

SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT ALERT *September 2011*

Requirement to Post Notice of Right of Employees to Unionize Challenged

The National Association of Manufacturers (“Association”) has filed suit, requesting that a federal court enjoin the National Labor Relations Board (“NLRB”) from enforcing its policy of requiring certain private sector employers to include a poster in the workplace advising employees of their rights under the National Labor Relations Act (“NLRA”), including the right to form or join a union. The Association alleges that the NLRB’s rule violates the First Amendment rights of businesses and exceeds “the [NLRB’s] statutory jurisdiction, authority, limitations and rights.” The lawsuit was filed in the United States District Court for the District of Columbia.

For additional information on the lawsuit, please visit the following link: [Labor Relations Today](#).

New Notification of Employee Rights Posting Requirement Effective November 14

The National Labor Relations Board (“NLRB”) requires 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, beginning November 14, 2011. The notice also provides contact information for the NLRB.

This applies to all private-sector employers, whether or not they have unionized employees. The notice must be posted where other employment notices are customarily posted, as well as on a company “intranet or internet site if the employer customarily communicates with its employees about personnel rules or policies by such means.”

Printed, color copies of the official notice will be available at the NLRB’s Regional Offices and may be downloaded from the Board’s official web page ([NLRB Website](#)). The text of the posting can be viewed here: [NLRB Employee Rights](#) or [NLRB Employee Rights](#). In addition, the NLRB has published a list of frequently asked questions, which can be viewed here: [NLRB FAQs](#).

Lying to Employer and a Customer Found to be Disqualifying Misconduct in Unemployment Compensation Case

In [Arbor Tree Management, Inc. v. Florida Unemployment Appeals Commission](#), (Case No. 1D10-6374), the First District Court of Appeal overturned a Final Order of the Florida Unemployment Appeals Commission (“UAC”), which in turn had reversed a Referee’s finding disqualifying a claimant from receiving unemployment benefits due to his misconduct on the job. The Referee found that the Claimant was terminated for misconduct, and was therefore ineligible for unemployment benefits, when he lied to customers and his supervisor about selling unneeded automobile repairs to customers. The UAC overturned the Referee based on the manner of proof offered by the employer during the hearing. On appeal, the Court reinstated the Referee’s determination, finding that the testimony of the service manager was competent substantial evidence, and also finding that the employee’s lies to the company and the customer were a “willful or wanton disregard of an employer’s interests [that is] a deliberate violation or disregard of the standards of behavior which the employer has a right to expect of his employee.”

The opinion can be found at the following link: [Arbor Tree Management, Inc.](#)

Proposed Legislation Offers Employer Tax Credit for Continued Employment of Homeless

Florida House Bill 105 (“HB 105”) and Florida Senate Bill 160 (“SB 160”) aim to provide tax credits for continued employment of homeless individuals. Under the proposed amendments to Florida’s tax code, employers who continuously employ an individual whose primary nighttime residence is a transitional, permanent supportive, or permanent housing facility for at least 6 months are entitled to apply for a \$1,000.00 tax credit for each qualifying employee. In addition, the employee must have worked at least 80 hours during each 30-day period for at least 6 months beginning on or after July 1, 2012. The proposed effective date is July 1, 2012.

More information is available at the following links: [HB 105](#); [SB 160](#).

Employee Fails to Establish Employer’s Actions were Pretext for Illegal Discrimination

In [Gobert v. Saitech, Inc.](#) (Case No. 10-61004), Plaintiff appealed the lower court’s entry of summary judgment in favor of the employer on Title VII and ADEA hostile work environment and disparate treatment claims and a Title VII retaliation claim. The employer asserted that it terminated Plaintiff’s employment on the basis of poor job performance and failing to comply with management direction; however, Plaintiff claimed that these reasons were merely pretext for race and age discrimination. The Fifth Circuit Court of Appeals held that Plaintiff’s evidence of pretext, a favorable performance review and promotion, an isolated comment by a coworker, and provision of cell phones for some employees but not others, did not constitute “substantial” evidence of pretext sufficient to overcome summary judgment.

The opinion is available at the following link: [Gobert](#).

Department of Labor Investigation Recovers More than \$104,000.00 in Unpaid Back Wages for 230 Employees of Georgia Barbecue Restaurant Chain

The U.S. Department of Labor’s Wage and Hour Division recently completed an investigation of “This Is It! BBQ & Seafood” and found violations of the minimum wage, overtime and record-keeping provisions of the Fair Labor Standards Act (“FLSA”) at five of its Georgia locations. The total amount which was improperly withheld from employees exceeded \$104,000.00.

The investigation found that the company improperly classified employees as exempt from the FLSA and consequently failed to pay them 1.5 times their regular rates (“time-and-a-half”) for hours exceeding 40 in a workweek. Investigators also found that tipped employees were not paid minimum wage due to the company deducting uniform expenses and lunch breaks that employees did not take from their wages. Additionally, workers younger than age 16 were allowed to work later in the evening than is permitted under the FLSA’s restrictions for young workers. Finally, the company failed to maintain accurate records of tips earned and hours worked.

More information is available at the following link: [DOL Investigation](#).

Exotic Dancers are Employees Under FLSA

On September 7, 2011, the United States District Court for the Northern District of Georgia granted summary judgment in favor of 80 current and former exotic dancers who sued Atlanta’s Club Onyx for unpaid wages under the Fair Labor Standards Act (“FLSA”). The Court ruled that Plaintiffs should be classified as “employees” and not “independent contractors.” Plaintiffs

alleged that the Club misclassified them as independent contractors and, consequently, failed to pay them the minimum wages under the FLSA. The Court found that the Club's degree of control over the work of entertainers, the entertainers' opportunity for profit and loss, the entertainers' relative investment, the lack of specialized skill required to be an entertainer, and the integral nature of nude entertainment to the Club's business support a finding that an employer-employee relationship existed, despite the fact that the dancers never received a paycheck from the Club and were paid directly by the Club's customers.

The opinion is available at the following link: [Clincy v. Galardi South Enterprises, Inc.](#)

Non-Solicitation Provision Applied to Employees is Overbroad

The National Labor Relations Board ("NLRB") recently found that Nova Southeastern University ("Nova") unlawfully interfered with the Section 7 rights of an employee of its maintenance contractor, UNICCO, when it prevented the employee from distributing pronoun handbills. The handbills were part of an organizational effort made to coworkers in a parking lot outside the campus building where UNICCO was located and occurred while both the employee and coworkers were off duty. The NLRB adopted the Administrative Law Judge's findings that Nova's no-solicitation rule, applied even to its own employees, was unlawfully overbroad.

The NLRB's decision is available at the following link: [Nova.](#)

Union Violated Florida Law by Declining to Represent Non-Union Members

On September 7, 2011, the Third District Court of Appeal in United Teachers of Dade v. School District of Miami-Dade County (Case No. 3D11-163), affirmed a ruling from the Public Employees Relations Commission ("PERC") that the provisions of the collective bargaining agreement and related actions of the United Teachers of Dade ("UTD") resulted in an unfair labor practice for non-union teachers. In United Teachers of Dade, a non-union teacher was denied representation at a performance evaluation and subsequently filed an unfair labor practice charge alleging UTD violated sections 447.501(2)(a) and (b) of the Florida Public Relations Act ("FPRA"), which prohibit public employee unions from coercing public employees or attempting to cause a public employer to discriminate against non-union members. PERC found the combined collective bargaining agreement provisions and the actions of UTD in denying representation were tantamount to an unfair labor practice. PERC also determined UTD could not legitimately deny knowledge of the unlawful effect. On appeal, the Court found there was substantial evidence in the record to support the hearing officer's finding of intent and reversed the denial of attorney fees for the teacher.

The Court's opinion is available at the following link: [United Teachers of Dade.](#)

OSHA Orders Beverage Company to Rehire and Compensate Whistleblower

The Occupational Safety and Health Administration ("OSHA") found nutritional beverage company Landow and Bond Laboratories ("Landow") and its former CEO in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act for improperly firing an employee. OSHA determined Landow terminated the employee for objecting to manipulation of sales figures that misrepresented the company's value to potential investors. Landow must re-hire the employee and pay approximately \$500,000.00 in back wages, interest and compensatory damages.

A copy of OSHA's news release is available at the following link: [Landow and Bond Penalty.](#)

OSHA Determines Bank of America Violated Whistleblower Provisions of Sarbanes-Oxley

The Occupational Safety and Health Administration (“OSHA”) found Charlotte, N.C.-based Bank of America Corp. (“BOA”) in violation of the whistleblower protection provisions of the Sarbanes-Oxley Act for improperly firing an employee. The employee, who originally worked for Countrywide Financial Corp., which merged with BOA in July 2008, led internal investigations that revealed widespread and pervasive wire, mail and bank fraud involving Countrywide employees. BOA has been ordered to reinstate and pay the employee approximately \$930,000.00, which includes back wages, interest, compensatory damages and attorney fees.

A copy of OSHA’s news release is available at the following link: [Bank of America Penalty](#).

Internal Disciplinary Review did not Negate Decisionmaker’s Retaliatory Animus

In McKenna v. City of Philadelphia (Case Nos. 09-3567 and 10-3430), three police officers alleged that they were disciplined in retaliation for protesting the discriminatory treatment afforded to their African American colleagues. The Third Circuit Court of Appeals, applying the recent holding of the U.S. Supreme Court in Staub v. Proctor Hospital (2011), considered whether the City demonstrated that its internal disciplinary review hearing severed the causal connection between the police captain’s (supervisor) retaliatory animus and the City’s ultimate decision to terminate three police officers. In Staub, the Supreme Court disagreed with an employer’s argument that a decision maker’s independent investigation and rejection of the employee’s allegations of discriminatory animus relieves an employer of fault. The Court in Staub further declined to adopt a hard-and-fast rule that a decision maker’s independent investigation would be sufficient to negate the effect of a non-decision maker’s discrimination.

Based on Staub, the Third Circuit held that a reasonable jury could find that the police captain’s animus played a substantial role in the recommendation to terminate the police officers.

The opinion is available at the following link: [McKenna](#).

Firm News

Sniffen & Spellman, P.A.’s **Todd D. Engelhardt** spoke at the 37th Annual Public Employment Labor Relations Forum in Orlando on September 22, 2011. Mr. Engelhardt presented an update on Federal Eleventh Circuit Employment Law.

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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