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Strongly Worded Internet Usage Policy Does Not Allow Employer Access to Privileged E-mails

Many employers believe that a well-drafted computer usage policy entitles them to monitor at will employee e-mails and Internet use from any employer-provided computer. In *National Economic Research Associates, Inc. v. Evans*, however, the Massachusetts Superior Court ruled that even a strongly worded policy may not allow an employer to review e-mails sent to or from an employee's private e-mail account accessed through an employer-provided computer unless the policy includes certain, very detailed disclosures.

During his employment with National Economic Research Associates (NERA), David Evans exchanged e-mails with his private attorney from his personal Yahoo e-mail account. After his departure, NERA hired a computer forensics expert to examine the company laptop that Evans had used. The expert determined that several of Evans's Yahoo e-mails were partially retained on the computer in "screen shots," including exchanges between Evans and his attorney.

In subsequent litigation between NERA and Evans, NERA sought to compel Evans to produce complete copies of the e-mail correspondence that NERA's expert had partially recovered from the laptop. Evans resisted, arguing that the e-mails were privileged attorney-client communications. Relying on its computer use policy, NERA argued that Evans had waived any attorney-client privilege that might apply to the messages because he had used a company computer to correspond with his lawyer. The computer usage policy warned employees that "e-mails deleted in the ordinary course of business may be retrieved . . . . A log may be kept of users' network activities to monitor network usage. This may include logins, Internet sites visited, and electronic mail sent or received."

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Employer Not Required to Provide Impractical Remote Working Arrangement for Disabled Employee

A recent decision from the U.S. Court of Appeals for the First Circuit establishes important limits on an employer's obligation to accommodate handicapped employees who seek to work remotely. In *Mulloy v. Acushnet Company*, the Court affirmed an order granting summary judgment to an employer in a suit alleging disability discrimination in violation of the Americans with Disabilities Act (ADA) and Massachusetts General Laws c. 151B (Chapter 151B). The Court found that the employee's attendance at his assigned job site was an essential function of his job, and the employer was not required to allow him to work remotely from another facility because doing so would fundamentally change the nature of the position.

Acushnet hired Michael Mulloy as an on-site electrical engineer at its golf ball manufacturing plant. Over time, Mulloy developed breathing problems when he came into contact with certain chemicals in the plant, which eventually prevented him from working at the manufacturing site. Mulloy requested a permanent transfer to corporate headquarters and asked that he be allowed to perform his plant job duties remotely through the use of web cameras and on-site assistants. Acushnet denied Mulloy's request and subsequently terminated his employment. Mulloy sued, claiming Acushnet was required to provide the accommodation he had requested as a reasonable accommodation for his respiratory problems. The District Court upheld the employer's decision and Mulloy appealed.

The Appeals Court also ruled in favor of Acushnet, finding that that Mulloy's requested accommodation was unreasonable as a matter of law. In reaching this conclusion, the Court emphasized that an employer's judgment regarding the feasibility of a proposed accommodation is entitled to substantial deference. Relying on testimony from Mulloy's

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The Court ruled in Evans's favor and found that communications with his lawyer through his private, password protected e-mail account were not subject to discovery, even though he had accessed them through a company computer. Although the Court assumed that NERA's policy would allow the Company to review information that Evans had sent through his NERA e-mail account, it viewed messages sent through the Yahoo account differently. The Court held that a reasonable person in Evans's position would not have anticipated that his Yahoo account e-mails would be retained on his company laptop, and Evans, therefore, had not waived any applicable privileges.

The Court went on to clarify that employers who wish to monitor e-mails sent to or from an employee's private account using techniques like those that NERA's expert had employed "must plainly communicate to the employee that: 1) all such e-mails are stored on the hard [drive] of the company's computer in a 'screen shot' temporary file; and 2) the company expressly reserves the right to retrieve those temporary files and read them."

This ruling makes clear that employers must be cautious both in drafting computer usage policies and in specifying the information that may be subject to such policies. If employers anticipate using sophisticated techniques to retrieve computer data, they should ensure that their policies include detailed disclosures regarding the types of information that they may review. Similarly, when employers go to unusual lengths to recover information from company computers, they should consider whether their techniques exceed the scope of their policy (and what employees might reasonably expect) and consult with legal counsel when in doubt.

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supervisors at the plant regarding the duties of his position, the Court found that regular attendance at the manufacturing plant was an essential function of Mulloy's job. For that reason, the Court determined that Mulloy was unable to perform the essential functions of his job with or without reasonable accommodation, and he was not subject to the protections of the ADA or Chapter 151B.

Mulloy also argued that he was entitled to special treatment under Chapter 151B because his respiratory condition, which developed as a result of exposure to chemicals at the plant, was a work-related injury. Under the Massachusetts Workers' Compensation Statute, an employee who suffers an on-the-job injury is deemed to be handicapped for the purposes of Chapter 151B, regardless of the degree of the employee's limitations. The Court rejected Mulloy's alternative argument, holding that whether or not he was handicapped under the law was irrelevant because he was unable to perform the essential functions of his job.

This decision brings some certainty to an issue that has become a hot topic for employers. Requests to work from remote locations, including telecommuting arrangements, are increasingly common. The *Mulloy* case establishes that an employer's obligation to provide such arrangements will be assessed with a focus on the practicality of the proposed arrangement, and employers will not be forced to accede to requests that would remake the employee's position.

Employee's Destruction of Evidence Results in Dismissal of Claim

In *Plasse v. Tyco Electronics Corporation*, the U.S. District Court for the District of Massachusetts dismissed an employee's wrongful termination claim because he committed a "fraud on the court" by destroying evidence relating to the issues in the lawsuit. James Plasse filed suit against his former employer in 2004, claiming that Tyco had fired him for raising internal concerns about the Company's accounting practices. Tyco denied Plasse's allegations and asserted that the Company had fired him for a pattern of misconduct that included inappropriate disclosures of confidential information.

In the middle of the litigation, Tyco asked the Court to dismiss Plasse's claim based on apparent misrepresentations he had made in the course of discovery regarding his educational credentials. Specifically, he had produced conflicting versions of his resume and given deposition testimony regarding those documents that the Court later found to be contradictory and evasive. Rather than dismissing Plasse's claims based on these apparent misrepresentations, the Court authorized Tyco to conduct additional discovery, including a forensic inspection of Plasse's personal computer. Tyco retained experts to analyze the information on Plasse's hard drive, and the experts' analysis revealed that several documents on the computer,

including versions of Plasse's resume and other documents pertaining to his employment with Tyco, had been erased or manipulated. The experts also determined that the internal clock on Plasse's computer had been manipulated, and it was therefore impossible to determine when the documents on the hard drive had been altered or deleted.

Based on the additional information gleaned from Plasse's computer, Tyco renewed its request to dismiss Plasse's claim. The District Court found that Plasse had engaged in "extensive and egregious misconduct." It declined to credit Plasse's explanations of the discrepancies in his deposition testimony or his claim that he lacked the technological sophistication to manipulate the data on his computer. As a penalty for his misconduct, the Court dismissed Plasse's claims against Tyco and ordered him to pay attorneys' fees and costs to the Company.

This case shows that the outcome of an employment-related lawsuit is not always driven by the merits of the parties' respective claims and that a party's conduct during litigation may also substantially affect the outcome of the case. While this decision involved misconduct by a former employee, employers must also be mindful of their own obligation to preserve information that may be relevant to legal proceedings, including claims that have been threatened but not yet filed. This obligation extends both to paper documents and electronic files. Employers with questions about the need to preserve documents and information should consult legal counsel before destroying or altering information that they may later be required to produce.

Recent Changes in MCAD's Procedures

The Boston office of the Massachusetts Commission Against Discrimination (MCAD) recently changed its procedures for investigating charges of employment discrimination. The MCAD is now issuing comprehensive information requests at the outset of each case, requiring respondent employers to produce documents and other information together with their formal responses to charges. Employers must provide copies of positions statements to complainants, but need not provide them with the other information requested by the MCAD. The MCAD's Boston office has also largely discontinued its practice of holding investigative conferences after the parties have made their respective written submissions. MCAD Investigators previously used investigative conferences as a forum for hearing the parties' arguments in support of their positions and often requested additional information about cases after hearing these presentations. While this change in procedure increases the burden on an employer when compiling its initial responses to a charge of discrimination, the change may also decrease the likelihood that the investigator will request supplemental information at a later stage of the case.

Unlike the Boston office, the MCAD's Springfield office continues to maintain two separate investigative units, an Attorney Assisted Unit (AAU) which handles charges in which both parties are represented by counsel and a Pro Se Unit which handles all other charges. The Springfield office's AAU now conducts status conferences at which it determines whether to issue a discovery order. The unit typically relies on the parties' own discovery efforts to compile information about each case. The Pro Se Unit has also moved away from conducting investigative conferences in every case, but has not started to issue requests for information routinely at the outset of investigations. Employers therefore face very different procedural regimes in defending against charges of discrimination, depending on where the charge is filed, and in the case the case of Springfield, on whether all parties are represented by counsel.

Court Upholds Reasonable Physical Requirements for Safety Sensitive Positions

A recent decision of the Massachusetts Supreme Judicial Court (SJC) clarifies that employers may impose reasonable job-related physical requirements as qualifications for safety-sensitive positions. In *Carleton v. Commonwealth*, the Court found that Massachusetts's requirement that firefighters meet certain standards of physical health does not violate state handicap discrimination law.

Christopher Carleton suffered a significant hearing loss, and he had worn hearing aids in both ears since childhood. In April 2001, Carleton applied for a position as a full-time firefighter. He had previously worked as a part-time firefighter and EMT without difficulty, and he had achieved a high score on the Commonwealth's written civil service examination. In conjunction with his application for a full-time firefighter position, Carleton underwent a pre-employment medical examination required under Massachusetts law for all police and firefighters. The medical examination included a

hearing test, and pursuant to the applicable regulations, the examining nurse did not allow Carleton to wear his hearing aids during the test. He failed the medical examination, and the Commonwealth deemed him ineligible for a full-time firefighter position.

Carleton sued, claiming that the Commonwealth's refusal to allow him to take the hearing test with his hearing aids was a violation of Chapter 151B. An expert Carleton retained opined that he could meet the minimum hearing standards with his hearing aids, but that he could not pass the test unassisted. The Superior Court granted summary judgment to the Commonwealth, finding that the ability to hear was an essential function of the full-time firefighter position and that Carleton's request to take the hearing test with his hearing aids would require the Commonwealth to waive that essential function. Carleton appealed.

The SJC also ruled in favor of the Commonwealth after thoroughly reviewing the physical health requirements for firefighters. The Court recounted the process by which the legislature adopted the requirements and concluded that the legislature had rigorously studied and designed the requirements to match closely with the demands of a firefighter's job. As a result of this analysis, the Court concluded that the ability to hear well without technological assistance is an essential function of the position. Applying reasoning slightly different than the Superior Court, the SJC concluded that because Carleton was unable to meet the unassisted hearing requirements, he was not "qualified" for the firefighter position within the meaning of Chapter 151B, and his claim therefore failed.

This decision is encouraging because it recognizes that employers hiring people to perform dangerous or safety-sensitive jobs must be able to impose certain minimum physical health requirements for those positions. While certain aspects of the *Carleton* case are unique to the Commonwealth and other public employers, the reasoning of the case should apply equally to private companies that employ people in dangerous positions. It is important, however, that employers evaluate such physical health requirements to ensure that they are closely tied to the essential functions of the position. Employers should also regularly review physical requirements to ensure that they take into account current working conditions and the latest technology and equipment available in performing safety-sensitive work.

Court Revives Bid for Unpaid Overtime by Treating Claim as Breach of Contract

A recent decision of the Appellate Division of the Massachusetts District Court illustrates what may be a developing trend that threatens the ability of employers to fend off untimely claims. In *Spears v. Miller*, the Court revived the claims of two former employees for unpaid overtime wages even though the limitations period for a statutory overtime pay claim had clearly expired. In reaching this conclusion, the Court found that the employees had alleged sufficient facts to support a contract claim, which carried a longer statute of limitations.

After voluntarily leaving their positions as administrative medical assistants, Ellen Spears and Leslie Gabriel sued their former employer, Crown Medical Group, P.C., for allegedly failing to pay them overtime compensation for time worked in excess of 40 hours per week. They brought suit in January 2006 and claimed that Crown had failed to pay them overtime from approximately 1997 until 2002. The employer successfully moved to dismiss the claims, arguing they were barred by the two-year statute of limitations for overtime claims under Massachusetts General Laws c. 151 (Chapter 151).

On appeal, the plaintiffs argued that their claims were contractual, rather than statutory overtime claims under Chapter 151, and thus a six-year statute of limitations should apply. The Appellate Division agreed. First, the Court found that, unlike some other employment-related statutes, the overtime pay statute is not an employee's exclusive remedy, and, therefore, the plaintiffs may use contractual claims to recover unpaid overtime. Second, the Court found that the plaintiffs clearly were not seeking a statutory remedy under Chapter 151 because they only sought to recover the unpaid overtime, not the additional penalties of treble damages and attorneys' fees available under the statute. Moreover, the Court found that the plaintiffs' simple allegation that the employer "agreed to pay legally mandated overtime" was sufficient to ground an express contract claim.

Spears is the second Massachusetts case this year in which a plaintiff has used a contract theory to avoid a statutory bar. In the June 2006 edition of the *Report*, we discussed *Gasior v. Massachusetts General Hospital*, in which the Massachusetts Supreme Judicial Court held that an employment

discrimination claim could proceed even after the plaintiff had died. In that case, the Court reasoned that the state anti-discrimination statute served as an implied term of the at will employment of the plaintiff with his employer, and found that, like a contract claim, the discrimination claim survived the plaintiff's death. Following the reasoning of *Gasior*, the *Spears* Court suggested that a contractual obligation to pay overtime may be an implied term of an employment relationship without elaborating.

The reasoning in *Spears* and *Gasior* is troublesome for employers. If courts continue to allow employees to circumvent the limitations that apply to statutory claims by recharacterizing their cases as claims for breach of contract, implied or express, employers will find themselves defending lawsuits based on much older events. This puts employers at a disadvantage in compiling evidence to defend themselves because, as time passes, memories fade and documentary evidence may be lost. Therefore, it is more important than ever for employers to ensure that their compensation and other employment-related practices comply with the law to minimize their exposure to claims that could lay dormant for years before an employee files suit.

Petty Slights Fail to Establish Retaliation

A recent decision of the First Circuit clarifies the types of conduct that may give rise to retaliation claims under federal law in the wake of the latest Supreme Court decision on the issue. In *Carmona-Rivera v. Puerto Rico*, the Court clarified that mere inconveniences and petty indignities experienced by an employee who has complained about discrimination may not rise to the level of actionable retaliation.

Ada Carmona-Rivera was a teacher who suffered from ulcerative colitis and chronic hemolytic anemia. As a result of her condition, she required special prosthetic equipment to dispose of bodily waste. In 2000, Carmona-Rivera requested accommodations from the school system for her condition, including a first floor classroom, a private bathroom to maintain her prosthetic device, and a parking space near the school's entrance. The parties later reached an agreement, which included many of the accommodations that Carmona-Rivera had requested. At the start of the 2003-2004 academic year, the school had assigned Carmona-Rivera to a first floor classroom, but it had not yet assigned her a private bathroom or parking space. When the school allegedly failed to meet her renewed demands for accommodations, Carmona-Rivera sued, claiming that the school's delay in providing the accommodations she had requested constituted retaliation for asserting her rights under Title VII and the ADA.

While the case was pending, the Supreme Court decided *Burlington Northern & Santa Fe Railway Co. v. White*. In *White*, the Supreme Court interpreted the retaliation provisions of Title VII quite broadly and held that any action an employer takes toward an employee that would deter a reasonable person from asserting his rights under the statute may constitute actionable retaliation.

The First Circuit reviewed Carmona-Rivera's claim in light of the Supreme Court's newly articulated standard and held that the conduct she attributed to her employer failed to support a retaliation claim. The Court found that the school's slow progress in providing the accommodations it had agreed to extend to Carmona-Rivera merely reflected the sort of delays "inherent in the workings of an educational bureaucracy." The Court analogized these delays to "trivial actions such as 'petty slights, minor annoyances, and simple lack of good manners,'" which would not deter most people from complaining about discriminatory practices in the workplace. The Court also explained that a plaintiff in a retaliation case must produce some evidence to show that the employer's conduct was undertaken for the purpose of retaliating. In this case, the Court found no evidence that the slow progress the plaintiff attributed to the school in providing accommodations to her was motivated by an intent to punish her for asserting her rights.

This decision is a positive one for employers. While the Supreme Court's *White* standard seemed to create a minefield for employers in dealing with employees who have complained of discrimination, the *Carmona-Rivera* case clarifies that employers will not be held liable for retaliation as a result of mere inconveniences, annoyances, or petty slights that a complaining employee may later experience in the workplace.

Failure to Hire Claim Based on Generic Expression of Interest in Employment Fails

In a positive decision for employers, the First Circuit has clarified the standard of proof for cases in which an applicant alleges that an employer declined to hire her in retaliation for complaining about alleged discrimination. In *Velez v. Janssen Ortho, LLC*, the Court held that to establish a retaliatory adverse employment action, a plaintiff must show that she applied and was qualified for a particular vacant position.

In 1989, Janssen Ortho hired Gladden Velez to work in one of its chemical plants. Eight years later, Velez filed a claim against the Company alleging sexual harassment and retaliation. She continued to work for the Company over the next year but lost her job in December 1998 when the Company closed the plant where she worked.

Shortly after she lost her job, Velez sent a resume to the Company requesting that it consider her for a manufacturing supervisor position. After receiving no response, Velez sent another resume, this time applying for a different position. Again, the Company did not respond. Two years later, Velez sent a letter expressing interest in "any position available" that the human resources department considered her qualified to fill. In response to this request, the human resources department sent a letter to Velez indicating that it would not consider rehiring her. Three days later, Janssen Ortho published an advertisement in the local newspaper for two manufacturing process facilitator positions.

Velez then filed a second complaint, alleging that the Company's decision not to hire her was made in retaliation for her previous lawsuit, and, therefore, violated Title VII, the ADA, and Puerto Rico law. The District Court entered summary judgment in favor of Janssen Ortho because it found that Velez failed to prove a *prima facie* case of discrimination. The Court found that she had not engaged in protected activity because her prior lawsuit was objectively unreasonable. Further, the Court stated that even if her activity had been protected, she had no evidence of any causal connection between her lawsuit and the Company's decision not to hire her.

On appeal, the First Circuit affirmed the District Court's grant of summary judgment in the Company's favor. The Court held that to establish an adverse employment action in a retaliatory failure-to-hire case, a plaintiff must demonstrate that (1) she applied for a particular position; (2) the position was vacant; (3) she was qualified for the position; and (4) she was not hired for the position. The Court found that general letters, such as those Velez sent, expressing interest in any available job do not constitute an application and "ordinarily cannot be the predicate for the adverse employment action prong in a retaliatory failure-to-hire case."

By requiring an individual to apply for a specific position, the Court eased the burden on employers to review an applicant's general qualifications for any open position. As a result, employers will not be forced to defend their decisions not to hire an applicant for a position for which she has not specifically applied.

Massachusetts Increases Minimum Wage

In August, the Massachusetts legislature, overriding Governor Romney's veto, adopted a two-step increase in the state minimum wage. Effective January 1, 2007, the Massachusetts minimum wage will increase from $6.75 to $7.50 per hour. As of January 1, 2008, the minimum wage will increase again to $8.00 per hour.

The Massachusetts minimum wage statute also mandates that the state minimum wage be at least $.10 per hour higher than the federal minimum wage. Thus, a substantial increase in the federal minimum wage could push the Massachusetts minimum wage higher yet.

Table of Cases

Carleton v. Commonwealth, __ Mass. __, 2006 WL 350121, (Mass. 2006).
Carmona-Rivera v. Puerto Rico, 464 F.3d 14 (1st Cir. 2006).
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Nat'l Econ. Research Assocs., Inc. v. Evans, 21 Mass.L.Rptr. 337 (Mass. Super. 2006).
Plasse v. Tyco Elec. Corp., 448 F. Supp. 2d 302 (D. Mass. 2006).
Spears v. Miller, 2006 Mass.App.Div. 151 (2006).
Velez v. Janssen Ortho, LLC, 467 F.3d 802 (1st Cir. 2006).

Please watch your e-mail for details on upcoming breakfast briefings on the Massachusetts wage and hour laws (February 2007), recent developments relating to trade secrets and defecting employees (early Spring 2007), emerging employee benefits issues and handling the challenges of medical leaves and reasonable accommodations. If you are not on our mailing list and would like to receive e-mail notifications of upcoming events, please visit www.seyfarth.com/subscribe.

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Boston Office Labor & Employment and Employee Benefits Attorneys

Richard L. Alfred
617-946-4802
ralfred@seyfarth.com

Michael R. Brown
617-946-4907
mrbrown@seyfarth.com

Anthony Califano
617-946-4925
acalifano@seyfarth.com

Ariel D. Cudkowicz
617-946-4884
acudkowicz@seyfarth.com

Lisa J. Damon
617-946-4880
ldamon@seyfarth.com

Brigitte M. Duffy
617-946-4808
bduffy@seyfarth.com

Carla J. Eaton
617-946-4903
ceaton@seyfarth.com

Andrew L. Eisenberg
617-946-4909
aeisenberg@seyfarth.com

Miles Henderson
(617) 946-4868
mhenderson@seyfarth.com

Lynn Kappelman
617-946-4888
lkappelman@seyfarth.com

Daniel B. Klein
617-946-4840
dklein@seyfarth.com

Kristin G. McGurn
617-946-4858
kmcgurn@seyfarth.com

Catherine Meek
(617) 946-4873
cmeek@seyfarth.com

Barry J. Miller
617-946-4806
bmiller@seyfarth.com

Leah Moore
(617) 946-4990
lemoore@seyfarth.com

Katherine E. Perrelli
617-946-4817
kperrelli@seyfarth.com

Krista Green Pratt
617-946-4850
kpratt@seyfarth.com

Jennifer A. Serafyn
617-946-4843
jserafyn@seyfarth.com

Dawn Solowey
617-946-4800
dsolowey@seyfarth.com

Diane M. Soubly
617-946-4899
dsoubly@seyfarth.com

Business Immigration
Salomon Chiquiar-Rabinovich
617-946-4805
schiquiarrabinovich@seyfarth.com

Dyann DelVecchio
617-946-4911
ddelvecchio@seyfarth.com

John F. Quill
617-946-4913
jquill@seyfarth.com

Russell B. Swapp
617-946-4905
rswapp@seyfarth.com

Employee Benefits
Arthur S. Meyers
617-946-4980
asmeyers@seyfarth.com

Laura K. Roos
617-946-4983
lroos@seyfarth.com

Laura D. Sanborn
617-946-4982
lsanborn@seyfarth.com

ATLANTA
One Peachtree Pointe
1545 Peachtree Street, N.E.
Suite 700
Atlanta, GA 30309-2401
404-885-1500
404-892-7056 fax

BOSTON
Two Seaport Lane, Suite 300
Boston, MA 02210-2028
617-946-4800
617-946-4801 fax

CHICAGO
131 South Dearborn Street
Suite 2400
Chicago, IL 60603-5577
312-460-5000
312-460-7000 fax

HOUSTON
700 Louisiana Street
Suite 3700
Houston, TX 77002-2797
713-225-2300
713-225-2340 fax

LOS ANGELES
One Century Plaza, Suite 3300
2029 Century Park East
Los Angeles, CA 90067-3063
310-277-7200
310-201-5219 fax

NEW YORK
1270 Avenue of the Americas
Suite 2500
New York, NY 10020-1801
212-218-5500
212-218-5526 fax

SACRAMENTO
400 Capitol Mall, Suite 2350
Sacramento, CA 95814-4428
916-448-0159
916-558-4839 fax

SAN FRANCISCO
560 Mission Street, Suite 3100
San Francisco, CA 94105-2930
415-397-2823
415-397-8549 fax

WASHINGTON, D.C.
815 Connecticut Avenue, N.W.
Suite 500
Washington, D.C. 20006-4004
202-463-2400
202-828-5393 fax

BRUSSELS
Boulevard du Souverain 280
1160 Brussels, Belgium
(32) (2) 647 60 25
(32) (2) 640 70 71 fax