SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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United States Court of Appeals for the Eleventh Circuit Clarifies Administrative Exemption to the FLSA

Recently, the Eleventh Circuit Court of Appeals clarified the administrative exemption to the minimum wage and overtime requirements of the Fair Labor and Standards Act ("FLSA"). This exemption requires that an employee (1) be paid a minimum salary (currently $455 per week), (2) performs primarily office work related to the management or general business operations of the employer, and (3) exercises independent discretion and judgment on matters of significance in the execution of their duties.

In the recent case of *Brown v. Nexus Business Solutions,* the Eleventh Circuit addressed the third prong of this test, noting specifically that the employee must independently make judgments effecting the business in order to qualify for this exemption. In *Brown*, the Plaintiffs were employed ass business development managers, tasked with "persuading corporate customers to purchase General Motor vehicles for their fleets." These workers argued that the scripts they were required to use in acquiring new customers precluded them from qualifying for this exemption. The Eleventh Circuit disagreed, noting how the workers had some discretion in which leads they developed, performing customized research, tailoring presentations for prospective customers, and noting that they were given leeway in their approach with each customer to tailor to the customers perceived needs. Because of the discretion these employees exercised, they qualified for the administrative exemption, and were found to be exempt under the requirements of the FLSA.

To read more, please refer here.

OSHA Launches Heat Enforcement Program

Last year, the federal Occupational Safety and Health Administration ("OSHA") announced the agency was developing heat standards that employers would be required to follow when employees were in temperatures exceeding a certain threshold. Last week, OSHA announced a New Emphasis Program. This program would focus heat stress risks, both indoors and outdoors, in the workplace. OSHA's authority to cite employers for violations will come under the General Duty Clause. Once the National Weather Service has issued a heat warning or advisory for a local area then the program will begin inspections.

For more information click here.

11th Circuit Issues Decision on Firefighter's First Amendment Claims

The 11th Circuit recently affirmed in part, and vacated in part, the United States District Court for the Southern District of Florida's decision in *O'Laughlin v. Palm Beach County*, where two firefighters challenged the department's social media policy claiming it violated their First

Amendment rights, and that it was overbroad and vague. The two firefighters, AJ O'Laughlin and Crystal Little were disciplined by the department for their role in an exchange on an invite-only Facebook page related to O'Laughlin's campaign for the presidency of the local union.

On the page, O'Laughlin made a post accusing the union's First Executive Vice President of attempting to misuse, for his personal benefit, time that union members had donated to the "Union Time Pool." Little commented on O'Laughlin's post, and both were given written warnings pursuant to the Palm Beach County Fire Department's social media policy.

Both O'Laughlin and Little sued, alleging that the Policy unconstitutionally restricted their free-speech and free-association rights, and that the Policy was overbroad and vague. The district court dismissed the Plaintiffs' free-speech and free-association claims on the pleadings, and granted the fire department's motion for summary judgment as it relates to the Plaintiff's claims that the Policy was overbroad and vague.

The 11th Circuit held that while the policy should not be voided for vagueness and did not restrict their rights to freely associate, the Plaintiff's speech was protected by the First Amendment as it addressed a matter of public concern. The court further found that the Policy was unconstitutionally overbroad. The 11th Circuit has remanded the overturned claims back to the district court for further consideration.

Florida's "Stop WOKE" Act

On April 22, 2022, Florida Governor Ron DeSantis signed House Bill 7, commonly known as the "Stop WOKE" Act, into law. The Act, which goes into effect on July 1, 2022, makes it an unlawful employment practice under Florida law to "**[subject] any individual, as a condition of employment** . . . to training, instruction, or any other required activity that **espouses, promotes, advances, inculcates, or compels** such individual to believe" a defined list of concepts related to diversity, equity, and inclusion ("DEI Training"). The Act requires that instruction, materials, and professional development be "consistent with principles of individual freedom"—and allows Floridians to sue if they believe their school or workplace has violated the law. The prohibited concepts in the Act are as follows:

- Members of one race, color, sex, or national origin are morally superior to another.
- An individual is inherently racist by virtue of his or her race, color, sex, or national origin.
- An individual's moral character or status as privileged or oppressed is necessarily determined by his or her race, color, sex, or national origin.
- Members of one race, color, sex, or national origin cannot and should not attempt to treat others without respect to race, color, sex, or national origin.
- An individual bears responsibility for, should be discriminated against, or should receive adverse treatment because of actions committed in the past by other members of the same race, color, sex, or national origin.
- An individual should be discriminated against or receive adverse treatment on account of his or her race, color, sex, or national origin, to achieve DEI.
- An individual bears personal responsibility for and must feel guilt, anguish, or other forms of psychological distress because of actions committed in the past by other

members of the same race, color, sex, or national origin in which the individual played no part.
- Virtues such as merit, excellence, hard work, fairness, neutrality, objectivity, and racial colorblindness are racist or sexist or were created to oppress members of another race, color, sex, or national origin.

The same day Governor DeSantis signed the Act, several individuals filed a lawsuit in federal court in the Northern District of Florida challenging the new law. The plaintiffs argue that the legislation violates the free speech rights of Florida employers and educators, and seeks an injunction to stop enforcement of the new law.

The Alert will continue to monitor this lawsuit and will provide updates on any significant developments. In the meantime, pending further guidance from the courts, employers with mandatory DEI Training or similar training programs may wish to reach out to counsel for assistance in ensuring their programs comply with the requirements of the Act.

Florida Appellate Court Rules that Employees on "Thin Ice" Are Not Protected by Anti-Retaliation Laws

Florida's First District Court of Appeal recently held that an underperforming employee was not protected by anti-retaliation laws. The employee, who had previously been placed on a corrective action plan by her employer due to several documented performance issues, brought whistleblower, racial discrimination, and retaliation claims. Summary judgment was granted against the employee at the trial court level, and on appeal, the First District Court affirmed the trial court's ruling based on the following:

- The employee failed to make a disclosure protected under Florida's Whistleblower act because her disclosures were not in writing or signed as required by the Act;
- The employee failed to provide evidence of similarly situated employees outside of her protected class that were treated more favorably to prove a race discrimination claim; and
- The employee's retaliation was untimely because her report of the alleged unlawful employment act did not occur until after she received several negative performance evaluations and was placed on a corrective action plan. The court noted that anti-retaliation laws "do not allow employees who are already on thin ice to insulate themselves against termination or discipline by preemptively making a discrimination complaint.

Read the case here.

Florida Court of Appeals Rules that Prevailing Plaintiff in Florida Public Whistleblower Act Case Must be Reinstated to their Previous Position or be Awarded Front Pay

Florida's Fourth District Court of Appeal recently addressed an important remedies issue in the context of claims brought under Florida's Public Whistleblower Act set forth in §§ 112.3187–112.31895, of the Florida Statutes. The underlying claim involved allegations that the plaintiff was retaliated against, and specifically demoted, because of protected whistleblowing activity.

The appeals court held that under the law, relief in a whistleblower action "must" include either reinstatement or reasonable front pay. However, reinstatement is the preferred remedy. When there are extenuating circumstances that do not allow for reinstatement, then front pay can be used as a remedy.

In instances where there is discord or antagonism between the parties, reinstatement is not the proper remedy. Additionally, when there is no vacancy for the former employee to be placed in, reinstatement is not the proper remedy. Front pay is appropriate in these circumstances.

Click here to read the case.

United States Supreme Court: Federal Courts do not Have Exclusive Jurisdiction Over Claims Brought Under Sections 9 or 10 of the Federal Arbitration Act

In *Badgerow v. Walters*, the Supreme Court recently held that federal courts cannot examine the substance of arbitration to establish federal question jurisdiction for suits brought under Sections 9 and 10 of the Federal Arbitration Act ("FAA"). Sections 9 and 10 of the FAA allow a party to petition a federal court to confirm or vacate a judgment awarded via an arbitration. However, the review provision in those sections alone does not itself grant jurisdiction to a federal court, but rather the court must still have an "independent jurisdictional basis."

This dispute arose out of a wrongful termination claim that was referred to arbitration. The petitioner, who had their claims dismissed by the arbiter, brought suit in Louisiana state court in an attempt to vacate the award due to fraud. Stating that the underlying claims of the case were rooted in federal law, the Respondents removed the matter to federal court, which after a completing "look-through" analysis pursuant to the Supreme Court's decision in *Vaden v. Discover Bank* (stating that federal courts have an "independent jurisdictional basis" to decide whether to compel arbitration under Section 4 of the FAA), agreed with the Respondents and retained jurisdiction. The district court proceeded deny the Petitioner's request, and confirmed the arbiter's award to the Respondents.

The Supreme Court ultimately overturned the decision, stating that the "look-through" analysis for determining jurisdiction was not proper for suits attempting to confirm or vacate an arbitration award under Sections 9 or 10 of the FAA. The Court based its decision on the fact that Sections 9 and 10 of the FAA do not explicitly grant jurisdiction of challenges to federal courts, and that simply arguing that the FAA is a federal statute is not enough to establish subject matter jurisdiction. This decision may ultimately put more of a burden on state courts in matters relating to the FAA.

From the Lighter Side: Need a Career Change? Like the cold?

The authors of the Alert love living in Florida due its balmy weather. That's easy to say in April, and maybe less easy to say in July. Regardless, some thrive in the cold, and those that are interested in a career change might wish to pursue this one. Working at an Antarctic post office where your duties include counting penguins.

The remote post office in Antarctica at Port Lockroy, also known as the "Penguin Post Office" is hiring. The post office is a popular tourist destination, and the area is filled with penguins. The area is in British Antarctic territory and managed by the UK Antarctic Heritage Trust. The job

involves working in the post office and monitoring visitor impact on the environment, including counting penguins.

No word on dress code. Hopefully it's not "black tie" like the penguins wear!

More about the opportunity, including the tough conditions, here.

Firm News

Rob Sniffen served as a panel speaker at the 7th Annual Employment Practices Liability Insurance ExecuSummit in Uncasville, Connecticut. Mr. Sniffen co-presented "A New Era: Updates on the Supreme Court and the Biden Administration" to an audience of insurance professionals and attorneys.

Robert Sniffen and Jeff Slanker will serve as adjunct professors at Florida State University's College of Law teaching an executive education course on employment discrimination for the FSU College of Law's Stoops Center for Law & Business.

Jeff Slanker has been appointed by the Florida Bar President to serve on the Florida Bar's Federal Court Practice Committee. The Federal Court Practice Committee serves as the Bar's liaison to the federal courts, federal bar organizations in Florida, the Eleventh Circuit Judicial Conference, and others interested in federal practice.

Jeff Slanker presented at the Florida Society of Association Executive's Roundtable last month on issues involving website accessibility claims arising under the Americans with Disabilities Act. The topic is hotly litigated and concerns an evolving area of the law.

Elmer Ignacio presented "Labor and Employment Law: Topics and Special Issues" as a guest lecturer for the Law & Ethics class at Florida A & M University's Veterinary Technology Program on April 4, 2022.

Michael Spellman and Elmer Ignacio were featured speakers at the Florida Municipal Insurance Trust 2022 Human Resources and Risk & Safety Management Seminars, which were held throughout April 2022 in Panama City, Pinellas Park, St. Augustine, Orlando, West Palm Beach, and Tamarac.

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

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