

THARPE & HOWELL

LABOR & EMPLOYMENT LAW NEWSLETTER

RECENT DEVELOPMENTS

NOVEMBER 2009 EDITION

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Employer's Act Of Accessing Private Networking Cite May Violate Law

In *Pietrylo v. Hillstone Restaurant Group*, Pietrylo set up a password protected MySpace group during personal time, so he and other employees of

Hillstone Restaurant Group could “talk about the crap/drama/ and gossip occurring in our workplace without having to worry about outside eyes prying in...” The site contained language about it being private, and the group could be joined by invitation only. Employees who accepted the invitation could access the site at any time to read and add new postings. Managers were not invited to join.

The site contained various messages, including one with derogatory and sexual remarks about the restaurant's managers and customers.

After joining the group, one of its member employees made a manager aware of the site and showed the manager some of the message postings. [This occurred during personal time, while the (sharing) employee was at the manager's home for dinner.] News of the postings spread to various managers of the restaurant, and one of the managers asked the (sharing) employee for her private password to the website while she was at work. The sharing employee obliged and, eventually, her co-employees Pietrylo and Marino were terminated from their positions for creation of and/or participation in the MySpace Group.

The discharged employees sued the restaurant claiming violation of public policies favoring free speech and invasion of privacy. In the action, the employee who had provided her password to the manager testified that although adverse employment action against her was not threatened, she believed she would have gotten into trouble had she not provided it upon request.

The regional supervisor who had fired the plaintiff employees testified he found the postings offensive and contradictory to the company's core values of professionalism, positive mental attitude, aim to please approach, and teamwork. He also believed the restaurant could be adversely affected as a result of the negative postings.

The restaurant filed a Motion for Summary Judgment as to all causes of action. Although the Court found the restaurant's actions did not violate the plaintiffs' freedom of speech, it did find plaintiffs' invasion of privacy claim and claim that the restaurant had violated Federal and State Law, were matters for a Jury to decide. When ruling in favor of the plaintiff employees on these threshold issues, the Court noted a factual dispute existed as to whether the private password had been given by the (sharing) employee to the manager freely, or by the employee while under duress. If a Jury finds the employee provided the password to the manager

while under duress, then the manager may not have been truly "authorized" to access the private site.

Subsequently, a Federal Jury determined the restaurant had, indeed, violated State and Federal law (stored communications and wire-tapping acts), and awarded the plaintiff employees \$3,400 in back-pay and \$13,600 in punitive damages. However, with regard to plaintiffs' invasion of privacy claim, it found in favor of the defense and also determined no emotional distress had been caused.

NOTE: Although the monetary value of this award was relatively small, significant funds were likely expended on the employer's defense. Given our current technological society, employers should keep in mind that they may be in violation of Federal and/or State laws if accessing private websites not intended for their use.

Sears Pays \$6.2 Million To Settle ADA Class Action Suit

For generations, Sears has been known as a staple of American society. Whether it be clothes for the kids, power tools for the garage, or appliances for the home, most of us have long-held memories relating to Sears. This why it is so surprising that, nearly 20 years after the passing of the American with Disabilities Act, the mega-giant retailer will be paying mega-bucks for alleged violations of the ADA.

Recently, the EEOC announced Sears has agreed to pay more than \$6.2 Million Dollars to settle a class action suit for alleged violations of the ADA - making it the largest single settlement of such a claim in EEOC history. As reported by the EEOC, a former Sears Service Technician, John Bava, took Workers' Compensation leave after he became injured on the job. Although he remained disabled as a result of his injuries, Mr. Bava

repeatedly attempted to return to work but Sears failed to provide him with reasonable accommodation. Instead, Mr. Bava was fired by Sears when his leave expired. The EEOC became involved and subsequently filed suit.

During pre-trial discovery, the EEOC found that hundreds of Sears employees who had taken Workers' Compensation leave had been terminated from their positions without consideration of reasonable accommodation and/or extensions of their leave (which may have allowed them to subsequently return to work). In the end, Sears agreed to pay \$6.2 Million to settle the ADA class-action suit.

In its press-release, the EEOC warned it will use its enforcement actions boldly to protect and advance the rights of disabled employees.

Commute Home After Business Conference Can Be Special Work Errand

In *Chuenchomporn Jeewarat, et al. v. Warner Brothers Entertainment, Inc.*, the California Court of Appeal has determined that travel back home from an out-of-town business conference may be considered a special errand, subjecting the employer to liability.

In this case, Marc Brandon worked for Warner Bros. Entertainment, Inc. ("Warner") as Vice-President of Anti-Piracy Internet Operations. Warner did not provide him with a car or gas allowance, and he was not reimbursed for mileage. Typically, he left his office between 5:00 p.m. and 6:00 p.m. each work day.

In August of 2006, employee Brandon attended a three-day business conference in Sunnyvale,

California that was sponsored by one of Warner's anti-piracy vendors. Warner approved the trip and paid for employee Brandon's airfare, hotel, and airport parking.

On August 11, 2006, Brandon left the conference early and flew back to the Burbank Airport, when he retrieved his car from a satellite parking lot. He did not intend to go to his office, but instead planned to return home to take his dogs for a walk. On his way home, Brandon drove around the studio complex where his office was located without stopping and took his normal route home for approximate two to three miles, until he was involved in an automobile collision with Jared Southard. The accident occurred at approximately 4:35 p.m. One or both cars struck and injured pedestrians Chuenchomporn Jeewarat, Tiphawan Tantisriyanurak, and Kanhathai Vutticharoen. Vutticharoen died as a result.

Pedestrians Jeewarat and Tantisriyanurak filed a personal injury action against both drivers, Brandon and Southard. Later, plaintiffs amended the Complaint to add employer Warner as a Doe defendant; and the decedent's estate joined as a plaintiff in the case as well.

Warner filed a Motion for Summary Judgment on the grounds that its employee Brandon was commuting from work to home when the accident occurred and, therefore, under the "going and coming rule," Brandon was not acting within the scope of his employment and Warner could not be held vicariously liable. Warner further argued that the "commercial traveler exception," which extends workers' compensation liability to accidents occurring during commercial travel, does not apply in third party tort cases, and the "special errand" doctrine does not apply to cases involving commercial travel. Warner asserted that *even if* the special errand doctrine applied, any special errand ended when Brandon began to drive his regular commute route home.

Plaintiffs opposed the Motion, arguing that a reasonable inference could be drawn that Brandon was traveling “from work to work” at the time of the accident, because he regularly did work at his home office. They argued that, as a result, Brandon was acting within the course and scope of his employment and the “going and coming rule” did not apply. Alternatively, plaintiffs argued the special errand exception to the “going and coming rule” applied, because Brandon had not made any personal stops during the drive, and had not yet returned home from the conference at the time the collision occurred. Plaintiffs argued that thus, Brandon was in the course and scope of his employment for the entire trip - until he arrived safely at home.

The Trial Court granted the Motion in favor of the defendant employer; and plaintiffs appealed.

The Court of Appeal found that an employee’s attendance at an out-of-town business conference, such as was the case in the fact pattern herein, may be considered a special errand under the special errand doctrine. It noted that, in addition, when an employee intends to drive home from the errand, the errand is not concluded simply because the employee drives his regular route but, rather, the errand is concluded when the employee returns home or deviates from the errand for personal reasons. The Appellate Court determined that because employer Warner failed to show its employee Brandon was not acting within the course and scope of his employment at the time of the accident, Summary Judgment had been improperly granted in this case. The Trial Court’s decision was reversed and the matter will proceed toward trial.

Employer Can Be Liable For Discriminatory Hiring Acts Of Others

On September 10, 2009, the United States Court of Appeals held that an employer may be held liable for discrimination by third parties, including independent contractors that the employer authorizes to make decisions on the employer’s behalf.

In *Michael Halpert v. Manhattan Apartments, Inc.*, Robert Brooks, an independent contractor of defendant Manhattan Apartments (“Manhattan”), interviewed plaintiff Halpert for a position showing vacant rental units. Sometime following the interview, plaintiff Halpert filed suit against defendant Manhattan (but not its independent contractor Brooks) - alleging that Brooks had told him during the interview that he (applicant Halpert) was too old for the job. In his Complaint against Manhattan, Halpert claimed discrimination based on age.

In the end, the U.S. Court of Appeals found the prohibition on discrimination applies *regardless* of whether an employer uses its employees to interview applicants, or hires intermediaries such as independent contractors to fill that role. If an employer gives authority to a third party to interview job applicants and make hiring decisions on the company’s behalf, then the company/employer may be held liable if that individual improperly discriminates in violation of employment laws.

Hazardous Materials Must Be Carried “Every Day” For Driver Employee To Be Exempt From Overtime Pay

The California Court of Appeal recently opined that a driver employee must carry hazardous

materials each and every day in order to be exempt from overtime pay.

In the case of *Jose Gomez, et al. v. Lincare, Inc.*, employer Lincare provided respiratory services and medical equipment setup to patients in their homes. Jose Gomez and others worked as service representatives for Lincare and drove vans containing liquid oxygen and compressed oxygen, which are defined by the federal government as hazardous materials.

The subject employees worked eight hours Monday through Friday and received overtime when they worked more than eight hours a day. After regular work hours, during nights and over weekends, they were required to carry a pager and respond to patient service calls. Under Lincare's employment policy, the employees were required to respond to pages telephonically within 30 minutes and had to be able to respond to calls in-person within 2 hours. Also, the employees could not drink alcohol while on-call, although they could otherwise enjoy their activities however they choose.

Evidence presented indicated that if the employees made an after hour in-person service call, they were compensated for the work at their regular rate of pay. If the matter was resolved via telephone, then the employee could not record the time and received no additional pay.

Plaintiff Gomez and other employees sued Lincare to recover unpaid compensation for the on-call time spent resolving customer questions by phone, and for all the time they were on call, even when not responding to calls. Plaintiffs also claimed they were entitled to other benefits such as a premium rate of compensation for all hours worked in excess of 40 hours per week.

In response to the Complaint, defendant Lincare filed Motions for Summary Judgment and/or Summary Adjudication, arguing that because the plaintiff/employees transported hazardous materials as part of their job, they were exempt from overtime requirements under California law. The

Trial Court ruled in favor of the employer, finding that plaintiffs, as drivers of hazardous materials (the liquid and compressed oxygen), were covered by the motor carrier exemption and therefore exempt from the California overtime laws. Plaintiffs appealed.

The Court of Appeal disagreed with the Trial Court as to whether the drivers were exempt under the motor carrier exemption - because the employer had not yet proved that the exempted activity (carrying hazardous materials) applied to each of plaintiffs' workdays. However, it did agree with the Trial Court as to plaintiffs' claims for unpaid wages while being on-call. The Court noted the employees were allowed to engage in personal activities while on-call, and could trade on-call responsibilities with co-workers. Although the plaintiff/employees argued they felt unable to fully engage in personal activities, the Court held the employee's unilateral decision to avoid activities while on-call did not change the conclusion that the time was non-compensable personal time off - which requires no additional pay.

The matter was remanded to back to the Trial Court for further proceeding as to the motor carrier exemption issue only.

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