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TRANSPORTATION DISTRIBUTION & LOGISTICS ALERT

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Pennsylvania's Appellate Court Concludes Lifetime CDL Disqualification Was Proper

By Barbara A. Darkes

In 2005, in order to comply with the Federal Motor Carrier Safety Improvement Act and ensure Pennsylvania's continued receipt of federal highway funds, the Pennsylvania Vehicle Code was amended to provide that certain violations in personal non-commercial vehicles could lead to a disqualification of someone's CDL, including a lifetime disqualification. One such offense, not surprisingly, is DUI.

James Sondergaard got his CDL in 2000. He was convicted of two separate DUI offenses in December 2010, one having occurred in March 2010 and the second in August 2010. Both occurred in a personal non-commercial vehicle. He received a one year disqualification for the first conviction and a lifetime disqualification for the second. He timely appealed the lifetime disqualification arguing that the statute required him to be driving a commercial motor vehicle at the time of the DUI in order for the lifetime disqualification to apply. More specifically, he argued that the statute requiring the lifetime disqualification was penal in nature and, as such, required the rule of lenity to be applied.

The rule of lenity requires that when a statute is penal in nature, and the language of the statute is ambiguous, the statute is to be weighted in favor of the person against whom it is being applied and against the government. Though the trial court found in favor of Mr. Sondergaard, the Commonwealth Court of Pennsylvania, reversed that decision on PennDOT's appeal.

The Commonwealth Court agreed that the lifetime disqualification is, in fact, penal in nature. However, they did not agree with the trial court that the statute was ambiguous. The statute in question provides, "where the person was a commercial driver at the time the violation occurred", includes the person driving a commercial motor vehicle at the time as well as the person operating a non-commercial vehicle, but holding a CDL, at the time the violation occurred. This decision was based upon the definition of "commercial driver" contained in the Vehicle Code, which provides that a "commercial driver" is "a person who is either a commercial driver license holder as defined in section 1603 or who is driving a commercial vehicle". As such, the Court held that there was no ambiguity and the lifetime disqualification imposed upon Mr. Sondergaard was, in fact, proper.

The full version of this decision can be found at *James Sondergaard v. Commonwealth of Pennsylvania, Department of Transportation*, 65 A.3d 994 (Cmwlth Ct. 2013). ■

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NLRB's New Ruling Could Spell Trouble in Harassment Investigations

By Schaun D. Henry

In a recent ruling, the National Labor Relations Board ("NLRB") has expressed the view that telling employees that they may not discuss an internal investigation may violate an employee's Section VII rights. In *Banner Health Systems d/b/a Banner Estrella Medical Cente*r, 358 N.L.R.B No 93 (2012), the NLRB found that a blanket instruction from employers to employees to hold matters discussed in an investigation as confidential would violate Section 8(a)(1) of the National Labor Relations Act.

The ruling follows a plethora of so-called social media cases where the NLRB has directly reproached employers for taking action against employees for their comments against supervisors on social media sites.

After *Banner Health Systems*, it appears that the NLRB would only consider confidentiality policies unlawful where limited business needs exist. The NLRB delineated the following situations as acceptable situations for requiring a confidentiality policy in investigations:

1. A witness in the investigation needs protection.
2. Evidence is in danger of being destroyed.
3. Testimony is in danger of being fabricated.
4. There is a need to prevent a cover-up.

The NLRB's ruling may leave employees in a quandary. Certainly, avoiding retaliation is a key factor in the use of confidentiality policies. By virtue of this ruling, the NLRB has likely placed employers at risk for greater scrutiny from the EEOC as to why the employer did not take more care to avoid a potential retaliation claim in the case of a sexual harassment claim, for example. Governmental agencies are often unaware and even unconcerned about the requirements and nuances of their sister agencies. Accordingly, the wieldy HR professional will take appropriate steps to protect themselves.

We suggest that any written policy regarding the confidentiality of investigations be removed from your records or modified to explain that the employer may, at its own discretion, designate an investigation as confidential based on legitimate business needs. Consider each case individually and where you believe that one of the conditions above exists, you may implement the policy and tell employees as much. Confidentiality may still be invoked, but we will need to be more discerning about its use.

We caution against getting too cute with your modifications. Should you choose to input a policy of only invoking confidentiality in a harassment setting, for example, I suspect that the NLRB would still call the policy too broad. As recent cases have shown, the NLRB will likely invalidate any "rule" that inhibits an employee's right to act for concerted protected activity. The use of confidentiality policies will have to be limited to cases where an individualized assessment deems it necessary. ■

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