LEGAL UPDATE

CLIENT NEWSLETTER OF
CARR, MORRIS & GRAEFF, P.C.

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DISCRIMINATION;
E-COMMERCE

COURT RULES A.D.A. NOT APPLICABLE TO WEB SITES

In a recent decision a Federal Judge in Miami dismissed a lawsuit filed by a disability rights group that claimed Southwest Airline's website violated the Americans With Disabilities Act (the "ADA"). Specifically, plaintiff Access Now, Inc., a non-profit group, alleged that Southwest's online reservation system violated the ADA because it was incompatible with screen reading software that is used by the blind to read Internet websites. In its suit Access Now contended that, because Southwest publishes some of its low price fares only on its website, its failure to make its site compatible for the blind was discriminatory.

The ADA, which was promulgated in 1990, prohibits, among other things, discrimination

continued on page 2

IN THIS ISSUE

DISCRIMINATION; E-COMMERCE: WEB SITE NOT COVERED BY A.D.A. 1

CORPORATE: LEGISLATION PROTECTS CORPORATE WHISTLEBLOWERS 1

WAGE-HOUR: ROUNDING EMPLOYEE START AND STOP TIMES 2

TRADEMARK: COURT REVIEWS DILUTION LAW 3

STAFF NOTES 4

CORPORATE

SARBANES-OXLEY ACT CREATES WHISTLEBLOWER PROTECTION FOR EMPLOYEES

On July 30, 2002, President Bush signed into law the Sarbanes-Oxley Act of 2002. Among other things, the Sarbanes-Oxley Act ("the Act" to be codified at 18 U.S.C§1514A) provides new protections for employees of publicly traded companies who "blow the whistle" on securities fraud. In response to high-profile corporate breakdowns stemming from *creative accounting* and other unethical behavior by corporate officers and accounting firms, the Act is a legislative attempt to increase reliability of corporate reporting and restore public confidence in the capital markets.

As white-collar crime becomes a higher priority, prosecutors will likely rely on the same strategy that has been successful in the past—using corporate *insiders* to provide incriminating evidence. As a result of the recent rash of corporate corruption, the Act was promulgated in part to encourage corporate insiders to report fraudulent corporate behavior and to prohibit economic retaliation against these corporate "whistleblowers." The Act's protections provide that no company regulated by the Securities and Exchange Commission may "discharge, demote, suspend, threaten, harass, or in any manner discriminate against an employee in the terms and conditions of employment" as a result of that employee's dissemination of securities fraud information to a federal regulatory or law enforcement agency, or to any person with supervisory authority over the employee.

The Act creates a private right of action for the employee who believes his/her rights under the Act have been violated. If aggrieved, the employee must file a complaint with the Department of Labor within 90 days of the violation, and he may file suit against the employer no sooner than 180 days after filing the initial complaint. If successful in his/her suit against a company, the employee could be entitled to reinstatement, back pay with interest, and special damages including litigation costs, expert witness fees and reasonable attorneys' fees. It is important to note that the employee's burden of proof is low when filing suit under the Act. The employee must show that the whistleblowing activities were merely a *contributing factor* in the unfavorable personnel action alleged in his/her complaint. It is also important to note that the Act imposes criminal penalties on any person found to have taken harmful action against an employee who gives information to law enforcement officials relating to violations of federal law.

continued on page 3

The articles in this publication are designed to give general information on the matters covered. Space limitations prevent exhaustive treatment or analysis of any topic. The articles are not intended to substitute for advice on specific legal problems.

WAGE-HOUR
'ROUNDING' OF EMPLOYEE START AND STOP TIMES

The Fair Labor Standards Act (FLSA) requires an employer to pay non-exempt employees (those employees paid an hourly wage for services provided) for all hours *actually* worked with the *knowledge* and *consent* of the employer. While a non-exempt employee must be paid for all hours worked with the knowledge and consent of the employer, the FLSA explicitly permits the employer to round an employee's starting and stopping time in accordance with the regulations issued by the Department of Labor.

The Department of Labor (DOL) will accept a rounding method provided that the method is consistently applied and that it is used in a manner that will not result in the failure to properly compensate the employee for all time actually worked over a period of time. Under DOL's interpretation of these regulations, any acceptable method of rounding requires the employer to *both* round the working time up and down. For example, if the employer's policy requires rounding to the nearest quarter hour, an employee who clocked in at 9:08 would be paid from 9:15 while an employee who clocked in at 9:07 would be paid from 9:00. Provided that the policy of rounding is uniformly applied, it is anticipated that the rounding up and down over a period of time would even out and the employee would be paid for all hours worked.

In addition to requiring knowledge and consent of the employer to be paid, the employee must *actually* perform work for the employer. Accordingly, under the provisions of the Portal-to-Portal Act, employers may exclude payments to employees for activities which are *preliminary* and *postliminary* to the main job duties. For instance, if the employee clocks in and out at the plant entrance, she need not be paid for the time spent walking to and from her work station at the beginning and end of a work shift. Additional preliminary and postliminary activities which may not be compensable include time spent by an employee which is not *productive* work, such as clocking in and getting coffee before reporting to the work station or completing the shift's work and remaining at the worksite to socialize with other employees before clocking out. However, employers are cautioned to clearly document time spent on postliminary and preliminary activities when they will not be compensated to prevent an employee claim for uncompensated worktime.

PHIL SCHWARTZ

DISCRIMINATION
continued from page 1

in "places of public accommodation." The dispositive issue in the *Access Now v. Southwest Airline, Inc.* litigation was whether Southwest's presence on the Internet was a "place of public accommodation" under the ADA. In granting Southwest's motion to dismiss, the trial judge construed the literal language of the ADA as applying only to physical locations rather than "virtual places." The Court found support for its decision in the language of the ADA specifically enumerating "places of public accommodation" including hotels, restaurants, theaters, dry cleaners, bus stations, zoos and other exclusively physical—rather than ethereal—locations. The Court concluded that Congress, and not the court system, was the proper venue for Access Now to seek redress and that, rather than filing suit, Access Now should lobby Congress to amend the ADA and extend the law's reach to cyberspace.

While the case and the issue of whether ADA protection extends to the Internet will be further examined by the Court of Appeals, this issue is important to any business that has an Internet presence. For example, if, as a result of a successful appeal by Access Now or an act of Congress, the ADA is expanded to include websites as "places of public accommodation," every company's website could be required to have the functionality to assist a variety of handicapped users. This may prove costly because there is no standard software to accomplish this task and, invariably, there will be an initial increase in related litigation as the plaintiff's bar explores the new boundaries of the ADA.

TIMOTHY FEELY

TRADEMARK

SUPREME COURT REVIEWS DILUTION LAW

In a case recently argued before the Supreme Court, well-known women's lingerie manufacturer Victoria's Secret claimed that an adult novelty store named "Victor's Secret" is impermissibly using its "famous" name and hurting its good reputation. At issue is the Federal Trademark Dilution Act of 1995 ("FTDA").

The FTDA gives owners of *famous* trademarks, arguably like Victoria's Secret, protection from dilution infringement. The FTDA provides that the owner of a famous trademark may sue in federal court if another's unauthorized commercial use of the mark dilutes the mark's distinctive quality. This is a unique cause of action created by the FTDA and not expressly included in traditional trademark law. Historically, trademark law has focused not on dilution but infringement. The federal Lanham Trademark Act of 1946 protects the public from deceptive practices that would likely cause confusion as to source, affiliation or sponsorship of the trademark. For example, the U.S. Patent and Trademark Office ("USPTO") would likely reject an application if the proposed trademark was too similar to an existing and competing trademark. In order to make that determination the USPTO would look at many factors including the similarity of the actual marks as well as the similarity between the goods and services associated with the marks. Thus, two "Water World" trademarks exist because one relates to seafood products and another to video games. The products do not compete, and a consumer is not likely to confuse the two.

Dilution laws do not focus on "likelihood of confusion" or competition between goods and/or services. Instead the FTDA attempts to protect the goodwill or economic value associated with famous marks like Coca-Cola or Xerox from tarnishment. The FTDA states that dilution means "the lessening of the capacity of a famous mark to identify and distinguish goods or services, regardless of … competition between the owner of the famous mark and other parties, or likelihood of confusion, mistake, or deception." The theory behind dilution laws is that famous marks like Coca-Cola would be less effective if "Coca-Cola" was used to advertise cars, books, medicines and candy. The mark would lose its selling power because consumers would no longer uniquely associate it with the famous soft drink.

While the FTDA went a long way in providing protection from dilution, it is still an unclear road. The FTDA defined "dilution" but did not clarify what constitutes a "famous" mark. Further, there is uncertainty as to what type of injury a plaintiff must prove in order to be successful. The owners of Victor's Secret, now known as "Cathy's Little Secret," claim that Victoria's Secret has not been injured and that it must prove actual injury in order to win. The 4th Circuit agrees and in 1999 held that a plaintiff suing under the FTDA must prove actual harm to the economic value of the famous mark. *See Ringling Bros.-Barnum & Bailey Combined Shows v. Utah Division of Travel Development*, 170 F.3d 449 (4th Cir. 1999). The Supreme Court has not yet issued a ruling.

DANA THERIOT

CORPORATE

continued from page 1

The Act requires companies to establish procedures to facilitate whistleblowing complaints. The company must have their audit committees establish procedures for receiving complaints. These procedures must include complaints relating to accounting, internal accounting controls and auditing matters. The procedures must also establish a confidential and anonymous system for submission of complaints over questionable accounting and/or auditing matters.

The Act creates a new, serious litigation risk for employers. It also necessitates further legal analysis before employers can fire, demote or take other disciplinary action against employees.

ALAN BOWDEN

CARR, MORRIS & GRAEFF, P.C.

Carr, Morris & Graeff, P.C., was established in 1982 by the named principals–Lawrence Carr, Roy Morris and Stephen Graeff. It is a diversified firm structured primarily to meet the legal needs of businesses and their principals.

The firm strives to provide full service representation to its corporate and individual clients. It is designed to provide such service by organization and presentation of an array of attorneys with diverse backgrounds in specialized areas of the law as well as a generalized background which enables them to look beyond a narrow specialty or need. The academic and cultural backgrounds of the attorneys of the firm are as diverse as their experience and specializations.

Carr, Morris & Graeff, P.C., specializes in the following areas: Corporate/General Business; Taxation/Estate Planning; Civil/Commercial Litigation; Alternative Dispute Resolution; Employment/Labor; Discrimination; and Wage-Hour.

The firm maintains its office in the Metro Center region of downtown Washington. It has attorneys admitted to all of the local judicial jurisdictions–the District of Columbia, Maryland and Virginia.

STAFF NOTES

As a member of the Development Committee of The Washington Opera Board of Trustees, Néstor Cruz helped organize a Camerata Donors Dinner followed by a performance of *La Boheme* with Virginia Tola as prima donna.

* * *

In an incredible election upset, Phil Schwartz was recently elected to the Board of Directors of Springfield Country Club. Mistakenly, Phil thought this entitled him to tee time preferences and reserved parking.

* * *

Adam Wilk has once again transitioned smoothly from coaching youth soccer to youth basketball. Adam's Under-9 Boys soccer team finished a very competitive 5-3 in the Fairfax Police Youth Club. His Under-8 basketball team begins play in late December. At this rate Adam should be coaching in the A.C.C. by 2012.

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