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ACCESS DENIED: COURT UPHOLDS JURY VERDICT AGAINST EMPLOYER THAT IMPROPERLY ACCESSES EMPLOYEES' MYSPACE PAGES

*By: David R. Vance**

The District of New Jersey upheld a jury verdict against an employer who terminated two former employees after viewing their MySpace pages (www.myspace.com). *See Pietrylo v. Hillstone Restaurant Group*, No. 06-5754, 2009 U.S. Dist. LEXIS 88702, at *1 (D.N.J. Sept. 25, 2009). The employer, Houston's Restaurant, alleged that the employees damaged employee morale and violated the restaurant's "core values" by posting comments and holding chats about the restaurant's management through their MySpace accounts. However, the former employees successfully argued that Houston's Restaurant violated a federal Wiretap Act, a parallel act under New Jersey law, and the federal Stored Communications Act by logging into their MySpace accounts.

Upon learning that the employees held chats and posted comments through MySpace's Spect-Tator (a chat group on myspace.com which is only accessible by invitation and then by password) about Houston's management, the managers requested the employees' password and log-in information. However, the managers failed to receive written or verbal authorization from the employees to access their MySpace accounts.

The jury determined that the managers accessed the employees' password-protected websites five times without authorization. Because no direct evidence of authorization existed, the jury relied on testimony from employees in reaching its decision. One of the employees testified that while she provided her managers with her password and log-in information, she did not authorize them to access her account. The only reason she gave them her account information was because she felt she would get in trouble if she failed to do so.

The jury concluded the managers had the requisite state of mind and that the repeated visits to the website showed their actions were purposeful or intentional. The jury awarded nominal compensatory damages for back pay. The District Court upheld the jury's award of punitive damages because the managers acted maliciously in repeatedly accessing the website.

This case puts employers on notice that they should not access employee websites or personal pages without authorization and even then should be cautious in doing so. In situations where access to an employee's personal website is necessary, the authorization should be explicit.

***David R. Vance** practices in all areas of labor and employment law. For more information about employee privacy or any other labor or employment issue, contact David at 216.696.4441 or drv@zrlaw.com.

THE ROLE OF ECONOMISTS IN REDUCTIONS-IN-FORCE ANALYSIS

*By: Audrius Girnius, PhD Huron Consulting Group**

The economic downturn has hit the U.S. labor market nearly as hard as the stock market over the last two years. The national unemployment rate has reached its highest point since the early 1980s and, according to the Department of Labor's figures, it jumped to 10.2% in October, 2009. See, http://www.bls.gov/news.release/empsit.nr0.htm. A significant factor in the increased unemployment rate is large-scale layoffs – Reductions-in-Force (RIFs). Many large and prominent companies have had to make the tough decision to reduce their workforce, and more reductions are likely to come. This environment is rife with potential for litigation on various discrimination claims, with age discrimination (ADEA) claims particularly common.

An organization considering a RIF can take several simple proactive steps to help reduce its potential litigation risks. An organization should allow for sufficient time in the process for consideration of potential adverse impact, document their decision-making, and work with a statistical expert to determine whether the resulting change in the composition of employees may be evidence of adverse impact or explained by business-related factors.

The main task for a statistical expert is to conduct an analysis to determine whether the terminations will affect disproportionately a protected group. The statistical analysis of potential adverse impact from a RIF might, for example, compare (a) the proportion of older employees among the affected employees with (b) the proportion of older employees in the "at risk" population. The "at risk" population consists only of those employees who were considered for the RIF. For instance, if the RIF were to affect only employees in the IT department, the "at risk" population would be all employees in the IT department. The reason for comparison of the affected employees to the "at risk" population is straightforward. If the selection process is random with regard to age, then the affected employees should be representative of the "at risk" employees. In our example, if 50 percent of IT employees were over the age of 40, one would expect that about 50 percent of the affected employees would be over the age of 40. If a disproportionately high number of the affected employees are over the age of 40, one must perform a statistical test to determine whether this difference is statistically significant. Such statistical evidence may be used to support a claim of age discrimination. The example above focuses on age but there are other categories, such as race or gender, that may be critical to a statistical analysis. There are two important steps in an adverse impact analysis in a RIF, creating an "at-risk" group and conducting a statistical analysis.

Creating an "At-Risk" Group. The first step in a RIF is to identify the correct pool of employees at risk. Without a proper identification, any statistical analysis can yield spurious results. A statistical analysis on a faulty "at risk" grouping can result in a faulty finding of statistically significant adverse impact.

Conducting Statistical Tests. The second important step is to conduct a statistical analysis of the outcome of the RIF. Two alternative tests are frequently used to determine the level of statistical significance. The first is called a chi-squared test and the other is called the Fisher's exact test. The chi-squared test compares the actual number of older employees in the "at risk" group to the expected number and calculates a test statistic. If the corresponding probability value test is less than five percent, the overrepresentation of older employees is considered statistically significant. Statistical tests that show that a particular outcome has less than a five percent chance of resulting from random chance is considered statistically significant.

The Fisher's exact test calculates the probability of each possible outcome which would show a greater overrepresentation of older employees than the proposed RIF. Once all of the probabilities have been calculated, they are summed and if the resulting sum is less than five percent, the

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outcome is considered statistically significant. In essence, this test calculates how many more extreme and over-representative distributions exist. If the particular distribution of older affected workers is extreme enough, this test finds the distribution to be statistically significant. One advantage of the Fisher's exact test is it is appropriate even for small sample sizes. Thus, even if the correct "at risk" groups are small, a valid test of adverse effects is still available.

Notably, both the chi-squared and a Fisher's exact test have only two dimensions: the protected class and whether affected. Other explanatory factors, such as experience, performance, and education that could impact a decision to terminate an employee, are not accounted for in these tests. In instances where such factors can be explanatory, an economist may use a logistic regression. A logistic regression models the decision-making process by including all factors that were used by the decision-makers to determine who was to be chosen for the RIF. As with the two tests described earlier, a logistic regression also calculates the statistical significance of age in the decision-making process so it can be used as empirical evidence in a case of age discrimination.

While conducting a RIF is a difficult and unpleasant process, an economist can assist decision-makers in ensuring that the process is statistically sound and help mitigate potential liability. An economist can assist with creating the correct "at risk" groupings and can conduct a statistical analysis to determine whether an adverse impact has occurred in a particular RIF. The economists at Huron Consulting Group have assisted Zashin & Rich Co., L.P.A with statistical analyses related to employment decisions/lay-offs for numerous clients.

***Audrius Girnius, PhD,** a Director with Huron Consulting Group, specializes in the application of microeconomics, statistics, and econometrics to complex problems in employment and labor litigation. Audrius has developed innovative economic models to analyze a variety of complex issues involving employment and labor and economic damages. If Huron can be of assistance to you, please contact Audrius at 646.520.0068 or agirnius@huronconsultinggroup.com.

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THE ENEMY WITHIN: DEALING WITH DISLOYAL EMPLOYEES

*By: Britt J. Rossiter**

Congress enacted the Computer Fraud and Abuse Act ("CFAA") to reduce the cracking of computer systems and to address computer related crimes. Since its enactment in 1984, employers have attempted to use the CFAA as a mechanism to bring actions against former employees that took or misused the employers' data or confidential information. However, courts are continuing to limit employer's ability to do so by narrowly construing whether an employee's use of a company computer is "unauthorized".

The Ninth Circuit in LVRC Holdings LLC v. Brekka, 581 F.3d 1127 (9th Cir. 2009) recently ruled that whether an employee's use of a work computer is "without authorization" under the CFAA turns on the employer's policies and definitions of acceptable use and not the employee's state of mind. The employee in Brekka emailed corporate documents containing the company's proprietary information to his personal email account. Since the company did not maintain a policy against emailing proprietary information, the Court could not find that the employee engaged in "unauthorized" use of his work computer as defined by the CFAA. Rather, the Court held that the CFAA permits employers to pursue claims against ex-employees that have stolen proprietary information only when the theft violates a clearly defined limit to access of company networks.

The case marks a continuing trend away from allowing employers to use CFAA in trade secret cases against former employees. It basically prohibits those employers without a policy explaining acceptable computer use from pursuing a CFAA claim. Employers, however, can still pursue alternative claims (e.g., breach of a nondisclosure agreement or misappropriation of trade secrets).

In light of the Court's ruling, employers should revisit their data confidentiality and technology use policies. Company data and use and confidentiality agreements should include all potential causes of action – breach of contract, intellectual property infringement, trade secret, computer crime, etc. – so as to best protect the company from disloyal former employees. In order to maintain an action under the CFAA, companies also must clearly define authorized use within their technology policies.

***Britt J. Rossiter** has extensive experience representing employers in litigating and arbitrating workplace disputes in Ohio, California, and throughout the country. For more information about the CFAA or any other labor or employment issue, please contact Britt at 216.696.4441 or bjr@zrlaw.com.

Z & R SHORTS

Speaking Engagements

On January 29, 2010, George Crisci will be presenting Mandatory Bargaining Subjects in Public Sector Collective Bargaining for the ABA Labor & Employment Sections' Committee on State and Local Government Collective Bargaining and Employment Law. For more information go to www.abanet.org.

On February 16, 2010, Steve Dlott will be presenting "How to Defend a Workers' Compensation Claim" for the Medina Safety Council. For more information go to www.medinasafetycouncil.com.

On June 8, 2010, Patrick Watts will be one of the presenters of "Employment Law Alphabet Soup" for the National Business Institute. For more information go to www.nbi-sems.com.

EMPLOYEE RESTRICTED, EMPLOYER CONFLICTED: WHEN DISABLED EMPLOYEES WANT TO RETURN TO WORK

By: Lois A. Gruhin*

In July 2009, the U.S. Equal Employment Opportunity Commission ("EEOC") settled a class action disability lawsuit with an Ohio based company. In that case, the company agreed to pay more than $90,000 and offer jobs to employees it allegedly subjected to discrimination. The EEOC alleged that the company violated the Americans with Disabilities Act ("ADA") by failing to permit disabled employees to return to work without a full-duty, no-restriction doctor's release.

In the U.S. District Court for the Southern District of Ohio, the EEOC argued that disabled employees out on leave should be permitted to return to work regardless of whether they still have some physical restrictions, so long as they are able to perform their jobs. The company, however, maintained a policy requiring these same employees to obtain a full-duty, no-restriction doctor's release prior to returning. The company's policy adversely affected over 80 employees in Ohio and several surrounding states. Laurie Young, an EEOC attorney from the office in which the case was brought said, "Employers should be aware that the most recent amendments to the ADA became effective on January 1 of this year, and those amendments made substantial changes to the ADA as interpreted by the court."

This case reminds employers to check their policies to assure compliance with the Americans with Disabilities Act Amendments Act ("ADAAA"). Additionally, employers must revise those policies that fail to meet the ADAAA's requirements. Lastly, employers must be particularly careful when workers' compensation laws, the Family and Medical Leave Act and the ADA intersect.

***Lois A. 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 the ADA or any other labor or employment issue, please contact Lois at 216.696.4441 or lag@zrlaw.com.

GINA TOOK EFFECT ON NOVEMBER 21, 2009 – NEW EEOC POSTER REQUIRED

*By: Jessica T. Tucci**

Title II of the Genetic Information Nondiscrimination Act ("GINA" or the "Act") grants the Equal Employment Opportunity Commission ("EEOC") the authority to police workplace discrimination based on genetic information. GINA prohibits the use of genetic information when making decisions related to any term, condition or privilege of employment. Further, the Act prohibits employers from requiring, requesting or purchasing genetic information. The Act applies to private employers and state and local government employers with fifteen or more employees. Genetic information includes information resulting from employee or family member genetic testing. Such tests include the analysis of DNA, RNA or chromosomes. Genetic information also includes information regarding a disease or disorder of an employee's family member.

While the Act strictly prohibits the use of genetic information in making employment related decisions, some exceptions exist that allow employers to request or acquire genetic information. For example, an employer does not violate GINA when it inadvertently acquires an employee's medical history or offers health or genetic services as part of a wellness program. Additionally, an employer does not violate GINA if the employee gives prior voluntary informed written consent. However,

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However, GINA does not exempt well intentioned genetic information collections such as collecting DNA to perform a criminal background check. Absent some enumerated exceptions, employers likely violate the Act by using DNA to conduct a background check.

GINA does not directly prohibit harassment, although its prohibiting language is similar to the prohibiting language of Title VII and other equal employment statutes. Therefore, the EEOC predicts an inferred harassment cause of action exists under GINA. At this time, GINA expressly rejects a disparate impact cause of action.

GINA's remedies include reinstatement, hiring, promotion, back pay, injunctive relief, pecuniary and non-pecuniary damages and attorneys' fees. Similar to Title VII, GINA caps compensatory and punitive damages. Finally, punitive damages are not available against federal, state or local government employers.

Immediate compliance with GINA requires employers to post the most recent version of the "Equal Employment Opportunity is the Law" poster or post its supplement. The revised poster and its supplement can be found at http://www.dol.gov/ofccp/regs/compliance/posters/ofccpost.htm. Employers should also revise all stated anti-discrimination policies to include GINA.

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