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December 2012

BUSINESS LAW DEVELOPMENTS

Legal updates for entrepreneurs and business owners from the Law Office of Edward E. Sharkey LLC.

Dear Friends of the Firm,

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Very truly yours,

Ed

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Employer Uses "Honest Suspicion" Defense To Combat Abuse of FMLA Leave

In a [new case](#) decided by the Seventh Circuit Court of Appeals, the court issued a favorable ruling for employers in their efforts to combat abuse of the Family and Medical Leave Act ("FMLA") by employees.

The FMLA entitles eligible employees to take leave in order to care for family members with serious health problems. Employers may not interfere with this right, nor may they retaliate against employees for exercising this right, such as by terminating or refusing to reinstate an employee after taking leave.

In the recent case, an employee was granted intermittent FMLA leave to care for his mother who was in a nursing home. As part of an initiative to combat misuse of leave by employees, the employer hired a surveillance company to monitor employees “who were suspected of misusing leave or had a high number of unexcused absences.” The plaintiff in this case was one such employee.

On one occasion, the employee requested FMLA leave to go to the nursing home to assist in his mother’s care. The surveillance company found, however, that he did not leave his house all day long. The employer suspended the employee pending further investigation. Thereafter, the employee gave the employer documentation to support his contention that he had been helping his mother that day. The documentation had many inconsistencies, and the employee was eventually fired.

The employee sued, arguing that the employer interfered with his FMLA right and retaliated against him for taking leave. The trial court ruled summarily in favor of the employer. On the question of interference, the court said that “an employer’s honest suspicion that the employee was not using his medical leave for its intended purpose is enough to defeat the employee’s” claim.

The Seventh Circuit affirmed the trial court’s ruling. The appellate court held that the surveillance report, which indicated that the employee never left his house on the day he requested leave, combined with the “facially inconsistent” documentation provided by the employee, were enough for the employer to establish an “honest suspicion” that the employee was not using his leave for its intended purpose. Therefore, he was not entitled to reinstatement after taking leave.

The court went out of its way to note that the employer was not required to conduct a more thorough investigation, even though it could have done so. The court did not articulate exactly the extent to which the employer’s “honest suspicion” must be supported. A [Sixth Circuit opinion](#) issued earlier this year addressing the same issue, however, held that an employer has such an “honest belief” as long as its decision is “reasonably informed and considered.”

The “honest suspicion” or “honest belief” defense is very deferential to employers, but has not yet been recognized by the Fourth Circuit (the federal jurisdiction covering Maryland). As more jurisdictions encounter similar cases, this defense should become a useful tool for employers to protect themselves against abuse of FMLA leave by employees.

Online Businesses May Need to Make Sites Accessible to Individuals with Disabilities

The Americans with Disabilities Act (ADA) prohibits places of public accommodation from discriminating against individuals with disabilities. The Act identifies twelve categories of enterprises that qualify as places of public accommodation. These categories include:

- Places of entertainment;
- Places of recreation;
- Sale and rental establishments; and
- Service establishments.

The ADA requires such establishments to comply with accessibility standards and provide equal access to people with disabilities. One issue that has arisen for internet-only businesses is whether their websites are places of public accommodation that must be accessible to persons with

disabilities.

In a [June 2012 opinion](#), the U.S. District Court for Massachusetts became the first court to hold that a website can be a place of public accommodation covered by the ADA. The plaintiffs in the case, one individual and associations for the deaf and hearing impaired, sued Netflix. They claimed that Netflix's failure to provide closed captioning for all of the content on its video streaming website violates the ADA. Netflix moved for judgment on the ground that a website is not a place of public accommodation.

The court rejected Netflix's argument. In doing so, the court noted that the purpose of the Act is to make the same things available to individuals with disabilities that are available to individuals without disabilities. The court ruled that limiting the scope of the ADA to physical structures "in a society where business is increasingly conducted online" would contravene this purpose. For these reasons, the court concluded that, generally, a website can be a place of public accommodation.

The court went on to assess Netflix's video streaming site in particular. It concluded that, for several reasons, the site may be a place of public accommodation under the Act:

- The site may qualify as a service establishment because it allows customers to stream video through the internet.
- The site may qualify as a place of entertainment because it displays movies, television, and other content.
- The site may be a rental establishment because it allows customers to rent videos.

A month after the decision, the U.S. District Court for the Northern District of California issued a [contrasting opinion](#). Relying on prior decisions by the courts of its state, the California court held that only physical structures can be places of public accommodation under the Act.

Most recently, Netflix settled the Massachusetts case without a trial. Among other terms, the settlement agreement requires Netflix to:

- Provide closed captioning for 100% of its streaming content by 2014;
- By 2016, caption new content within 7 days of its release; and
- Pay \$755,000 for the plaintiffs' attorneys' fees.

The two cases illustrate the unsettled nature of the law concerning online businesses and the ADA. Although the Department of Justice has been promising regulations concerning the issue since 2008, the government has yet to give any guidance to businesses. Until it does so, or until the Supreme Court resolves the split in the law, entities that operate on the internet should be wary of maintaining sites that are not accessible to individuals with disabilities.

Our law firm will continue to monitor the state of the law concerning the application of the ADA to websites. If you have questions about this subject or any other business law topic, please feel free to contact us.

New Case Protects Businesses' Ability to Copyright Employee-Generated Material

Many companies create or acquire copyrighted material for business use. Software developers, retailers, designers, architects, consultants, marketers, publishers, and professional service providers are some who often do so. When employees create the material, there is often a dispute over who

owns the copyright: the company or the employee. A [recent decision](#) by the U.S. Court of Appeals in the Ninth Circuit will make it easier for companies to claim ownership of copyrights in employee-created work.

The facts of the case are pretty common. In 2000, a freelance computer programmer licensed his order-processing software to a fledgling auto parts website. In 2001, the programmer was hired by the website. During his employment, the programmer added a new feature to the software that facilitated drop-shipping, an upgrade that was instrumental to the website's growth.

The website was a success, and it was purchased by a larger auto parts company, U.S. Auto Parts Network ("USAP"), in 2006. The contract of sale included all of the original website's intellectual property, including the software developed by the programmer. After the sale, the programmer, along with most of the other employees of the original website, took a job at USAP. While the programmer was employed by USAP, he made more modifications to the order processing software at the company's behest, leading to two newer versions of the software.

The programmer left USAP in 2008, around the same time as the founders of the original website. The founders created a new, competing website. The programmer wrote new software, which included the drop-shipping feature, for use by the founders' new website.

USAP sued the founders' new website and the programmer, arguing that it owned the copyright to the modified software. The trial court summarily rejected the claim. It held that USAP did not have any claim to the copyright of the software because the programmer "never agreed to transfer his ownership of the...program to either" the original website or USAP.

The Ninth Circuit reversed that decision, ruling that the modifications to the software would belong to USAP if they (1) were made "within the scope of [the programmer's] employment," and (2) were eligible for copyright protection as derivative works. The Ninth Circuit adopted a three-part test – already in place in the Fourth Circuit, which covers Maryland – to determine whether a work is made within the scope of employment. Under this test, work is done within the scope of employment when it:

- Is of the kind the employee is employed to perform;
- Occurs substantially within the employer's authorized time and space limits; and
- Is actuated, at least in part, by a purpose to serve the employer.

A modification is eligible for its own copyright as a derivative work if the answers to the following questions are "yes," "yes," and "no," respectively:

- The derivative work was authorized by the owner of the copyright to the preexisting work;
- The original aspects of the derivative work [are] more than trivial; and
- The author of the derivative work made so few changes to the preexisting work that issuing a copyright for the derivative work would prevent the owner of the preexisting work from exercising some of its rights under copyright law.

This case provides that, even if an employee developed the original work before being hired, his employer has ownership rights to modified versions of the work if (1) the employee made the modifications within the scope of his employment and (2) the modified work is eligible for copyright protection as a derivative work.

It is important to remember that a business can contract for ownership of works created by employees

even if these two criteria are not met. Businesses whose employees create intellectual property in the course of their work should include a provision in their employment agreements stating that the employer will retain the copyright to any intellectual property created by its employees.

Parent's Waiver of Child's Claim Against Business is Not Enforceable

Most businesses that provide activities for children make parents sign waivers releasing any potential injury claim. These documents typically say two things: (1) the business is released from liability if the child is injured, and (2) the parents will indemnify the business in the event that any injury claim is filed.

Many businesses wonder whether such releases are enforceable if the child gets hurt. Most assume that they are. Surprisingly, Maryland's courts only recently addressed the issue. In [an opinion](#) that has tremendous implications for Maryland businesses that serve children, the Court of Special Appeals held that a release, presented by a for-profit commercial entity that principally serves private interests ("commercial entity") and signed by a parent for their child before the child is injured, is not enforceable.

The case arose out of a child's fall in a play center at BJ's Wholesale Club ("BJ's"). BJ's provides the center to entertain children while their parents shop. Before permitting the child to use the play center, BJ's required his parent to execute a release that provided that (1) BJ's is released from all claims arising out of the child's use of the play center and (2) the child's parents will indemnify BJ's for any such claim.

Although they had signed the release, the injured child's parents sued BJ's, on their own behalf and on behalf of the child, for negligence. The trial court summarily rejected the parents' claims, finding that (1) the agreement was enforceable against the adult parents and (2) there is no Maryland public policy which precludes enforcement against the child. The parents appealed, claiming that, because it contravenes public policy, such a release is not enforceable against the child.

The appellate court agreed with the parents. In doing so, it also agreed with the majority of courts in other jurisdictions that have considered the issue. The court held that releases, presented by a commercial entity and executed by a parent on a minor child's behalf before the child is injured, are invalid and unenforceable. In reaching its decision, the Maryland court relied on four considerations:

- Enforcing such releases might remove businesses' incentive to act with reasonable care;
- Most releases are imposed unilaterally without a real opportunity to negotiate;
- Commercial enterprises are better able than children to eliminate hazards and insure against risks that cannot be eliminated; and
- The State has an interest in protecting children.

The court further held that, because enforcement of the indemnification clause would circumvent the State's interest, the indemnification clause is also invalid and may not be enforced.

There are a few things, in addition to the holding, to note about the opinion. The court distinguished between commercial entities on the one hand and government agencies and non-profits. The court did not decide whether a similar release used by a government or non-profit would be enforceable. The court also seemed to find BJ's practice of printing the release in small, eight-point type unfair,

although it is unclear what impact, if any, this had on the decision.

The takeaway for businesses that serve children: be mindful of, and insure against, the increased exposure to liability that exists as a result of the court's holding. Our firm monitors legal developments affecting the risk profiles of businesses. If you have a question about this or any liability-related matter, please feel free to contact us.

ABOUT US

[The Law Office of Edward E. Sharkey LLC](#) is a firm of dedicated business and trial lawyers in Bethesda, Maryland, concentrating on [business law](#) and [commercial litigation](#). Other areas of practice include [pension](#), [securities](#), [negligence/professional liability](#), and [construction law](#).

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<p>Law Office of Edward E. Sharkey LLC 4641 Montgomery Avenue Suite 500 Bethesda, MD 20814 www.sharkeylaw.com</p>	<p>Tel. (301) 657-8184 Fax (301) 657-8017 Business Hours: 9 a.m. - 5 p.m. Monday - Friday</p>	<p><u>ATTORNEYS</u></p> <p>Edward E. Sharkey Admitted to Practice in Maryland and Washington, DC</p> <p>Jeanine Gagliardi Admitted to Practice in Maryland and Washington, DC</p>
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