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California Court Holds Employer Immune Under Federal Statute for Employee's Cyberthreats

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California Court Holds Employer Immune Under Federal Statute for Employee's Cyberthreats

Although Congress passed the Communications Decency Act of 1996 (CDA) (47 U.S.C. § 230) 10 years ago, a California appellate court decided for the first time last month that its protections apply to employers who provide Internet access to their employees. *See Delfino, et al. v. Agilent Technologies, Inc.*, 2006 WL 3635399 (Cal. App. 6 Dist.).

The plaintiffs in *Delfino* alleged that an employee of Agilent (Moore) used Agilent's computer system to send anonymous messages via the Internet that constituted threats to the plaintiffs. They sued Moore and Agilent for intentional and negligent infliction of emotional distress, alleging Agilent was aware that Moore was using its computer system to threaten plaintiffs yet took no action to stop him. The trial court granted summary judgment in Agilent's favor on the ground that Agilent was immune from suit under the CDA as a "provider of an interactive computer service." The Court of Appeal affirmed, also finding that plaintiffs failed to make a prima facie showing to support a claim against Agilent under theories of ratification, respondeat superior, or negligent supervision/retention.

The CDA Provides Immunity to "provider[s] . . . of an interactive computer service."

The CDA was enacted with the primary goal of controlling the exposure of minors to indecent material over the Internet. The CDA's immunity provisions were enacted to encourage Internet service providers to self-regulate the dissemination of offensive materials over their services. The California Court of Appeal noted that an important objective of the CDA was "to avoid the chilling effect upon internet free speech that would be occasioned by the imposition of tort liability upon companies that do not create potentially harmful messages but are simply intermediaries for their delivery." To that end, the CDA provides that "[n]o provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider." 47 USC § 230 (c)(1). The CDA defines the term "interactive computer service" as "any information service, system or access software provider that provides or enables computer access by multiple users to a computer service, including specifically a service or system that provides access to the Internet . . ." 47 USC § 230(f)(2). *Delfino* is the first case in which an employer was found to qualify for CDA immunity.

Essential Elements for Immunity Under the CDA

To qualify for CDA immunity, an employer must establish: "(1) the defendant [is] a provider or user of an interactive computer service; (2) the cause of action treat[s] the defendant as a publisher or speaker of information; and (3) the information at issue [is] provided by another information content provider."

First, the California Court of Appeal noted that the term "interactive computer service" has been interpreted broadly (to include, for example: library providing Internet access to public; nonprofit Web site operator; online dating Web site; company providing Internet access to customers through computer rental). The Court concluded that Agilent meets the definition of the term "in that it provides or enables computer access by multiple users [i.e., Agilent's employees] to a computer server." Second, the Court concluded that in alleging that Moore's employer was liable for his cyberthreats, the plaintiffs sought to treat Agilent as a publisher or speaker of those messages. Third, plaintiffs' complaint consistently attributed authorship of the offensive messages to Moore. Thus, the Court of Appeal affirmed the trial court's finding that Agilent was entitled to CDA immunity.

Finally, the Court of Appeal held that even if plaintiffs' claims were not barred by the CDA, Agilent was nonetheless entitled to summary judgment because: (1) plaintiffs failed to provide evidence that Agilent ratified or even was aware of Moore's conduct; (2) Moore's conduct in sending threatening e-mails to third parties through the Internet was plainly outside the scope of his employment; and (3) plaintiffs did not establish the existence of a duty, breach of duty or causation.

Can All Employers Expect Immunity Under the CDA?

While *Delfino* is helpful for employers, it remains unclear whether employers should expect immunity under the CDA in all circumstances. In *Delfino*, the employer was not liable for the independent and unratified acts of one of its employees acting outside the scope of his employment. Immunity may be in doubt, however, when the facts are less clear about the employer's responsibility for an employee's conduct.

Furthermore, Agilent's thousands of employees who used the company's servers as a primary means of accessing the Internet easily qualified as "multiple users" under the CDA. But does a business that provides Internet access to fewer employees also enjoy immunity under the CDA? These questions will no doubt be answered by subsequent litigation. It is unlikely that the appellate court's decision will be the final word on the subject. An appeal of the decision is expected, and attorneys have already stepped forward to represent the *pro per* plaintiffs in their anticipated appeal.

Regardless of whether all employers who do nothing more than provide Internet access to their employees can count on CDA immunity going forward, they should continue to protect themselves against potential tort liability by maintaining and enforcing policies governing the proper use of the Internet by employees.

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Attorneys in the Employment Litigation & Policy Practice Group represent corporate employers throughout the United States in all types of employment matters. To learn more about the SHB employment group and its members, see SHB.com.

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