# THARPE & HOWELL, LLP

## EMPLOYMENT AND LABOR LAW NEWSLETTER

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***This informational Newsletter is brought to you by Christopher Maile, Chair of Tharpe & Howell's Employment and Labor Law Practice Group. Please feel free to contact "Chris" at cmaile@tharpe-howell.com; or telephone number (818) 205-9955 to discuss any questions or comments you might have.***

## EMPLOYEE'S VIOLATION OF COMPANY COMPUTER POLICY MAY BE CRIMINAL ACT

The Computer Fraud and Abuse Act ("the CFAA") prohibits a number of different computer crimes, the majority of which involve accessing computers without authorization or in excess of authorization, and then taking specific forbidden actions ranging from obtaining information to damaging a computer or computer data. Under the CFAA, anyone who commits, or attempts to commit an offense, or conspires to do, may be subject to criminal prosecution. Although the CFAA is customarily used in the criminal prosecution of "computer hackers," the United States Court of Appeal recently confirmed it can be applied to violating employees as well.

In *United States of America v. David Nosal*, Nosal worked for Korn/Ferry International ("Korn/Ferry"), an executive search firm. After leaving the company in 2004, Nosal and other Korn/Ferry employees conspired to help Nosal start a competing business (despite a non-compete agreement). Korn/Ferry subsequently learned that information contained within a confidential company database had been transferred to Nosal. Korn/Ferry believed this database was one of the most comprehensive of its type in the world and, accordingly, had taken significant measures to protect the information from improper use. This included the placement of strict controls on electronic access of the database and its servers, the creation of unique usernames and passwords for authorized users, and a requirement that all employees sign an agreement confirming the confidential and proprietary nature of the information.

The conspiring employees were criminally indicted for violation of the CFAA in relation to their actions. Nosal filed a Motion to Dismiss arguing that the CFAA was aimed primarily at computer hackers and did not cover employees who misappropriate information or who violate contractual confidentiality agreements by using employer-owned information in a manner inconsistent with those agreements. In other words, he argued the Korn/Ferry employees could not have acted without authorization, nor could they have exceeded authorized access, because they had permission to access the computer and its information.

At first, the District Court denied Nosal's Motion to Dismiss but, after reconsideration, agreed with Nosal and dismissed the majority of the criminal counts. The matter then went before the United States Court of Appeal. The Court of Appeal reversed the decision and remanded the matter back to the District Court. The Court of Appeal found an employee who is authorized to use a computer for certain purposes but goes beyond those limitations **is** considered by the CFAA to be someone who has exceeded authorized access (and therefore may be in criminal violation of the law). [This is not to say that every employee who uses a computer system in an "unauthorized manner" is in violation of the CFAA - as there must also be intent to defraud.]

## WORKPLACE HARASSMENT IS NOT "PART OF THE JOB"

Turning Point of Central California ("Turning Point") owns and operates halfway houses wherein prisoners are housed for transition into society prior to full release on parole. Joyce Turman ("Turman") was employed by Turning Point as a resident monitor. Residents of the house were still considered to be "in custody," and were subject to strict regulations and regular drug testing.

In May of 2001, Turman began working the overnight shift from 11:30 p.m. to 12:00 p.m. During the day, she worked for Easter Seals – which Turning Point knew and approved of. Turman continued to work the night shift at the halfway house until December of 2003, when she went on vacation. Upon her return, however, Turman was informed her shift had been changed from 2:00 p.m. to 10:00 p.m. Although she reminded her (male) supervisor about her Easter Seals' job, and asked if she could stay on the night shift, he refused the request and stated she needed to choose between the two jobs.

Turman's job at the halfway house included citing residents for disciplinary violations. The discipline was progressive and Turman would write residents up for various violations including intoxication, profanity, disrespect of others, and fighting. Residents complained to Turman's supervisor about the number of disciplinary citations Turman would issue. After hearing these complaints, her supervisor often sided with the residents and reversed the citations. Turman wrote 200 to 300 disciplinary citations during her work at the halfway house - however she never knew of a single incident in which her supervisor wrote up a resident, including times when she saw residents visibly drunk.

As a result of the disparity in the issuance of disciplinary citations between Turman and her supervisor, there was considerable tension in the house. While Turman was at work, male residents would proposition her for sex, exhibit sexual gestures in front of her, and address her using language which was (shall we say) very derogatory to a female. Although Turman advised her supervisor of the residents' conduct, he simply responded that the residents didn't really mean it, and that she should try to be nicer to them. The abuse by the residents made Turman feel degraded and sick. The only advice the supervisor gave Turman was to not write up the residents as often as she did. The abuse continued daily from 2002 until Turman's termination in 2004.

On January 8, 2004, Turman requested time off due to stress connected to the resident abuse. Turning Point denied her request on the grounds it was short on staff. The next day Turman was terminated. The reason stated in the termination memorandum was that a reduction in staff was necessary due to on-going financial difficulties; and that two employees would no longer be working at night. In addition, the memorandum stated Turman could not work the night shift because "our federal contract prohibits having a woman working alone at night." The memorandum also stated Turman had an opportunity for re-employment as of February 1, 2004 – in a different shift. Turman declined re-employment due to her job at Easter Seals.

Turman filed suit against Turning Point alleging a hostile work environment based on resident abuse, and gender discrimination related to the given reason for her termination: that women could no longer work alone at night.

At Trial, Turning Point claimed women could not work alone at night because a male was required to conduct urinalysis drug testing on male residents. And because Turning Point was experiencing financial difficulties, it could only afford to have one staff member working at night, and that employee needed to be male for drug testing purposes. Although the Jury found that Turman **had been** subjected to unwanted harassment while at work, it also found Turning Point **did <u>not</u>** fail to take immediate and appropriate corrective action. The Jury also decided in favour of Turning Point relative to Turman's gender discrimination claim. Although Turman appealed the Jury's decision on various grounds, the importance of the Appellate Court's subsequent decision (as further discussed herein) relates to the workplace harassment claim.

With regard to the workplace harassment claim, the Court of Appeal looked at Government Code section 12940(j)(1) which provides in pertinent part: "An employer may also be responsible for the acts of nonemployees, with respect to sexual harassment of employees, applicants, or persons providing services pursuant to a contract in the workplace, where the employer, or its agents or supervisors, knows or show have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing cases involving the acts of nonemployees, the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of those nonemployees shall be considered. **The entity shall take all responsible steps to prevent harassment from occurring.** Loss of tangible job benefits shall not be necessary in order to establish harassment." [Emphasis added.]

The Appellate Court also noted the evidence presented at Trial clearly showed Turman had been subjected to sexual harassment by residents of the facility; and that the Jury in fact had found she endured a hostile work environment. So the only item in dispute was whether Turning Point had taken corrective action to alleviate the hostile work environment on behalf of its employee, Turman. The Court determined no substantial evidence of corrective measures had been presented; and it disagreed with Turning Point's assertion that "**harassment by prisoners is inherently part of the job**." The Appellate Court found that while it may be true male residents living under restricted conditions are likely to harass or mistreat a female supervisor, **this does not absolve the employer of its legal responsibility under the FEHA**. Accordingly, the Jury's decision as it relates to workplace harassment was reversed in favour of the employee.

## BEWARE OF THE RIPPLING SUBPOENA POWERS OF THE EEOC

In the *EEOC v. Konica Minolta Business Solutions, Inc.*, the United States Court of Appeals recently confirmed the EEOC's broad investigatory powers relative to its investigation of employee complaints. In this case, Konica Minolta Solutions ("Konica") fired an African-American salesman. Soon thereafter, the worker filed a charge of discrimination with the EEOC, alleging that Konica subjected him to different terms and conditions of employment, disciplined him for not meeting a sales quota, and ultimately fired him after he filed a race-discrimination complaint with the firm's human resources department.

The EEOC initiated an investigation and Konica cooperated with the agency's requests for information – at least at first. During its investigation, the EEOC learned Konica had four facilities in and around the Chicago area. In addition to Tinley Park (where the terminated worker had been assigned), Konica maintained offices in Rolling Meadows, Downers Grove, and Chicago. The Commission discovered there were only six black employees at Konica, out of 120 total employees in the identified facilities, and all six were employed in Tinley Park. Of the approximately 100 employees at the other locations, only one was a person of color. The EEOC also found there were two sales teams at the Tinley Park facility, and those teams were segregated largely along racial lines. The terminated worker's team was made up of five black employees and two white employees. According to the EEOC, these facts led it to suspect Konica might have engaged in discriminatory hiring practices.

The EEOC issued a Subpoena requesting that Konica produce records relating to the hiring of sales personnel at all four of Konica's Chicago-area facilities. It also sought the disclosure of information relating to people who expressed an interest in sales work at those offices; the applications Konica reviewed to fill sales positions; communications with applicants about sales positions; evaluations for each application considered for a sales position; the personal information, including race, of each applicant hired, and information about whether that person was promoted or transferred; and the criteria used to evaluate applicants for sales positions.

Konica filed a petition with the EEOC to revoke the Subpoena but the Commission denied the request. Konica then refused to comply with the Subpoena; and the EEOC filed an application with the District Court for an order requiring Konica to abide. The application was granted and Konica appealed.

In its appeal, Konica argued the information sought by the EEOC about its hiring practices was not relevant to the terminated employee's discrimination charge. It argued that because the employee's charge alleged only "discipline and discharge" discrimination, information about Konica's assignment of sales territories was irrelevant.

The Court of Appeal found in favor of the EEOC – holding all that is required is a realistic expectation (rather than an idle hope) by the EEOC that the information requested will advance its investigation of an employee's charge. Because the EEOC reasonably believed the information requested could cast light on the terminated employee's discrimination complaint – the employer was ordered to respond.


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**This informative Newsletter has been brought to you by Christopher Maile, a Partner of Tharpe & Howell and Chair of its Employment and Labor Law Practice Group. Tharpe & Howell has been part of the California, Arizona, Nevada and Utah business communities for more than 35 years, providing clients with experience, judgment, and technical skills. We are committed to delivering and maintaining excellent client service and case personalized attention, and to be an integral member of each client's team.**

**For further inquiry about any of the articles discussed, please contact Mr. Maile direct at (818) 205-9955; Email: cmaile@tharpe-howell.com**


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