SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
June 2022

U.S. Supreme Court Issues Decision in Kennedy v. Bremerton School District (No. 21-418) Regarding Prayer of School District Employee

Football Coach Joseph Kennedy ("Kennedy") lost his job after praying on the fifty-yard line of the football field after the game ended. Kennedy brought forth a First Amendment Free Speech and Free Exercise claim. The First Amendment right to Free speech extends to teachers when speaking as a citizen. Kennedy was found to be praying as a citizen and not a teacher. Thus, he had a First Amendment right to pray. Kennedy also showed that by not allowing him to pray the District was burdening his sincerely held religious beliefs violating the Free Exercise Clause.

The burden then switched to the District to show that the action was justified by a compelling state interest and narrowly tailored. The District argued that by allowing Kennedy to pray it would be violating the Establishment Clause. However, the Establishment Clause is not violated just because a public school or government entity does not censor private religious speech. Kennedy is entitled to summary judgment on his claims.

This is an important decision for all governmental employers that have to consider constitutional implications of employment decisions.

Click here to read the entire Supreme Court decision.

U.S. Court of Appeals for the Eleventh Circuit Determines that Fraud Investigators Are Not Exempt

In a recent decision by the U.S. Court of Appeals for the Eleventh Circuit, the Court determined that fraud investigators working for OSP Prevention Group, did not qualify as exempt employees under the Fair Labor and Standards Act ("FLSA") and thus had to be paid overtime. This determination was made largely due to the nature of these investigators work. Relying on the case of *Calderon v. GEICO*, from the Fourth Circuit Court of Appeals, the 11th Circuit determined that, as fraud investigators, their primary work was fact finding, which was not directly related to the insurance companies' management or primary business operations, and instead qualified as "production work." Essentially, because the investigators merely reported factual determinations to their superiors, they were not engaged in any decision making for the business, and thus failed to qualify for the administrative workers exemption.

In its conclusion, the Eleventh Circuit stated one of the long-standing principles of the FLSA, namely that it is not the importance of the work, but its nature that determines whether or not an exemption applies. A good thing to keep in mind.

To read more, please refer here.

Eleventh Circuit Holds that Participant in County's Training Program Was an Intern and not an Employee under the FLSA

In more FLSA news out of the Eleventh Circuit, the Court also recently held that a former intern was not entitled to unpaid wages under the law because she was not considered an employee under the "primary beneficiary test."

In *McKay v. Miami-Dade County,* a former intern sued the County for unpaid wages under the FLSA, alleging that she was an employee while she participated in the County's autopsy forensic photography training program. In cross-motions for summary judgment, the parties stipulated that the plaintiff's participation in the internship program was "solely to acquire training in forensic photography." Utilizing the primary beneficiary test, the trial court held that the plaintiff was an intern, not an employee. Under the primary beneficiary test, courts look to seven non-exhaustive factors to determine whether an intern is in fact an employee:

1. The extent to which the intern and the employer clearly understand that there is no expectation of compensation. Any promise of compensation, express or implied, suggests that the intern is an employee—and vice versa.
2. The extent to which the internship provides training that would be similar to that which would be given in an educational environment, including the clinical and other hands-on training provided by educational institutions.
3. The extent to which the internship is tied to the intern's formal education program by integrated coursework or the receipt of academic credit.
4. The extent to which the internship accommodates the intern's academic commitments by corresponding to the academic calendar.
5. The extent to which the internship's duration is limited to the period in which the internship provides the intern with beneficial learning.
6. The extent to which the intern's work complements, rather than displaces, the work of paid employees while providing significant educational benefits to the intern.
7. The extent to which the intern and the employer understand that the internship is conducted without entitlement to a paid job at the conclusion of the internship.

On appeal, the Eleventh Circuit affirmed, finding that the plaintiff did not qualify as an employee under the FSLA because the plaintiff was the primary beneficiary of the relationship. The facts showed that the plaintiff learned forensic photography from a highly regarded county program for free over a six-month period. In participating in the program, the plaintiff also understood that she would not be paid, and that she was not entitled to a job with the County following her internship. Lastly, the plaintiff gained valuable practical experience and training from forensic photography professionals throughout the program. Due to those facts, the Eleventh Circuit held the plaintiff was the primary beneficiary of the intern-employer relationship, and was therefore not an employee.

Click here to read more.

Florida Third District Court of Appeal Rules that Private Cause of Action is Available Under Local Ordinance Concerning Employment Discrimination

Andre White filed a complaint against his employer for verbal abuse because of his sexual orientation under Chapter 11A-28(10), a Florida municipality local ordinance enacted by Miami-Dade County. His employer argued the ordinance did not provide a private cause of action for suits in Florida courts. The trial court dismissed the employee's complaint on this ground.

The ordinance provides in relevant part at Chapter 11A-28(10):

> (10) Enforcement by private persons.
> (a) If within one hundred eighty (180) days after a complaint is filed alleging discrimination, the Director [of the Commission on Human Rights] has been unable to obtain voluntary compliance with the provisions of this Article, the aggrieved person may demand a notice of right-to-sue from the Director, the issuance of which shall terminate the jurisdiction of the Director and the Board over such a complaint. Not later than ninety (90) days following receipt of the notice of right-to-sue, the aggrieved person may commence a civil action in a court of competent jurisdiction against the respondent named in the complaint.
> (b) If, in a private enforcement proceeding under this Article, the court finds that a discriminatory 6 practice has occurred or is about to occur it may issue an order prohibiting the practice and providing affirmative relief from the effects of the practice, including temporary or permanent injunctive and other equitable relief, temporary restraining order, actual and punitive damages, reasonable attorney's fees, interest, costs or other appropriate relief.

Some things to note about this language: first, once an individual has obtained the right to sue, then that individual may commence civil action. Additionally, under Chapter 11A-28(10), a court may issue orders or allow affirmative relief in privately enforcing the statute. It was this language that the Florida Third District Court of Appeal seized on to find that the plain language created a private cause of action that could be pursued in Florida courts. The appellate court thus reversed the trial court's dismissal of the case, and it will proceed further.

This case is important for Florida employers because it highlights the potential additional liability that could come in the form of local ordinances enacted by municipalities which may cover more employers or be more expansive than state or federal law. Employers must be cognizant of these local ordinances in evaluating employment actions.

To read more, please refer here.

Eleventh Circuit Affirms Dismissal of Former Atlanta Housing Authority Attorney's Whistleblower Suit

Karen Fuerst, an attorney with the Atlanta Housing Authority ("AHA"), alleged that she had been terminated for voicing her opposition to AHA's CEO's negotiation tactics, claiming whistleblower status under the National Defense Authorization Act ("NDAA"). The NDAA protects employees of federal contractors and subcontractors from retaliation for disclosing information that the employee believes is gross mismanagement, abuse of authority of a federal contract or grant, or a violation of law, rule, or regulation relating to a federal contract or grant.

Believing that the CEO's negotiation tactics constituted gross mismanagement, Fuerst filed complaints with the Department of Housing and Urban Development. The district court dismissed Fuerst's lawsuit, which she appealed arguing that the district court erroneously concluded that the NDAA did not apply to an employee of a federal grantee, and erroneously found that Fuerst merely alleged a difference of opinion, not a specific violation of a contract or grant. The 11th Circuit agreed that Fuerst fell within the class of protected persons under the NDAA, but affirmed the district court's dismissal, finding that Fuerst failed to show that her belief that Buell's actions constituted gross mismanagement, abuse of authority, or a violation of law was reasonable.

Read the case at the following link: *Fuerst v. Housing authority of the City of Atlanta, Georgia*

Florida Company Successfully Prevented the Deposition of a High-Level Corporate Officer by Meeting Burden Required by the Apex Doctrine

In *DecisionHR v. Mills,* a Florida company successfully prevailed in protecting a high-level corporate employee from being deposed under the Florida Supreme Court's adoption of Florida Rule of Civil Procedure 1.280(h), also known as the Apex Doctrine. Under the new discovery rule, companies can prevent certain high-ranking corporate officials from being deposed by demonstrating that the official lacks unique, personal knowledge of matters at issue in the litigation.

To block an official's deposition under the protection of the Apex Doctrine, companies must file a motion for protective order that is supported by an affidavit from the high-ranking official that meets the specific requirements set forth in Rule 1.280(h). The first requirement is that the affidavit must show that the officer qualifies as a high-level officer based on their actual day-to-day duties. Second, the filed affidavit must demonstrate that the high-level officer does not have unique, personal knowledge of the discoverable information that the party seeking to depose the officer could not find elsewhere. If the officer is successful and the proof set forth in the affidavit is sufficient, the burden then shifts to the party seeking to depose the official to show that they have exhausted all alternative discovery methods, and the only way to get the information they are seeking is to depose the high-ranking official. If the party seeking deposition cannot meet that burden, the court must grant the protective order.

In *Mills*, a company was able to successfully utilize the framework of Rule 1.280(h) and block the deposition of its chairman and CEO by submitting an affidavit that (i) analyzed the

allegations in the Complaint, (ii) delineated the CEO's day-to-day duties, and (iii) explained how that role did not make the CEO privy to the information that the opposing party was seeking. The affidavit was more than a "bald assertion of ignorance," but instead contained necessary details regarding the CEO's duties, and how those duties failed to intersect with the facts at issue in the lawsuit. The amount of information in the affidavit provided the appellate court with enough evidence to perform the analysis required by Rule 1.280(h), prompting the court to rule that the high-ranking official should not be forced to sit for the deposition.

Click here to read more.

11th Circuit Applies Anti-Retaliation Provision of Title VII to Protected Activity Against Former Employers

The 11th Circuit recently overturned the district court's dismissal of a case brought against Georgia Pacific under Title VII's anti-retaliation provisions. The plaintiff, Jacqueline Marie Patterson, was employed by Georgia Pacific as a senior human resources manager. She was terminated a week after Georgia Pacific found out she had testified against her former employer in a pregnancy discrimination lawsuit.

The district court initially dismissed the case after interpreting Title VII's anti-retaliation provision as inapplicable for two reasons: 1) it did not apply to HR managers acting during the scope of their employment, even if it would otherwise be considered protected activity; and 2) that an employee's actions involving a former employer were not protected conduct for the purposes of applying the anti-retaliation provision to a current employer. The 11th Circuit disagreed with the district court, finding that a manager exception or requirement that an employee's conduct relate to their current employer are not a part of Title VII's opposition clause or participation clause, and remanded it to the district court for further proceedings.

Read the case at the following link: *Marie Patterson v. Georgia Pacific, LLC*

From the Lighter Side: Parrot Helps Kangaroo Escape!

Yes – you read that correctly. To be more specific, a parrot named Thor helped a kangaroo named Baxter escape a zoo enclosure in Louisiana by opening the door and freeing him. Baxter was ultimately found running down a street by a passerby. Baxter was safely captured, although the zoo's owners may lose possession of the animal. Don't believe us? Here is a link to the article: HuffPost.com.

Firm News

Sniffen and Spellman is happy to announce that **Hannah McKinney** has become a Florida Registered Paralegal with the Florida Bar. Ms. McKinney has been a valuable member of our Firm for many years now and the lawyers and staff are incredibly proud of Ms. McKinney for this accomplishment and grateful to have her at the Firm.

Matt Carson, **Terry Harmon**, **Rob Sniffen** and **Michael Spellman** have been selected to the 2022 Florida Super Lawyers list. Each year, no more than five percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor. Additionally, **Jeff Slanker** has been selected to the 2022 Florida Rising Stars list. Each year, no more than 2.5 percent of the lawyers in the state are selected by the research team at Super Lawyers to receive this honor. Super Lawyers, part of Thomson Reuters, is a rating service of outstanding lawyers from more than 70 practice areas who have attained a high degree of peer recognition and professional achievement. The annual selections are made using a patented multiphase process that includes a statewide survey of lawyers, an independent research evaluation of candidates and peer reviews by practice area. The result is a credible, comprehensive, and diverse listing of exceptional attorneys. The Super Lawyers lists are published nationwide in Super Lawyers Magazines and in leading city and regional magazines and newspapers across the country. Super Lawyers Magazines also feature editorial profiles of attorneys who embody excellence in the practice of law. For more information about Super Lawyers, visit SuperLawyers.com.

Sniffen and Spellman is pleased to announce that four of its lawyers have been recognized in this year's edition of Florida Trend's Legal Elite. **Terry Harmon** has been recognized in the field of government/administrative law. **Matt Carson** has been recognized in the field of civil trial law. And both **Robert Sniffen** and **Michael Spellman** have been recognized in the field of Labor and Employment Law.

Florida Trend's website provides some information on this honor received by Messrs. Harmon, Carson, Sniffen, and Spellman:

Top 1.4% of Florida lawyers selected

Less than 2% of active Florida Bar members practicing in Florida appear among the exclusive Florida Legal Elite. Now in its 19th year, Florida Legal Elite presents the state's top licensed and practicing attorneys selected by their peers.

Florida Trend invited all in-state members of the Florida Bar to name attorneys whom they highly regard or would recommend to others.

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

You may view past issues of the Labor and Employment Law Alert on the Firm's website: www.sniffenlaw.com. After entering the Firm's website, click on the "Publications" page. Our Firm also highlights various articles of interest on our official Twitter feed, @Sniffenlaw.