SNIFFEN & SPELLMAN, P.A.

LABOR AND EMPLOYMENT LAW ALERT
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Florida Fourth District Court of Appeal Weighs in on Arbitrator Authority in Resolving Dispute Between School Board and Applicant

Gregory Smith, a member of the teachers' union, filed a grievance subject to the union's collective bargaining agreement. Under the agreement, union employees and the School Board of Broward County agreed to submit unresolved grievances to arbitration and that such decisions would be final and binding.

The collective bargaining agreement mandated that if more education support professionals applied than were positions, attendance, reliability, and seniority in the District should we be criteria considered by the principal in awarding the promotion.

Smith was not selected for multiple teaching positions he applied for and filed a grievance challenging the decisions, arguing the Board did not consider his seniority during the hiring process. The arbitrator found the Board had violated the agreement by not considering Smith's seniority during the hiring process and that the appropriate remedy was to appoint Smith to the position and grant him backpay.

The Board moved to vacate the award, arguing the remedy exceeded the scope of his authority under the agreement and the arbitrator was only vested the authority to determine whether the Board made the appropriate considerations during the hiring process. The trial court denied the motion and the appeal followed.

The appellate Court found that the arbitrator had exceeded his authority in ordering a remedy, where the arbitrator's authority was limited to directing the Board to reconsider Smith's application in light of the appropriate factors. Further, the Court found the arbitrator, in addressing the breach of the agreement, awarded the position to Smith and that such power was vested in the principal—not the arbitrator.

Supreme Court Says Whistleblower Retaliation Claim Does Not Require Evidence of Retaliation

On February 8, 2024, the Supreme Court issued an opinion in the case of *Murray v.UBS Securities, LLC,* which clarified the requirements for a Plaintiff to raise a claim of retaliation under the Sarbanes-Oxley Act. This Act, codified under Title 18 U.S.C. § 1514A(a), prohibits publicly traded companies from retaliating against employees who report what they reasonably believe to be instances of criminal fraud or securities violations. Specifically, it prohibits a qualifying employer to "discharge, demote, suspend, threaten, harass, or in any other manner discriminate against an employee in the terms and conditions of employment because of" an

employee engaging in a protected disclosure. In this case, the Plaintiff filed a whistleblower claim alleging that he had disclosed that two of his supervisors engaged in illegal and unethical behavior to skew his reports to UBS customers, which he was required by law to certify as being independently produced and containing his own views.

At trial, the Plaintiff was awarded nearly $1 million in damages following a jury trial where it was found that UBS had engaged in retaliatory conduct under the Act. UBS appealed to the Second Circuit Court of Appeals, which determined that the trial court had erred because there was no evidence that the final decision maker had acted with retaliatory intent in terminating the Plaintiff's employment. The employee appealed again, and the Supreme Court, in a unanimous opinion, determined that the Plaintiff did not need to prove retaliatory intent on the part of the decision-maker, only that the protected activity contributed to the adverse employment act.

Citing the burden shifting framework provided by the statute, the Supreme Court noted that, once a Plaintiff shows that their protected activity was a contributing factor to the adverse employment action, it is then the burden of the employer to show that the same actions would have been taken had the employee not engaged in protected activity. Here, UBS did not provide the evidence necessary to meet this burden, and the Supreme Court determined that the introduction of a retaliatory intent requirement was contrary to law.

To read more on this opinion, please refer here.

Florida's Fifth Circuit Affirms Contract Requirements for Membership Buy-In

Kun Xiang, MD was a medical doctor that worked for the Ocala Heart Clinic II. After two years of employment, he was given the opportunity to buy-in to the practice, becoming a member physician and partial owner of the practice. Per the terms of the agreement between Dr. Xiang and the Clinic, he was allowed to purchase 100 member shares of the Clinic for approximately $300,000, amortized over five years. Dr. Xiang's relationship with the Clinic did not last though, and due to some disputes over members required tax liabilities, Dr. Xiang resigned giving 45 days notice of his resignation rather than the 180 days required under his contract. His contract also required that, upon resignation, Dr. Xiang would be required to pay all balances due on the purchase of his member shares.

Dr. Xiang filed suit and the Clinic counterclaimed. Following a two-day bench trial, the trial court found that the Clinic had prevailed on its counterclaims, awarding them no damages for Dr. Xiang's breach of contract related to the resignation matter, but the remaining costs of purchase of the 100 member shares. This resulted in the Clinic receiving an award of attorney fees and costs in addition to the damages owed by Dr. Xiang. Dr. Xiang appealed, stating that the lack of a damages award meant that the Clinic could not have prevailed as to the resignation matter, and that the lack of a promissory note meant that he owed no balance under his contract. The Fifth Circuit Court of Appeals affirmed the lower Court's ruling, as under long standing Florida Law, a party may prevail in a breach of contract action even if no damages are awarded. Moreover, as related to the promissory note issue, while the contract references a promissory note, and none was executed, the contract nevertheless contained sufficient information to

determine the amounts owed on the 100 member shares, thus rendering the absence of the promissory note a functionally moot issue. The Fifth Court went on to affirm the trial Courts ruling as to these issues, including the award of attorney fees and costs.

To read more, please refer here.

DOL Overtime Changes are Imminent

On September 8, 2023, the Department of Labor issued a proposed rule which would raise the minimum salary threshold for most exempt employees to $55,068 annually and increase the minimum salary threshold for the highly compensated employee threshold to $143,988 annually. While there is some speculation that this may increase to approximately $60,000 for the exemption threshold from various interested parties, there has been no guidance from the Department of Labor referencing any changes to the numbers at this time. On March 1, 2024, the Secretary for the Department of Labor sent this proposed rule to the Office of Information and Regulatory Affairs for review, one of the final steps prior to the publication of the Final Rule. OIRA has ninety days to review the proposed rule, however regularly takes only thirty to sixty days. Therefore, employers should be aware that the DOL is on track to finalize this rule in April of 2024.

To read the text of the proposed rule, please refer here.

Florida Legislative Changes to Watch

The Florida Legislative session is in full swing, and there are a couple bills which have passed the legislature which could effect labor and employment in the future:

- HB 49 – This bill expands the hours that those under the age of 18 can work, permitting 16 and 17 year olds to work as much as those who have reached the age of majority except during the school week (unless the minor is enrolled in virtual school, has dropped out of school, or is in a home education program, in which case there are no limits for when school is in session) and removing mandatory break provisions for 16 and 17 year olds. This bill has currently been approved by both the House and Senate, and will become effective on July 1, 2024, if signed by the Governor.

- HB 433 – This bill places certain restrictions on employers and government entities, prohibiting political subdivisions in the state from awarding contracts on the basis of the wages paid to a contractor's employees, and requiring employers operating in high heat environments to provide cooling measures, water, employee monitoring, and various other first-aid and recovery measures to employees working in high heat environments. This bill has currently been approved by both the House and Senate, and will become effective on July 1, 2024, if signed by the Governor.

To read more on these bills please refer here and here.

NLRB Joint Employer Rule Blocked

In a ruling issued Friday, March 8th, the U.D. District Court for the Eastern District of Texas granted summary judgment in the matter of *Chamber of Commerce of the United States of America v. National Labor Relations Board*. This lawsuit involved a challenge to the recently enacted joint employer rule published by the National Labor Relations Board as a Final Rule on October 27, 2023, and going into effect on December 26, 2023. While we anticipate that this ruling will be appealed, the current standard has reverted to that enacted in 2020, which requires that the companies identified as joint employers exercise "substantial direct and immediate control" over the essential terms and conditions of the employee which include "wages, benefits, hours of work, hiring, discharge, discipline, supervision and direction." The new standard sought to revert this standard to an expanded version of the 2015 joint employer ruling which provided for additional factors and a balancing test.

To read more on this ruling, please refer here.

Firm News

On February 23, 2024 Mitchell Herring presented to employees of Gadsden County on Public Records Requests and the Sunshine Law.

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