employment brief

Legal Developments Affecting Employers
Murchison & Cumming, LLP Management Advisors

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CONTENTS

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Tweeting for Customers: Company and Employee Battle on Ownership of Social Media Following

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What is the value of an employee's social media presence? Can a company keep a following that the employee built through on-the-job tweets or blogging?

These are two novel questions currently being hashed out in a case which is unfolding in the United States District Court for the Northern District of California, *PhoneDog v. Kravitz*. As more companies implement the use of social media accounts such as blogs, Twitter, YouTube, Google Plus, LinkedIn and Facebook to generate business, and allow individual employees to develop a personal presence through those accounts on behalf of their company, these questions are increasingly relevant. The influence

> **Kravitz contends he opened the Twitter account, personally maintained the account, had the password to the account. . .**

of social media on general brand awareness and the value of large followings can be substantial.

In the *PhoneDog v. Kravitz* case, Noah Kravitz started a Twitter account with the handle "@PhoneDog_Noah," in which he posted tweets in his role as a product reviewer and video blogger for PhoneDog. The company describes itself as an "interactive mobile

news and reviews web source." Kravitz amassed 17,000 followers before he left PhoneDog. He contends that PhoneDog consented to his changing of his Twitter handle to "@noahkravitz," in exchange for posting occasionally on their behalf. Subsequently, Kravitz went to a competitor. PhoneDog then sued Kravitz, alleging that the Twitter followers constitute a customer list and proprietary confidential information, and that Kravitz's retention and use of the Twitter account was equivalent of taking its property and trade secrets. PhoneDog's lawsuit seeks damages of $2.50 a month per follower for a period of eight months, for a total of $340,000.

PhoneDog contends that Kravitz accumulated the followers in the course and scope of his employment, and that the company requests its representatives to maintain Twitter accounts to increase traffic to its website, which generates income from advertisers. PhoneDog alleges that Kravitz has interfered with its access to the followers of the Twitter account, which in turn interferes with its economic relations with its advertisers. Prior to PhoneDog's filing the lawsuit, Kravitz had initiated a claim against PhoneDog for commissions on a share of the advertiser revenue generated by the website.

Earlier this year, the court denied Kravitz's motion to dismiss the lawsuit. After this ruling, Kravitz fired back with an answer and counterclaims against PhoneDog. Kravitz contends he opened the Twitter account, personally maintained the account, had the password to the account, and that PhoneDog has no property rights in the account or its followers. Essentially, the case between PhoneDog and Kravitz hinges on the answer to the following question: Who owns the Twitter account? Are followers the same as a customer list and do their identities constitute confidential information?

The answers to these questions are not likely to come for months or even years. Further, as this case shows, including the company name in the Twitter handle may not be enough to designate the account as company property. The takeaway from this case for employers is to establish from the outset who owns these social media accounts. Employers should include in their social media policies a clause or statement that dictates ownership rights of social media accounts given or used by employees for work. By having in place such a statement or even an agreement with its employees, employers can avoid situations like the one faced by PhoneDog.

Supreme Court Expands Title VII Class Of Litigants: Third Party Retaliation Claims Now a Reality

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Consider the following scenario: sisters Sue and Sally both took jobs at XYZ company after graduating college and have worked in the same office for the past seven years. They eat lunch together most days and are regularly found chatting in the break room. Sue told Sally in confidence about inappropriate comments that her superior had been making to her. After the situation had escalated, Sue filed a sexual harassment charge with the EEOC. Sally supported her sister's decision, but while at work, she did not discuss the matter. She generally completed work timely and efficiently. Six

weeks later, Sally was fired without ever having been given any sort of formal disciplinary notification. Can Sally bring a retaliation claim against XYZ Company under Title VII of the Civil Rights Act?

Under a recent Supreme Court ruling, the answer is yes. In *Thompson v. North American Stainless*, when a man felt that he had been fired after his fiancée initiated a sexual harassment claim against a mutual employer, his "close relation" to his fiancée enabled proper litigant status. *Thompson v. North American Stainless*, 131 S. Ct. 863 (2011). In its opinion in *Thompson*, the United States Supreme Court held that the provisions from the Title VII anti-retaliation statute extend to any individual within the "zone of interests" of the person who engaged in a protected activity. Prior to this decision, only the charging employee could file such a claim against his or her employer.

By using this broad "zone of interests" test, the Supreme Court declined to "identify a fixed class of interests" and offered little instruction for qualifying a third party claimant. The only additional guidepost that the court suggested was that "firing a close family member will almost always meet [the] standard, and inflicting a milder reprisal on a mere acquaintance will almost never do so." *Thompson* at 868. Filling the contours of these classifications is a task left to the lower court justices and judges.

Looking to case law within the last 18 months since the *Thompson* decision came down, it seems that California courts, on both state and federal levels, have yet to be faced with this task. In June 2011, the District Court for the Eastern District of California affirmed *Thompson* when it held that a husband, an employee of the Department of Homeland Security, had proper standing to bring a retaliation claim based in part on his wife's status. She was an attorney representing DHS employees in discrimination claims against the DHS. (*John P. Morgan v. Napolitano* 2011 U.S. Dist. LEXIS 64610). Like in *Thompson*, the court held that the employer's negative action against this plaintiff had been imputed on to the significant other of the targeted employee. The spouse, like a fiancée,

serving as a conduit through which an employer could punish a charging employee, undoubtedly falls within the "zone of interests."

In tandem with this new precedent, retaliation claims continue to make up the largest portion of charges filed with the EEOC. At the end of Fiscal Year 2011, we saw a noticeable .4% increase in the retaliation charges filed with the EEOC. (Charge Statistics FY 1997 through FY 2011, U.S. Equal Employment Opportunity Commission). With the number of retaliation claims on the rise, this area of law presents itself as one that employers should carefully monitor.

As we await further opinions that will narrow the scope of the *Thompson* decision, employers should note that third party retaliation claims from a fiancée or spouse of an aggrieved party are now viable. What remains to be seen is how far beyond those relationships the "zone of interests" will extend. A sister? A best-friend? A girlfriend? Employers will be best suited by becoming aware of any personal relationships that exist between co-workers, and when making termination decisions, seeking consult of legal counsel about potential exposure to third-party claims.

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H.R. TIPS

Policies Your Employee Handbook May Not – But Should – Have

Lactation Accommodation

Employers must provide a reasonable amount of break time to accommodate mothers of infants who wish to express milk, and must provide a place where they can do that.

Workplace Violence Prevention

This policy should inform employees how to deal with direct and indirect threats of violence, and what to do during an incident of violence. The policy should also express accommodation to employees who are victims of domestic violence.

Social Media Code of Conduct

This policy should, among other things, reinforce a company's anti-harassment and anti-bullying policies by prohibiting postings on social media vehicles which adversely affect coworkers or the company's customers.

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