KUMEN L. TAYLOR'S CASE VICTORIES

Kumen L. Taylor
Partner

1 The Plaintiff came to Las Vegas on business. He caught a late flight out of Florida and flew directly to Las Vegas. He took a taxi to the Firm's client hotel and casino. Arriving late at night, he went directly to his room and went to bed. In the morning, he ate breakfast at the client's restaurant and then went downtown for a meeting, which lasted most of the day.

He came back to the hotel and casino later that evening and ate dinner. He went back to his hotel room and went to bed. About an hour and a half later, he felt sick and began to vomit and experience diarrhea. This continued through the night. In the course of his difficulties, he suffered at least one heart attack.

The next morning he summoned room service to clean the bathroom and his room and bed. He was taken to the hospital and treated for food poisoning symptoms. After his condition stabilized, he returned home to Florida.

The Plaintiff filed a lawsuit against the Firm's client claiming that it was the dinner he ate that night that gave him food poisoning. Firm partner Kumen Taylor took his deposition and asked him if he preserved a stool sample to be tested for the virus or bacteria he believed had made him ill. He admitted he had not. Taylor asked him if he preserved a food sample to test it for bacterial or viral contamination. He had not.

The medical literature is very clear that the incubation period for either bacterial or viral contamination in food is at least 12 hours and as long as 72 hours. The Plaintiff testified that he experienced his first symptoms less than two hours after he finished his meal at the restaurant. The Firm filed a motion for summary judgment asking the Court to dismiss his complaint against the client because he could not have been sickened by the food he ate at the client's restaurant. The incubation period was simply too short.

The Court agreed and dismissed the Plaintiff's complaint in its entirety against the client.

2 Plaintiff was the driver of a service van that was rear ended by the Firm's client. Plaintiff complained of pain in his shoulders, neck, and low back. He was treated by various health care providers and incurred $10,861 in medical bills.

He sued the client and the case proceeded to an arbitration trial. At arbitration, Plaintiff was awarded all of his medical bills, plus a monetary award for pain and suffering. The Firm requested a trial de novo.

The party who requests a jury trial de novo must beat the arbitration award by at least 20% or must pay the other party its attorney fees. Prior to the trial de novo, the Plaintiff served an offer of judgment. This meant that the client had to beat that amount or pay Plaintiff the costs and fees.

Firm partner Kumen Taylor tried the case this summer. Both parties presented their case to a jury. In closing argument, Plaintiff asked the jury to award the amount of the arbitration. In closing argument Taylor pointed out that Plaintiff had pre-existing problems with his neck, shoulders, and low back and that he was trying to pass these conditions off as having been caused by the accident. Taylor argued that the client may have temporarily aggravated these conditions, but that they cleared up, by Plaintiff's own testimony, within three months. Taylor also argued that some of his bills were unnecessarily incurred.

The jury agreed and awarded Plaintiff a small amount – less than his total medical bills. The client beat his arbitration award by more than 75%. ■

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Legal Matters

Issue 3, 2011

RESIDENTIAL DEVELOPER SECURES HARD-FOUGHT VICTORY

Christian M. Orme

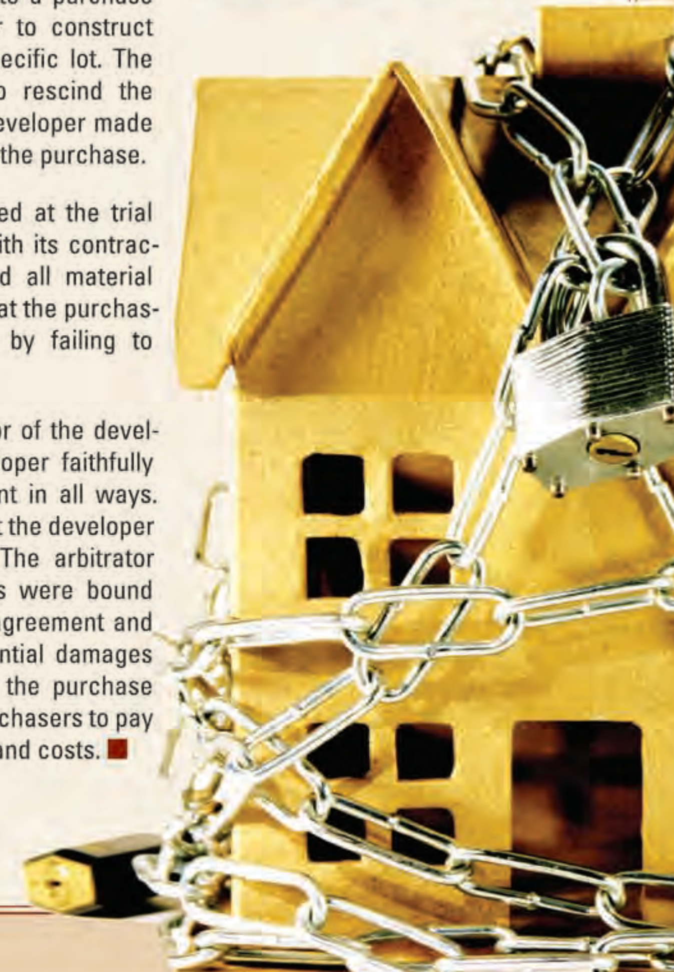
Mark A. Hutchison

Following a trial before an arbitrator, Mark A. Hutchison and Christian M. Orme recently secured a substantial arbitration award for a client, a Southern Nevada residential developer, against property purchasers. Hutchison and Orme also secured an award for attorney's fees and costs on behalf of the client as the prevailing party.

The purchasers entered into a purchase agreement with the developer to construct a large custom house on a specific lot. The purchasers later attempted to rescind the agreement, claiming that the developer made misrepresentations concerning the purchase.

Hutchison and Orme argued at the trial that the developer complied with its contractual obligations, fully disclosed all material terms to the purchasers, and that the purchasers breached the agreement by failing to purchase the property.

The arbitrator ruled in favor of the developer, observing that the developer faithfully performed under the agreement in all ways. The arbitrator stated further that the developer made no misrepresentations. The arbitrator concluded that the purchasers were bound by the terms of the purchase agreement and awarded the developer substantial damages for the purchaser's breach of the purchase agreement and required the purchasers to pay the developer's attorney's fees and costs. ■



DELETING COMPANY E-MAIL

When a telecommunications company went defunct, almost literally on his way out the door, the former president and CEO of the company allegedly deleted certain e-mails from the company's computers. When the company was placed in receivership, the receiver sued the former executive for a variety of his actions taken in connection with the collapse of the company. Among these claims was an assertion that when he deleted the e-mails, allegedly to cover up some misconduct, the executive violated the federal Computer Fraud and Abuse Act (CFAA).

One of the executive's arguments was that the CFAA only makes it illegal to damage computers, and that the mere deletion of e-mails could not reasonably be regarded as inflicting such damage. The federal district court hearing the case disagreed. To require something like physical harm to a computer, or even some lesser injurious action of the kind, for there to be damage would be to ignore the expansive language that Congress used in drafting the CFAA.

"Damage" is defined in the law as "any impairment to the integrity or availability of data, a program, a system, or information." Given that definition, the court concluded that even the commonplace act of deletion of data from the company computers impaired the availability of computerized data, thereby constituting damage within the meaning of the CFAA.

The executive was unable to have the case against him dismissed on this basis, but it remained for a jury to decide if he had, in fact, both deleted the e-mails and done so without authorization. On those points, an examination of the defendant's e-mail box on the server was enough to allow a jury to find that he had deleted the e-mails in question.

The e-mail box had been reduced in size by about 98%. Moreover, even the previously authorized use of a computer system may become unauthorized when an employee breaches his duty of loyalty to his employer. The executive no doubt at some point had broad authority to deal with his company e-mails as he wished, but the pending litigation against him was replete with claims that he had been disloyal to the company in a number of different ways. If the receiver could prove such disloyalty, whatever authority the defendant had once had over the company computers was gone as quickly as he had left the premises following the deletions.

SOCIAL MEDIA IN THE WORKPLACE

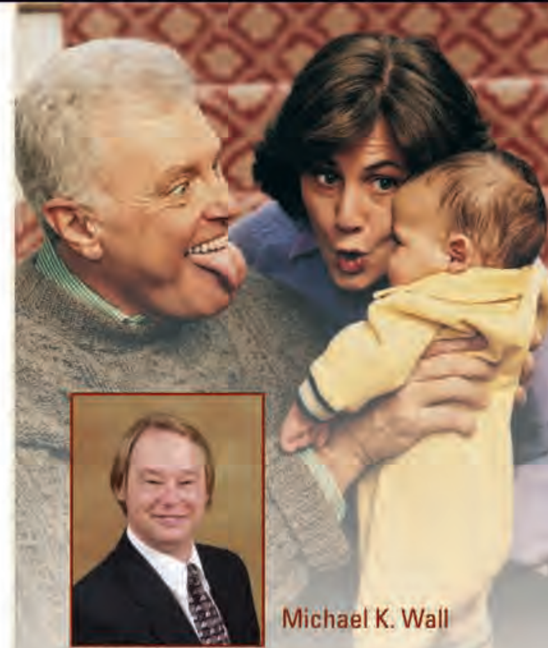
The prevalence of social media, including postings that are meant for employment related topics in particular, has led to an increase in litigation on the subject between employees and their employers. The scenarios leading the parties to the courtroom are as varied as one might imagine. A company fires a worker over her criticisms of the boss that she posted on Facebook. Repeated attempts by a manager to "friend" a female employee on Facebook eventually leads to allegations of sexual harassment. A disappointed job applicant sues when a job offer is retracted after a hiring manager turns up something about the applicant on Twitter that the manager finds disturbing.

In addition to scenarios in which a worker loses his or her job because of something appearing in social media, litigation may ensue against an employer if its supervisory officials go too far in digging for dirt by this means. For example, two restaurant workers won a monetary settlement after having sued their former employer for gaining access to postings on a password protected Myspace page set up as a chat group for employees only. What was found on the page eventually led to the workers' termination. The case was settled after a jury found that the employer had violated the federal Stored Communications Act (SCA).

The employees' managers had violated the SCA by knowingly accessing the chat group on Myspace without authorization. Although a fellow employee had provided her log-in information to one of the company's managers, she had not authorized access to the chat group by any of the company's managers. She also felt that she had been coerced into giving her password to her manager, as she felt that she would have been in trouble if she had not done so.

Using the employee's password, the company's managers accessed the chat group on several occasions, although it was clear on the Web site that the chat group was intended to be private and accessible only to invited members. Finally, the managers continued to access the chat group even after realizing that the employee had reservations about having provided her log-in information.

Since e-mail first came on the scene, similar cases have arisen over what was or was not appropriate when employees used their company provided computers for sending e-mails. One preventative measure for employers has been to create a clear written policy on the subject, followed up by informing and training the employees. Likewise, an employer's best protection against potential liability stemming from social media may be to establish a policy that clearly spells out the ground rules for the use of social media. ■



Michael K. Wall

FIRM PARTNER MICHAEL K. WALL WINS GROUND-BREAKING NEVADA SUPREME COURT VICTORY ON GRANDPARENTS' RIGHTS

Hutchison & Steffen partner Michael K. Wall recently secured an unprecedented appellate victory at the Nevada Supreme Court. The Court recognized for the first time that grandparents have child visitation rights following a divorce. The Firm's clients asked for visitation rights, but the District Court denied the request. On appeal to the Nevada Supreme Court, Wall argued that the Court should recognize and protect grandparents' legal rights to continue their relationship with grandchildren following a divorce, including visitation rights. The Supreme Court agreed, granting and recognizing a new legal right for all grandparents in Nevada.

"Non-parent rights can be a difficult subject," says Wall. "Even though a non-parent isn't typically allowed visitation rights, due to the circumstances of the relationship including a period of time where the child lived with her grandmother, the Court decided it was indeed in the best interest of the child to maintain that relationship. We are very pleased with this important decision." ■

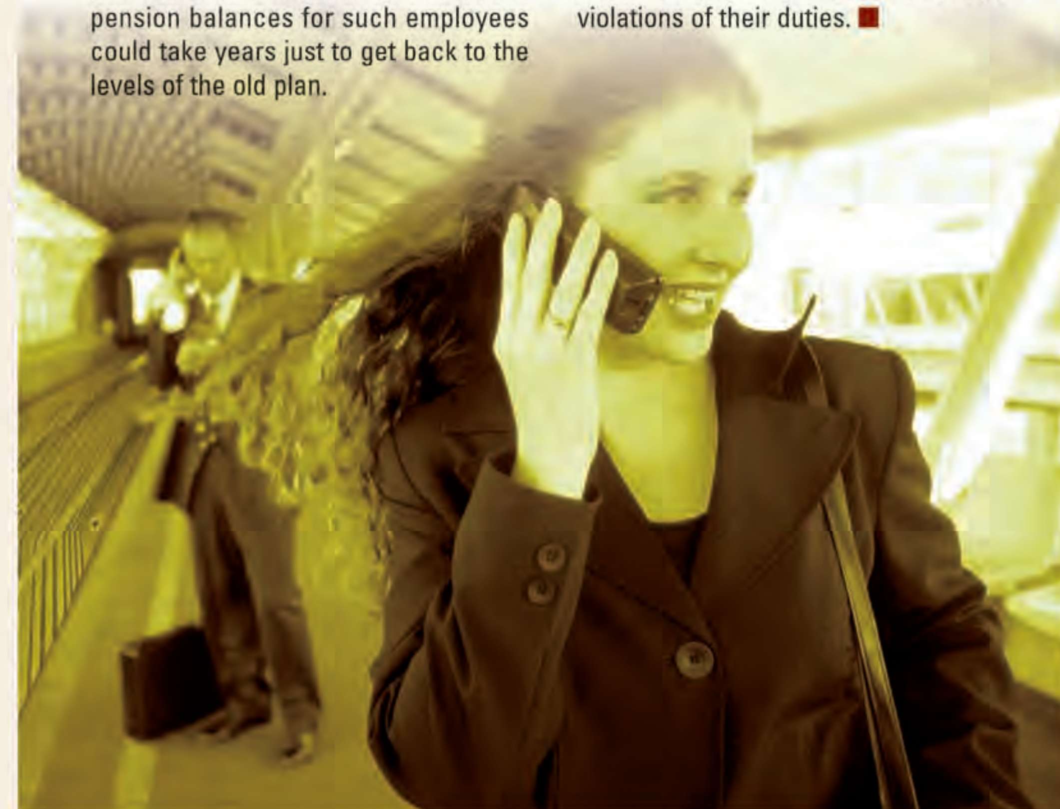
EMPLOYEES WIN BENEFIT PROTECTIONS

A major health services company with thousands of employees overhauled its pension plan some years ago. As it explained to the employees at the time, their then existing benefits would all be converted into a hypothetical lump sum, which would constitute the opening account balance for the new plan. That amount would then grow by a percentage of the employee's pay each year. It all sounded as though there was nothing to which the employees could object.

But what was not explained to the employees, and what eventually led a class of employees to sue under the federal Employee Retirement Income Security Act (ERISA), was that the beginning balance for many employees with long tenures at the company would be as little as 50% to 70% of the amounts built up under the old pension plan. Calculated in such a manner, the pension balances for such employees could take years just to get back to the levels of the old plan.

The now illegal practice that led to the litigation has happened often enough that it has a name: "wear away." The employer's creation of "underwater" beginning balances effectively tells employees that prior pensions were overpaid and that before they can receive compensation under a new pension plan, they effectively must work off a debt, or "wear it away."

When the case ultimately reached the U.S. Supreme Court, a majority of the Justices agreed with the plaintiffs that if the company had deliberately provided misleading and incomplete information to its employees, in violation of ERISA, a monetary remedy was appropriate. This was a resounding win for the employees, given some earlier case precedents making it difficult to recover monetary awards for employment benefits lost due to employer violations of their duties. ■



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