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February 2010

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Practice Group Highlight

Matt Stone, partner in charge of Transportation Law Practice Group at Freeman Mathis & Gary regularly defends claims against companies involved in the transportation and trucking industry, both through their insurers and on a direct hire basis for clients that have large deductibles or self insured retentions. Read Article

Dana Maine and Fred Dawkins recently participated in DRI's CIVIL RIGHTS AND GOVERNMENTAL TORT LIABILITY SEMINAR in San Diego, California. Dana served as Program Chair for the DRI governmental employment law seminar and Fred's presentation on First Amendment - Government Defense of Employee Speech Issues was well attended.

Fred's session focused on the evolving area of employee speech issues by providing an overview of recent developments in First Amendment law and provided strategies local government employers can use to manage risks. Contact Fred Dawkins at fdawkins@fmglaw.com for more information on this presentation.

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Upcoming Seminar

What's New In Employment Law for 2010? - Changes In Workplace Law You Need To Know

When: Tuesday, February 9, 2010, 8:30 a.m.

Where: Westin Buckhead-Atlanta

Our next seminar will be on Tuesday, February 9, 2010, at the Westin Buckhead-Atlanta beginning at 8:30 a.m. and lasting until 10:00 a.m. Registration and coffee begin at 8:00 a.m.

Please let us know if you plan to attend by calling our RSVP line at 770.818.1423 or email us at fmgseminar@fmglaw.com. You can also visit our website at www.fmglaw.com. Click here to register.

The Westin Buckhead-Atlanta is located at 3391 Peachtree Road, NE, Atlanta, Georgia 30326 across from Lenox Mall. As always, our seminar is free of charge. We hope to see you there.

Upcoming Webinar

Are You At Risk?
Union Vulnerability in 2010

Presented by: Ben Mathis of Freeman, Mathis & Gary

Are you worried about unions targeting your employees? In this presentation, you will learn more about how to assess your own union vulnerability, including recent stats from the NLRB and

how to use that information. Plus, Mr. Mathis will be looking at unit determination issues, and how you can plan ahead to determine the best unit. Plus, learn what can be done in-house and when it's time to call in the experts.

When: February 23, 2010, 1 p.m. (EST)

Click here to register.

About Freeman Mathis & Gary, LLP

Freeman Mathis & Gary, LLP is a leading specialty litigation firm, serving clients through its practice groups in Business Liability and Insurance Law, Labor and Employment Law, Construction Law, Commercial and Complex Litigation, and Government Law. FMG attorneys serve as trusted counsel to corporations and governments throughout the country, providing practical, efficient, and cost-effective solutions for legal issues. For more information about FMG, visit www.fmglaw.com.

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LAWLINE

The Eleventh Circuit Draws Fine Line Between Actionable And Un-Actionable Sexually-Charged Banter In The Workplace

By Fred Dawkins and Amy Combs

Two cases recently addressed by the federal appeals court for Georgia, Alabama, and Florida have drawn a fine distinction between language constituting sexual harassment and language found not to constitute actionable sexual harassment. Both cases involve comments of a sexual nature, with each case reaching a different result, highlighting the Eleventh Circuit's propensity to examine closely the lawfulness of sexual banter. As discussed below, the critical difference between these two cases lies in the pervasiveness of the extreme, sexually-charged use of profanity.

In *Corbitt v. Home Depot U.S.A., Inc.*, two male former store managers filed suit against the national home improvement chain claiming that their male supervisor harassed them based on their sex. The plaintiffs, Corbitt and Raya, alleged that their supervisor, Cavaluzzi, made sexual comments to them over the phone and touched them in a sexual way. Examples of the alleged behavior included:

- Cavaluzzi told Corbitt he knew he was not gay, but Cavaluzzi could show Corbitt how, and he would "like it;" asked if Corbitt colored his hair and remarked that it must be Corbitt's "natural color down there too;" and told Corbitt to visit specific gay websites, saying Corbitt "should look at them" so Corbitt "could see what he is talking about."

- Cavaluzzi called Raya several times a week; asked what Raya was wearing and if he was wearing the pants that Cavaluzzi liked; asked whether Raya was happily married, remarked that Raya's hair was beautiful, and stated that he liked Raya's green eyes; and repeatedly asked Raya to meet him for drinks.

- Cavaluzzi massaged Corbitt's and Raya's necks and shoulders, made comments about their hair, played with their hair, and hugged Corbitt and Raya in front of other employees; Cavaluzzi sat down next to Raya and put his hand on Raya's thigh under the table; Cavaluzzi gave Raya a hug and pressed his whole body against Raya so that Cavaluzzi's body was touching Raya's "privates;" and "snuck up" behind Corbitt, put one of his hands on Corbitt's shoulder, and rubbed Corbitt's stomach with the other.

In this case, the court found that Cavaluzzi's conduct did not go so far as to create a hostile work environment because it was not sufficiently severe and pervasive. The court explained that, although some of the behavior was inappropriate for the workplace and may have caused the plaintiffs discomfort, it would not have been offensive to a reasonable person and involved many non-sexual comments and gestures. The court also noted, "Flirtation is part of ordinary socializing in the workplace."

On the other hand, a month after the *Home Depot* case, the court found other sexual banter to be actionable in *Reeves v. C.H. Robinson Worldwide, Inc.* In *Reeves*, the plaintiff claimed that her nearly all-male workplace was permeated with insulting, offensive, and profane comments targeting women (i.e., "bitch," "whore," the "f" word, and the "c" word). In addition, nearly every day, her male coworkers tuned the office radio to a crude program that featured discussions of women's anatomy. One male coworker also displayed a pornographic image of a woman on his work computer. Although the plaintiff admitted that none of the comments were made directly to her, the court denied summary judgment to the employer on her Title VII sexual harassment claim. This time, the court did not base its holding on the "severe and pervasive"

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element (as it did in *Home Depot*), but focused on whether the conduct in question was based on the plaintiff's sex. The court found ample evidence of gender-specific, derogatory comments made about women on account of their sex.

These opinions illustrate that, while there may be no bright-line test for determining whether conduct constitutes unlawful sexual harassment under Title VII, sexual banter of a profane and offensive nature is often found to be actionable in the Eleventh Circuit. Indeed, trial courts now may permit juries to decide sexual harassment claims more frequently as courts struggle to reconcile the Eleventh Circuit's cases defining the boundary between ordinary teasing and flirtation in the workplace and illegal harassment. Both cases demonstrate that it is critical to maintain and distribute policies prohibiting harassment and discrimination based on sex and other protected categories as well as a comprehensive complaint procedure for employees. Although not all comments of a sexual nature are illegal, they are sure to come under close scrutiny by a court of law, and employers must adopt policies to insulate themselves from liability should an employee raise the issue of inappropriate sexual comments.

For more information regarding this article, please contact Mr. Dawkins at 770.818.1409 or by email at fdawkins@fmglaw.com, and Ms. Combs at 770.818.1421 or by email at acombs@fmglaw.com.

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LAWLINE

Simply "Going through the Motions" With E-Discovery Creates Serious Risks

By David A. Cole

It is easy to understand that intentionally destroying evidence during a lawsuit will get you into serious trouble. But an important federal case published last week is making waves in the world of e-discovery because it demonstrates that companies risk serious consequences, even when they do not intentionally destroy evidence, by simply not being as thorough as they could have been in preserving and collecting electronic evidence. As such, the case of *The Pension Committee of the University of Montreal Pension Plan v. Banc of American Securities, LLC, et al.*, provides important lessons for all companies.

What the companies did (or didn't do)

The *Pension Committee* case began in 2004 when a group of investors filed suit to recover $550 million in losses caused by the liquidation of two hedge funds in which they held shares. When the case began, the plaintiffs and their lawyers did not issue a written "litigation hold" telling employees to preserve all potentially relevant evidence and to stop their routine document retention/destruction policies. As a result, some employees deleted old emails without knowing they were doing anything wrong. Backup tapes with potentially relevant evidence also stayed in the companies' normal rotation schedules and were overwritten.

When searching for electronic evidence, the plaintiffs did not involve management or their lawyers, but instead delegated the tasks to individual employees and asked them to search their own computers without supervision. Other plaintiffs delegated the search efforts to a supervisor who, although generally knowledgeable about computers, did not have the experience or training needed to accurately and thoroughly search for electronic evidence. As a result, the plaintiffs located and produced very few emails and electronic documents, which made the opposing parties and the court very suspicious.

How the court punished the companies

Although there was no evidence of the loss or destruction of specific documents, the court believed that documents likely existed at some point in time, but were lost or destroyed as a result of the plaintiffs' half-hearted efforts. The court explained that, "surely records must have existed documenting the due diligence, investments, and subsequent monitoring of these investments. The paucity of records produced by some plaintiffs and the admitted failure to preserve some records or search at all for others by all plaintiffs leads inexorably to the conclusion that relevant records have been lost or destroyed."

As a result, the court sanctioned the plaintiffs by deciding to instruct the jury at trial that "as a matter of law, each of these plaintiffs failed to preserve evidence after its duty to preserve arose." It also decided to tell the jury that it may presume that the lost evidence was relevant to the case, harmful to the plaintiffs, and helpful to the defendants. In addition, the court imposed monetary sanctions against the plaintiffs by awarding the defendants their costs and attorney's fees associated with the discovery disputes. The court also ordered the plaintiffs to search their backup tapes at their own expense.

Lessons to be learned

The court's opinion is clear that, while companies do not have to be perfect when

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producing documents, at a minimum they must act diligently and search thoroughly. Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policies and put in place a "litigation hold" to ensure the preservation of relevant documents. In doing this, companies should: (1) identify the key players and ensure that their electronic and paper records are preserved; (2) cease the deletion of email and preserve the records of former employees that are still in the company's possession, custody, or control; and (3) preserve all backup tapes when they are the sole source of relevant information (*e.g.*, when the active files of key players are no longer available).

During litigation, management and key players need to take an active role in the preservation and collection of evidence. They should work with counsel to identify sources of electronic information and how they can be searched. The search efforts should not be delegated to individual employees without supervision, but should be assigned to individuals with sufficient experience and training to complete an accurate and thorough search. Management and counsel should then monitor the process to make sure it is done and done correctly. While not every employee will require hands-on supervision, oversight of the process, including the ability to review, sample, or spot-check the collection efforts is important.

For more information regarding this article, please contact Mr. Cole at 770.818.1287 or by email at dcole@fmglaw.com.

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Practice Group Highlight

Transportation Law Practice Group

Matt Stone, partner in charge of Transportation Law Practice Group at Freeman Mathis & Gary regularly defends claims against companies involved in the transportation and trucking industry, both through their insurers and on a direct hire basis for clients that have large deductibles or self insured retentions.

For those of you not familiar with this Freeman Mathis & Gary practice group, here is a short description of the firm's Transportation Law Practice Group and our 24/7 Emergency Response Team (ERT):

The Transportation Law Practice Group has extensive experience defending motor vehicle liability claims against companies and drivers involved in the trucking and transportation industry. FMG's 24/7 Emergency Response Team (ERT), which is part of the Transportation Law Practice Group, provides clients, their insurers, and their claims administrators with immediate around-the-clock access to our attorneys and network of qualified investigators and experts.

ERT attorneys are experienced in quickly assessing an incident and determining the appropriate level of response. When a situation warrants, ERT members are dispatched to an accident location to coordinate and manage on-scene accident investigation; to interface with law enforcement and administrative officials; to obtain driver and witness statements; to document, collect, preserve, and analyze evidence; and to oversee vehicle and cargo recovery and salvage.

Our attorneys have the knowledge and experience to handle claims from start to finish, from on-scene investigation through trial, and a track record of achieving cost-effective, positive results. We are committed to maintaining a working knowledge of federal, state, and local laws and to staying ahead of developments and trends that affect our clients, their fleets, and their employees. Our attorneys are active members of legal and industry specific groups, including the Defense Research Institute, the Georgia Defense Lawyers Association, the Transportation Lawyers Association, and the Georgia Motor Trucking Association.

Please visit our website for a more detailed description of the ERT members and capabilities. As you know, having the right team in place to respond to an incident is critical.

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