

Fenwick Employment Brief

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NINTH CIRCUIT CONFIRMS COMPUTER-USE POLICY DEFEATS EMPLOYEE'S EXPECTATION OF PRIVACY

A recent decision by the Ninth Circuit emphasizes the importance of putting employees on notice that their computer and internet activity may be monitored. In *U.S. v. Ziegler*, the federal appellate court for California (and the other western states) concluded that an employer's widely-known policy and practice of monitoring employee computer and internet activity defeated the employee's claim that he had a reasonable expectation of privacy in his computer use.

The employee, Ziegler, worked as the director of operations for Frontline, an online payment processing company. Frontline's internet service provider alerted the FBI of child porn-related internet searches on the company's account. After the employer helped the FBI trace the activity to Ziegler's computer, the FBI arrested him. At his criminal trial, Ziegler moved to suppress the electronic evidence, arguing that he had a reasonable expectation of privacy on his work computer.

Rejecting Ziegler's argument, the court held that "an employer's policy of routine monitoring is among the factors that may preclude an objectively reasonable expectation of privacy." The court observed that "social norms" suggest that employees are not entitled to privacy in the use of computers owned by the employer. While the court did not rule that employer ownership of the computer, standing alone, would be sufficient to defeat any expectation of privacy, it did note that "employer monitoring is largely an assumed practice." The Court concluded that employer ownership of the computer, coupled

with a disseminated computer-use policy "is entirely sufficient to defeat any expectation [of privacy] that an employee might nonetheless harbor."

FEDERAL "SAFE HARBOR" PROPOSED FOR SOCIAL SECURITY "NO-MATCH" LETTERS

The federal Department of Homeland Security ("DHS"), responsible for enforcing the nation's immigration laws, issued proposed regulations to guide employers on how to respond to a Social Security Administration ("SSA") notice that an employee's name and/or social security number does not match-up with the SSA or DHS records. Under federal immigration laws, it is unlawful for an employer to knowingly employ an individual who is not authorized to work in the U.S. Liability attaches as a result of actual or constructive knowledge, *i.e.* the employer's inaction in the face of information that would have led a reasonable employer to conclude that the employee was not authorized to work in the U.S. To avoid government sanctions for knowingly employing an employee not authorized to work in the U.S., the proposed regulations provide a "safe harbor" that the employer may satisfy by taking prescribed actions upon receipt of a "no match" letter from the government:

- Within 14 days of receiving the no-match letter, the employer must take reasonable steps to resolve the discrepancy, including checking the employee's records for any typographical errors, and verifying with the government that the corrected information matches the agency's records, and/or requiring the employee to resolve the discrepancy with the government; and

- Within 60 days of receiving the no-match letter, if the employer has not been able to verify with the government the employee's authorization to work in the U.S., then the employer must within three additional days verify the employee's authorization to work and his or her identity by completing a new I-9. However, documents on which the no-match letter is based may not be used to satisfy the I-9 requirement. Further, documents lacking a photograph may not be used to establish identity under this safe-harbor procedure.
- The proposed regulation cautions employers not to infer illegal status because of an employee's foreign appearance or accent.

NEWS BITES

In *Danes v. Senior Residential Care of America, Inc.*, a Wisconsin federal court rejected the employer's defense to a sexual harassment claim that the subordinate employee/plaintiff and a manager had agreed in writing that their relationship was consensual. The male subordinate alleged that he began a consensual relationship with the female company president and disclosed the relationship to the owner of the business. The subordinate employee and company president signed a writing acknowledging that the relationship was voluntary. In the lawsuit, the plaintiff claimed his signature on the document was coerced. He asserted that he repeatedly tried to break off the relationship but was told by the president that, while she could not fire him, she would make his job intolerable if he did not continue the relationship. The company discharged plaintiff purportedly for insubordination. The case will proceed to trial.

In *Francis v. Booz, Allen*, the Fourth Circuit held that an employer did not violate USERRA when it changed the work schedule and duties of the plaintiff, a Navy reservist, and ultimately terminated her for misconduct. Upon her return from active duty, the plaintiff resumed her job but on a different shift performing different duties, triggered by a

reorganization pre-dating plaintiff's return. After her return, plaintiff's performance deteriorated. The employer placed her on probation and, following further performance issues and policy violations, terminated her employment. Affirming summary judgment in the employer's favor, the court held that there was no evidence that the change in shift or job duties was motivated by plaintiff's military service. The court also held that, while USERRA provides that an employer may only terminate a returning veteran for "cause" in certain circumstances (as was the case with the plaintiff), sufficient cause existed to terminate plaintiff.

In a potentially wide-reaching decision, the Federal Court for the District of Columbia held that compensatory damages for emotional distress and loss of reputation were not "income" under the Sixteenth Amendment, and therefore the IRS regulation permitting taxation of such damages was unconstitutional. *Murphy v. IRS*. The court based its conclusion on the concept that compensation for the loss of a personal attribute, such as well-being or reputation, are designed to make a person "whole" and are not a substitute for lost wages or taxable earnings. While the case will likely be appealed, the holding, if it stands, may make it easier to settle employment disputes by eliminating the taxation of settlement payments allocated for emotional distress and loss of reputation.

In *Green v. Franklin National Bank*, the Eighth Circuit upheld summary judgment for the employer in a race discrimination case, demonstrating the importance of quickly responding to inappropriate behavior. Following a coworker's use of racially inflammatory language, the plaintiff complained to her supervisor. The bank's managers met with the offending coworker and told him that if it happened again, he would be fired. When he sent the plaintiff a racist email two days after being warned, the bank terminated him. Finding that the bank's actions stopped the harassment, the court kept the plaintiff's discrimination claim from going to trial.

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