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EMPLOYMENT LAW QUARTERLY

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RAIN ON YOUR COMPANY PARADE:

workers' comp liability can dampen employer-sponsored social events

*By: Steven P. Dlott**

Summertime ranks a close second to the holiday season as the most popular time for employer-sponsored social events. Many of us fondly (or not so fondly) recall attending company picnics as kids. These days, events such as company-sponsored amusement park days are more common than company picnics. Regardless of the activity, every employer hosting a summer social event for its employees should be aware of its potential liability for employee injuries occurring during such an event.

Some employers mistakenly assume that an employee's voluntary participation in a company-sponsored recreational event eliminates any employer liability. While some states have adopted that concept, Ohio has not. The event also need not occur on the employer's premises to impose employer liability for an employee's injury.

The seminal case in Ohio, *Kohlmayer v. Keller*, involved an employee who injured himself during a company picnic and sued to participate in the workers' compensation fund. In finding the employer liable for the injury, the Ohio Supreme Court articulated the factors that indicated that the employee's attendance at the picnic was "logically related to his employment":

- the employer sponsored the event;
- the employer paid for the event;
- the employer supervised the event; and
- the employer's purpose was to provide employees with an outing to improve employee relations.

The Court reasoned that the "improved employee relationships" resulting from an employer-sponsored event benefited the employer and thus related to the person's employment:

> [i]mproved employee relationships which can, and usually do, result from the association of employees in a recreational setting produce a more harmonious working atmosphere. Better service and greater interest in the job on the part of the employees are its outgrowths…Thus, business-related benefits…which may be expected to flow to the employer from sponsoring a purely social event for his employees, are sufficiently related to the performance of the required duties of the employee so that it is 'correct to say that the Legislature intended the enterprise to bear the risk of injuries incidental to the company event.'

As a result, the key to ascertaining workers' compensation liability for an employee injury at a company-sponsored event is the degree of employer involvement. Assuming the employer sponsored the event, the next question is whether the company paid for the event. Resolution of that issue becomes murky if the company paid for only a portion of the event (especially in the case of a company-sponsored amusement park day).

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SIXTH CIRCUIT CONFIRMS IT: Pregnancy Discrimination Act does not demand better treatment for pregnant employees

*By: Michele L. Jakubs**

How does an employer accommodate a pregnant employee when the employee's condition affects her ability to work? In *Reeves v. Swift Transportation*, the Sixth Circuit Court of Appeals recently confirmed that employers must treat pregnant employees the same as all other employees–no better, no worse.

The employee in this case worked as a truck driver beginning in August 2002. When she applied for the job, the company informed her that the job required bending, twisting, climbing, squatting, crouching, and balancing. The company also informed her that the job sometimes required strenuous physical activity, including pushing or pulling up to 200 pounds of freight with a dolly, pushing up to 100 pounds without mechanical aid, and lifting sixty pounds over her head. During the application process, the employee represented that she could bear the level of physical strain that the job required.

In November 2002, the employee learned that she was pregnant. She saw her doctor, who restricted her to light work pending her first appointment with an obstetrician. When the employee returned to work with her doctor's note, the employer told her it had no light work for her to do and sent her home.

The employer had a policy of providing light-duty work–but only to employees who had been injured on the job. Injured employees received light-duty assignments like office work.

The employee visited her obstetrician, who told the employee that she could continue working if she performed light work only and did not lift more than twenty pounds. The obstetrician gave the employee a letter setting forth these restrictions.

The employee told her employer that she could not perform regular truck driver duties but continued to request special light duty work assignments. The employer continued to inform her that it had no light duty work for her. The employee continued to contact her employer every day to request light duty work, which the employer continued to inform her it did not have for her. The employee was also not entitled to leave under the Family and Medical Leave Act because she had worked for the company for less than one year. The employer terminated the employee in late November 2002.

The employee filed suit in federal court, alleging violations of the Pregnancy Discrimination Act ("PDA"). The PDA provides, in part:

> [w]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes, including receipt of benefits under fringe benefit programs, as other persons not so affected but similar in their ability or inability to work…

The lower court found in favor of the employer, and the Sixth Circuit Court of Appeals affirmed. The employee attempted to argue that the employer's light-duty policy was direct evidence of discrimination. The Court disagreed because "the Act merely requires employers to 'ignore' employee pregnancies" and the employer's policy was "indisputably pregnancy-blind." It did not grant or deny light work on the basis of pregnancy, but on the *non-pregnancy basis of whether there had been a work-related injury or condition.* The court found, therefore, that the policy's express terms could not serve as direct evidence of discrimination.

The court then performed an indirect evidence analysis. The court found that the employee met her initial burden of establishing a *prima facie* case. The employer met its burden of establishing a nondiscriminatory reason for terminating the employee, i.e., she could not perform the heavy lifting required of truck drivers.

The employee could not establish that the employer's reason was pretext for discrimination. As a result, her claim failed. The court also noted that the employee failed to produce evidence tending to prove a discriminatory motive, nor did she even allege that the employer acted with discriminatory intent. Finally, the court accepted the reasoning of other courts that the PDA requires only equal treatment.

The employer had two things going for it: a clear policy and supervisors who understood its application. Employers should have policies that are "pregnancy-blind." In addition, employers should ensure that their supervisors apply their policies uniformly. Finally, keep in mind that any analysis of a situation like this should include an understanding of other state and federal law implications. When in doubt, consult your legal counsel.

***Michele Jakubs** *practices in all areas of employment litigation. For more information about light-duty work policies or pregnancy discrimination, please contact Michele at (216)696-4441 or mlj@zrlaw.com.*

Zashin & Rich Co., L.P.A. represents individuals in all facets of domestic relations law and employers in all aspects of workplace law.

TURNING A BLIND EYE:

when technology policies at work aren't put to work

*By: Helena Oroz**

Employee email and internet monitoring are really nothing new. Most employers have had such policies and practices in place for years. An employer's right to monitor the use of its own equipment and communication systems is pretty solid if employees are on notice. So why does a New Jersey state case involving internet monitoring have everyone so excited? Instead of a case about employee privacy, the court was confronted with questions about an employer's duty and liability to third parties when it turns a blind eye to harmful computer use.

The case. In *Doe v. XYC Corporation*, an accountant used his work computer to not only access pornographic websites but also to store and transmit child pornography. Several individuals at his company knew of the employee's activities but failed to take further action. The court's decision describes at least six incidents of *managers* learning of the employee's activities but doing virtually nothing. Starting in 1998 or 1999, the employer's Internet Services Manager and Senior Network Administrator noticed that the employee's computer log reports showed visits to porn sites, told the employee to stop, but informed no one else.

The employer's conflicting company policies concerning internet and email monitoring apparently also contributed to the inertia. In early 2000, the employee's immediate supervisor told the Senior Network Administrator that the employee was visiting inappropriate websites. The Administrator reviewed only the employee's logs, which again showed visits to porn sites, and informed the employee's supervisor and the Director of Network and PC Services. The Director told the Administrator to never again access employee internet logs. Her concern was a 1999 policy communicated to certain management personnel forbidding any employee from monitoring any other employee's computer use "just for the sake of monitoring."

However, the employer also had an email and internet policy that stated that all email messages were the property of the employer and reserved the employer's right to review and access all email messages. The policy further stated that employees were permitted to access only business-related websites and provided that any employee aware of a violation of the policy was to notify personnel. Further, the policy warned that violators would be subject to discipline, up to and including termination.

The employee continued his activities through 2000 and 2001. In March 2001, after a co-worker complained about the employee, the employee's supervisor learned that the employee was again accessing porn sites–as well as at least one that mentioned children. The employee's supervisor told the employee to stop his inappropriate computer usage. In June 2001, although he noticed that the employee had reverted to his old behavior, the supervisor told no one and left on a business trip. By the time he returned, the employee had been arrested on child pornography charges. Days before the arrest, the employee had transmitted three photos of his stepdaughter from his work computer to a child porn site to gain access to it.

The child's mother, who had married the employee the year before, sued the company. The mother alleged that the Company knew or should have known that the employee was using its equipment to view and download child pornography and had a *duty* to report the conduct to the proper authorities, which it breached. The trial court granted summary judgment for the employer, finding that the company "acted as a reasonably prudent corporation" and had "no duty to investigate the private communications of its employees."

On appeal, the court first addressed the fact that the employer had the ability to monitor employee Internet use. Second, the court addressed the employer's right to monitor employee Internet use. The company had a technology policy in place, the employee was aware of it, his office had no doors, and his screen was visible to everyone. The court held that the employee "had

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ZASHIN&RICH CO.,L.P.A.

cleveland office:
55 public square, 4th floor
cleveland, ohio 44113
p: 216.696.4441
f: 216.696.1618

columbus office:
fifth third center, suite 1900
21 east state street
columbus, ohio 43215
p: 614.224.4411
f: 614.224.4433

www.zrlaw.com

WRONGFUL DISCHARGE: it is just for at-will employees

*By: Robert W. Hartman**

For a while, under Ohio law it was a foregone conclusion that only an at-will employee could bring a lawsuit alleging wrongful discharge in violation of public policy. The Ohio Supreme Court first recognized an exception to the employment-at-will doctrine–when an employee is discharged or disciplined for a reason that violates Ohio's public policy–in 1989 in *Greeley v. Miami Valley Maintenance Contractors, Inc.*

Then, in 2003, the Ohio Supreme Court issued its decision in *Coolidge v. Riverdale Local School District*, and no one was sure anymore. In *Coolidge*, the Ohio Supreme Court held that an employee receiving temporary total disability under the Workers' Compensation Act may not be discharged solely on the basis of absenteeism if the inability to work is directly related to the condition for which the employee is on disability. The employee in that case was a teacher who was subject to a collective bargaining agreement, so the question became: could unionized employees bring claims for wrongful discharge?

The employee in *Urban v. Osborn Manufacturing, Inc.* apparently thought this was the case–and brought her case for wrongful discharge in violation of public policy to court. The employee was a union member and subject to a collective bargaining agreement ("CBA"). Under the terms of the CBA, she could not be fired without just cause. The CBA also provided a comprehensive dispute resolution program for disputes concerning discipline or termination.

The employee initially worked as an operator, but the employer eliminated the position and transferred her to another department. The employee complained to management that her new work area was infested with pigeon droppings and asked the company to remove the droppings. The employee told her supervisor that she would contact the Occupational Safety and Health Administration ("OSHA") if the company did not remove the droppings. The employee never filed a formal complaint with OSHA, but continued to complain to her employer. She next complained to the company president about the droppings.

At about the same time, the employee began receiving warnings about her work performance. About one month later, the employer terminated the employee for continued poor performance. The employee's union filed a grievance on her behalf but later withdrew it. The employee then filed suit in court alleging wrongful discharge in violation of public policy. The trial court granted summary judgment in the employer's favor.

On appeal, the employee argued that the trial court erred in dismissing her claim. The employee urged the court to ignore prior cases that declined to extend wrongful discharge to union employees. In 1995, in *Haynes v. Zoological Society of Cincinnati,* the Ohio Supreme Court held that a CBA specifically limited the power of the employer to terminate the employee, and thus took the employee outside the context of employment at-will, and outside the class of employees for whom the wrongful-discharge tort provides protection.

The employee nonetheless urged the court to expand the holding in *Coolidge* to find that members of a union who are subject to a CBA can assert a claim for wrongful discharge in violation of public policy. The court rejected this argument, stating that "*Coolidge* does not address a union employee of a private employer nor does it allow any other expansion of wrongful termination claims outside the at-will context." The court also noted that the employee's CBA provided her with a comprehensive grievance procedure, and that she "cannot now claim wrongful discharge merely because she was dissatisfied with the outcome of the grievance process." Moreover, even if she were an at-will employee, the court was not convinced that the employee alleged facts demonstrating that her employer's act of terminating her contravened a "clear public policy." There was no evidence that she was terminated for any reason other than poor performance.

The court concluded that the employee could not bring a claim for wrongful discharge because she was not an at-will employee, finally ending the mystery of *Coolidge's* meaning, at least to this court of appeals.

***Rob Hartman** *practices in all areas of employment and labor law. For more information about at-will employment or collective bargaining issues, please contact Rob at (216)696-4441 or rwh@zrlaw.com.*

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GIVE ME AN S-S-N-V-S...Social Security Administration implements new online verification system

*By: Lois A. Gruhin**

It doesn't spell anything, but it stands for Social Security Number Verification System, or SSNVS for short. The Social Security Administration recently implemented the new online system for easier employer verification of employee social security numbers.

The Immigration Reform and Control Act of 1986 ("the Act") requires employers to verify both the employment eligibility and identity of all new hires. The Immigration and Naturalization Service (now called the Citizenship and Immigration Service) designated the Form I-9 for this purpose.

The Act's implementing regulations provide for three lists of documents to accomplish verification. Acceptable "List A" documents establish both identity and employment eligibility. Acceptable "List B" documents establish identity only. Acceptable "List C" documents establish employment eligibility only. A "U.S. social security card issued by the Social Security Administration" is among the "List C" documents and is often used in conjunction with a "List B" document to establish new hire employment eligibility and identity.

SSNVS allows employers to verify those social security numbers quickly, via the internet, and in large numbers if desired. The new online system offers registered employers the ability to either:

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no legitimate expectation of privacy that would prevent his employer from accessing his computer to determine if he was using it to view adult or child pornography." Next, the court determined that the employer was on notice of the employee's activities and that further investigation would have "readily uncovered the full scope of Employee's activities." Individuals at the Company were also aware that the employee resided with a young child.

Finally, the court had to determine the heart of the matter–did the employer have a *duty* to act on its knowledge? The court concluded that the duty exists, based on the strong public policy against child pornography reflected in state and federal laws, coupled with the public policy favoring exposure of crime. The court thus agreed with the plaintiff that the company had a duty to report the employee's activities to the proper authorities and to take effective internal action to stop the employee's activities, whether by termination or otherwise.

The court also rejected the trial court's analysis of the employer's duty to control the employee while he was acting outside the scope of his employment to prevent him from harming others. The court determined that the employer was "under a duty to exercise reasonable care to stop Employee's activities, specifically his viewing of child pornography, which by its very nature has been deemed by the state and federal lawmakers to constitute a threat to 'others;' those 'others' being the children who are forced to engage in or are unwittingly made the subject of pornographic activities." The court remanded the case for determination of proximate cause.

The analysis. Analyses of *Doe* have resulted in fearful employers wondering how far courts may eventually extend this duty to report employee activities to authorities. While the duty discussed in *Doe* may be new, the case reinforces "dos and don'ts" that already exist:

- DO promulgate an effective technology policy and ensure that all employees are aware of it. While it is not necessary or desirable to have employees feel like "Big Brother" is constantly watching their every move, you do need to ensure that employees are on notice that their workplace communications are subject to monitoring.
- DO enforce your technology policy. Determine in advance what the internal course of action will be if you discover an employee accessing inappropriate websites or the like.
- DON'T have conflicting policies in place. You cannot issue or review your technology policy in a vacuum–ensure that your policies are in sync with each other to avoid confusion and misapplication.
- DON'T assume that a verbal warning will end what could be compulsive, destructive, or even harmful behavior.
- DON'T turn a blind eye to criminal behavior. This is really the baseline rule illustrated by the *Doe* case.

***Helena Oroz** *practices in all areas of employment law and compliance issues. For more information about implementing or enforcing a technology policy for your company, please contact Helena at (216) 696-4441 or hjo@zrlaw.com.*

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ZASHIN&RICH CO.,L.P.A.
55 public square
4th floor
cleveland, ohio 44113
attorneys at law

www.zrlaw.com

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Courts will also consider the amount of employer supervision. The amusement-park-day example likely favors employers because employers rarely have any control or supervisory authority over the amusement park's site. However, the analysis might change if the company rented out an entire park or the particular site where an injury occurred (e.g., a picnic area). Finally, an analysis of whether the event produced "improved employee relationships" will almost always result in employer liability. An employer's very purpose in sponsoring such events is often to improve employee relations.

Perhaps the best advice for an employer planning a summertime social event for employees is–less is more. The less company involvement, the greater the likelihood that a court will not hold an employer liable for an employee injury sustained during a company-sponsored activity.

***Steve Dlott** defends employers in all aspects of workers' compensation law. For more information about this article or any other aspect of workers' compensation law, please contact Steve at (216) 696-4441 or spd@zrlaw.com.*

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receive instant verification of up to ten names and social security numbers per screen; or receive results usually within one business day for uploaded batch files of up to 250,000 names and social security numbers.

The SSNVS may be used only to verify current or former employees and only for wage reporting purposes. Registration is required and may be completed at www.socialsecurity.gov/bso/bsowelcome.htm.

***Lois Gruhin,** a member of the firm's Columbus office, is a former General Counsel for Schottenstein Stores Corporation and has extensive experience in corporate compliance and employment discrimination matters. For more information about SSNVS, Form I-9, or other employment verification issues, please contact Lois at (614) 224-4411 or lag@zrlaw.com.*

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