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MID-ATLANTIC PROPERTY & CASUALTY REPORTER

EMPLOYMENT DISCRIMINATION: EMPLOYEE MAY PURSUE CLAIM FOR HARASSMENT BY THIRD PARTIES NOT UNDER EMPLOYER'S CONTROL

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The United States Court of Appeals for the Fourth Circuit recently held that an employer may be held liable to an employee when the employee has been harassed by third parties, away from the employer's own work site.

In *EEOC v. Cromer Food Services, Inc.*, No. 10-1552 (4th Cir. Mar. 3, 2011), the Court reversed a grant of summary judgment in the employer's favor and remanded the case for trial. The action, which is being prosecuted by the EEOC pursuant to its statutory authority, involves Homer Ray Howard, an employee of Cromer Food Services. Howard worked as a route driver, stocking the company's vending machines at various locations. Howard claimed that he was repeatedly subjected to sexual harassment by two employees of a hospital where he was required to stock a machine. Howard allegedly reported the harassment to his employer, but the company took no action.

In its first decision on the issue, the Fourth Circuit adopted the approach taken by several other circuits; namely, that if an employer has actual or constructive knowledge of harassment of one of its employees by third parties, it may be held liable for discrimination if it fails to take steps to protect its employee. According to the Court, Cromer Food Services could have raised the issue with its client, the hospital, or arranged for Howard to work another shift.

Funk & Bolton's Coverage & Defense Practice Group provides advice and counsel to insurers in coverage and extra-contractual matters, product development and claim compliance, and defends claims and litigation matters.

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The case is unreported, which means that it has no precedential value at this time. The Fourth Circuit, however, is clearly signaling its willingness to extend employers' discrimination liability to cover acts committed by third parties. Companies whose employees even occasionally work off site should review their discrimination policies and ensure that counseling includes advice on this issue.

THE ETHICAL PERILS OF THE CLOUD

If you've read a blog or been to a tech show lately, you've become familiar with cloud computing, "software as a service", or SaaS. Until recently, business owners generally purchased or leased computer hardware and software, and stored date on site. Cloud computing permits business owners to essentially operate through the Internet. Vendors lease software to users, who access the software via the web and store data online, in servers which may be located anywhere in the world. Cloud computing is cheaper and permits access to a wider variety of software, including online file sharing; but it does not come without risks, particularly for professionals who must preserve the confidentiality of their data.

For lawyers, maintaining client confidentiality can mean the difference between a successful case resolution and malpractice. Preservation of confidentiality in an electronic environment is not a new issue; lawyers grappled with it, and related privilege issues, when the use of email and the Internet became widespread. But cloud computing presents a unique problem, since client data is being maintained by a third party. Specifically, data may be stored in countries with fewer legal protections; third parties may gain unauthorized access to client data; data may not be adequately backed up by third parties responsible for maintaining it; third parties may lack policies for notifying clients of security breaches; and data may be destroyed.

The ABA Commission on Ethics is currently working on cloud computing recommendations for lawyers. In the meantime, lawyers and companies who insure lawyers and other professionals should consider the following:

- Purchasers and users of data storage should find out who will have access to information stored on a vendor's system, and whether and under what circumstances those persons will be subject to confidentiality obligations.
- Purchasers and users should know what the vendor's security practices are, particularly in case of a security breach, as well as the vendor's encryption protocols and storage procedures.
- Purchasers and users must ensure that any data forwarded to a vendor for storage remains the sole and
- exclusive property of the firm, and vendors should disclose whether they use servers located outside the United States.

Reporting Obligations under the Medicare, Medicaid, and SCHIP Extension Act of 2007

Section 111 of the Medicare, Medicaid, and SCHIP Extension Act P.L. 110-173 ("MMSEA") amends the Medicare Secondary Payor Act ("MSP") (42 U.S.C 1395y(b)(8)) by imposing an affirmative reporting obligation on liability, no-fault, and worker's compensation insurers, including self-insureds. Medicare remains the secondary payor, but the amendment adds a reporting requirement designed to enhance enforcement of the statute.

MMSEA requires that the "responsible reporting entities" ("RREs") report information regarding payments made to Medicare beneficiaries whenever medical expenses are claimed or released. An RRE is any entity that is responsible for paying benefits to a Medicare or Medicaid beneficiary, including group health plans, workers' compensation plans, automobile insurers, and *defendants* in lawsuits. These entities are now required to report claimant information to Medicare including, but not limited to, the claimant's social security number or Health Insurance Claim Number ("HICN"); information about the illness or injury; information about the reporting entity; information about the beneficiary's attorney; details about any settlements or payments made; and information concerning claimants if the beneficiary is deceased. This information must be reported electronically directly to the Centers for Medicare and Medicaid Services ("CMS"), which is responsible for monitoring this information and pursuing recovery activities where necessary. CMS essentially holds a "super lien" against any third party recovery by Medicare beneficiaries.

CMS has established "interim reporting thresholds" for the first several years, although the agency reserves the right to change these thresholds without notice. Before the threshold date can be determined, the RRE must decide whether the settlement information to be reported is part of an "ongoing responsibility for medicals" ("ORM") or a "total payment obligation to the claimant ("TPOC"). A TPOC is generally a "one time only" payment to resolve a claim and is therefore most often at issue in third party liability cases. There is *no de minimus dollar threshold* for reporting ORM information. There are multiple TPOC thresholds depending on the date of the TPOC. For example, TPOC amounts under $ 5,000 made before January 1, 2013 need not be reported to CMS. This threshold reduces incrementally, so that after January 1, 2015, all TPOCs regardless of dollar value must be reported. Although CMS recently announced that it would stay reporting requirements for TPOCs until after January 1, 2012, this stay does *not* apply to ORMs. RREs must report ORMs (such as worker's compensation benefits) *now*.

Claims that involve exposure *solely* prior to December 5, 1980, as in certain toxic tort cases, are excluded from the reporting requirements. If exposure continued past that time, reporting is required. It is anticipated that this issue will be among the most contentious of the reporting requirements, as claimants will likely game the dates of exposure in an effort to avoid the reporting trigger. Another difficult question is raised where multiple defendants are involved. It is not at all clear how the reporting obligations of each defendant may be satisfied, and, where defendants do not all settle at the same time, how defendants can be assured that claimants meet their reimbursement obligations. Failure to ensure that the Medicare super lien is repaid may make a settling defendant liable to Medicare for double damages plus interest. Therefore, it is absolutely essential that settling parties remain diligent until CMS issues its final "case closed" letter.

Funk & Bolton Provides Continuing Education

Our attorneys provide education and training on issues such as MMSEA compliance, claims best practices and bad faith avoidance, regulatory compliance, insurance fraud, and subrogation, and issues associated with particular kinds of claims and coverages. We work with your organization and licensing agencies to assist you in meeting your continuing education requirements. To schedule a training, contact Mary McGrath at (410) 659-4972.