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New Federal Law Makes it a Crime to "Annoy, Abuse, Threaten or Harass" Over the Internet Without Disclosing Identity

On January 5, 2006, President Bush signed into law a prohibition on anonymous internet postings and electronic communications that "annoy" another person. Specifically, the new statute provides that

> Whoever ... utilizes any device or software that can be used to originate telecommunications or other types of communications that are transmitted, in whole or in part, by the Internet ... without disclosing his identity and with intent to annoy, abuse, threaten, or harass any person ... who receives the communications .... shall be fined under title 18 or imprisoned not more than 2 years or both.

Commentators have suggested that an individual can avoid criminal prosecution by revealing his or her identity before engaging in electronic activities -- including blogging, e-mailing, or posting information on a website -- intended to annoy, abuse, threaten or harass anyone who reads or receives such communications.

Former Employee Can Sue Former Employer for Post-Employment Retaliation in Massachusetts

Dane Donaldson was the Senior Vice President of Operations for Akibia, Inc., a technology support company. After the employment relationship was terminated, Donaldson was offered sixteen weeks of severance pay by Akibia. When Donaldson hired an attorney to investigate whether potential discrimination claims relating to his separation from employment existed, Akibia reduced the length of Donaldson's severance pay from sixteen weeks to nine weeks. Donaldson sued his former employer for post-employment retaliation.

In Donaldson v. Akibia, Inc. (11/23/05), the Massachusetts Superior Court concluded that a former

employee may bring a retaliation claim against a former employer based on the employer's actions after the employment relationship has ended and denied Akibia's motion for summary judgment. The court noted that Akibia's decision to reduce the severance pay closely followed its receipt of a letter from Donaldson's attorney discussing the potential for a discrimination lawsuit against the company. According to the court, the letter raised a factual question for trial as to whether the decision was grounded in a legitimate business reason or motivated by an intent to retaliate against Donaldson because of his threat to sue for discrimination.

Sarbanes-Oxley Whistleblower Protection Does Not Extend to Employees Working for U.S. Subsidiaries Abroad

Ruben Carnero, an Argentinean citizen, worked for a Brazilian subsidiary of Boston Scientific Corporation. When he learned that the company's Latin American officials were allegedly inflating sales figures and creating false invoices, he reported these improprieties and subsequently was terminated. Carnero filed a lawsuit in Massachusetts against Boston Scientific, claiming that the company retaliated against him because of his whistleblowing activities in violation of the Sarbanes-Oxley Act.

The trial court dismissed Carnero's case, ruling that the Sarbanes-Oxley Act did not protect foreign employees working outside of the United States for foreign subsidiaries. In his appeal, Carnero asserted that he was an employee of Boston Scientific because the company supervised him and exercised control over his work in Latin America. Carnero also argued that the whistleblower protection provisions of Sarbanes-Oxley should be given extraterritorial effect so as to allow foreign employees working for subsidiaries of American companies the right to seek relief in American courts.

In Carnero v. Boston Scientific Corp. (1/5/06), the U.S. Court of Appeals for the First Circuit explained that the Carnero's claim would have fallen within Sarbanes-Oxley's whistleblowing protections if his case arisen domestically. However, because the text and legislative history of the Sarbanes-Oxley Act is silent as to its territorial reach, the appeals court ruled that the Act's protections were limited to the territorial jurisdiction of the United States. As a result, the trial court properly dismissed Carnero's whistleblower claim.

Paralegals and Legal Assistants Generally Are Not Exempt Employees under the FLSA

In a recently released Opinion Letter (12/16/05), the U.S. Department of Labor, Wage and Hour Division reiterated that paralegals and legal assistants usually are not exempt from overtime under the Fair Labor Standards Act. Responding to an inquiry about whether the status of paralegals as non-exempt employees changed under the 2004 revisions to the FLSA regulations, the DOL stated that paralegals do not meet the requirements of the professional and administrative exemptions.

As the Department of Labor explained, merely having a college degree does not render a paralegal an employee who is employed in a bona fide professional capacity under the FLSA regulations. While some two and four-year colleges offer paralegal certification classes, no minimum formal education or training requirements must be completed before a person can assume the title "paralegal." Because an advanced specialized academic degree is not a prerequisite for paralegals, they generally do not qualify for the professional exemption.

Paralegals may qualify for the professional exemption when they possess an advanced specialized degree in a professional field and apply the knowledge gained from their degree to perform their primary duties.

For example, a paralegal with a master's degree in business administration may qualify for an FLSA exemption if he or she primarily performs expert work in the business field. However, a paralegal with an MBA will not fall within the professional exemption if he or she performs conventional paralegal duties and not tasks specifically related to the MBA.

The Department of Labor also explained that paralegals typically do not qualify as bona fide administrative employees under the FLSA regulations because a paralegal's duties do not involve the exercise of discretion and independent judgment regarding legal matters.

Employer Must Pay Overtime to Employee for Attendance at Mandatory Counseling Sessions

Kari Sehie was a police dispatcher with the City of Aurora in Illinois who took a leave of absence due to a work-related injury. The city required her to submit a fitness for duty evaluation before she could return to work. Sehie's physician reported that she was fit for duty, but recommended that she undergo weekly psychotherapy sessions as a condition of continuing her job. The city refused to allow Sehie to continue seeing her therapist and instead recommended a new therapist for her. Sehie traveled two hours round trip to attend 16 hour-long sessions with the city's recommended therapist. At the same time, she worked forty hours or more each week with the city. When the city refused to pay her overtime in connection with her therapy sessions, Sehie sued under the Fair Labor Standards Act, claiming that the city should have compensated her for the counseling sessions and related commute time because they extended her regular workweek beyond 40 hours.

In Sehie v. City of Aurora (12/27/05), the U.S. Court of Appeals for the Seventh Circuit reasoned that, because the counseling sessions were necessarily and primarily for the benefit of the city, Sehie was entitled to compensation under the FLSA. In determining that the therapy inured to the city's benefit, the appeals court was persuaded by the mandatory nature of Sehie's therapy sessions and the city's refusal to allow Sehie to see her own therapist, as well as by the fact that the city paid up to 90 percent of the costs of Sehie's sessions. The appeals court rejected the employer's argument that FLSA regulations prevent employees from receiving compensation for time spent during non-working hours receiving employer-required treatment.

Refusal to Rehire Retiree Did Not Amount to Age Discrimination

George Lee retired as the human resources manager of Rheem Manufacturing. Six years later, after suffering from financial difficulties, he decided to return to work and applied for an open labor administrator position in Rheem's human resources department. Lee openly described his financial problems in the interview and informed the interviewers that he did not wish to take over as human resources manager. In his interview, Lee was asked how long he intended to work if he was re-hired. When Lee, 63, learned that he did not get the job and that the position was awarded to a 39-year old applicant, he sued the company under the Age Discrimination in Employment Act, claiming Rheem's intent to discriminate on the basis of age was demonstrated during the interview.

In Lee v. Rheem Mfg. Co. (12/28/05), the U.S. Court of Appeals for the Eighth Circuit concluded that the interview questions related to "legitimate business concerns" and did not show the company harbored an illegal motive. The appeals court found that Rheem had successfully articulated legitimate, non-discriminatory reasons for its decision not to hire Lee and that Lee had not met his burden of showing that Rheem's reasons indicated a pretext for age discrimination. Specifically, the court concluded that, based on Lee's answers to the interviewers' questions, Rheem reasonably believed Lee was only interested in earning money for a short period of time to recoup his personal financial losses. Lee's short-term goals conflicted with the company's interest in hiring someone who would eventually succeed the present human

resources manager when he retired. The court also concluded that the company genuinely believed that the successful 39-year old candidate, who was chosen from a pool of twelve applicants, was the best qualified because of his significant job-related experience. Accordingly, summary judgment was appropriately granted to the company.

Wal-Mart Ordered to Pay $172 Million for Failing to Provide Lunch Breaks to Employees

On December 22, 2005, a California jury ordered Wal-Mart Stores, Inc. to pay $172 million for denying meal breaks to a certified class involving over 100,000 current and former Wal-Mart employees. The verdict includes $115 million in punitive damages. California law mandates that employees working at least six hours receive a 30-minute lunch break. Under the law, a company must pay workers a full hour's wages for every missed break.

For more information, please contact Stephen Aronson or Erin O'Brien Choquette or phone either of them at 800-826-3579. Visit our Labor, Employment and Benefits website at www.rc.com. To view back issues, visit our searchable archives. If you would like certain information covered in future communications, let us know. We welcome your feedback.