

Facebook privacy rights at work

By Eli Kantor

A U.S. district court judge in New Jersey has found that a private Facebook wall posting made by an employee at work is covered by the federal Stored Communications Act (SCA), 18 U.S.C. Sections 2701-11, in *Ehling v. Monmouth-Ocean Hospital Service Corp.*, No. 2:11-cv-03305 (WJM), issued Aug. 20, by Judge William J. Martini. This decision raises serious issues for employers who act on private information posted by their employees on Facebook.

Deborah Ehling was a registered nurse and paramedic, and she was also president of the labor union that represented the employees who worked at the hospital where she worked, Monmouth-Ocean Hospital Service Corp. (MONOC).

On June 8, 2009, she posted the following statement to her Facebook wall:

"An 88 yr old sociopath white supremacist opened fire in the Wash D.C. Holocaust Museum this morning and killed an innocent guard (leaving children). Other guards opened fire. The 88 yr old was shot. He survived. I blame the DC paramedics. I want to say 2 things to the DC medics. 1. WHAT WERE YOU THINKING? and 2. This was your opportunity to really make a difference! WTF!!!"

After MONOC management was alerted to the post by a co-worker, Ehling was temporarily suspended with pay, and she received a memo stating that management was concerned that her comment reflected a "deliberate disregard for patient safety." In response, she filed a complaint with the National Labor Relations Board, which found that the hospital did not violate the National Labor Relations Act because there was no privacy violation in that the post was sent unsolicited to MONOC management by another employee who was a Facebook "friend" of Ehling.

Thereafter, Ehling was eventually terminated for numerous attendance issues. She then filed a complaint alleging numerous causes of action

including violation of the SCA and common law invasion of privacy, alleging that the hospital unlawfully accessed her private Facebook news feed. Ultimately, the district court granted summary judgment to the hospital, dismissing all of her claims.

However, in doing so the court held that private Facebook postings are electronic communications that are subject to the SCA. The only reason that Ehling lost was because the evidence showed that her co-worker, who forwarded the post to management, was her Facebook friend, and as such an "authorized user" under the SCA. A Facebook user can connect with other users

court noted that "privacy in social networking is an emerging, but undeveloped area of case law." On the one hand, where posts are placed in cyberspace for everyone to view, case law has determined that there is no reasonable expectation of privacy. On the other hand, users may have a reasonable expectation of privacy if they only invite specific friends to visit their cyber pages.

The court found that when users make their Facebook wall posts inaccessible to the general public, the wall posts are "configured to be private" for purposes of the SCA, noting that the critical inquiry is whether Facebook users took steps to limit access to the information on

United of Buffalo, Inc., 359 NLRB No. 37 (2012), the NLRB held that the employer committed an unfair labor practice in violation of Section 8 (a)(1) of the act by discharging employees based on their Facebook posts, which the NLRB found to be protected.

In *Costco Wholesale Corp. and the United Food and Commercial Workers Union*, 358 NLRB No. 106, the NLRB struck down Costco's social media policy, finding it to be overbroad and chilling of workers rights protected by the National Labor Relations Act. Recently, the NLRB issued an advice memo in *Cox Communications*, No. 17-CA-01762, setting forth guidelines as to what constitutes an acceptable social media policy.

The take away from the Ehling case and the recent NLRB decisions is that the law regulating social media in the work place is rapidly evolving. Therefore, employers should consult with experienced employment law counsel before taking any action based upon employee's Facebook posts.

This decision raises serious issues for employers who act on private information posted by their employees on Facebook.

by adding them as friends, who are allowed access to the posts on their Facebook wall. Further, the court found that the "friend" was not pressured by management to reveal the post, but rather did so freely, without being solicited to do so.

The court noted that when the SCA was passed in 1986, the World Wide Web, Internet browsers and social media were nonexistent, stating that "most courts, including this one, would prefer that Congress update the statute to take into account the invention of the Internet. As the Ninth Circuit observed, 'until Congress brings laws in line with modern technology, protection of the Internet ... will remain a confusing and uncertain area of the law.'" Citation omitted.

The issue before the court was whether Ehling had a reasonable expectation of privacy when she posted something on Facebook, and therefore whether her Facebook posts were protected the SCA. The

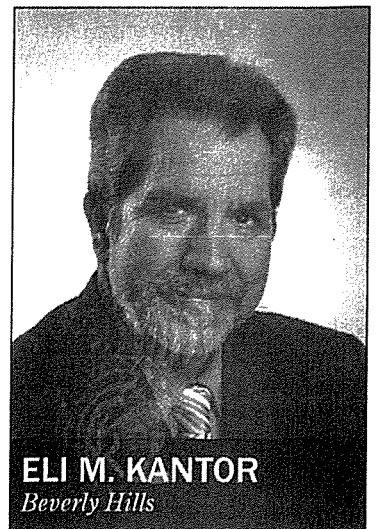
their Facebook walls. Further, the court noted that "Privacy protection provided by the SCA does not depend on the number of Facebook friends a user has."

The court cited with approval *Crispin v. Christian Audigier, Inc.*, 717 F. Supp. 2d 965, 982 (C.D. Cal. 2010), a California case in a slightly different context, where a federal district court judge found that Facebook is an electronic communication service provider within the meaning of the SCA, and quashed a third-party subpoena for Facebook posts.

This case is important for employers. They must now think twice before viewing employee's social media posts. Although there may be a strong temptation, employers who pressure "friends" of an employee to gain access to private posts without authorization may be liable for damages under the SCA.

Further, the NLRB has already started to regulate employer's social media policies. In *Hispanics*

Eli M. Kantor has extensive experience as an attorney in private practice. He represents employers and employees in all aspects of labor, employment and immigration law. He can be reached at (310) 274-8216 or at eli@elikantorlaw.com.



ELI M. KANTOR
Beverly Hills