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PORNOGRAPHY IN THE WORKPLACE: WHAT IS THE EMPLOYER'S OBLIGATION?

Does an employer have any obligation to monitor personal use of email? If the employer learns that email is being used for illegal purposes, does the employer have an obligation to do something? These questions were raised in a recent case in New Jersey where an appeals court concluded that an employer who is on notice that one of its employees is using a workplace computer to access pornography, possibly child pornography, has a duty to investigate and take prompt and effective action lest the employee's actions harm an innocent person. *Doe v. XYZ Corp.*, DLL, E-13 (December 27, 2005, Sup Ct. N.J.).

In this case, the (unnamed) defendant company learned that an (unnamed) employee had been accessing pornography sites from his workplace computer. The company took no action. The company later learned that the sites accessed by the employee included child pornography sites. A manager then told the employee to stop these activities and confirmed his directive in an email. Several months later, however, in early June, the manager noticed that the employee had resumed accessing pornographic web sites. He did nothing and left on a business trip, returning on June 21 after the employee had been arrested for child pornography.

The employee was a married man who had taken photographs of his ten-year-old stepdaughter in the nude. The company knew that the employee was stepfather to a young girl. The employee used his office computer to upload pictures of his stepdaughter to a pornographic website.

The plaintiff in this case was the employee's wife, mother of the stepdaughter, who sued on her

daughter's behalf. She sued the Company for negligence, claiming that it should have known what the employee was doing and had a duty to notify authorities about crimes occurring on its property.

The court ruled for the plaintiff. It first found that the Company had the ability to monitor the employee's access to the internet. It then found that no privacy interest of the employee prevented the Company from monitoring the employee's internet use. It noted that the Company email policy stated that all messages sent on company computers were company property and that the company reserved the right to monitor email. Based on these provisions, the court found that the employee had no legitimate expectation of privacy. It then found that the Company was on notice of the employee's activities and, most importantly, that the company was under a duty to act. To argue that the company had no duty to act may seem counterintuitive, but the law did not historically require a bystander to throw a rope to a drowning person, the theory being that there is no legal duty to be a good Samaritan. That rule of law has changed through the years so that in New Jersey today a person has a duty of reasonable care towards another if "the imposition of such a duty satisfies an abiding sense of basic fairness under all of the circumstances in light of considerations of public policy." Relying on the fact that the employee's actions were criminal; that there is a public policy against child pornography and a public policy in favor of exposing crimes; that an employer has a duty to prevent its employees from harming others when acting outside the scope of their employment; and that the harm inflicted was reasonably within the Company's "range of apprehension,"

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the court concluded that the Company had a duty to the plaintiff to take steps to prevent harm against her.

The holding in this case is actually narrow. The case does not hold that companies have an obligation to routinely monitor email; in fact, it suggests that if employees have an expectation of privacy on company email, monitoring may violate privacy rights. It states that if companies learn that company computers might be being used to harm innocent people, the company must promptly investigate and take appropriate action. This case turns on the finding that the employee was accessing child pornography sites, in other words, engaging in activity that was not just prurient but potentially harmful to others. The case also illustrates the pitfalls in an email policy which prohibits all company monitoring of employee email and suggests that such a policy (which is questionable for other reasons) must at least contain exceptions permitting monitoring of personal email in specific circumstances, including circumstances where the company has reason to believe that email is used for illegal purposes or to harm innocent people. Among other things, the case confirms the need for company email policies which, for a variety of reasons, should include provisions negating any employee expectation of privacy.

SUPREME COURT CLARIFIES JURISDICTION AND BURDENS OF PROOF IN DISCRIMINATION CASES

The Supreme Court issued two decisions under Title VII. The first is fascinating to lawyers but likely to confuse anyone who did not circumnavigate three years of law school. That case dealt with the application of Title VII to small employers but, technically, addressed the legal issue of "subject matter jurisdiction." *Arbaugh v. Y & H Corp.*, No. 04-844, 2006 WL 397863 (U.S. Feb. 22, 2006). We'll try to explain

and hopefully clarify this interesting decision.

The plaintiff, Arbaugh, filed a sexual harassment charge against her employer, a restaurant which had less than 15 employees. The case ended with a trial in which the jury awarded damages to Arbaugh for sexual harassment. Title VII defines "employer" as a company with 15 or more employees. After the trial, the company raised for the first time the defense that the court did not have "subject matter jurisdiction" over the case because it employed less than 15 employees. The lower courts, recognizing that dismissal after trial was a waste of time and judicial resources, nonetheless dismissed the case, finding that it had no choice because a decision rendered by a court which lacks subject matter jurisdiction is null and void.

The Supreme Court reversed. The Court drew a distinction between two different defenses – subject matter jurisdiction and failure to state a claim. Subject matter jurisdiction means the jurisdictional power of a court to decide a case. If a court lacks subject matter jurisdiction, then it lacks power to decide the case, and, if it does, its decision, even after trial, is null and void. The "failure to state a claim" defense is used when a defendant claims that even if everything asserted in the complaint were true, the case must be dismissed because those facts don't constitute a legally valid claim. One practical difference between these two defenses is that a subject matter defense is never waived; in other words, it can be raised at any time, even after trial. In contrast, a "failure to state a claim" defense is waived if the defendant does not assert that defense on a timely basis.

Another practical difference between the two defenses relates to the "supplemental" jurisdiction of the federal courts. Under the doctrine of "supplemental" jurisdiction, a federal court which has jurisdiction to hear a federal claim can "supplement" its jurisdiction by deciding related state law claims at the same time. If, however, the court lacks subject matter jurisdiction over the federal claim, it has no

supplemental jurisdiction over the state claim. Under these rules, a federal court which has jurisdiction to hear a discrimination claim under Title VII can simultaneously hear related state law discrimination claims. If that court has jurisdiction over the federal claim, but finds that no discrimination occurred, it can still issue a decision on the related state claims.

The Supreme Court case turned on whether the defense raised by the defendant – that it employed fewer than 15 employees – was a "subject matter jurisdiction" defense or a defense that the complaint did not state a claim because the defendant was not an "employer" as defined in Title VII.

The Court held that the defense was not a "subject matter jurisdiction" defense. It noted that the Federal Judicial Code gives federal courts "jurisdiction" to hear any case that arises under the laws of the United States. Since Title VII is such a law, a federal court has "jurisdiction" to hear that case under the Judicial Code. The fact that Title VII covers only employers with 15 or more employees is, according to the court, not jurisdictional but simply one of the elements that have to be established to support a claim. Because the defense was not jurisdictional, the verdict in this case did not have to be vacated after trial. To the contrary, because it was not jurisdictional, it was waived when not raised before trial on a timely basis. The Court took the occasion to articulate a general rule that when a limitation on a statute's scope (such as the 15 employee requirement) is imposed, that limitation will be deemed "jurisdictional" only if Congress specifically states such an intent.

This case does not affect the underlying rule that Title VII applies only to employers with 15 or more employees. The effect of the case is that if the employer fails to raise that defense on a timely basis, it will be waived. In some cases, an employer with less than 15 employees which is

sued in federal court for discrimination may choose not to raise the defense because it prefers litigating in federal rather than state court. If, however, it prefers state court, that employer will want to raise the 15-employee requirement promptly with EEOC and, if the case somehow ends up in federal court, promptly with the court.

In another decision, the Supreme Court remanded a case for further consideration on two issues. *Ash v. Tyson Foods Inc.*, No. 05-379, 2006 WL 386343 (U.S. Feb 21, 2006). The case involved a refusal to hire two Afro-Americans by a plant manager who had referred to them as "boys." The court of appeals held that the use of "boy" when modified by a racial classification like "black" or "white" might be evidence of discrimination, but that word, standing alone, was not. The Court reversed, holding that although the word boy may not always evidence discrimination, "it does not follow that the term, standing alone, is always benign," and that the speaker's meaning could depend on several factors such as context, inflection, tone of voice, local custom, and historical usage.

The second issue was whether the employer's asserted non-discriminatory justification for its decision was pre-textual. (The ultimate issue in most discrimination cases is whether the employer's asserted justification is true or a pretext for discrimination). The lower court recognized that pretext can be found based on comparing the qualifications of the claimant with those actually hired, but only if the "disparity in qualifications is so apparent as virtually to jump off the page and slap you in the face." Without articulating the precise standard that should apply, the Court rejected the "slap you in the face" criteria and cited other decisions which articulate a lower threshold of proof but still seem to require more than a minimal difference between the qualifications of the rejected employee and those hired, *i.e.*,

pretext can be found if the qualifications of those hired were "clearly superior" to those rejected.

IS "BANNERING" A FORM OF ILLEGAL PICKETING?

In a recent newsletter, we wrote about the legal issues that have arisen from union use of an inflatable rat to protest unfair practices by employers. The legal issue in these cases is whether the inflatable rat is a form of free speech – which would be protected under federal law – or an act of coercion analogous to picketing. An unlawful secondary boycott is committed if a "neutral" employer – meaning one who is not directly involved in a labor dispute (like a customer of the struck company) – is "coerced" during another company's labor dispute. Picketing has traditionally been found to be "coercive" because it is a form of conduct as well as a form of speech. If the inflatable rat is a form of picketing, then the rat cannot be placed at the premises of a neutral company; but if it is a form of free speech and not an act of coercion, then the use of the rat would be lawful. In recent cases, the General Counsel of the NLRB has issued complaints claiming that use of the rat is equivalent to picketing.

In other cases, the General Counsel has taken the concept one step further. In several recent cases, he has sought injunctions on the theory that "bannering" at the premises of neutral employers is the unlawful equivalent of a secondary picket line. In a recent case, *Gold v. Carpenters*, 178 LRRM 2769 (Md. 2005), the union used a 4' x 20' banner in front of a law firm to protest the firm's retention of a non-union contractor. Union members held the banner aloft but did not move it or shout or carry it higher. They also distributed leaflets protesting the firm's hiring of the non-union employer. The leafletting was not challenged because the Supreme Court has ruled that leafletting is a form of free speech. The General Counsel sought a preliminary injunction against the union's "bannering," arguing that it was a form of coercion tantamount to picketing.

The court denied the injunction. It noted that its role was not to decide the case

but simply to determine if the Board had "reasonable cause" for its position. Because this standard is relatively easy to meet, preliminary injunctions are typically granted in NLRB cases. In this case, however, the court, following the recent decisions of six other district courts, found that the Board could not even establish "reasonable cause." The court first noted that the deference ordinarily owed to NLRB complaints is lessened where free speech issues are involved. It then noted that there is no reported case where a court found that a sign, without some other type of conduct, constituted the kind of "coercion" required for a secondary boycott. For the same reason, it rejected the argument that the size of the sign, standing alone, made the use of the sign coercive. Finally, it rejected the argument that the totality of circumstances presented the equivalent of a "physical barrier," noting that in the absence of physical conduct that blocked access or constituted "patrolling," the sign could not be found coercive.

One can only conclude that the Board's attempt to limit "bannering" as a form of picketing seems to be imploding.

RETIREE MEDICAL BENEFITS: CAN THEY BE TERMINATED AFTER RETIREMENT?

Many companies are having difficulty meeting their obligations to provide medical benefits to retired employees. Many have either altered the benefits, eliminated them, or increased employee contributions. A recent case by the court of appeals in Chicago addresses the standards that apply in such cases. *Barnett v. Ameren Corp.*, No. 05-1496, 2006 WL 287402 (7th Cir. Feb. 8, 2006).

The plaintiffs in this case were retired employees receiving medical benefits during their retirement. The case arose when the employer announced a sharp increase in contributions for retired employees. The plaintiff

argued that the collective bargaining agreements that covered them guaranteed their retiree medical benefits, not just for the term of the labor agreement, but for life.

The court began by noting that the ERISA rule, under which pension benefits vest on retirement, does not apply to health care benefits. Whether such benefits vest on retirement depends on the terms of the specific contract. Therefore, unless a contract provides for vesting, the employer is generally free to modify or terminate health care benefits when the contract terminates. The rules of the federal courts are not uniform on this issue. The rule in the Seventh Circuit is that if a collective bargaining agreement is silent on the issue of vesting, the presumption is that the benefits expire with the contract. If, however, the language of the contract is ambiguous, plaintiff can introduce evidence demonstrating that the intent of the parties was to vest benefits on retirement.

In this case, the court ruled for the Company finding that there was no ambiguity in the contract. Nothing in the contract stated that the benefits vest "for life" and, to the contrary, the contract gave the company the right to "take such action as may be necessary to modify and continue [the provisions] for the life of the agreement." Based on this language, the court found that the benefits were valid only for the life of the agreement, and no trial was required on that issue. The court concluded by noting that it was mindful of the difficulties faced by retirees when the cost of their medical benefits increase. However, it also observed that its responsibility was simply to determine whether a legally sufficient contract for lifetime benefits exists. Finding no such agreement, the court ruled for the company.

Not all circuit courts apply the same standards used in the seventh circuit. However, there is general agreement that whether retirement benefits are vested for life is a question of

contract, to be resolved based on principles of contract interpretation.

MILWAUKEE "LABOR PEACE" REGULATION FOUND UNLAWFUL

In Milwaukee County, firms that have contracts with the County to transport elderly and disabled residents must negotiate "labor peace" agreements with any union that wants to organize the employees working on County contracts. The labor peace agreement must include specified provisions, including provisions which prohibit the company from coercing employees in selecting their bargaining representative and requiring an arbitrator to set the terms of the labor contract if the parties cannot agree. The district court upheld this ordinance, which we discussed in an earlier newsletter in which we questioned whether the district court's determination was sustainable. The court of appeals in Chicago has held that it is not, specifically, that it is preempted by the National Labor Relations Act. *Metropolitan Milwaukee Chamber of Commerce v. Milwaukee County*, 431 F. 3d 277 (7th Cir. 2005).

States are prohibited from regulating conduct that is subject to the jurisdiction of the NLRB. If, however, the state is regulating labor relations in order to reduce its cost of services or improve service, then the state's action is not preempted. This rule was articulated by the Supreme Court in the "Boston Harbor" case. *Construction Trades v. Associated Building and Contractors of Massachusetts and Rhode Island*, 507 U.S. 218 (1993). The issue in the Milwaukee labor peace case was whether the agreement was an attempt by the county to regulate labor relations or an attempt to reduce costs and/or improve services provided by the contractors. Judge Posner, an eminent federal judge, found that the labor peace agreement was a "pretext" for regulating labor relations.

Judge Posner noted that, as applied in most companies, the peace agreement would affect all employees, not just those providing services to the County because

the same group of employees was customarily used to transport disabled residents, whether to county facilities or elsewhere. Another reason why the regulation was viewed as an attempt to regulate labor relations was that the county could, in the court's view, limit strikes and work disruptions by contract penalty provisions. This being the case, the regulation was viewed as an attempt to regulate labor relations, rather than an attempt to limit disruptions of service. The court distinguished the *Boston Harbor* case by noting that in that case the regulation required the contractor to sign a pre-hire labor contract. Since such contracts are lawful in the construction industry, the court observed that the state in that case was simply requiring contractors to do something that they themselves could lawfully do under federal labor law. For that reason, there was no basis for inferring that the Boston Harbor ordinance was a pretext for regulation.

The underlying problem with most "labor peace" agreements is that their underlying purpose is to encourage and boost unionization. Whether the court in this case had sufficient basis for reaching that conclusion can certainly be debated. Nonetheless, the court's rationale, if applied elsewhere, will make enforcement of "labor peace" ordinances in other jurisdictions problematic.

THE EMPLOYER'S OBLIGATION TO PAY OR GRANT LEAVE TO EMPLOYEE NEGOTIATORS

Labor law has long recognized that employers are not obligated to pay employees for time spent negotiating and that an employer can insist that negotiations take place during working hours. But what happens when the employer insists on negotiating during work hours and then denies leave for employees who are part of the union's negotiating team? Or grants leave to the employees to negotiate during work

hours but insists that time spent negotiating be deducted from the annual personal leave granted to each employee. This latter question was presented to the District of Columbia Court of Appeals in *Ceridian Corp. v. NLRB*, 435 F.3d 352 (D.C. Cir. 2006).

In this case, the NLRB reiterated its long-standing rule that an employer can demand that negotiations occur during work hours and that the employer is under no obligation to pay employees for negotiating. It found, however, that the right of employees to bargain collectively includes protection against employer action that chills employee participation in the bargaining process. Applying this principle in earlier cases, the Board held that an employer can insist that bargaining occur during working time, but cannot simultaneously deny time off to the employee-negotiators. By similar logic, in this case, the Board found that although the employer was not obligated to pay employees for time spent negotiating, its insistence that negotiating time be charged against personal leave allotment chills and discourages employees from participating in the negotiating process.

The court of appeals upheld the Board's decision, finding that it was entitled to deference as a reasonable and plausible interpretation of the National Labor Relations Act.

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