

Fair Employment Practices

GUIDELINES

Ask The Expert: Q&A

This month's installment of "Ask the Expert" has been contributed by Micah Heilbrun, an Associate in Littler Mendelson's Houston, Texas office. Mr. Heilbrun has extensive experience representing employers in all aspects of labor and employment law. He received his J.D., *cum laude*, and M.A. from Wayne State University.

Q: *Can an employer monitor or discipline employees for their publicly available but password-protected messages posted on Internet websites and message boards like MySpace, Facebook and Twitter?*

A: How far can employers go when monitoring chat rooms and websites for negative comments from disgruntled employees before they are guilty of privacy violations?

This past June, a federal jury in New Jersey answered that question in a decision that established limits for employers who access and monitor social networking websites (*Pietrylo v Hillstone Rest. Group*, jury verdict issued June 18, 2009). The case involved managers at a restaurant who were held to have violated state and federal electronic communications laws by accessing a private, password-protected MySpace website where workers had criticized the company, their coworkers, and had made fun of customers. Once managers reviewed the negative comments, the website's two founding members, both servers at the restaurant, were terminated for violating the restaurant's policies, which require employees to be professional, cooperative and courteous. The jury awarded the fired workers a total of \$17,000 in back pay and damages.

Several key aspects of the recent decision offer guidance on when monitoring of public websites and Internet forums may risk employer liability:

- The two restaurant workers had intended the MySpace group for only invited cowork-

ers to vent their annoyances privately; access was restricted through use of an e-mail address and password.

- Management learned about the negative comments and derogatory postings from a third employee, a hostess at the restaurant and MySpace group member, who showed the website to her manager. Another manager later requested the hostess' e-mail and password to access the website, and he reported the postings to the company's executives.
- At trial, the fired workers argued that the hostess provided her access information only after management pressure and out of concern for her job. Whether providing the access information was voluntary or whether it was coerced was a significant issue at trial.

The jury found the company violated the state privacy and federal communications laws and held that the managers' actions had been intentional and malicious – warranting punitive damages in an amount four times the actual damages.

The case reveals several practical steps that can help employers weigh the risks of taking disciplinary action against employees who post criticism or negative comments on social networking websites:

- **Privacy.** The key issue for the jury was whether the workers had a reasonable expectation of privacy. If the employees had posted comments on a public website or via the employer's e-mail system, then the company would have had a legally defensible position for its termination decision. The invitation-only, password-restricted aspects of the workers' website may have persuaded the jury that the employer acted illegally.
- **Coercion.** The fired workers argued that the manager who requested that the hostess

Continued on page 7

Ask The Expert

Continued from page 6

disclose how to access the website placed the employee under duress. Despite the hostess denying this claim at trial, the jury's focus was shifted from the workers' comments to the manager's intentions. Given the rise in workplace retaliation claims, it seems likely that the jury questioned whether the hostess willingly disclosed her access information.

- **Cost-Benefit Analysis.** Although the jury awarded less than \$3,500 in compensatory damages to the two terminated employees (plus a four-fold amount in punitive damages and to-be-determined attorneys' fees), the risk of more significant jury awards should caution employers to carefully evaluate similar decisions. The company's benefit from removing a disgruntled employee may be quickly outweighed by the risk of a protracted, and public, legal fight.