assert a free speech retaliation claim. Like a liberty interest in freedom from stigmatization, an employee need not have a property interest in his continued employment to state a free speech retaliation claim. The employee need only show that: (i) the speech addresses a matter of public concern, (ii) the employee's interest in communication outweighs the defendant public employer's interest in promoting efficiency of public service, and (iii) the uttered speech motivated the employee's dismissal.

The public employer must be well-informed and well-versed on the legal implications and impact of limiting an employee's speech and/or association at the workplace. The public employer must remain mindful of various competing interests, effectively distinguish between matters of public and private concerns, while simultaneously provide for adequate free speech, when necessary, in a fashion that will neither disrupt or otherwise impede efficient delivery of service. In anticipation of litigation and as a matter of proactive strategy, it is the responsibility of the defense practitioner to counsel his or her public employer on the most efficient method of dealing with free expression in the context of a public workplace, weighing the applicable legal analysis and addressing each free speech issue on a case by case basis.

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THE LANDRUM & SHOUSE REPORT

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Charles Landrum, Jr. & Weldon Shouse

THE LANDRUM & SHOUSE REPORT

Winter 2007

Welcome to the Landrum & Shouse Report, a newsletter designed to keep you informed on current events and legal issues. Landrum & Shouse, LLP, traces its history from pre-World War II legal service. For nearly 40 years following military service, the late Weldon Shouse and Charles Landrum, Jr., together with their firms practiced law throughout Kentucky before merging in 1984 to become what is now known as Landrum & Shouse, LLP. The resulting firm is built upon the well-deserved reputations of its founders as experienced, knowledgeable, and hard working trial lawyers.

U.S. Supreme Court Approves New Rules On Electronic Discovery

By: Mike Hammond

On April 12, 2006, the U.S. Supreme Court approved a package of amendments to the Federal Rules of Civil Procedure that addressed the discovery of Electronically Stored Information (ESI). These amendments took affect on December 1, 2006. The goal of the amendments is to accommodate the discovery of electronic information. Electronic discovery refers to the discovery of electronic data and documents. Electronic data and documents include e-mails, word processing files, text messages (Blackberry messages), spreadsheets, web pages, duty recorders, event data recorders, and virtually any other information that is stored on a computer.

Compliance with the new procedural rules is imperative to avoid costly penalties. Depending on the nature of the misconduct, the potential ramifications include monetary penalties (the assessment of the opposing side's attorney's fees, costs of restoration of data, and other monetary sanctions), exclusion of evidence and testimony at trial, an adverse jury instruction, dismissal or default judgment. For example, in a landmark case, USB AG v. Laura Zubulake, the court awarded $29 million to the plaintiff in a discrimination matter solely due to the manner in which e-mail purging had been handled.

The obligation to preserve electronic data begins once a potential party reasonably anticipates litigation. At this point, a party must suspend its routine document retention/destruction policy and put in place a "litigation hold" to ensure that all relevant documents are preserved. This "litigation hold" should be communicated to all key personnel (president, board of directors, management employees, witnesses, as well as IT employees) so that the company's standard document retention/destruction policy or "normal housekeeping" procedures are altered to ensure that any electronic or paper data that could potentially be discoverable is preserved. Companies should also enable backup procedures to prevent individual employees from independently destroying such data or documents.

The new rules also modify the procedure and timeline for the disclosure of electronic evidence after litigation has commenced. Included amongst the new rules is a "clawback" provision. This addresses the potential for the inadvertent disclosure of privileged information. In such a situation, the court determines if the information is subject to a "claw back" provision. If the court decides that the information is subject to the provision, the information/documentation must be destroyed by the receiving party. The rule does not address whether inadvertent disclosure constitutes a waiver of the pertinent privilege. The purpose of the rule change is to prevent the delay of information in cases where there are a very high volume of documents by allowing the documentation to be disclosed before intensive review but then later destroyed if it is determined that privileged information was disclosed.

There are a number of additional changes to the Federal Rules of Civil Procedure dealing with the discovery of electronic information that have not been addressed above. Further useful guidance on issues related to electronic discovery can be found in The Sedona Principles: Best Practices, Recommendations and Principles for Addressing Electronic Document Production (Sedona Conference Working Group Series 2004), which can be found at www.thesedonaconference.org/publications.html.

A New Look at "Failure to Warn" Allegations in Kentucky Product Liability Cases

Often plaintiffs will allege both an "unreasonably dangerous defective product" and that the manufacturer "failed to warn" expected users of potential hazards of the product. The result at trial is that product liability plaintiffs normally receive two "bites at the apple" in proving a manufacturer's liability: First, that the product is defective and unreasonably dangerous. Second, that there was a "failure to warn"of the hazard. Both instructions will be given at trial if there is evidence to support it. *Clark v. Hauck Manufacturing Company*, 910 S.W.2d 247 (Ky. 1995).

For many years in defending product liability cases defendants have placed primary emphasis upon the question of "defectiveness," stressing "adequate warning" largely as an element of whether the product is defectively designed. "Failure to warn" is a common, everyday concept within the common experience of jurors, but we feel that renewed emphasis needs to be placed on the warning aspects of product liability trials.

While Kentucky cases hold that the "adequacy of product warnings" simply is one of the considerations in deciding whether the product itself is unreasonably dangerous, other cases contain statements that a separate "duty to provide an adequate warning" separately exists under common law.

We feel that a fresh approach to the concept of "failure to warn" is needed. "Warning" as a separate common law duty in product liability cases actually derives from the Restatement 2nd Torts§388. As the "duty to warn" concept has evolved, however, Section 388 has been ignored. Originally, a "failure to warn" claim was based upon a theory separate from the concept of defective design of a product and the presumed knowledge of the manufacturer. We believe that under the Restatement 2nd Torts §388, "failure to warn" liability *only* applies where the seller has reason to know the product may be dangerous for the use for which it is supplied, yet no expectation that those who will use the product will realize its dangerous condition. To sell a product under these circumstances can be negligence.

We feel the "sophisticated user defense" should be raised in any case where there is substantial evidence that the plaintiff's employer or supervisor knew of the dangers inherent in the product, yet failed to make sure the ultimate user, i.e., the injured plaintiff, was aware of the danger. The seller should be allowed to rely upon the sophisticated employer purchaser's knowledge and duty to inform the employee user. This will have particular application in factories or other industrial settings where the employer or supervisor knew of the dangerous characteristics of a product.

"Adequate warning" always will be an issue in the basic design defect case. However, where a plaintiff requests a separate "failure to warn" instruction, we believe the sophisticated user defense should be raised in appropriate cases where the danger is known to the employer or supervisor. Kentucky has not separately recognized the "sophisticated user"defense, although in *Larkin v. Pfizer, Inc.*, 153 S.W.3d 758, 769 (Ky. 2004), the court recognized the closely relative concept of "learned intermediary." In any case involving"negligent failure to warn," the manufacturer should evaluate whether the product had been delivered or sold to a sophisticated, knowledgeable user who was aware of the danger, yet failed to pass on warnings to the ultimate employee user. A jury can conclude that the manufacturer "failed to warn," but that the manufacturer had a "right to rely upon the sophisticated user" to insure its employees knew the dangerous characteristics of the product.

Larry C. Deener

The First Amendment and the Public Workplace

By: Chris J. Gadansky

An individual does not give up his or her First Amendment rights by becoming a public employee. However, the government, as an employer, has the right to place limitations upon its own employees that it might not otherwise be able to place on the general citizenry. The Supreme Court has recognized the need of the government, just as any employer, to have in place reasonable rules and regulations to protect its interests in maintaining the efficient and effective delivery of governmental services. The balancing of these governmental interests against the employee's federal constitutional rights, from the drafting of rules and regulations to the limitation of speech and association in the workplace, is a fundamental component of First Amendment jurisprudence as it relates to public employment.

The First Amendment to the United States Constitution protects public employees from being punished or terminated from their employment in retaliation for exercising their First Amendment rights. Effective management demands that those responsible for administration and maintenance be well aware of the legal considerations and implications surrounding the issue of public expression by public personnel. This awareness includes familiarity with the process by which the rights of a public employer are balanced against the rights of the public employee, both of which fall under the broad protection of the First Amendment.

The Constitution provides to all public employees the right not to be terminated or otherwise punished for reasons that infringe on their First Amendment right to free expression. See *Elrod v. Burns*, 427 US 347 (1976); *Arnett v. Kennedy*, 416 US 134 (1974). The United States Supreme Court has stated that although public employees may be terminated for a variety of reasons, they may not be terminated merely for speaking out. *See Perry v. Sindermann*, 408 US 593 (1972). However, the government has interests as a public employer in regulating the speech of its employees that differ from those it has in regulating the speech of the public in general. See Pickering v. Board of Education, 391 US 563 (1968).

The *Pickering* decision, and the balancing test it set out, continues to be the standard by which a public employee's First Amendment rights are measured. This test consists of weighing the state's interest in regulating the particular form of speech against the speaker's First Amendment rights as a citizen. The Supreme Court did not choose to lay down a "bright line" rule in *Pickering* as to how statements should be judged or what weight should be given any particular factor or circumstance. The Court committed this area of the law to the lower courts to be applied on a case by case basis. But since the decision was handed down in 1968, the lower courts have, in fact, identified six situations or factors referred to by the Supreme Court in its decision which would present considerations sufficient to outweigh an employee's First Amendment rights:

1. There is a need for maintaining discipline and harmony in the workforce;
2. The need for confidentiality is great;
3. The employee's position is such that his statements might be difficult to counter due to his presumed greater access to facts;
4. Statements of the employee inhibit the proper performance of his duties;
5. Statements are so unfounded that the individual's basic capability to perform his duties is called into question; or
6. A close personal working relationship requiring personal loyalty and confidence is jeopardized.

While the Supreme Court refused to establish an easily identifiable rule of law for dealing with free speech in public employment, the lower courts have essentially merged the factors to produce a three-prong analysis the employee can use to

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