

# PERSONNEL LEGAL ALERT

Alexander Hamilton Institute Incorporated

February 20, 2006 • Volume 17, Number 18

## In This Issue

- 4 Policy Pointers  
*Blogs: Popularity  
Necessitates Policy*
- 5 Give Employees A  
Break: You May Not  
Have A Choice
- 6 Beware Of Turning A  
Resignation Into A  
Discharge
- 7 New CMS Guidance On  
Disclosing Creditable  
Status Of Prescription  
Drug Coverage
- 8 We Couldn't Make This  
Up If We Tried...  
*Employer Orders  
Pepperoni Pizza; EEOC  
Delivers Bias Charges*
- 9 FLA Post Office  
Toss Employees' Records  
After One Year?

## Employer May Be Liable To Third Party For Employee's Online Porn Activities

*Ignore Such E-Evidence At Your Own Risk*

Employees abuse Internet and e-mail privileges in companies all over the country, so it would be wise to pay attention to the following recent New Jersey Superior Court decision, no matter where you're located. Other state courts could easily agree that employers that fail to act on evidence of an employee's illicit online activities should be held accountable.

### EVIDENCE ADDS UP

From monitoring computer logs, two IT employees saw that an employee was accessing pornographic websites. They told him to stop, but did not report him.

*3 essential steps for avoiding liability*

— see page 2

## History Of Violence Does Not Preclude Reinstatement To Service Position

*Perception Of A Mental Disability Was Company's Downfall*

Think you're pretty safe excluding an individual with a history of violence from a service position that involves unsupervised customer contact? After all, if you were to hire this person knowing his/her history, and he/she went on to commit a violent act against a customer, your company could certainly be liable for negligent hiring. Well, here's a ruling out of California — which was upheld by the Ninth Circuit Court of Appeals — that will make you think twice about why and how you reject such a person.

On his job application, a worker checked "no" in response to the question: Have you ever been convicted of, or are you awaiting trial for, a felony or misdemeanor? Three months into his employment, a criminal history check revealed that he had been arrested for attempted murder and was found not guilty by reason of insanity; and he had been convicted for a misdemeanor

*Why a termination can be legal,  
but the refusal to reinstate illegal*

— see page 3

## Employer May Be Liable To Third Party For Employee's Online Porn Activities

Separately, the employee's suspicious supervisor asked IT to monitor him. A top IT exec warned the supervisor against it, believing company policy prohibited such monitoring.

Also, a co-worker complained to her supervisor about the employee's computer habits. That supervisor's complaints yielded no response.

Eventually, the company checked his web browser and saw that he was accessing numerous pornography sites, including ones that appeared to contain child pornography. It only told him to stop his activities.

**But he didn't.** In fact, he began uploading nude and semi-nude pictures of his 10-year-old stepdaughter. Months later, he was arrested. Only after a police search, which turned up evidence of his illegal activities, was he fired.

The employee's wife filed a negligence lawsuit on behalf of her daughter. The company argued it had no obligation toward the child.

*Appeals court:* An employer that is on notice of an employee using a workplace computer to access pornography, possibly child pornography, has a duty to investigate the employee's activities and take prompt and effective action to stop the unauthorized activity, lest it result in harm to innocent third parties, which can be anyone, not only a child. (*Doe v. XYZ Corp.*, NJ Super. Ct. App. Div., No. A-2909-04T2, 2005)

### WHAT DOES THIS CASE MEAN TO YOU?

Eric A. Savage, Esq., of Littler Mendelson, P.C. (Newark, NJ) admitted that it is difficult to know the potential impact of this ruling, "since the facts were so egregious and the employer's response, at least as described by the court, was so tepid. Under a narrow view, it simply re-emphasizes employers' obligations to investigate and act effectively when there is evidence of criminal activity, such as distribution of child pornography, and also to take reasonable preventive measures." This is common sense for proactive em-

ployers. What is more worrisome is if the decision is interpreted more broadly. Employers may be placed at risk "if an employee uses the company computer or e-mail systems to transmit material that another employee finds offensive and only arguably contributes to an allegedly offensive workplace environment," Savage said.

"New Jersey does have a reputation as an aggressively pro-employee state, so some employers may be tempted to downplay the ruling. However, since the state has at times led the way for newer doctrines which move into the mainstream, that may not be a safe course," warned Savage. Until your own state's highest court makes an opposite ruling, your company could face the same legal risk.

### ESSENTIAL STEPS TO TAKE

Savage went on to recommend important actions employers should take in light of this ruling.

1. Understand that "employees have no reasonable expectation of privacy for Internet and e-mail use when company-provided computers are involved." Make this absolutely clear to employees. Any personnel policies that do not make this explicit or that are inconsistent, as was the case in *Doe*, must be changed.

2. Implement some type of protective measure, such as blocking software. Alternatively, use a device that tracks employee Internet usage.

3. If you do monitor or track employee Internet usage, you must follow up on findings — another mistake made in *Doe*. The company actually found multiple examples of the employee entering explicit websites and then decided not to pursue the matter or investigate. Just as in all harassment issues, if employees bring to management's attention information that suggests an employee is using company computers to access improper websites, you have an obligation to investigate and take appropriate action. ♦

#### EDITORIAL ADVISORY PANEL

Jessica B. Alexander  
PricewaterhouseCoopers  
New York, NY

John Fontana  
The Fontana Group  
Monroe, NY

Catherine Greenhow  
HR by Request, Inc.  
Boston, MA

Monte Jennings  
Jennings Consulting Services  
Austin, TX

Wade A. Dwyer  
Forness, Gelsman, Fraser &  
Murphy LLP  
Atlanta, GA

Matthew Roberts  
Rosen & Peters  
Rockland, NY

Eric A. Savage  
Littler Mendelson, P.C.  
Newark, NJ

Charles E. Stevens  
Jon Lykins  
Michael Best & Friedrich LLP  
Milwaukee, WI

Frederick W. ...  
New York, NY  
...  
Hamilton, NJ