



Off-Duty Discussion Groups Can Be Off-Limits to Employers

By George A. Reeves, III (Columbia)

There is an inherent tension between an employee's right to privacy and an employer's right to monitor an employee's conduct – especially where the employer believes that the conduct may harm its business or otherwise subject it to liability. This tension has only grown with the rapid expansion of social media and the larger audience with which an employee may share his grievances.

Recently, a federal court in New Jersey addressed this tension. In that case two former restaurant employees were awarded compensatory and punitive damages after managers accessed a private online chat room and used information obtained from the forum to terminate the employees. The court upheld the jury's award and determined that there was enough evidence to find that the managers did not have authority to access the chat room and, therefore, violated federal and state law.

On a positive note, the court's decision provides employers with more guidance on how far they can go when monitoring their employees' off-duty conduct. *Pietrylo v. Hillstone Restaurant Group d/b/a Houston's*.

Talking About "Crap"

Brian Pietrylo was a server at Houston's Hackensack, New Jersey restaurant and, like millions of other people, maintained a MySpace page in his off-duty time. While his page was public, and therefore open for all to see, including his managers, Pietrylo also included a private chat group called the Spec-Tator. The Spec-Tator was a place for Houston's employees to "talk about all the crap/drama/and gossip occurring in [their] workplace, without having to worry about outside eyes prying in. . . ." According to the lawsuit, users of the Spec-Tator used the chat room to discuss wages, union activity, and political activity, among other things.

In order to join the Spec-Tator a user must have received an electronic invitation from Pietrylo which, if accepted, would allow the user to access the chat room using his or her personal email address and a password. Pietrylo invited several coworkers to participate in the Spec-Tator, but did not invite any members of management. He maintained the Spec-Tator in his off-duty time, and no employee accessed the forum using company computers.

One of the employees who was invited to join the Spec-Tator was Karen St. Jean, a greeter at the restaurant. St. Jean later provided her password to two managers who, in turn, provided it to one of the restaurant's regional managers. These managers then accessed the private chat room on multiple occasions with the greeter's password and were horrified at what they found. The site contained sexual remarks about customers and managers, references to violence and illegal drug use, and a copy of a new wine test that was to be given to employees. Houston's terminated Pietrylo and one other employee for posting offensive comments.

But How Did They Get There?

The two employees filed suit against Houston's alleging that the restaurant's managers violated the Stored Communications Act (SCA) and the New Jersey Wiretapping and Electronic Surveillance Act when they accessed the forum. The SCA is a federal statute that expands the protections of the previously enacted Electronic Communications Act, and

creates privacy protections in electronic communications such as emails and discussions in chat rooms. The law makes it an offense to intentionally access stored communications without authorization, or to exceed the scope of one's authorization.

At trial, Houston's argued that the managers did not violate the SCA because they were given a password to access the chat room by a member of the group and, therefore, accessed the site with permission. Thus, Houston's liability ultimately turned on whether or not Ms. St. Jean provided the managers with her access information voluntarily and whether the managers exceeded the scope of their authorization.

In deciding that Houston's violated the SCA, the jury believed that St. Jean did not provide her password voluntarily. The court agreed and upheld the jury's verdict noting that the employee testified that she felt compelled to provide her manager with her password as she felt she would "have gotten in trouble" had she not done so. Furthermore, the court determined that there were reasonable grounds for the jury to determine that the managers intentionally accessed the Spec-Tator despite their knowledge of St. Jean's discomfort with their use of her password.

Lessons To Be Learned

Before you log on to check on your employee's off-duty conduct, keep the following questions in mind:

Is the information private or public? If employees place information on a public forum for all the world to see then it is unlikely that they will be able to later claim that they did not want you to see it. But as the *Pietrylo* case demonstrates, if the employee takes steps to limit access to such information, or to make such information private, gaining access by using someone else's credentials is not only a bad idea, it may be illegal. Furthermore, employees who are disciplined or discharged for their online conduct may have a claim for invasion of privacy if the employee can show that the information that you used was private.

Is the employee's off-duty conduct lawful? Even if you have authorization to access an employee's off-duty conduct, or the employee has posted it on a public page, you cannot necessarily discipline an employee for inappropriate, yet legal, conduct. Many states have laws that prohibit employers from disciplining an employee for engaging in lawful conduct while off-duty, or for engaging in political activity or speech. Your state may be one of them.

Do you have legitimate grounds for disciplining the employee? Most state laws prohibiting discipline for off-duty conduct provide exceptions that allow an employer to discipline or terminate an employee if the employee's off-duty conduct jeopardizes trade secrets, harms the employer's business, creates a material conflict of interest, or exposes the company to potential liability for harassment or discrimination.

Do you have a policy in place to deal with this? Employees need to know what you consider acceptable and unacceptable off-duty conduct. The best way to accomplish this is to implement a well-crafted policy that provides you with a legitimate basis for disciplining your employees and, at the same time, balances the employee's rights with your business needs.

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Staying Out Of The EEOC's Line Of Fire

By C.R. Wright (Atlanta)

The last place you want to see your company listed is on the EEOC's website under "Press Releases." Hospitality employers continue to make this list with reports of high-dollar settlements of discrimination and harassment allegations.

Recent high-profile cases listed on the EEOC website include a \$19 million settlement of a class-action case against Outback Steakhouse; a \$1.26 million settlement of a case against a Bahama Breeze restaurant in Ohio; and a \$500,000 settlement of two cases against Landwin Management, Inc., a hotel operator in California.

The Trouble Out Back

The Outback case charged a pattern of sex discrimination against female employees. The EEOC alleged that females hit a "glass ceiling" at Outback corporate stores because they were denied experience in jobs leading to top management positions.

In addition to the \$19 million settlement fund, Outback agreed to adopt an online application system for management and supervisory positions; to employ a new "Vice President of People;" and to use an outside consultant for two years to analyze data and determine whether females are provided equal opportunities for advancement. Outback must also report its progress to the EEOC every six months.

Gone With The Breeze

The Bahama Breeze lawsuit alleged that restaurant managers used offensive racial slurs, and mimicked and harassed employees. The journey began when one employee came forward to complain to the EEOC about being called offensive names. The EEOC investigated and found other employees who also reported being harassed, but who previously kept silent because they feared retaliation.

In addition to the \$1.26 million settlement, Bahama Breeze entered into a three-year consent decree agreeing to update discrimination and

harassment policies and procedures; provide discrimination and diversity training; and comply with EEOC monitoring and reporting requirements.

Meanwhile Out On The Coast

The Landwin cases involved allegations of national origin discrimination and sexual harassment at the San Gabriel, California Hilton. The management company was accused of hiring less-qualified Chinese workers to displace Latino and Hispanic workers who previously held positions. There were also allegations of a hostile work environment in the housekeeping department, where the supervisor allegedly used offensive language and called female employees offensive names.

In addition to the \$500,000 settlement, Landwin entered into a three-year consent decree to implement hiring and recruiting goals for Hispanic employees; conduct annual discrimination and harassment training; retain an EEO monitor to be named by the EEOC; and provide annual reports to the EEOC.

Aretha Franklin Got It Right

For years we have been warning employers about the need to stay aware of what is going on at all levels within the organization, not just keeping an eye on the big picture. While the examples above all include statements that the company admits no wrongdoing and is only settling to avoid the costs of litigation, it is always possible that the "ounce of prevention" principle could have been used to make the complaints less credible and the cases easier to defend.

The bottom line is that as an employer, you can decide to spend the time and resources up front to police your own organization – or you can wait until you are taken to task by the government, acting on complaints from employees who have stories to tell about inappropriate behavior and how their complaints fell on deaf ears. As the examples above show, those who wait may look forward to many years of reporting obligations and government oversight.

Now it is more important than ever to know what is going on in your own organization. Recently a client asked why all of a sudden every problem seems to turn into a formal complaint or lawsuit. In the current economy and in an environment many expect to favor individual rights, there has been an increase in government agency complaints against employers and a similar increase in employment lawsuits.

You should therefore invest in appropriate resources designed to fit your organization. Regardless of whether you have a Vice President of People, a Director of Human Resources, or use some other title, assign responsibility to someone knowledgeable who is vested with authority and who will command RESPECT:

- R - Regularly update and distribute policies prohibiting discrimination and harassment;
- E - Educate every employee to encourage compliance with those policies;
- S - Set up reporting procedures so that each employee is encouraged to voice concerns internally (and make certain those concerns are dealt with and that there is follow-up);
- P - Pay attention to what is actually going on at every level and in every facility;
- E - Enforce the rules by promptly investigating all concerns and taking appropriate action when warranted;
- C - Consult with experts including legal counsel to spot potential problems and deal with them effectively; and
- T - Train managers and supervisors to understand that discrimination and harassment are "no joking matter!"

By taking a close look at things and fostering open communication within the organization, you can apply these guidelines to make the chances of having expensive or embarrassing litigation much less likely. Let the government pick on someone else.

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