



# Business Law Newsletter

## Employment Discrimination Laws

*by James V. Irving*

Employment laws must strike a balance between protecting the rights of a targeted class and avoiding overly broad remedies that may be unfairly applied. As the pendulum swings back and forth, both employers and employees are heard to complain that the state of the law works to their disadvantage. A case handed down in United States District Court for the Eastern District of Virginia, Richmond Division, on February 5, 2004, demonstrates that remedies are available if anti-discrimination laws are abused.

After United First Mortgage (“UFM”) fired John J. Lomanno on the basis of allegations of sexual harassment, Lomanno sued his former employer, the complainant, and a second employee, alleging, among other things, that the complainant and the second employee had concocted the sexual harassment complaint in order to get Lomanno fired.

The facts showed that UFM fired Lomanno after a female employee (the complainant) accused Lomanno of both physical and verbal sexual abuse. Lomanno alleged that UFM immediately terminated him without investigating the complaint, although it had conducted investigations in similar circumstances where female colleagues had been accused. Claiming that he had lost salary, commissions, and bonuses, Lomanno sued UFM and also brought claims of malicious interference with contract and defamation in the Federal Court against the individual defendants. The individual defendants moved to dismiss the two counts for failure to state a claim, but United States District Court Judge Henry Hudson denied their motion.

Judge Hudson noted that in order to survive a Motion to Dismiss, an Employment Discrimination complaint need only set forth sufficient facts to allege each element of the claim. The essential elements necessary to sustain the tortious interference complaint are that Lomanno and the two individual defendants were employees of UFM; that the defendants made intentionally false statements to their employer in a successful attempt to have him fired; and that as a result, Lomanno suffered substantial economic loss. Assuming Lomanno’s essential allegations to be true at this stage of the proceedings, Judge Hudson ruled that the claim could go forward.

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## ELECTRONIC CONTRACTING IN VIRGINIA

By Scott J. Spooner

Virginia's recently-enacted Uniform Electronic Transaction Act (UETA) validates the making and execution of electronic contracts in Virginia. UETA provides that the rules for electronic contracting follow the same rules as regular contracting, with one additional element. An electronic contract still requires an offer, acceptance, valuable consideration and a "meeting of the minds" as to the terms of the contract. In addition, a valid electronic contract under UETA must be preceded by a preliminary agreement of the contracting parties to conduct business electronically.

With respect to the preliminary agreement requirement, UETA mandates that the parties first authorize the transaction to be conducted electronically. The authorization to proceed electronically may be demonstrated through the actions of the parties, including a specific oral or written agreement or through any other discernible manner. An agreement to proceed electronically also may be demonstrated by: (i) a party giving a business card with an e-mail address to the other party; (ii) setting forth terms or conditions of any business relationship via e-mail; (iii) a click-through web-page system that conspicuously advises users

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## THE INTERNET AND JURISDICTION PART II

by Scott J. Spooner

In the January 2004 Newsletter, we discussed the recent case of Palmer v. Valone and GRNC/FFE, Inc., decided by Judge Leonie M. Brinkema on November 10, 2003. As a quick reminder, this case involved an allegedly defamatory e-mail sent by Valone to a limited email distribution list, or listserv. Of the 117 members of the listserv, only one lived in Virginia.

After the posting of the original message on the listserv, one of the members of the group forwarded the e-mail outside the original circle of members, so that it eventually reached a number of Palmer's friends and associates in Northern Virginia. In holding that the federal court in Virginia did not have jurisdiction over Valone, Judge Brinkema determined that Valone did not intentionally and purposefully avail himself of the benefits of Virginia by his use of an AOL e-mail

account utilizing servers located in Virginia.

At first blush, Judge Brinkema's decision may seem very fair. According to the holding, the use of an AOL account alone (of which there are tens of millions) is insufficient to establish jurisdiction in Virginia. Essentially, the holding explained that it does not matter where the e-mail ended up; rather, it only matters where the defendant (Valone) originally intended to send the e-mail. The fact that the internet service provider's (AOL) servers were located in Virginia was not enough to confer jurisdiction, at least according to Judge Brinkema.

While arguably fair, Judge Brinkema's decision seems to conflict with other decisions interpreting Virginia's jurisdictional statute. According to Virginia's jurisdictional

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The Judge felt the defamation claim was equally well plead. The Court noted that statements made by a co-worker to the parties' employer can be protected by qualified privilege, but no privilege exists when the plaintiff shows actual malice. Here, assuming that the facts are true, the Court concluded that actual malice existed, since a false accusation of sexual battery constitutes defamation *per se*.

While it is unclear at this stage of the litigation whether Lomanno or the individual defendants are the victims, one thing is certain: By assuming Lomanno's guilt and firing him without due process, UFM has exposed itself to both real and unnecessary legal risk. Business owners are well advised to adopt reasonable administrative policies for dealing with discrimination claims and seeing that those procedures are uniformly applied.

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that they are in the process of establishing an electronic business relationship; (iv) using various e-mail accounts for specific business tasks; or (v) orally instructing the other party to e-mail relevant business information.

While an intent to proceed electronically may sometimes be difficult to determine, UETA expressly provides that the parties' agreement to proceed electronically shall be determined by reference to all of the circumstances, including the parties' conduct. The critical element in this determination is the intent of the parties.

After the parties agree to conduct business electronically, any business transactions between the parties will be subject to normal contract law. This is important to remember because the purpose of UETA is not to create new law, but only to give effect to certain electronic instruments in the regular course of business under already-established contract law.

Contract law frequently requires the contracting parties to sign the final contract as a manifestation of assent and agreement to the terms outlined in that contract. UETA addresses the obvious impossibility of physically signing an electronic record by allowing for electronic signatures. UETA defines an electronic signature as "an electronic sound, symbol, or process attached to or logically associated with a record, and executed or adopted by a person with the intent to sign the record."

UETA provides that whether or not any particular record is signed is a question of fact under other applicable law. UETA simply assures that the signature may be accomplished through electronic means. No specific technology need be used in order to create a valid signature. A valid electronic signature could consist of: (i) one's voice on an answering machine if the requisite intent is present; (ii) including one's name as part of an electronic mail communication; (iii) a digital signature; or (iv) an agreed-upon list of words or numbers.

One popular form of electronic signature consists of a "click-through" process on a web-page. A "click-through" process is a series of linked web-pages that contain conspicuous disclaimers such as "continuing through this process constitutes an agreement to be bound by the terms of this contract," and "by clicking 'I agree,' you are effectively signing this document as a binding contract." In the context of the click-through process, greater individual verification maximizes the likelihood that a valid electronic signature will be found. If an individual must go through 15 web-pages, entering their name and other personal information unique to that individual on each page, the intent to sign the contract may be easily demonstrable should any disputes arise. In any case, the overriding consideration is whether the party manifested an intent to adopt the record for the purpose of entering into a contract or executing a written instrument.

While electronic contracting is still relatively new, UETA makes clear that parties may do business electronically without worrying about the legal validity of their transactions. However, businesses wishing to conduct business electronically should carefully consider UETA's requirements to ensure that their electronic transactions are valid and legally enforceable.

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statute (the long-arm statute), the use of a computer or computer network located in the Commonwealth constitutes an act in the commonwealth. Another provision of the long-arm statute confers jurisdiction when one commits an act in Virginia that causes tortious injury to another. This particular tort provision of the long-arm statute has served as the basis for the exercise of jurisdiction over an out-of-state party's use of the Internet that caused a tortious injury to a party in

Virginia.

In Bochan v. La Fontaine (1999), Judge Ellis of the Eastern District of Virginia exercised jurisdiction over a New Mexico resident who used an AOL account based in Virginia to post defamatory messages regarding a Virginia resident. Judge Ellis found that the use of the Virginia-based account was sufficient to give rise to jurisdiction in a Virginia court.

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In Krantz v. Air Line Pilots Association (1993), the Virginia Supreme Court exercised jurisdiction over a New York resident who posted a message on an Internet bulletin board located in Virginia. The message posted on the bulletin board allegedly caused tortious injury to a party located in Virginia.

In short, Judge Brinkema's decision in Palmer v. Valone represents only one view of the law of jurisdiction in Virginia and the impact that the Internet has on jurisdiction. Because Virginia is a "one-contact" state for jurisdictional purposes, any act occurring in Virginia that causes tortious injury to a

party in Virginia arguably could serve as the basis for a court's exercise of jurisdiction. This is particularly true in the case of a defendant's use of an internet service provider located in Virginia in a manner that causes an allegedly tortious injury to a party located in Virginia.

Given the uncertainty of the law of jurisdiction, users of internet service providers, list-serves, bulletin boards, and other Internet features must be particularly careful in disseminating information that could injure another person. Otherwise, the user could find himself or herself a defendant in a foreign state.

*This paper was prepared by Bean, Kinney and Korman, P.C. as a service to clients and friends of the firm. The purpose of this paper is to provide a general review of current issues. It is not intended as a source of specific legal advice. © Bean, Kinney and Korman, P. C. 2004.*



2000 14TH STREET NORTH, SUITE 100  
ARLINGTON, VIRGINIA 22201

**“GETTING IT DONE”**