SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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Supreme Court Hears Oral Argument in Big Employment Law Cases

In early October, the United States Supreme Court heard oral argument in a trio of high profile cases involving the interpretation of the term "sex" in Title VII of the Civil Rights Act of 1964. The Supreme Court heard oral argument first in the consolidated cases of Bostock v. Clayton County and Altitude Express v. Zarda. Those cases concern whether the term sex in Title VII encompasses a prohibition of discrimination against someone based on their sexual orientation. Next, the Court heard oral argument in R.G. & G.R. Harris Funeral Homes Inc. v. Equal Employment Opportunity Commission which concerns whether the term sex in Title VII encompasses and prohibits discrimination against an individual based on their gender identity. These issues are currently subject to a dispute between federal appellate courts. While many states have enacted laws that make discrimination based on sexual orientation and gender identity illegal under those state laws, Florida lacks such a law. Accordingly, the Supreme Court's decision will have major consequences for employers throughout Florida. Decisions on these cases will likely be released in June of 2020.

The transcripts and audio for the oral arguments may be found on the Supreme Court's website at the following link: Audio and Oral Argument Information.

First DCA Finds Employer's Arbitration Agreement Incorporated in its On-Boarding Process Not Enforceable

The Florida First District Court of Appeal recently upheld a trial court's decision denying an employer's motion to compel arbitration. In CEFCO v. Odom, 278 So. 3d 347, 349 (Fla. 1st DCA 2019), an employee filed suit alleging sexual harassment and retaliation. The employer sought to dismiss the claim, asserting the employee entered into an arbitration agreement as part of the employer's on-boarding process. The Court, however, concluded the employer failed to present sufficient evidence to refute the employee's claim she never completed the on-boarding process and had never seen the arbitration agreement before the employer sought to enforce it.

The employer had presented as evidence a copy of the arbitration agreement, but the Court noted the agreement did not have a date and did not reference the employee. The employer had also presented the testimony of its vice president of human resources about the employer's general on-boarding process. The Court rejected such testimony, because the vice president had no personal knowledge about the on-boarding process which the employee actually underwent. Testimony by the vice president about the employer's ordinary practice was insufficient to establish the employee entered into an enforceable arbitration agreement.

A copy of the opinion is available at the following link: CEFCO.

Disparate Impact Provision Under the Age Discrimination in Employment Act Applies Only to Employees and Not to Outside Job Applicants

In January 2019, a federal appellate court based in Chicago ruled job applicants cannot assert a disparate impact claim under the Age Discrimination in Employment Act (ADEA). A disparate impact claim challenges a facially neutral employment practice which adversely affect a protected class. Kleber v. CareFusion Corp., 914 F.3d 480 (7th Cir. 2019), involved a company which posted a job advertisement seeking applicants with less than seven years of experience. A 58-year-old applicant with significantly more experience applied but was rejected, and the applicant subsequently brought a disparate impact claim under the ADEA. The trial court dismissed the claim citing the plain language in the ADEA referring to "status as an employee" only intended to protect *employees*, not job applicants, from disparate impact discrimination. The applicant appealed, and the U.S. Court of Appeals for the Seventh Circuit upheld the dismissal of his disparate impact claim. The applicant sought review of Seventh Circuit ruling, but the Supreme Court recently declined to consider the applicant's case.

A copy of the opinion is available at the following link: Kleber.

Supreme Court Denies Cert in ADA Website Case

Guillermo Robles, a man with a vision impairment, sued Domino's Pizza under the Americans with Disabilities Act (ADA) when he was unable to access the national pizza chain's website or mobile app using common screen-reading software. Recently, courts have produced inconsistent rulings related to the applicability of the law to websites and other parts of the virtual world.

Title III of the ADA prescribes how "places of public accommodation" (such as restaurants, hotels, and stores) must accommodate disabled individuals. Although fairly broad in its scope, the ADA never mentions the Internet. Domino's Pizza argued that Title III only applied to its physical stores, and that if its customers with vision impairments needed to order a pizza, the could use the telephone. The Ninth Circuit Court of Appeals held that the ADA applies to services *of* a place of public accommodation, not services *in* a place of accommodation.

On October 7, 2019, the U.S. Supreme Court denied Domino's Pizza's petition for writ of certiorari, allowing the Circuit's ruling to stand, and the underlying lawsuit to proceed.

More information is available at the following link: Domino's Pizza.

Graduate Students' Union Rights May Be Abolished by Proposed NLRB Rule

A previous decision from the NLRB in 2016 ruled that private university graduate students were "employees" and therefore entitled to collective bargaining rights. This ruling meant that employers of graduate students had to recognize and bargain with democratically elected unions. On September 23, 2019, the NLRB announced a proposed rule which would in effect reverse the 2016 decision and not treat students who perform services, such as teaching and research for compensation at a private college or university in connection with their studies, as "employees" under the National Labor Relations Act (NLRA). The proposed regulations would

define most graduate students as outside the protections of federal labor laws. This would be the third time in the past 19 years the NLRB changed its stance on this issue. Members of the public are invited to make comments on the proposal for 60 days after its publication.

More information regarding the proposed rule is available at the following link: NLRB

Proposed FLSA Rule Clarifies Tip Sharing

Under the Fair Labor and Standards Act (FLSA), and by extension the Florida Minimum Wage Act (FMWA), an employer may pay an employee less than the minimum wage if they are a tipped employee such as a waiter who receives more than $30.00 a month in tips and is permitted to keep all his tips. However, if an employer has a valid tip pooling arrangement which shares up to the portion of tips in excess of the tip credit tips only amongst employees who "customarily and regularly" receive tips, an employer can distribute tips more evenly amongst their staff. While this arrangement is still applicable for employees who are paid less than the minimum wage under the tip credit, a new U.S. Department of Labor rule proposes to expand the tip pooling arrangement if employers do not take the tip credit and the full minimum wage is paid to tipped employees.

The proposed rule would permit tips received by individuals who are paid the full minimum wage to be shared amongst employees who do not customarily receive tips such as cooks and dishwashers. While it is important to note that tips still may not be retained by employers or distributed to management under this arrangement, this should permit easier tip sharing arrangements for employers who do not take the tip credit. The comment period for this proposed rule will end on December 9, 2019.

Additionally, employers should note that the Florida minimum wage will be increasing $0.10 to $8.56 per hour on January 1, 2020, though the maximum tip credit employers can take will remain $3.02 per hour.

A copy of the proposed rule is available at the following link: Federal Register.

NLRB Upholds Employee Information-Sharing and Media Contact Policies in Employer Handbooks

The NLRC recently found an employer's policies (rules) set forth in its employee manual concerning sharing of company information and contact with the media did not interfere with an employee's Section 7 NLRA rights. In LA Specialty Produce Co., 368 NLRB No. 93 (Oct. 10, 2019), the NLRB reviewed the following two employer handbook provisions:

> "Every employee is responsible for protecting any and all information that is used, acquired or added to regarding matters that are confidential and proprietary of [Respondent] including but not limited to client/vendor lists"; and
>
> "Employees approached for interview and/or comments by the news media, cannot provide them with any information", and the company president is "the only person

authorized and designated to comment on Company policies or any event that may affect our organization."

The NLRB determined that both rules, when "reasonably interpreted," did not interfere with the exercise of employee NLRA rights. The NLRB found that the confidentiality rule did not prohibit employees from appealing to customers during a labor dispute and that client/vendor lists may be lawfully concealed. As to the media contact rule, the NLRB found that the since the rule did not prohibit an employee from speaking to the media, but only prohibited the employee from speaking to the media *on the employer's behalf*, the rule was lawful.

The LA Specialty decision represents a continued move by the NLRB to shift towards a more reasonable (and employer friendly) common sense review of workplace rules.

NLRB: Mandatory Arbitration Agreements that Interfere with Employee Rights to File an Administrative Charge Are Invalid

The NLRB in two recent decisions ruled mandatory arbitration agreements which interfere with an employee's right to file an administrative charge with the NLRB are invalid. In Prime Healthcare Paradise Valley, LLC., 368 NLRB No. 10 (June 18, 2019), the arbitration agreement at issue included a long list of covered claims. It also set out claims excluded from arbitration, but it did not specifically exclude charges filed with the NLRB. In finding the arbitration agreement invalid, the NLRB determined a reasonable interpretation of the arbitration agreement restricts the filing of charges with the NLRB.

In Beena Beauty Holding, Inc. d/b/a Planet Beauty & Michael Sanchez, 368 NLRB No. 91 (Oct. 8, 2019), an arbitration agreement included the following language in all capital letters, "THE COMPANY AND [EMPLOYEES] AGREE . . . TO SUBMIT ANY CLAIMS THAT EITHER HAS AGAINST THE OTHER TO FINAL AND BINDING ARBTIRATION." The arbitration agreement did not explicitly prohibit filing a charge with the NLRB, but the NLRB still ruled the agreement was unlawful because, "when reasonably interpreted, [the arbitration agreement] interfere[s] with employees' access to the [NLRB] and its processes."

Copies of the decisions are available at the following links: Healthcare; Beena.

OSHA Offers New Guidelines to Help Reduce Motor Vehicle Crashes

According to the Occupational Safety and Health Administration (OSHA), someone is injured in a motor vehicle collision every 10 seconds, with many crashes occurring during the workday or commute to and from work. Employees are the most valuable assets to most businesses, and injuries can be very costly to employers.

OSHA has recently released a "Guidelines for Employers to Reduce Motor Vehicle Crashes," and suggests that employers set up a driver safety program. By reducing automobile-related injuries, employers can protect their human resources and guard against potential company liability.

More information is available at the following link: OSHA Guidance.

EEOC Will Continue Accepting Component 2 (Compensation Data) of EEO-1 Reports Past the Reporting Deadline

Employers had until September 30, 2019, to submit Component 2 information of their required EEO-1 Reports. Component 2 requires employers to submit pay information (compensation rates and hours worked). The EEOC began this requirement during the Obama administration. After the new administration began under President Trump, the Office of Management and Budget (OMB) suspended this requirement, but a federal court ruled the OMB suspension was invalid and ordered the EEOC to collect the data.

The OBM and EEOC subsequently appealed, which is currently pending. During the pendency of the appeal, the EEOC is required to provide periodic status reports to the Court. In its status report filed just days before the September 30th deadline, the EEOC indicated only 40% of employers who are required to submit Component 2 information have done so. The EEOC also stated it will continue to accept compensation data, "[s]o long as the Court's order is in effect stating that the collection will not be complete until it reaches what the Court has determined to be the target response rate."

From the Lighter Side - Court Grounds Cardinals' Attempt to Sue Escort

Katina Powell co-authored a book entitled "Breaking Cardinal Rules: Basketball and the Escort Queen." In it, she claimed that she and her daughters engaged in or agreed to engage in sexual conduct with University of Louisville men's basketball players and recruits from 2010-2014 in exchange for $10,000. After the book's publication, the University self-imposed a postseason ban on its men's basketball program for the 2015-16 season.

Several current and former Louisville students filed suit asserting a variety of claims, including civil conspiracy, a violation of Kentucky's "Son of Sam" law, and tortious interference with a prospective business advantage, in which they contended there was a diminution in the value of their degrees. They also claimed that in public, when wearing Louisville attire, they were approached by strangers who made rude and hateful remarks because of the events chronicled in the book.

The Kentucky Court of Appeals unanimously rejected all Plaintiffs' claims. As an aside, Ms. Powell's fame and fortune were short-lived as she been arrested several times in 2019 for theft-related incidents.

A copy of the Court's Order is available at the following link: Court Order.

Ms. Powell's demise is chronicled here: WDRB.com.

Firm News

Molly L. Shaddock, Esq., has joined Sniffen & Spellman, P.A. Molly is Board Certified by The Florida Bar in Education Law and brings years of experience in handing education law matters to the Firm. We are truly excited to have Molly join the team. Molly will be based out of our office

in West Palm Beach, Florida. Sniffen & Spellman, P.A. is now one of only a select few law firms in the State of Florida with more than one attorney Board Certified by The Florida Bar in Education Law. Terry J. Harmon, Esq. out of our office in Tallahassee, Florida is also Board Certified by The Florida Bar in Education Law.

Robert J. Sniffen presented "HR Issues During the Period of Employment" at the Big Bend Society for Human Resources Management Employment Law Workshop in Tallahassee.

Jeff Slanker presented at the 45th Annual Public Employment Labor Relations Forum, a CLE program put on by the Florida Bar's Labor and Employment and City, County, and Local Government Sections. Jeff presented an update on the FCHR and the EEOC at the Forum, which took place in Orlando from October 17th - 18th.

Jeff Slanker and Rob Sniffen co-authored "Cyber Security and Data Breach Issues for Associations," published in the September/October issue of Association Source magazine.

Past Issues of the Labor and Employment Law Alert Available on Website

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