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TO TELL OR NOT TO TELL:

PRIVACY RIGHTS OF EMPLOYEES

By Fred Fenster

In today's litigious society, employers are constantly being sued for wrongfully disclosing personal information pertaining to their employees.

Understandably, employers are prohibited from "misusing" personal information obtained about employees when making employment, promotion or termination decisions with respect to that individual. For example, if an employee releases personal health information to an employer in order to receive health or disability benefits, that personal information cannot be used later by the employer when deciding whether that employee should be promoted or terminated.

In addition, California courts have routinely held that an employer is the "custodian" of an employee's confidential information, and accordingly has a duty to protect that information against unauthorized disclosure to third parties.

This obligation often creates controversy for employers when they are asked by third parties to disclose arguably confidential information concerning an employee's performance. As a general rule, employers should limit disclosure to confirming the dates of employment. Otherwise, a negative evaluation may lead to a lawsuit by the employee while a positive performance review, if untrue, may precipitate litigation by the new employer.

The protection given to employees extends to information

regarding claims or complaints made by or against them during their employment. Employers often become privy to such private or confidential communications through voluntary disclosure by employees, who report information in reliance on the understanding that it will remain confidential even after the employment relationship has been severed.

The issue of disclosure thus becomes even more troublesome when an employer is requested to disclose information or documentation in connection with a lawsuit. In that regard, courts have denied a litigant's right to obtain the personnel file of other employees absent a showing by the complaining party

that a compelling reason exists for such disclosure.

Even when the litigant requests production of his or her own personnel file, courts have limited the disclosure of information by not permitting the employer to reveal the names of the individuals who have communicated information contained in the files concerning the employee's qualifications for employment, promotion, additional compensation, bonuses or termination.

To protect the employer from becoming embroiled in costly lawsuits, employers should obtain the written consent of the employee to disclose specific information in specified circumstances. The consent can be contained in the employment application, as part of the acknowledgment of receipt of an employee handbook or in a separate document. For recommendations on how to best handle this situation for your company or client, please call Fred Fenster.

Fred is a trial attorney with over 28 years of experience representing notable sports figures as well as a multitude of other clients in complex business disputes. He may be reached at (310) 286-1700 or at ffenster@rutterhobbs.com.



NOTES FROM CYBERSPACE

Anonymous Strikes Back

By: Sam Poss

A prior article in this column about the *Raytheon v. John Does* case considered the spate of lawsuits against unknown persons who anonymously criticized companies on Internet message boards. Raytheon, like many other objects of anonymous critics, sued the John Does, subpoenaed the Internet service providers (“ISPs”) to identify the critics and, once the identities were discovered, dropped the suit. Electronic Frontier Foundation, ACLU, Public Citizen and other privacy advocates and attorneys have sought protections against suits whose real goal is to intimidate and silence critics. Recent cases suggest a possible trend toward greater balance between the competing interests of anonymous speech and its aggrieved objects.

In an interesting turnabout, an anonymous message board poster using the cybername “Aquacool_2000” sued Yahoo after Yahoo identified Aquacool in response to a “John Doe” subpoena from Aquacool’s employer.

Following Aquacool’s identification, his employer fired him, divested his stock and sued for defamation and breach of confidentiality. Aquacool’s suit claimed violation of constitutional privacy rights and breach of contract and sought to enjoin the future release of private information without prior notice to the John Does, in addition to compensatory and punitive damages. The Aquacool/Yahoo suit was settled out of court. Although a confidentiality agreement bars the parties and lawyers from discussing the settlement, Yahoo apparently has reversed its policy regarding subpoenaed personal information and now provides pre-disclosure notice to the John Does. It appears that virtually every major ISP now has a similar policy, which gives individuals an opportunity to seek preservation of their anonymity.

Is there any legitimate basis for protecting the anonymity of those who allegedly would perpetuate abuses such as cybersmear or other fraudulent, malicious or actionable conduct? Perhaps, the answer is found in a recent statement of the United States Supreme Court:

“[I]n general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”

On July 11, 2001, in possibly the first appellate decision addressing the anonymous posting issue, a New Jersey appellate court specified a procedure to balance the First Amendment right of anonymous speech against the target’s right to protect its interests and reputation. The *Dendrite International, Inc. v. John Does* case requires the plaintiff

first to (a) make appropriate efforts to give prior notice to the anonymous poster to allow an opportunity to challenge the subpoena, (b) specifically identify the allegedly actionable speech and (c) establish a *prima facie* legal claim supported by sufficient evidence on each element of the claim.

If those requirements are met, then to determine whether discovery will be permitted, the court must balance the right of anonymous free speech against the strength of the case presented and the necessity for disclosure of the John Doe’s identity. The *Dendrite* court applied this test in affirming the lower court’s decision denying discovery.

Other recent decisions also have recognized anonymous Internet speech as a protected First Amendment right and developed tests that seek to balance the competing interests or prevent abusive discovery. In other cases (some contested, some not) discovery has proceeded without

prior notice to the Internet user based on minimal standards, if any. Time will tell whether *Dendrite*-like analysis will become the majority rule in other jurisdictions.

Prior to the *Dendrite* holding, the General Counsel of the Electronic Privacy Information Center proposed an amendment to the Electronic Communications Privacy Act that resembles the *Dendrite* test. It would not be surprising if more privacy proponents now advocate a uniform federal statutory standard. The issue of national uniformity is raised by *Dendrite* in that the court relied upon the free speech protections of the New Jersey Constitution, which exceed those of the United States Constitution.

Despite uncertainties about future developments, it is clear that the legal analysis employed in recent cases has reached a more sophisticated level. Technical and commercial advances undoubtedly will continue to challenge the courts and expand the law, whatever the nationwide evolution of such cases.

Sam Poss is a business lawyer whose practice includes Internet, computer and high technology transactions. He may be reached at (310)286-1700 or at sposs@rutterhobbs.com.



“... in general, our society accords greater weight to the value of free speech than to the dangers of its misuse.”

What We've Been Up To

• Geoff Gold represented the buyer of real property who had entered into a contract to purchase a million dollar commercial site in South San Francisco. The seller prevented the transaction from closing. The buyer sued for specific performance of the real estate contract. After a three-day arbitration before the American Arbitration Association in San Francisco, the buyer won specific performance plus \$65,000 in attorney's fees and costs.

• Terry Nunan made a presentation at the 25th Annual Fall Program of the Estate Planning, Trust and Probate Law Section of the State Bar of California on October 18, 2001 on the subject of "Meet the New Boss: Accounting Rules for the Revocable Trust."

• The firm represented two over \$550,000 including attorney's fees and costs in September 2001.

• A former employee of a firm client sued the client for wrongful termination based on disability discrimination. Curtis Graham and Olivia Goodkin successfully persuaded the court that the case should be arbitrated instead of tried before a jury, based on the employee's written arbitration agreement with the client.

• Mr. Gold represented a business owner who had a lease option contract on commercial property in Culver City. The defendant attempted to abandon the

contract. We filed a lawsuit on behalf of our client after several successful legal maneuvers undertaken by the firm, he obtained specific performance of the real estate contract plus \$75,000 for attorney's fees and costs.

• Carmella Greacen, assistant to two of the firm's corporate/transactional partners, is the volunteer editor of the LAPA (Los Angeles Paralegal Association) Reporter and published an article in its September 2001 newsletter entitled "The Accidental Paralegal."

• Duane Kumagai and Geoff Gold successfully represented a technology company in defeating an application by a plaintiff to freeze \$2.8 million in assets.



WHO'S NEW?



Neil A. Shah

Legal Update interviews RHD's newest addition, Neil A. Shah. Neil recently joined RHD after practicing with a large Los Angeles litigation firm. Since beginning his practice in 1997, he has worked on a variety of business, construction and probate matters. Neil graduated *cum laude* from California State University

at Long Beach in 1991 and received his Masters in Business Administration from the University of Southern California in 1994. As part of his study of international business, Neil studied in Vienna, Austria. In 1997, he graduated *cum laude* from the Boston University School of Law. Neil is also a registered Patent Attorney.

1. What do you enjoy most about practicing law?

I enjoy solving a problem and communicating that solution to the client.

2. What is your biggest accomplishment as a lawyer?

I became the point-person on litigation involving the Hyperion Wastewater Treatment Plant (three contracts with an estimated \$150 million in dispute). I created the system of evaluating the million+ documents produced in that litigation and scanned into a computer database. I also spoke with engineers and project managers to become an expert on

the details related to many of the issues that arose during the course of that project.

3. Have the challenges of practicing law changed since you began your practice?

As a young associate on big cases, much of my work was discovery-related. As I've developed my skills, my work has progressed to encompass the whole process that lawyers go through, from the client-interview through, in some cases, the appellate brief.

4. Why did you choose RHD?

The practice here is so diverse. Also, the people here are the best that I've worked with.

5. What do you like to do in your spare time?

I travel whenever I have a free moment. In the summer, I love to scuba dive and in the winter, I try to take a week to go skiing.

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