



EMPLOYEE'S DELETION OF COMPUTER FILES

Violates Computer Fraud Law



The permanent deletion of certain computer files by an employee who decided to quit and go into business for himself, which violated the terms of his employment contract with his employer, was found by a federal appeals court to violate the federal Computer Fraud and Abuse Act (CFAA) International Airport Centers, L.L.C. v. Citrin, 440 F. 3d 418 (C.A. 7, 2006). After deciding to quit his employer, the employee installed a "secure-erasure" program

on the company's laptop, and deleted all files in a manner to prevent recovery of the deleted files. The deleted files included not only data relating to prospects for his employer, but also included information that would have revealed that he had engaged in conduct violating his contract in preparation for starting his own business. His employer sued, relying on the provision of the Computer Fraud and Abuse Act, 18 U.S.C.A. Section 1030, stating that a person who "... knowingly causes a transmission of a program, information, code or command, and as a result of such conduct, intentionally causes damage without authorization, to a protected computer . . ." is guilty of a violation.

The court deemed that the CFAA was aimed at both "outside, long-distance attacks" on computers such as by transmission of a virus or computer worm, as well as "inside" attacks such as those by a disgruntled programmer or employee who trashes the files or data in the employer's computer system. The court held that the employee's authorization to access the employer-provided laptop terminated when he resolved to destroy files and data that incriminated him and other files that were the property of his employer, and that such conduct was in violation of his duty of loyalty to the employer. This case indicates that the CFAA may be used by employers against disgruntled employees who destroy computer

Patty Wheeler

"... the CFAA may be used by employers against disgruntled employees who destroy computer data or files."

data or files. The prohibitions of the CFAA also extend to employees copying confidential files for use in their conflicting employment.

STATE LAWS HAVING SIGNIFICANT IMPACT ON Health Insurance



Mary Moffatt Helms

"... Maryland passed the first state law requiring large employers to spend a certain amount on employee healthcare. . ."

Several significant developments have occurred in the state legislatures regarding health insurance. Perhaps the most significant is the legislation proposed by Republican Governor Mitt Romney in Massachusetts, and which was passed by the Democratic legislature. The law makes Massachusetts the first

state to require everyone to have health insurance, just as drivers must have automobile coverage. Other states may look at the Massachusetts example. The Massachusetts law blends several different

concepts proposed across the political spectrum, sharing the cost among businesses, individuals, and the government. For a conservative Republican, the new law is individual responsibility. For a liberal Democrat, this is government helping those that need help. "The reason this is so landmark is that we have found a way, collectively, to get all of our citizens insurance without some new government-mandated takeover or a huge new tax program," according to Governor Romney, who is laying a possible run for the Republican Presidential nomination in 2008. The cost of the program has been estimated at \$316 million in the first year, rising to more than \$1 billion in the third year, with much of that money coming from federal reimbursements and existing state spending. \$125 million in new money will come from the state's general fund each of the three years. The Governor believes the

Continued on page 4 ►►

KNOW YOUR ATTORNEY

William R. Seale



WILLIAM R. SEALE is Regional Managing Member of Wimberly Lawson Seale Wright & Daves, PLLC, Morristown, Tennessee, which he joined in 1982. He

received his Bachelor of Science Degree in Industrial Engineering with High Honors from the University of Tennessee and his law degree from the University of Tennessee. He practices in the areas of labor and employment law, with a particular emphasis on NLRB defense work, union avoidance, collective bargaining, contract administration, Equal Employment Opportunity, employee relations, wage and hour, affirmative action, ERISA, workers' compensation, occupational safety, and arbitration law. He has served as an Editor of the Tennessee Bar Association, Labor Law Section Newsletter, and is a member of the Labor and Employment Law Sections of the Tennessee Bar Association and the American Bar Association. Prior to entering private practice, Mr. Seale was Judge Advocate in the United States Marine Corps from 1979 to 1981 and a Special Assistant U.S. Attorney from 1980 to 1981. Mr. Seale is Vice President of Management Resources, Inc. Bill is a member of Honorary Societies of Tau Beta Pi and Alpha Pi Mu. He served on the Board of Directors of K.C. Home of Morristown, Inc. and is currently on the Board of Directors of Young Life and Fellowship of Christian Athletes. Bill is also a member of the University of Tennessee Letterman's Club.

SAVE THE DATE

November 9-10, 2006

*Annual
Labor Relations &
Employment Law
Conference*

Nashville

WHETHER JOB ROTATION IS ESSENTIAL FUNCTION, Held To Be Jury Question



Jerry Pinn

"...the issue of whether job rotation was an essential function of the inspection position, should be decided by a jury..."

Most employers have assumed up to now that consistent requirement of job rotation, is an essential function, so that an employer can insist that an employee perform each part of the job rotation, regardless of an inability to perform a portion of the job rotation due to a disability. In March of this year, however, the Third Circuit Court of Appeals ruled that in certain circumstances, such a situation creates a factual issue for a jury. Turner v. Hershey Chocolate USA, 440 F. 3d 604 (March 20, 2006). The background facts of the case are pertinent, so they will be summarized as well as the rationale of the court.

In 2001, Hershey learned that its inspectors had suffered an increase in incidents of repetitive stress injuries, particularly certain inspectors, and they reviewed ways to protect the inspectors from these repetitive stress injuries. Hershey adopted the requirement that the inspectors rotate among all three lines daily. This rotation system was designed to allow the inspector to change positions hourly, alternate between sitting and standing, and to use both their left and right arms, thus decreasing the likelihood of repetitive stress injury.

An employee objected to the rotation scheme, and refused to work on one of the lines. She contacted her lawyer who wrote a letter requesting that management exempt her from the rotation system. A doctor issued her a more restrictive opinion limiting her to activities that did not require any stretching, bending, twisting, or turning of the neck or lower back or lifting of greater than 20 pounds. Hershey decided that the employee's inability to work on one of the lines prevented her from participating in the rotation system, which they viewed as necessary to prevent injuries to all inspectors. Hershey did not allow the employee to continue in the manner she proposed, and she went on short-term disability pursuant to Hershey's policies. At Hershey's suggestion, the employee and her doctor completed an application for long-term disability coverage, and she was ultimately awarded Social Security total disability benefits as well. Nevertheless, she filed a claim of discrimination with the EEOC, which found no cause for discrimination and issued a right to sue letter. She filed a lawsuit, alleging that she was not completely disabled and could have performed her job if Hershey had accommodated her by exempting her from the rotation system.

The lower court granted summary judgement in favor of Hershey, because the plaintiff could not perform part of the rotation, and it was deemed "an essential function" required and the lower court further reasoned that the plaintiff's inability to perform indicated she was not a "qualified individual" within the meaning of the ADA. The lower court also reasoned that the plaintiff could not maintain a claim for reasonable accommodation, because any exemption from the rotation system could create a danger of increased injuries for the plaintiff and the other inspectors and, therefore, would be unreasonable.

The appeals court reversed the lower court, finding the issue of whether job rotation was an essential function of the inspection position, should be decided by a jury, rather than by the court on a motion for summary judgement. The court stated that certain factors suggested that the rotation system was not necessarily an essential function of the inspector position; a written job description made no reference to rotation; little time was actually spent rotating from machine to machine each hour; the collective bargaining

Continued on page 4 ►►

HOMELAND SECURITY'S IMMIGRATION ENFORCEMENT STRATEGY Affect Employers



Howard Jackson
"... in April more than 1,100 illegal immigrants were apprehended that were employed by a major pallet supply company based in Houston."

In April, officials from the Department of Homeland Security, Department of Justice, Department of Labor, Department of State and other agencies announced the creation of task forces in 10 major U.S. cities, including Atlanta and Dallas, to combat the growing problems of document fraud and immigration benefits fraud. It will be both a strategy pertaining to the Department's border security efforts, but also interior enforcement strategy designed to reverse the tolerance of illegal employment and illegal immigration in the U.S. To meet these objectives, the strategy sets out three primary goals that will be

carried out simultaneously:

- The first is to identify and remove criminal aliens, immigration fugitives and other immigration violators from this country;
- The second is to build strong worksite enforcement and compliance programs to deter illegal employment in this country;
- The third is to uproot the criminal infrastructures at home and abroad that support illegal immigration, including human smuggling/trafficking organizations and document/benefit fraud organizations.

Concerning worksite enforcement, the strategies are designed to punish knowing and reckless employers of illegal aliens. The U.S. Immigration and Customs Enforcement (ICE) has already initiated a strategic shift in the way it approaches such employers by bringing criminal charges against them and seizing their illegally derived assets - rather than relying on the old tactic of administrative fines as sanctions. Last fiscal year, this new approach resulted in 127 criminal convictions, up 46 from the previous fiscal year. At a press conference on April 20, announcing that week's raids and arrests, the Department of Homeland Security Secretary, Michael Chertoff announced a crackdown on employers, saying: "We are looking at those people who adopt as a business model the systematic violation of U.S. laws."

As an example of such a crackdown, in April more than 1,100 illegal immigrants were apprehended that were employed by a major pallet supply company based in Houston, as well as the arrest of 7 of its managers. Homeland Security Department officials said that company supervisors knowingly hired illegal immigrants, provided some of them housing and

transportation to and from work, and even reimbursed an undercover agent for the cost of obtaining fraudulent identity documents. An investigation started in February 2005, when agents received a tip that company employees were seen ripping up federal tax-related employment verification forms, and then an assistant manager present explained that they were illegal immigrants who did not intend to file tax returns. The Social Security Administration had written the company over 13 times and told them they had over 1,000 employees that had faulty Social Security numbers, and the company did not do anything about it. A year long investigation revealed that certain managers had induced illegal aliens to work there, telling them to doctor W-2 tax forms and others that no documentation was needed at all.

Another situation involved a restaurant group located in Baltimore where the operators of the restaurants pled guilty to harboring/employing illegal aliens and money laundering. The owners of the restaurant chain not only employed individuals who had not been lawfully admitted into the U.S., but also did not pay employee benefits or make the required tax payments on behalf of their employees. They also required them to work more than 40 hours a week and paid them in cash amounts substantially less than required by law. As part of their guilty plea, the defendants agreed to forfeit \$286,000 in cash, their properties and vehicles, and the plea agreements do not resolve any civil tax liabilities. Two operators also face a maximum sentence of 20 years in prison on the money laundering conspiracy charge and 10 years in prison for conspiracy to commit alien harboring. Another employee faces a maximum sentence of 6 months in prison for employing illegal aliens and a \$3,000 fine for each illegal alien employed.

The conclusion for our industry, is that immigration issues are the "hot topic" of the day. It is a major social, political, economic, and employment issue. The questions to private employers range from topics such as: (1) Should I sign up for one of the pilot programs?; (2) Should I verify Social Security numbers?; (3) What if I get a letter from the Social Security indicating a "no-match" of Social Security numbers, what do I do?; (4) Do I need to change my I-9 procedures?; (5) Are there any protective steps I can take to avoid civil and criminal liability?; (6) Will the government reinstitute "raids" of employment locations? Although the answers to these questions are complex, and reasonable people may reach different conclusions, some things seem clear. Any employer that has criminal elements working within its workforce, either committing crimes outside the work place, engaging in professional counterfeiting of immigration documents and the like, or blatant situations within the organization where laws are ignored, is subjecting itself to increased scrutiny by the

government and significantly increased risks. Therefore, it is submitted that the first

TO SUBSCRIBE to our complimentary newsletter,
please go to our website at www.wimberlylawson.com or email
srichards@wimberlylawson.com

Continued on page 4 ►►

WHETHER JOB ROTATION IS ESSENTIAL FUNCTION, HELD TO BE JURY QUESTION continued from page 2

agreement made no reference to the rotating of the inspector; and, in the past, inspectors had not rotated.

Hershey also argued that even if the rotation policy was not an essential function, it was entitled to summary judgment because the plaintiff's request not to rotate was not a reasonable accommodation. Under the plaintiff's proposed accommodation, each inspector could continue to rotate on an hourly basis, with the plaintiff herself rotating only between two out of the three lines. Hershey had not contended that this was not practical or possible, and the appeals court ruled that a genuine issue of material fact for jury resolution had been created. The court did note that Hershey would have the opportunity at trial to defeat the claim by showing that the plaintiff's proposed accommodation would jeopardize the health or safety of its employees.

***Editor's Note -** For some reason, the appeals court does not cite the EEOC Technical Assistance Manual provision stating: "An employer may structure operations to be carried out by a "team" of workers. Each worker performs a different function, but every worker is required, on a rotating basis, to perform each different function. In this situation, all the functions may be considered to be*

essential for the job, rather than the function that any one worker performs at a particular time.

Most prior rulings have been in favor of the employers on this issue, finding job rotation to be an essential function, as rendering a plaintiff unable to complete the rotation to be unqualified. Perhaps in this case the court was influenced by the fact that the job rotation system was new, and had not been included in the job description or other employer policies.

In the course of its opinion, the court also mentioned other situations where it found factual issues as to whether a variety of functions were actually essential. For example, in a ruling involving hospital nurses, the hospital claimed that lifting heavy objects was an essential function, but the court refused to grant summary judgment, concluding that whether lifting heavy objects was an essential function of being a nurse was a factual question for the jury.

The main significance to these line of cases, is to point out that it is hard to draw firm conclusions as to all forms of job rotation. Generally, an employer's policies involving job rotation should be upheld, but if a claimant should threaten legal action, advice of counsel if recommended.

www.wimberlylawson.com

HOMELAND SECURITY'S IMMIGRATION ENFORCEMENT STRATEGY AFFECT EMPLOYERS continued from page 3

step in the analysis and review should be, whether the employer is following the basic laws and whether it is doing anything that might create the perception by anyone that it is ignoring the basic laws. Also, employers should do everything they can to avoid the hiring or retention in employment of any known criminal elements operating within its workforce. The government has been known to "crack down" on employers who are innocent of any wrongdoing simply because they have a large number of employees that are engaging in criminal activities, on or off the job. Also, elements within the employer's workforce taking advantage of illegal aliens in some manner is another situation that creates a great deal of governmental interest, even if the employer is not involved.

However, at this point most food processing employers are not the immediate target of ICE scrutiny, so long as they have followed basic paperwork and I-9 guidelines AND do not participate in or condone known or blatantly apparent fraudulent documentation. The ICE has too many current "targets of opportunity" in order to focus on the typical poultry processor AT THIS TIME. The future of enforcement action, and the speed of change in focus, remains to be seen.

STATE LAWS HAVING SIGNIFICANT IMPACT ON HEALTH INSURANCE continued from page 1

program will be financed largely with the millions of dollars that the state now spends on uncompensated medical care for poor people who show up at hospitals and clinics without health insurance. Under the plan, the state will offer free or heavily subsidized coverage to poor and lower-income people, while those who can afford insurance but still refuse to get it will face escalating tax penalties. Government subsidies to private insurance plans will allow more of the working poor to buy insurance.

In another significant state law development, Maryland passed the first state law requiring large employers to spend a certain amount on employee healthcare or make payments to the state's insurance program for the poor. The new law has been called the "Wal-Mart" law because it requires employers with more than 10,000 employees in the state to spend at least 8% of their payroll on employee health benefits. Legislation similar to that in Maryland has been proposed in numerous other states. A lawsuit has already challenged this new law, brought by the Retail Industry Leaders Association, alleging that the new law "unlawfully mandates a specific healthcare expenditure, singles out the retail industry and threatens to eliminate the flexibility that businesses require to meet the needs of their diverse work forces."