THE HOWE & HUTTON REPORT

ANALYZING LEGAL NEWS OF IMPORTANCE TO THE NONPROFIT COMMUNITY

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JURISDICTION CASE INSTRUCTIVE FOR NONPROFITS — Your organization has a social media site accessible throughout the world. Can your group, located in the States, be sued in Uzbekistan if someone there has a problem with you, even if you never operated there and don't know how to spell Uzbekistan (we didn't until we looked it up)? A recent case in Chicago federal district court shows there are limits on what people in far-off, or even not so far off, places can do to you legally just because you have a social media site. In that case, a man in Illinois sued California-based Facebook for allegedly violating the Illinois Biometric Information Privacy Act by creating and storing templates of non-users' faces without their permission. But the trial court threw out the suit, without even reaching the legality of what Facebook had allegedly done. Instead, the court held that it had no jurisdiction to hear the case, since nobody in Illinois had any business dragging Facebook from California to Chicago for a lawsuit just because Facebook has an interactive social media site accessible here. *Though the court found no Illinois legal precedent involving social media sites, it applied the reasoning of the U.S. Court of Appeals in Chicago in a case relating to interactive websites. We know nothing about Uzbekistan law, but we hope the courts there think along the same lines.*

CUSTOMER HARASSMENT SUIT ALLOWED TO PROCEED — A recent suit by the federal Equal Employment Opportunity Commission provides a reminder that employers can get in trouble when customers harass workers. A federal district court in Chicago has refused to dismiss a suit filed by a female employee alleging that her employer was liable for gender-based harassment by a customer on the employer's premises that created a hostile work environment for the employee. The customer, over a period of 13 months, was said to have hidden behind clothing racks at a store so that he could stare at the employee and photograph her with his cell phone, and then repeatedly asked her questions of an intimate and unwelcome nature, including asking her out to dinner. *The dismissal means that the case must go to trial, and the EEOC will have to prove its case against the employer. The case is particularly interesting because the employer made some efforts to prevent any harassing conduct, including telling the customer to avoid contact with the employee (though not, apparently, telling him not to come to the store). Keep in mind also that others who are not supervisors or customers can create a "hostile work environment" for a nonprofit's employees, including members and other constituents.*

GOOD READING … See you in April

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NOT-FOR-PROFIT LAW DEVELOPMENTS

COURT WON'T FORCE CATHOLIC HOSPITAL TO PERFORM STERILIZATION — A San Francisco superior court judge has refused to order a Catholic hospital to perform a tubal ligation sterilization procedure, saying that such a requirement would violate the hospital's freedom of religion and that the religious beliefs reflected in the operation of some nonprofit hospitals "are not to be interfered with by courts at this moment in history." A woman had sought the procedure in connection with a caesarian section to be performed at the hospital, arguing that tubal litigation is safest when performed immediately after a birth. But the court was unimpressed by that argument, finding that she could obtain the procedure elsewhere (though the nearest other hospital option for the woman was 70 miles away). The complainant also contended that the hospital was engaging in sex discrimination by denying her the sterilization. However, the court found that argument unpersuasive as well, since the hospital had a no-sterilization procedure applying to men as well as women, even though it was administered on a case-by-case basis as to both sexes. *Difficult questions of law seem to be arising frequently these days when freedom of religion collides with health concerns. Similar questions have arisen recently as some nonprofits and private businesses seek to challenge the birth control coverage mandate under the federal Affordable Care Act (Obamacare).*

AUTOMATIC RENEWAL OF DUES CAN CAUSE LEGAL PROBLEMS — Some nonprofits are using automatic dues renewal arrangements, storing member credit card information and charging the cards periodically. But a number of states and some foreign countries place limits on such provisions. While such laws vary from one jurisdiction to another, they typically require clear and conspicuous disclosure of terms, an affirmative opt-in consent from members, a written acknowledgement from the organization, a clear cancellation policy, notice to members concerning any material change in renewal provisions, and adequate notice to members before each charge is made to their cards. *Class action suits have been filed by members seeking restitution of dues charged automatically, particularly in California, which deems all products and services provided to members automatically charged for dues in violation of the state's laws to be an unconditional gift by the organization. The need for safe-keeping of credit card information is also a drawback to such arrangements.*

CATHOLIC SCHOOL COULD NOT RESCIND JOB OFFER TO GAY APPLICANT — Applying Massachusetts law, a court has held that a Catholic school was guilty of illegal discrimination when it rescinded a job offer to an applicant for the position of food services director after his gay sexual orientation was discovered. The court found that the school violated a state law prohibiting adverse employment actions because of sexual orientation. *Massachusetts law had a narrow exemption from the sexual orientation discrimination prohibition, applying only to certain religious organizations limiting "membership, enrollment, admission or participation to the members of a particular religion." But this school was open to non-Catholic students and had no other religious limitations of the sort required for the exemption.*

INTELLECTUAL PROPERTY & COMPUTER LAW DEVELOPMENTS

SUIT TOSSED FOR "HUMORLESSNESS" — A federal judge in Chicago has dismissed a suit filed against the makers of 5-Hour Energy drink by someone claiming that one of the company's commercials improperly traded on the plaintiff's identity as a record holder for Hacky Sack, a bag kicking game. In the commercial, an actor is said to have performed a number of feats in the same afternoon thanks to a shot of the energy drink – finding Bigfoot, disproving the theory of relativity, swimming the English Channel,

Mastering origami, and "beating the record for Hacky Sack." But the judge was unimpressed with the actual record holder's contention that the commercial violated the Illinois Right to Publicity Act or constituted false advertising under the federal Lanham Act, finding that the commercial was an "obvious joke" that could not deceive anyone with "a modicum of common sense and wit." The court also speculated that the plaintiff may have lost his sense of humor in putting years of training into Hacky Sack, and the judge noted that "the law does not reward humorlessness." *Bringing a trivial matter to court sometimes brings a harsher penalty than a judge's sarcasm. In this case, we note that the plaintiff represented himself instead of hiring counsel, who might have dissuaded him from filing the suit. That's a joke of another color.*

PETA GOES APE — Copyrights in a photograph generally belong to whoever took the photo. But what if the photographer was a monkey? That burning question faced a federal district court recently when a cameraman named Slater set up his equipment in an Indonesian nature reserve and later discovered that a macaque monkey named Naruto had been playing around with it, found the shutter release, and took a few selfies that were later posted on the Internet, garnering some interest. Slater decided to include them in a book. Problem was, People for the Ethical Treatment of Animals felt like the copyrights to the photo belonged to Naruto, and they sued Slater, claiming to be the monkey's "next best friend" (though not the monkey's uncle), seeking money damages for copyright infringement. But the court tossed the suit, finding that only humans could be an "author" entitled to rights under the federal Copyright Act. *Excluding situations where the creator of a work was literally monkeying around, if your organization is using a photograph or any creative work, it is best to make sure you have an assignment of rights from the "author" or an agreement that your group owns the copyrights. That applies unless the author was an employee creating works per his employment, in which case your organization would be presumed to own the copyrights absent some specific agreement to the contrary.*

Regulatory Law Developments

FTC ISSUES STATEMENT ON NATIVE ADVERTISING — The Federal Trade Commission recently issued a policy statement on "native advertising," which is paid advertising designed to look and feel like editorial content around it. The FTC is concerned that consumers often cannot distinguish between the advertising and the editorial content, especially when it is encountered online. Consequently, the FTC feels that such advertising can sometimes be a violation of Federal Trade Commission Act Section 5, prohibiting unfair or deceptive acts or practices in advertising, among other things. The FTC has said it will look at the "net impression" native advertising makes on "reasonable" consumers, and if a prominent and conspicuous disclosure is necessary to prevent deception (such as "THIS IS PAID ADVERTISING"), then the provider of the material must include such a disclosure when it reaches the public. *Nonprofits are increasingly being asked to provide endorsements and promotional services for businesses and other nonprofits seeking exposure for their products and services. They can legally offer endorsements, but they generally have to pay taxes on income received for providing advertising services. Now, aside from tax considerations, the FTC has given nonprofits something else to consider in responding to those who want to use the nonprofit's contacts with members and other constituents in order to sell something.*

HOSPITAL CREDENTIALING MATERIALS SUBJECT TO DISCOVERY — The Illinois Supreme Court has held that records regarding a nonprofit hospital's granting of staff privileges to a physician are subject to discovery by someone suing that hospital for negligent doctor credentialing. Credentialing information, which is supposed to be kept "confidential" under the Illinois Health Care Professional Credentials Data Collection Act, was nevertheless found not to be "privileged" from discovery, because "confidential" is not synonymous with "privileged" and recognizing such a privilege for credentialing information would promote no important interests that would outweigh the need for evidence in a lawsuit. The court found nothing in the

The court found nothing in the Credentials Act, the Illinois Medical Studies Act or the federal Health Care Quality Improvement Act that would produce a different result. *Very little is privileged from discovery in a lawsuit these days, even under the long-recognized attorney-client privilege.*

Tax Law Developments

CHURCH AUDIT PROCEDURES APPLY TO EMPLOYMENT TAX ISSUES — The IRS recently issued a Memorandum advising that it will follow special church tax audit procedures even in employment tax cases, which were previously not subject to those procedures. The church audit procedures, set out in Internal Revenue Code Section 7611, state that the IRS may begin a church tax inquiry only if a high-level official in the Department of the Treasury reasonably believes, on the basis of facts and circumstances recorded in writing, that that the church may not be exempt from tax. In addition, an inquiry may not begin until the Secretary of the Treasury has provided written notice to the church explaining "the concerns which gave rise to such inquiry," "the general subject matter of such inquiry," and the applicable …administrative, statutory and constitutional provisions with respect to such inquiry. *We applaud this decision as being a good thing for churches in general. But we wonder whether elevating audit decisions to the highest level of the IRS decreases or increases the likelihood of political favoritism applying to such decisions, given that churches so often have a right wing or left wing inclination, especially around election time.*

Employment Law Developments

UNEMPLOYMENT BENEFITS MADE EASIER TO OBTAIN IN ILLINOIS — You fire an employee for misconduct and try to prevent the worker from obtaining unemployment compensation because nobody in their right mind would have thought that the employee's conduct was proper, even though it didn't violate any specific work rules. Until recently, workers fired for such "commonsense" violations could be denied unemployment compensation in Illinois. But now, the Illinois Supreme Court has held that, except where an employee's conduct was illegal or constituted an intentional civil wrong, employers must prove they had known rules specifically prohibiting certain conduct in order for that conduct to serve as a basis for denying unemployment compensation. That decision came in a case involving an airline worker who upgraded a friend's friend to first class and gave them a free bottle of Champagne without first checking with senior management. *Maybe those skies are getting a little too friendly for some. In any event, at least in Illinois, employers should make sure their work rules are specific and published to employees before using those rules as a basis for contesting unemployment compensation.*

JUDGE RESTRICTS EMPLOYEE SUIT FOR HARASSMENT — A federal judge in Chicago recently placed some restrictions on an employee's suit for sexual orientation harassment, dismissing a count alleging his employers violation of Title VII of the federal Civil Rights Act of 1964 and all charges the worker filed against his supervisor in her individual capacity. The judge found that the suit could not proceed under Title VII because it doesn't apply to sexual orientation harassment, as opposed to other sex discrimination. Additionally, all counts were dismissed against the supervisor, who allegedly began harassing the employee after discovering he was gay. The supervisor was not the employer in this case and the court found that such a person cannot be held liable as an individual for violating federal laws against employment discrimination. *The suit will proceed against the employer in this case, the Illinois Department of Financial and Professional Regulation, based on counts other than Title VII, including the federal Age Discrimination in Employment Act and Americans with Disabilities Act. Although the complaint filed was deficient as noted above, the judge allowed the filing attorney to amend it, which is something not always permitted.*

EQUAL PAY REQUIREMENT EXPANDED — An expansion of the Illinois Equal Pay Act takes effect this year, applying the Act's requirements to all employers rather than just those with four or more employees. The Act generally prohibits employers from discriminating between employees on the basis of sex by paying workers less than employees of the opposite sex would receive for the "same or substantially similar" work on jobs that require equal skill, effort and responsibility and that are performed under similar working conditions. Exceptions to the equal pay requirements of the Act can be made for payment systems based on seniority or merit, systems based on quantity or quality of work, and pretty much any payment system based on factors other than sex or other factors that would constitute some other type of unlawful discrimination. *New, increased penalties for each violation of the Act now range from a $500 fine to a $5,000 fine, depending on the number of an employer's workers and how many offenses it has racked up. But an employee can also sue an employer for damages based on underpayment of wages, along with interest, court costs and reasonable attorney's fees. And this is just the Illinois law. Federal law and the laws of other states also contain equal pay requirements. Employers, including nonprofits, would be wise to check their pay systems to make sure no violations occur.*

FLIGHT ATTENDANT INJURED FLYING TO JOB DENIED WORKERS' COMP — An employee is injured on his way to work. Is he entitled to workers' compensation? Not even if he is a flight attendant flying as a passenger to work on a flight in another city, according to the Illinois Appellate Court, which ruled against an attendant seeking to obtain compensation for an injury she suffered while flying as a passenger from her home in Denver to New York, where she was scheduled to work a flight. She tripped on the plane to New York and injured her knee. But the court said she was due no compensation because she was not a "traveling employee" injured when she was required to travel away from the employer's premises to perform her job. Rather, she was injured while traveling to work, and such people can't claim benefits under Illinois law. *This was a tough case to decide, apparently. An arbitrator originally ruled for the attendant. The state Workers' Compensation Commission then reversed that ruling, only to have its decision overturned by an Illinois Circuit Court judge, and the Appellate Court has now reinstated the Commission's decision. But the attendant's attorney says he plans an appeal to the Illinois Supreme Court, noting that the attendant would have been required to assist on-duty attendants on the flight to New York in the event of an emergency. The attorney says the employing airlines benefitted from having her on the plane. So, she was not like most employees injured while driving to work. Maybe the case isn't over yet.*

MEETINGS & TRAVEL LAW DEVELOPMENTS

HOTEL MUST RENDER ASSISTANCE TO GUEST DURING CRIME — A federal district court judge in Chicago has refused to dismiss a negligence suit filed against a hotel by a guest who alleged that he alerted housekeeping staff when he was being robbed in his room and they did nothing to assist him by calling the police or detaining the robber. The judge found that the hotel could not be found liable for failing to prevent the crime from occurring in the first place, because the hotel couldn't reasonably foresee that the crime would take place just because the hotel is in the Chicago downtown area and there might have been a generalized risk of criminal activity there. However, if they were told by the guest that he was being robbed, the hotel employees would have an obligation to take affirmative steps to aid the guest. In this case, the guest is alleging that several hotel employees refused to call the police after he ran out into the hall to tell them about a robber in his room, and the guest even charges that one of those people may have been the robber's accomplice. *This case would still have to go to trial, requiring that the guest prove his allegations about the hotel staff. However, the judge's ruling affirms that a hotel has a duty to take affirmative steps to aid its guests who are victims of a crime, even when it did not create any risk of harm.*

OTHER ISSUES, TRENDS & DEVELOPMENTS

WATCH THOSE INSURANCE EXCLUSIONS — You have an errors and omissions liability insurance policy for your organization, and you think you are pretty well covered if the group is sued for such things. Better read the "exclusions" section of the policy before you get too comfortable. The Illinois Appellate Court for the Second District recently upheld an insurer's efforts to avoid liability and the duty to defend in a case where an insured was sued for violating the federal Telephone Consumer Protection Act, which prohibits faxing advertisements to people without their consent, as well as the Illinois Consumer Fraud Act and other state laws. In allowing the insurer to avoid all liability and the duty to defend the suit against the insured, the court noted an exclusion in the insurer's policy for "liability or legal obligations of any insured… arising out of the TCPA or by any other similar statutes, ordinances, orders, directives or regulations." Because all of the claims against the insured arose out of the same alleged actions by the insured, namely, sending faxes without the permission of the recipient, the court concluded that the other laws the insured was alleged to have violated were "similar" to the TCPA for purposes of the insurance exclusion. *You need to read the fine print before you enter into any contract, including insurance contracts. We once encountered an errors and omissions policy that had two exclusions, (1) errors and (2) omissions. Insurers don't have their names on so many buildings because they are overly generous in paying claims.*

H & H DEVELOPMENTS

Naomi Angel presented "A Contract's GPS: Navigating Hotel Contract Legal Issues" and "Are Your Attendees Packin'? What You Can Do to Minimize Liabilities" to the MPI Mid America Conference in Sandusky, Ohio. She also served as facilitator and co-presenter at a Product Liability Legal Roundtable for a meeting of association manufacturers held in Orlando, Florida.

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