the bill) is available at the following link: [HB 247](#). A similar bill was filed in the Florida Senate ([SB 340](#)).

Florida Senate Bill Addresses Employment of Children by the Entertainment Industry

Florida Senator Arthenia L. Joyner filed Senate Bill 308 ("SB 308") on September 20, 2011, in order to address the employment of children by the entertainment industry. The bill was filed just a month after Senator Joyner was appointed to the newly created Senate Select Committee on Protecting Florida's Children. The purpose of the committee is to analyze laws in Florida protecting children's safety and to further make recommendations for improvement.

SB 308 substantially modifies Section 450.132, [Florida Statutes](#), and provides requirements for the employment of children in the entertainment industry, responsibilities of employers and parents or legal guardians, limitations on the working hours of child performers, safety requirements, criteria for wage claims, and numerous other issues.

More information pertaining to SB 308 (including the text of the bill) is available at the following link: [SB 308](#). A similar bill was also filed in the Florida House of Representatives ([HB 237](#)).

Possible Expansions to Protections under the FMLA

The Domestic Violence Leave Act (HR 3151)("DVLA") was recently reintroduced in the United States House of Representatives. The DVLA would expand the leave options for survivors of domestic abuse, sexual assault, or stalking of the employee or the employee's family member. Under the DVLA, an employee may be entitled to FMLA leave for medical appointments, mental health appointments, legal assistance or remedies, attending support groups, and participating in safety planning. Since July 1, 2007, employees in Florida receive similar protections under Section 741.313, [Florida Statutes](#).

More information pertaining to HR 3151 (including the text of the bill) is available at the following link: [HR 3151](#).

Firm News

Robert J. Sniffen was ranked by Chambers USA in the 2011 Edition of the *Client's Guide under Labor & Employment (Band 4) Other Notable Practitioners*. Chambers USA ranks leading firms and lawyers in an extensive range of practice areas throughout America. The rankings are read by industry-leading companies and organizations worldwide and are widely used by firms for referral

purposes. Chambers USA stated, “Robert Sniffen, founder and managing partner of Sniffen & Spellman, P.A., has built an active practice representing employers in court proceedings and administrative tribunals. He joins the rankings this year on the back of high praise from market commentators. Chambers USA noted, “[h]e is the go-to management employment person in Tallahassee...”

Robert J. Sniffen and **Michael P. Spellman** have again been selected by their peers for inclusion in the 2012 edition of *The Best Lawyers in America*® in the practice areas of Employment Law - Management, Labor Law - Management and Litigation - Labor & Employment. Selection to *The Best Lawyers in America*® is based on an exhaustive and rigorous peer-review survey (comprising more than 3.9 million confidential evaluations by fellow top attorneys).

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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