

Labor and Employment Law

You're Not Paranoid if Someone Really Is Watching You: Monitoring Employee Use of Social Media

The use of social media is a rapidly evolving fact of life in today's workplace that is changing the ways people communicate with each other, providing new ways to spend (and waste) time and new avenues for employees to get themselves—and their employers—into trouble. Many employers today are still struggling with basic questions such as whether or not to monitor their employees' use of social media, deciding what types of social media should be monitored and wondering what to do when misuse occurs.

To Monitor or Not to Monitor: That Is the Question

The answer may depend on the type of social media in question. Monitoring employee use of the Internet (e.g., the amount of time spent on non-work-related websites) appears to be a no-brainer. If an employee is spending all day updating his or her status on Facebook, or checking scores on espn.com, the employer will want to know and address it.

Reviewing e-mails and/or text messages sent by employees is a different situation. Monitoring simply to monitor can alienate employees. A more prudent course may involve checking whether an unproductive employee spends too much time sending and receiving personal e-mails. Most employers allow limited use of work e-mail for personal reasons, so it is essential that a monitoring practice be carried out consistently. Monitoring is also appropriate, and often essential, when responding to complaints of harassment in the workplace.

Whether to monitor other electronic media, such as Internet message boards, blogs, and the like, will often depend on the nature of an employer's

business, and whether employees can create problems for the employer by what they say in the forum. Employers are quick to react when they fear their reputation may be sullied, but should consider whether disciplining (or terminating) an employee for something he or she posted online may create a

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much bigger firestorm than the comments initially made by the employee.

We Want to Monitor. What's Next?

Any employer who wishes to monitor employee use of social media, whether it be e-mail, Internet usage, or blog postings, should have a comprehensive policy that is disseminated to all employees. The policy should make clear that the employer will be monitoring communications, what is prohibited and what the consequences will be if the policy is violated. The policy should also explain what communications will be monitored and why. Each employee should be required to sign a stand-alone acknowledgment form, just like many employers use for antiharassment and/or EEO policies.

Both management and staff should be trained on the policy and given an opportunity to ask questions so that their obligations and the company's expectations are understood.

Because social media are constantly changing, an employer's policy should change with it.

What Are the Courts Saying About These Issues?

The courts are playing catch-up in this area. However, more and more courts are weighing in.

In *City of Ontario v. Quon*, the U.S. Supreme Court held that a public employer acted reasonably when it reviewed an employee's private text messages sent and received on a device issued by the employer. The City had issued a policy addressing employee use of work computers, e-mail and the Internet, stating in relevant part that the City "reserves the right to monitor Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." An audit later revealed that Quon's work-related text messages constituted approximately ten percent of his total usage. Many of the remaining were sexually explicit messages between either Quon and his wife or Quon and his mistress. The City determined that Quon had violated Police Department rules.

Quon filed suit, alleging that the City had violated his Fourth Amendment right against unreasonable search and seizure.

The Supreme Court found that the City had not violated Quon's Fourth Amendment rights, primarily because Quon had been put on notice that his text messages were subject to audit and the City had a legitimate purpose behind its investigation of Quon's messages.

In reaching its conclusion that the City had acted reasonably, the Court assessed whether Quon had a reasonable expectation of privacy in his text messages. Finding that he did not, the Court emphasized that Quon had been put on notice that electronic communications on his employer's devices were subject to review, explaining: "[U]nder the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used."

While the employer in *Quon* was a public entity, and was thus limited by the United States Constitution in ways that private employers are not, the Court's opinion provides helpful insight into how it and the lower courts will likely view these issues. Indeed, the Court observed that the employer's search would be "regarded as reasonable and normal in the private-employer context" as well. Accordingly, private employers would be well-served to follow the City's example by adopting a policy and training their employees on its mandates.

In *Stengart v. Loving Care Agency, Inc.*, the New Jersey State Supreme Court looked at many of the same factors as the *Quon* court did in concluding that an employee's right to confidential communications with her attorney was preserved, notwithstanding the employer's recovery of e-mail communications between the employee and her attorney from a laptop that her employer had provided to her.

Many commentators have focused on the attorney-client privilege issue, intrigued, no doubt, by the question of whether an employer can find a way to get around the privilege because the employee was careless enough to send the messages using the employer's computer. The decision is significant beyond the privilege issue because of what it says about employer policies.

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Stengart sued Loving Care Agency, Inc., her former employer, alleging that she had been discriminated against on the basis of her gender, religion and national origin. Loving Care's attorneys arranged a scan of the laptop that the Agency provided to Stengart for work-related purposes, and they recovered several e-mails that Stengart had exchanged with her attorney. These e-mails were sent from Stengart's personal web-based Yahoo e-mail account, but were saved in the laptop's temporary Internet cache.

Like the City of Ontario, Loving Care had a written electronic communications policy. However, the New Jersey State Supreme Court found that the policy was ambiguous and internally inconsistent with respect to what communications were subject to inspection. The court concluded that "[a]s written, the Policy creates ambiguity about whether personal e-mail use is company or private property." Because Stengart used her personal, password-protected account for correspondence with her attorney, and the policy was silent as to the propriety of accessing such an account on a company computer, the court found that Stengart's expectation of privacy was reasonable.

An additional factor in the *Stengart* court's analysis was the nature of the communication at issue. The e-mails were labeled as privileged and confidential by Stengart's attorney. The New Jersey Supreme Court took into consideration the public interest served by preserving the confidential nature of such communications when it concluded that counsel for Loving Care had improperly obtained privileged attorney-client correspondence.

Guidance for Private Employers

The content of the employer's written electronic communications policy was crucial in both the *Quon* and *Stengart* opinions. The City of Ontario's policy was clear and unequivocal, and the Supreme Court found that Quon had adequate notice that his text messages could be reviewed. In contrast, Loving Care's policy had statements that seemed to conflict with one another, leading the New Jersey Supreme Court to the conclusion that the policy provided confusing and unclear notice to employees. While an employer's detailed and clearly articulated policy

statement regarding electronic communications at work is no guarantee that the employer will prevail in the event of litigation, the absence of such a policy is likely to weigh heavily against an employer who accesses private employee communications. Accordingly, employers are advised to distribute a written policy addressing these issues and to obtain a signed acknowledgment of receipt from each of their employees. Employers should consult with counsel prior to taking employment actions based upon information obtained by a review of an employee's electronic communications if it appears that the employee may have expected those communications to be private.

As both the *Quon* and *Stengart* courts emphasized, the role of electronic communications in the workplace is evolving at a rapid pace, as is the body of law addressing those communications. Employers should update their policies and practices on a regular basis, in consultation with counsel, to ensure compliance with recent law. If you need more information or assistance drafting an appropriate policy on employee use of communications technology, please contact **Aaron R. Gelb** (312-609-7844) or **Michael Goettig** (212-407-7781). ■

Employers Relying on Background Checks Face Increased Scrutiny

Laws limiting an employer's use of criminal background checks and credit histories are nothing new. The Fair Credit Reporting Act (FCRA) requires employers conducting background checks to obtain written authorization from the applicant (or employee) and provide disclosures when an adverse action is anticipated based on information obtained from the background check.

State laws add additional restrictions. For example, Illinois prohibits employers from basing employment decisions on an employee's arrest (not conviction) record. In New York, it is illegal to base employment decisions on arrests that did not result in a conviction, though employers may base employment decisions on pending arrests. Moreover, New York employers cannot make adverse hiring or termination decisions based upon a conviction record unless: (i) there is a direct

relationship between one or more of the previous criminal offenses and the specific employment sought or held by the individual; and (ii) the employment would involve an unreasonable risk to property or to the safety or welfare of specific individuals or the general public.

Employers should take note, however, of a number of new laws under consideration that would further restrict how and when employers use criminal and other background information to make employment decisions. Additionally, state and federal agencies appear to be increasing enforcement efforts of existing laws.

EEOC Steps Up Litigation Efforts

The EEOC, while recognizing an employer's right to consider arrest information in certain circumstances, nevertheless maintains that the automatic exclusion of applicants on the basis of arrest or conviction is a violation of Title VII. To this end, the EEOC has launched its "E-RACE" (Eradicating Racism and Colorism in Employment) initiative, which is geared toward eliminating "systematic discrimination." Employers can expect that the EEOC will pay more attention to pre-employment inquiries, especially job application questions regarding convictions, that may have a disparate impact on protected classes of applicants. Two recently filed lawsuits shed some light on the types of claims the Commission will pursue. In Tennessee, the EEOC filed a race discrimination lawsuit against Franks, Inc., accusing the company of refusing to hire two African-American applicants with felony convictions, despite hiring a white applicant with multiple felony convictions a year earlier. In Maryland, the EEOC filed a race and national origin discrimination lawsuit against Freeman Companies, challenging the company's use of criminal background checks and credit histories in making hiring decisions.

Pennsylvania Human Rights Commission Presumes Disparate Impact

The Pennsylvania Human Relations Commission (PHRC) recently issued draft "Policy Guidance" stating that it will, going forward, presume that an employer's policy of excluding individuals from

employment on the basis of a prior criminal conviction has a disparate impact on African-Americans and Hispanics. In order to rebut that presumption, an employer would have to produce conviction data from a narrower geographic area than Pennsylvania or conviction data for the specific crimes being screened by the employer, to show that African-Americans and Hispanics are not convicted at a disproportionate rate in those instances. An employer may also rebut the PHRC's presumption if it can demonstrate that its practice of rejecting some job applicants based on conviction records is justified by a legitimate business necessity, which must be established through "some level of empirical proof" that the applicant was convicted of a crime that poses an "unacceptable level of risk." But even if the employer establishes a business necessity defense, the employer may still prevail on a disparate impact theory if it can demonstrate that the employer could have employed an alternative, less discriminatory policy or procedure to satisfy its legitimate business needs.

Proposed Federal Legislation Concerning Credit Checks

A bill titled the "Equal Employment for All Act," which would amend the FCRA to prohibit the use of consumer credit checks to make adverse employment decisions on current and prospective employees, would allow for the use of credit checks only in the following circumstances: (i) when the consumer applies for, or currently holds, employment that requires national security or Federal Deposit Insurance Corporation clearance; (ii) when the consumer applies for, or currently holds, employment with a state or local government agency that otherwise requires use of a consumer report; (iii) when the consumer applies for, or currently holds, a supervisory, managerial, professional or executive position at a financial institution; or (iv) when otherwise required by law.

On May 12, 2010, the House Subcommittee on Financial Institutions and Consumer Credit held a hearing on the subject of "Use of Credit Information Beyond Learning: Issues and Reform Proposals." The subcommittee's chairman expressed concern that bad credit reports in this economy are linked

more closely to an individual's inability to get a job than to an individual's bad judgment with respect to personal finances. The chairman stated that "the current system facilitates the denial of employment to those who have bad debt, even though bad debt oftentimes results from the denial of employment." The subcommittee also focused on the effect of negative credit reports due to delinquent medical payments, because medical debt does not indicate the same kind of bad decision making that credit card debt implies. The bill was referred to the House Committee on Financial Services, where it is still pending.

State Laws

Not to be outdone by their counterparts in Congress, a number of state legislatures are considering laws that would proscribe an employer's ability to obtain and use information obtained through credit checks. In March 2010, the Illinois House passed the Employee Credit Privacy Act (ECPA), which would prohibit employers from inquiring about or using an employee's or prospective employee's credit history as a basis for hiring, recruitment, discharge, or compensation. Employers would also be prohibited from retaliating or discriminating against a person who opposes a violation of the ECPA or participates in the investigation of the violation. Excluded from the ECPA's coverage would be financial institutions, public safety agencies and government agencies that otherwise require use of the employee's or applicant's credit score. This bill is now being considered in the Illinois Senate.

What Should Employers Do

Employers should review their policies concerning the use of background and credit checks and ensure that they are using them for legitimate business reasons. Employers taking action based on criminal arrests or convictions should ensure they are aware of any state or local laws governing such decisions, and consider whether the conviction (or arrest) is truly related to the individual's job. If you have any questions on this topic, please contact **Laura Sack** (212-407-6960) or **Roy P. Salins** (212-407-6965). ■

Pending "Healthy Workplace" Legislation May Put Bullies and Their New York, New Jersey and Illinois Employers at Risk

Federal and state EEO laws generally do not protect employees from bullying unless the bullying is based on a legally protected personal characteristic, such as race, age or gender. But that may soon change, and employers need to take note. New York, New Jersey and Illinois are contemplating the passage of Healthy Workplace Bills which, if passed, will establish a civil cause of action for employees who are subjected to an abusive work environment—*without regard to whether the conduct is based on a protected characteristic*. To date, 17 states have introduced legislation that would outlaw bullying in the workplace.

Provisions of the "Healthy Workplace" Bills

The pending bills in New York, New Jersey and Illinois are substantively similar. The bills seek to maintain a "healthy" working environment by punishing employees whose "abusive conduct" creates an "abusive work environment." This punishment would also extend to employers when an employee puts them on notice that he or she has been subjected to abusive conduct that is so severe that it has caused him or her physical or psychological harm, and the employer thereafter fails to eliminate the abusive conduct. The bills seek to put an end to bullying in the workplace by punishing malicious conduct against an employee perpetrated by an employer or another employee in the workplace that a reasonable person would find to be "hostile, offensive, and unrelated to the employer's legitimate business interests." Verbal abuse, such as the use of derogatory remarks, insults and epithets that a reasonable person would find threatening, intimidating or humiliating, or the gratuitous sabotage or undermining of an employee's work performance is prohibited. Retaliation against a complaining employee would also be forbidden.

With limited exceptions, employers of all sizes, including small businesses, could be subject to liability for an abusive work environment created by

a bully if they are made aware of abusive conduct and fail to correct it. Employees would be entitled to lost wages and benefits, medical expenses, compensation for emotional distress, punitive damages and attorney fees if successful. Employer liability for emotional distress damages, however, would be capped at \$25,000, and the employer would not be liable for punitive damages where the employer has taken no adverse employment action against the complaining employee. An aggrieved employee's recourse against the bully would include the same damages, but damages are not capped against individual defendants.

Problems with the "Healthy Workplace" Bills

The text of the proposed bills raises significant concerns. They are extremely broad in scope and not very instructive. First and foremost, the bills would foster a civil cause of action free-for-all. A potential plaintiff need not meet any initial requirements for filing a lawsuit other than claiming he or she was subjected to bullying that, in their view, created an "abusive work environment" that remained uncorrected by the employer even after notification. Further, the definition of "abusive conduct" uses the difficult-to-define "reasonable person" standard for gauging whether conduct is offensive. It will be extremely difficult for an employer to determine what conduct is acceptable and what conduct violates the law, and to measure the "reasonable person" standard itself. What one employee finds offensive or abusive will likely differ greatly from what another employee finds offensive or abusive. What is an employer to make of an employee it views as overly sensitive? An employer, under the current definition of "abusive work environment," might be faced with a lawsuit because a so-called "bully" made a comment that might be seen as harmless by most employees. The subjective nature of what a person finds offensive or abusive would surely lead to an overwhelming number of complaints if the bills are passed.

Employer Proactivity Required

Under the Healthy Workplace Bills, an aggrieved employee's only recourse will be to file a civil

lawsuit. Employers can therefore anticipate an increase in employment litigation if/when the legislation is enacted. While there is no timeline for the potential passage of the bills at this time, it would be wise for employers to consider the following steps to prevent bullying in the workplace:

- Reexamine personnel policies and ensure that bullying is prohibited by those policies, that the policies instruct employees as to how to report workplace misconduct, and that the policies are effectively communicated to all employees.
- Train supervisors not to engage in bullying or abusive conduct themselves, and to take action in response to co-worker abuse they observe or of which they are otherwise aware.
- Promptly and thoroughly investigate claims of bullying, and take corrective action where appropriate to ensure that any abusive conduct is not repeated.

Vedder Price will keep you updated as to the progress of the pending "Healthy Workplace" legislation, and can assist you in taking proactive steps to avoid liability in the event anti-bullying legislation becomes a reality. If you have any questions about the proposed anti-bullying legislation and its implications, or would like to schedule a policy review or training session, please contact **Alan M. Koral** (212-407-7750) or **Valerie J. Bluth** (212-407-7739). ■

Watch What You Delete: Employers Must Act to Preserve Documents and Electronically Stored Information Earlier Than They Might Think

A recent federal court decision in Illinois serves as a reminder that employers who fail to promptly and properly preserve potentially relevant documents and electronically stored information (ESI) run the risk of significant court-imposed sanctions.

In *Jones v. Bremen High School District 228* (N.D. Ill. May 25, 2010), the court sanctioned the

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defendant employer for its failure to preserve e-mails after receiving notice of potential litigation. Victoria Jones, a former employee, filed an EEOC Charge in October 2007, and then a lawsuit in June 2008. While the School District promptly told involved managers to cull out documents and e-mails that they believed were relevant to the claims, it never provided guidance as to what might be “relevant” and waited until October 2008 to issue a legal hold notice halting the destruction of e-mails that employees otherwise were permitted to permanently delete. Jones moved for sanctions after learning that relevant e-mails were likely destroyed before the hold notice was issued in October 2008.

In deciding to impose sanctions against the School District, the court considered when the employer’s duty to preserve arose, whether that duty was breached, how the plaintiff was harmed and if the breach was caused by willfulness, bad faith or fault. The court found as follows:

- **Duty to Preserve:** The duty to preserve documents and ESI arises when the employer reasonably anticipates litigation—such as when an EEOC Charge is received—and requires the employer to preserve evidence that is within its control and that it reasonably knows to be or can foresee might be material to the claims.
- **Breach of Duty:** While an employer’s failure to issue a legal hold notice is not per se evidence of a breach, the employer *must* take some affirmative steps to preserve potentially relevant materials when the duty to do so arises.
- **Harm:** The court found that employees—particularly those with an interest in the litigation (such as the manager of the plaintiff)—were not qualified to judge which documents were relevant to the suit on their own, and, because there was a “distinct possibility” that e-mails relevant to the case were destroyed by employees, the plaintiff was harmed.
- **Level of Fault:** The court found that the School District’s conduct was grossly negligent, and

therefore reckless, because it relied on the employees implicated in the Charge and the suit to select the documents they felt were relevant.

Jones serves as a reminder that electronic discovery presents a number of pitfalls for employers who take lightly their obligations to identify and preserve relevant documents and ESI. To protect their interests, employers should develop a preservation procedure, which should be activated promptly after notice of potential litigation is received. That procedure must involve: (i) identifying all managerial employees who might have information or documents relevant to potential litigation; (ii) providing written guidance to those individuals, with the assistance of counsel, concerning what might be relevant and should be preserved; and (iii) taking steps to suspend the automatic deletion of (and to preserve) e-mails sent or received by those individuals. Smaller employers are not exempt from preservation obligations because of their size. This is particularly true where well-drafted and promptly distributed hold notices—which can be easily implemented and followed up on by the employer—provide the basic means to preserve documents and e-mails and to protect relevant information. This truly is an area where an ounce of prevention can be well worth a pound of cure.

If you have any questions about this article or need assistance drafting appropriate notices, please contact **Thomas M. Wilde** (312-609-7821) or **Elizabeth N. Hall** (312-609-7795). ■

U.S. Department of Labor Interprets Family and Medical Leave Act to Cover Non-traditional Families

The U.S. Department of Labor (DOL) recently issued an Administrator’s Interpretation clarifying the definition of “son or daughter” in the Family and Medical Leave Act (FMLA). As a result, employees who do not have a biological or legal relationship with a child may yet qualify under the FMLA to take leave for the birth of or bonding with a child, or to care for a child with a serious health condition. The DOL made clear that its Interpretation is intended to

reflect “the reality that many children in the United States do not live in traditional ‘nuclear’ families with their biological father and mother.”

According to the DOL, an employee who intends to assume the responsibilities of a parent need provide only day-to-day care or financial support to a child to be entitled to FMLA leave. While employers may require the employee to provide reasonable documentation of the family relationship, a simple statement from the employee asserting that the requisite family relationship exists is sufficient.

The Administrator’s Interpretation applies to: (i) an employee who provides day-to-day care for an unmarried partner’s child, but does not financially support the child; (ii) an employee who will share equally in the raising of a child with that child’s biological parent; (iii) an employee who will share equally in the raising of an adopted child with a same-sex partner, but does not have legal guardianship of the child; (iv) an aunt who assumes day-to-day care for a child after a parent is called to active military duty; and (v) a grandparent who assumes care for a child whose parent becomes incapacitated. This list is by no means exhaustive. In contrast, an employee who cares for a child while his or her parents are on vacation would not qualify for FMLA leave.

The DOL also made clear that although a child may have both a biological mother and father, it does not preclude an employee who lacks a biological relationship from qualifying for FMLA leave. Thus, where a child’s parents divorce and each remarries, all four adults have equal rights to FMLA leave to care for the child.

If challenged by an employer in court, this Administrator’s Interpretation will likely be granted some level of deference, which will be difficult to overcome unless the Interpretation is inconsistent with the statute/regulations or a prior DOL interpretation. Furthermore, until its ruling is modified or rejected by the courts, the DOL will no doubt enforce the edicts of this Interpretation if an employee files a complaint directly with the agency. Those employers who prefer to avoid litigation and follow the dictates of the DOL should modify their FMLA policies as well as their internal procedures for handling FMLA leave requests.

If you have any questions about this article, or the FMLA in general, please contact **Thomas G. Hancuch** (312-609-7824) or **Megan J. Crowhurst** (312-609-7622). ■

Reasonable Accommodation Obligations Clarified for Employers Attempting to Reassign Disabled Employees

Employers now understand, following the passage of the ADA Amendments Act, that the focus in disability discrimination cases is shifting away from whether the plaintiff was a “covered employee” as defined by the ADA, to whether the employer treated the employee differently because of his or her disability, or failed to provide the employee with a reasonable accommodation. As such, it is essential that employers have both a well-written, easily understood Reasonable Accommodation Policy and a process in place to ensure that the individuals responsible for ADA compliance engage in the “interactive process” when an accommodation is requested. Accommodation in his or her current position is always the preferred outcome, but when this is not possible, employers should explore reassignment to a different position as the next option. A recent decision from the Tenth Circuit U.S. Court of Appeals (Colorado, Kansas, New Mexico, Oklahoma, Wyoming and Utah) provides some useful guidance regarding the positions an employer should consider when the disabled employee cannot remain in his or her original job.

In *Duvall v. Georgia-Pacific Consumer Products*, the Tenth Circuit affirmed a district court ruling that positions held by temporary employees were not “vacant” under the meaning of the (ADA) when the positions were also unavailable to similarly situated non-disabled employees. The Tenth Circuit had previously held that when a disabled employee could be accommodated by reassignment to a vacant position, the employer must do more than consider the disabled employee alongside other applicants; “it must offer the employee the vacant position.” *Smith v. Midland Brake, Inc.*, 180 F.3d 1154, 1167 (10th Cir. 1999). Left unanswered, until

now, was the question of when a position is considered vacant.

Duvall, who suffered from cystic fibrosis, spent seven years in the shipping department of Georgia-Pacific's Muskogee Paper Mill. When the company decided to outsource the shipping function, Duvall was transferred to a different—and dustier—department, adversely affecting his health. As an accommodation, Duvall sought reassignment to his previous position in the shipping department, where the air quality was better and in which he was medically able to work. His request was denied because his former position, like the others in that department, had been filled with temporary employees, pending completion of the outsourcing initiative. Similarly, Duvall's subsequent request to be moved to the storeroom was denied because Georgia-Pacific was staffing that area with temporary employees while it considered outsourcing that area. Duvall was eventually offered and accepted a position in the storeroom after the company decided to staff the storeroom with Georgia-Pacific employees.

The Tenth Circuit held that Georgia-Pacific did not violate the ADA because a position is “vacant” for purposes of reassigning a disabled employee if the position “would be available for a similarly-situated non-disabled employee to apply for and obtain.” Because Georgia-Pacific's business plan involved using temporary employees to fill positions during times of transition and forthcoming or possible outsourcing, and because Georgia-Pacific did not allow other Georgia-Pacific employees to fill the positions in the shipping department or storeroom, the positions were not “vacant.” They were therefore unavailable to Duvall as reassignment options under the ADA.

This ruling does not represent an across-the-board determination that positions held by temporary employees will not be considered vacant and available for reassignment of a disabled employee under the ADA. One open question, for example, involves what will happen when employers use employment agencies to place temporary employees in a temp-to-hire situation, and whether those positions would be considered vacant under the ADA. Plus, it remains to be seen how other

courts outside the Tenth Circuit will rule on this issue.

Employers should continue to use caution when evaluating employees for reassignment, once it is determined that they can no longer perform their regular jobs. While the *Duvall* decision provides some clarity whenever you are faced with an ADA accommodation request, it is essential to evaluate the employee as an individual, as opposed to assuming a certain outcome based on his or her condition, and to make a good-faith effort to identify a reasonable accommodation, documenting your efforts along the way. Nuance abounds in this area, and you will typically be well-served by consulting outside expertise—vocational, medical, and legal—to help you do all that the ADA requires of employers today.

If you have any questions about this article, or the accommodation process in general, please call **Amy L. Bess** (202-312-3361) or **Sadina M. Boik** (202-312-3363). If you are interested in developing a standardized Reasonable Accommodation Request form to track such requests and the way in which your company responds to them, please feel free to call **Aaron R. Gelb** (312-609-7844). ■

Second Circuit Weighs in on Obesity as a Disability

In an important new decision arising from an overweight person's claims of disability discrimination, the Second Circuit U.S. Court of Appeals has concluded that there is no individual liability for retaliation under the Americans with Disabilities Act (ADA). *Spiegel v. Schulmann*, No. 06-5914 (2d Cir. May 6, 2010). The Second Circuit also confirmed in *Spiegel* that excessive weight, standing alone, does not constitute a protected disability under the New York State Human Rights Law (NYSHRL), but the court left open the possibility that obesity may nonetheless fall within the broader definition of “disability” found in the New York City Human Rights Law (NYCHRL).

Plaintiff Elliott Spiegel filed a lawsuit in which he claimed that his employment as a karate instructor

by the Tiger Schulmann Karate School was terminated because of his weight, in violation of the ADA, the NYSHRL and the NYCHRL. The district court granted the defendants' motion for summary judgment and dismissed the complaint in its entirety. The court found that Spiegel could not sustain a claim under the ADA because, under that statute, "obesity alone is not a physical impairment unless it results from a physiological disorder" of the sort described in the relevant section of the Code of Federal Regulations, and Spiegel had not produced any admissible evidence that his weight was the result of a recognized medical condition. The court also dismissed Spiegel's claim under the NYSHRL for essentially the same reason, citing a decision by New York State's highest court interpreting the law and holding that "weight, in and of itself, does not constitute a disability for discrimination qualification purposes," but plaintiffs who are "medically incapable of meeting . . . weight requirements due to some cognizable medical condition" may be disabled. The district court also dismissed Spiegel's NYCHRL claim while noting the possibility that he actually might be disabled under that statute's broader definition of disability. The district court found that Spiegel had introduced no admissible evidence that the defendants' stated reasons for dismissing him were merely a pretext for disability discrimination.

On appeal, the Second Circuit held that Spiegel's ADA claim had been properly dismissed, because there can be no individual liability for retaliation under the ADA; the court did not reach the issue of whether excessive weight, standing alone, may constitute a protected disability under the ADA. The court also affirmed the dismissal of Spiegel's claim under the NYSHRL because "New York courts have determined that, under the NYSHRL, 'weight, in and of itself, does not constitute a disability" Thus, only if he were medically incapable of losing weight might Spiegel have qualified as disabled under the NYSHRL. And while Spiegel claimed his excessive weight was due to an underlying hormonal imbalance, the Second Circuit found that there was no competent medical evidence to confirm a connection between his medical condition and his inability to lose weight.

However, the Second Circuit reinstated Spiegel's claim under the NYCHRL, finding that his account of certain remarks by his supervisors as to why they discharged him had been improperly excluded as hearsay. The Second Circuit agreed with the district court's speculation that excessive weight, taken alone, might be sufficient to support a claim of discrimination under the NYCHRL, but it noted that, "[a]s a result of the district court's incorrect evidentiary determination, the district court did not address the question whether obesity alone constitutes a disability pursuant to the NYCHRL." It therefore remanded the case to the district court, "so that the district court may consider in the first instance whether obesity is a disability under the NYCHRL." The Second Circuit noted that the definition of disability under the NYCHRL is broader than that provided by the NYSHRL. It did suggest, however, that the district court might appropriately decline to exercise supplemental jurisdiction and dismiss the NYCHRL claim without prejudice, leaving it to New York state courts to answer the question of whether obesity alone constitutes a disability under the NYCHRL.

The *Spiegel* decision is a compelling reminder that the scope of the New York City Human Rights Law is broader than that of its New York State and federal counterparts. Thus, employers should be mindful of the fact that an alleged disability that would not be covered by state or federal law may still constitute a protected disability under the NYCHRL. In particular, while the question of whether obesity constitutes a disability under the NYCHRL awaits a determination by the district court in *Spiegel* (and, ultimately, a definitive decision by New York's state courts), New York City employers should not necessarily reject the notion that an obese employee or applicant may be entitled to legal protection as a disabled individual.

If you are interested in learning more about the Second Circuit's decision and its implications, please contact **Laura Sack** (212-407-6960) or **Daniel C. Green** (212-407-7735). ■

I-9 and E-Verify Updates

In July, the U.S. Department of Homeland Security (DHS) issued two sets of rather inconsistent statements regarding I-9 Compliance. The DHS announced a new “interpretation” of the I-9 Employment Verification regulations which allows employers *four* days, rather than the previous limit of three days, for completion of the Form I-9 after the start of employment for new hires. For those employers who use E-Verify, the same four-day deadline will apply. While the announcement was phrased as a clarification of existing policy, it represents a surprising new interpretation of a rule in place for over 20 years.

Meanwhile, upon issuing the final rule on I-9 electronic storage, the DHS reiterated the three-day requirement. On August 22, 2010, final regulations will go into effect regarding how employers may use electronic systems to complete and store their I-9 Forms. The principal changes will be as follows:

- Employers must complete Section 2 of the Form I-9 within three business (not calendar) days.*
- Employers may use paper, electronic systems, or a combination of paper and electronic systems.
- Employers may change electronic storage systems as long as the systems meet the performance requirements of the regulations.
- The audit record-keeping system has been modified.

* In light of July’s DHS guidance regarding the change from the three-day rule to a four-day rule, there remains confusion as to how the DHS will implement the new regulation concerning electronic storage. Vedder Price will continue to keep you updated on these issues.

Recent Vedder Price Accomplishments

- **Thomas G. Abram** and **Joseph K. Mulherin** won summary judgment from the U.S. District Court for the Southern District of Texas in two collective actions on the named plaintiffs’ Fair Labor Standards Act commute time and off-the-clock claims. The court denied as moot the plaintiffs’ motion for certification of a nationwide collective action. The case is on appeal before the Fifth Circuit.

- **Neal I. Korval** and **Daniel C. Green** obtained voluntary dismissal of an ERISA lawsuit in the Southern District of New York on behalf of a national professional services firm.
- **Neal I. Korval** and **Daniel C. Green** also achieved voluntary dismissal of a lawsuit in the Eastern District of New York alleging violations of the Americans with Disabilities Act, Title VII and the New York State Human Rights Law on behalf of a regional healthcare provider.
- **Aaron R. Gelb** and **Mark L. Stolzenburg** obtained the voluntary dismissal, after filing summary judgment, of an age discrimination and intentional infliction of emotional distress lawsuit in the Northern District of Indiana on behalf of a large candy manufacturer.
- **Aaron R. Gelb**, **Joseph K. Mulherin**, and **Mark L. Stolzenburg** prevailed on a motion to vacate a jury verdict in an FMLA retaliation case, obtaining judgment in the company’s favor. The matter is presently on appeal in the D.C. Circuit.
- **Charles B. Wolf** and **Patrick W. Spangler** obtained the dismissal of an amended complaint brought on behalf of a putative class of over 15,000 retired and active employees of a public transit agency. The complaint alleged violations of the U.S. and Illinois Constitutions and various state law theories of recovery related to changes in eligibility and contribution requirements for retiree health care benefits.
- **Laura Sack** designed and delivered a supervisory harassment training program for a multi-state employer.

Vedder Price is a founding member of the Employment Law Alliance—a network of more than 3,000 employment and labor lawyers “counseling and representing employers worldwide.” Membership provides Vedder Price and its clients with network access to leading employment and labor counsel in all 50 states and over 100 countries around the world.

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About Vedder Price

Vedder Price P.C. is a national business-oriented law firm with more than 250 attorneys in Chicago, New York City and Washington, D.C. The firm combines broad, diversified legal experience with particular strengths in labor and employment law and litigation, employee benefits and executive compensation law, occupational safety and health, general litigation, corporate and business law, commercial finance, financial institutions, environmental law, securities, investment management, tax, real estate, intellectual property, estate planning and administration, health-care, trade and professional association, and not-for-profit law.

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