February 18, 2014 Daniel J. McCoy 650.335.7897
Dan Ko Obuhanych 650.335.7887

ACCESS OF COMPUTER SYSTEM WITH LOG-IN CREDENTIALS IS NOT UNLAWFUL "HACKING"

A California federal court in *Enki Corporation v. Freedman* held that a former employee's access of the employer's computer systems through his log-in credentials did not amount to unlawful hacking under either the Computer Fraud and Abuse Act ("CFAA") or the California Computer Data Access and Fraud Act ("CDAFA").

Enki Corporation entered into an agreement with Zuora to provide Zuora with certain consulting and IT services, and as part of these services Enki installed a computer resources and performance monitor on Zuora's network. In order to fulfill its obligations, Enki contracted with one of its former employees, Keith Freedman, to provide certain consulting services to Zuora. Enki subsequently terminated the contract with Freedman after it learned that Freedman had allegedly spread negative stories about Enki and its work product to Zuora, and alleged that prior to the termination of Freedman's contract, Freedman and Zuora had accessed Enki's performance monitor without authorization to download Enki's proprietary information. Enki subsequently sued both Freedman and Zuora for, among other things, violations of federal and state anti-hacking laws (*i.e.*, the CFAA and CDAFA). However, the federal district court dismissed both claims.

With respect to the CFAA claim, the court held that the employer failed to properly allege that the defendants accessed Enki's computer system "without authorization." The court noted that the CFAA "regulates access to data, not its use [or misuse] by those entitled to access it" and because both defendants were authorized to access the data in question there was no CFAA violation.

With respect to the CDAFA claim, the court held that a plaintiff must allege that defendants overcame "some technical code or barrier" to state a violation, and that a violation of a terms of use agreement is not sufficient to state a claim under the CDAFA.

With these facts, employers often turn to the CFAA and CDAFA to sue former employees who abscond with information from company computers, particularly when such information does not meet the definition of a protectable trade secret. The *Freedman* case reveals that such suits continue to face significant hurdles in California.

AGE DISCRIMINATION CLAIM SURVIVES DISMISSAL WHERE QUESTIONS EXISTED REGARDING ADEQUACY OF JOB PERFORMANCE AND EMPLOYEE PRESENTED EVIDENCE OF SUPERVISOR BIAS

Reversing a trial court's decision in favor of the employer, a California Court of Appeals in *Cheal v. El Camino Hospital* held that a former employee may present her age discrimination claim to a jury because there were triable issues as to whether the plaintiff performed adequately, and whether age bias motivated her termination.

Carol Cheal was employed as a Dietetic Technician by El Camino Hospital for over 20 years. She prepared patient meals, and consistently received strong performance evaluations. In July 2007, El Camino appointed a new supervisor in charge of nutritional services, Kim Bandelier, who began to accuse Cheal (age 61) of numerous shortcomings, which eventually resulted in Cheal's termination from employment in October 2008.

Cheal sued for age discrimination, but the trial court dismissed the case, primarily because Cheal failed to show she performed her job in a satisfactory manner, and did not produce substantial evidence that El Camino's actions were pretextual or that it acted with discriminatory intent.

The appellate court reversed and allowed the case to go to trial. The court noted that, despite the evidence that Cheal "made several mistakes on menus between January and May in 2008," the record revealed that, with the high volume of meals processed by

the Dietetic Technicians (around 500 meals a day), mistakes were commonplace and expected by the hospital. Moreover, there was evidence that younger workers were not disciplined for similar mistakes or that Cheal's mistakes were qualitatively more significant. This evidence belied the trial court's finding that "several mistakes" over a 4-5 month period constituted unsatisfactory performance.

The appellate court also rebutted the trial court's findings that plaintiff failed to produce substantial evidence of discriminatory animus. The appellate court noted that in addition to the questions about the legitimacy of the employer's proffered reasons for termination — which supported an inference of discriminatory animus — the plaintiff also presented hearsay evidence of a statement by her supervisor that she favored "younger and pregnant" workers. The court held that this hearsay statement was admissible as declaration against interest and raised a triable issue of whether the termination of Cheal was motivated by age discrimination.

This decision is a reminder of the importance of a substantial and consistent record of poor performance when an employer seeks summary dismissal of discrimination claims.

NEWS BITES

Walmart Potentially Liable For Wage Violations As Joint Employer Of Subcontractors' Employees
Finding that ample evidence existed that Walmart exercised control over the working conditions of the workers employed by Walmart's warehouse subcontractors, a California federal district court in *Carrillo v. Schneider Logistics Trans-Loading and Distribution, Inc.*, held that Walmart may be jointly liable for wage violations committed by the subcontractors.

In *Carrillo*, Walmart contracted with SLTD to operate the warehouses that received, processed and distributed merchandise on behalf of Walmart (and other retailers), and SLTD in turn subcontracted merchandise loading and unloading services to other entities. The plaintiffs were employed by the subcontractors that performed the merchandise loading and unloading services, and brought claims for unpaid wages, failure to maintain proper records and related claims against their employers, SLTD and Walmart. Walmart sought to dismiss the claims against it on the grounds that it could not be liable as the "employer" of the plaintiffs.

In denying Walmart's request, the court determined that Walmart exercised sufficient control over the working conditions of the plaintiffs to potentially render Walmart a joint employer, and thus be jointly liable for the subcontractors' alleged wage violations. Among other things, the court found that Walmart imposed screening requirements on all employees hired to work at the warehouses, approved overall staffing levels, had oversight of hours worked, monitored and enforced productivity standards, influenced pay rates and working schedules, and owned the warehouses and equipment used at the warehouses.

No Showing That "Primarily Engaged In" Requirement Met Where Executive Employee Spent More Than 50% Of Time Performing Non-Exempt Duties
In *Guilfoyle v. Dollar Tree Stores, Inc.*, a federal district court in California held that an employer was unable to meet the "primarily engaged in" requirement of the executive exemption test where the employee spent more than half of his working time performing non-exempt work and there were factual disputes about whether the employer had a realistic expectation that the employee would spend more than half his time performing exempt duties.

California's wage orders contain an executive exemption for an employee: (a) whose duties and responsibilities involve the management of the enterprise, or a recognized department or subdivision, in which he or she is employed; (b) who customarily and regularly directs the work or two or more employees; (c) who has the authority to hire and fire; (d) who customarily and regularly exercises discretion and independent judgment; (e) who is primarily engaged in duties which meet the test of the exemption; and (f) who earns at least 2 times the state minimum wage for full time employment.

The dispositive issue in this case was whether the plaintiff — a store manager at Dollar Tree — was primarily engaged in duties which meet the test of the exemption. The wage orders impose a strict time test in this regard, such that the term "primarily" means

more than one-half (50%) of the employee's work time. However, the employer's realistic expectations are also considered in determining whether the employee satisfies the "primarily engaged in" requirement, *i.e.*, did the employer realistically expect the employee to spend more than half of his time performing exempt duties, even if the employee — because of poor performance or otherwise — does not actually do so.

Although Dollar Tree conceded that the plaintiff spent more than 50% of the time performing non-exempt work such as cashiering, stocking and cleaning, it argued that the requirement was still met because its expectations that the plaintiff would spend more than half of his time performing exempt work were "realistic." The court concluded that a jury must decide the issue, and refused to dismiss the lawsuit, based in part on evidence that the plaintiff was pressured by Dollar Tree, through threats of termination, into certifying in writing that he spent more than 50% of the time performing exempt work.

Employer Allowed To Assert Counterclaims Based On Breach Of Confidentiality Agreement In Class Action Wage Lawsuit

In *Benedict v. Hewlett-Packard Co.*, a California federal district court permitted HP to bring counterclaims against the lead plaintiff in a wage and hour class action, based on the alleged breach of the plaintiff's confidentiality agreement, discovered when the plaintiff produced confidential and proprietary HP documents in discovery.

Benedict moved to dismiss the counterclaims on the basis that HP did not allege sufficient damages — a required element of a breach of contract claim — or alternatively, that HP's allegations of damages were "implausible" because the plaintiff stated that he imaged his HP laptop only to retain his personal documents, did not disclose the HP materials to anyone other than his attorney and was willing to return them to HP. The court denied the plaintiff's motion to dismiss, finding that HP's alleged damages of lost profits, unjust enrichment and reasonable royalties were sufficient allegations of loss, and that HP's theory that the plaintiff took the documents to use them for his own illicit gain was plausible.

Unemployment Rate Falls To Lowest Rate Since October 2008

The unemployment rate dropped to 6.6% in January 2014, which is the lowest rate since October of 2008 and reflects a pattern of decreasing unemployment since the high of 10% in October of 2009. Despite other indicators that suggest the job market is recovering slowly — such as weaker than expected job growth in December and January — the declining unemployment rate is a positive sign that the labor market is rebounding.

Follow us on Twitter at:
http://twitter.com/FenwickEmpLaw