

Civil Rights Laws Enacted in Oregon’s 2011 Legislative Session

Oregon’s 76th Legislative Assembly began its 2011 regular session on Feb. 1, 2011, and adjourned *sine die* on June 30, 2011. As in recent years, the legislature considered many bills related to civil rights. While a relatively small number of these bills became law, there are some significant developments. This article provides a brief summary of enacted legislation of interest to our readers. Except as noted below, the effective date of the laws is Jan. 1, 2012. Detailed measure history and the full text of the bills are accessible on the legislature’s website at www.leg.state.or.us/mag/home.htm.

HB 2036: BOLI Authority on Crime Victim Leave, Use of Genetic Information; Credit History Checks

House Bill 2036 amends ORS 659A.194 to allow the Oregon Bureau of Labor and Industries (BOLI) authority to enforce provisions allowing eligible employees to take crime victim leave to attend criminal proceedings, and amends ORS 659A.303 to allow BOLI authority to enforce provisions prohibiting employers from seeking to obtain or use genetic information of an employee or prospective employee.

The bill also amends Oregon’s recently enacted law generally prohibiting employers from using credit history for employment purposes (2010 SB 1045) to allow an employer to make specified employment decisions based on credit history of certain applicants for public safety officer employment.

HB 2036 was passed in the House by a 58–0 vote and in the Senate by a

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29–0 vote. It was signed by Governor Kitzhaber on June 1, 2011, and took effect that day, based on a declaration of emergency.

HB 2828: Jury Service and Health Insurance

House Bill 2828 amends ORS 10.090 and 659A.885 and repeals ORS 10.992. The legislation generally makes it an unlawful employment practice for an employer who employs ten or more people to cease to provide health, disability, life, or other insurance while the employee serves or is scheduled to serve as a juror.

The bill also provides that an employer may deduct from an employee’s wages in certain circumstances to recoup insurance premium contributions following the employee’s return from jury service. The new law authorizes a civil penalty of \$720 when an employer discharges or coerces an employee by reason of the employee’s jury service.

HB 2828, passed unanimously by the House and Senate, was signed by the governor on May 19, 2011.

HB 3034: Jury Service and Deferral, Use of Paid Leave

House Bill 3034 amends ORS 10.055 and 10.090, providing that a judge or a clerk of the court may defer jury service for an individual more than once only for good cause, and requiring that a person requesting a second deferral provide a list of not

fewer than ten dates within the following six-month period on which the person would be able to commence jury duty.

The legislation also provides that an employer may not require an employee on jury duty to use paid vacation leave, sick leave, or annual leave, and that the employer must allow the employee who chooses to do so to take leave without pay.

HB 3034 was passed in the House by a 56–0 vote and in the Senate by a 26–0 vote. It was signed by the governor on June 16, 2011.

HB 2241: Military Leave, Expanded Definition of Protected Service

House Bill 2241 amends ORS 659A.082 and ORS 408.290, expanding the definition of the term “uniformed service” for purposes of military leave employment protections for both private and public sector employees, including the initial active duty for training and inactive duty for training as categories of protected leave, and more specifically identifying as protected any service in the Army National Guard, Air National Guard, or commissioned corps of the U.S. Public Health Service “and any other category of persons designated

————— CONTINUED ON PAGE 6

◆ In This Issue

- New Laws Enacted 1
- Supreme Court Update 2
- Use of Social Media 3
- Public Forum on Bullying 7

Supreme Court Update

Arizona Free Enterprise Club's Freedom Club PAC v. Bennett, No. 10-238 (June 27, 2011)

The U.S. Supreme Court reversed the Ninth Circuit in this 5–4 decision, holding that a provision of the Arizona Citizens Clean Election Act is an unconstitutional burden on political speech. The “matching funds” provision of the act provided that a publicly financed candidate would receive additional matching funds if a privately financed candidate’s expenditures, combined with the expenditures of independent groups in support of that candidate, exceeded the publicly financed candidate’s initial state allotment. The matching funds would be roughly dollar for dollar.

In ruling that the provision was unconstitutional, the Court reasoned that it infringed on the First Amendment rights of privately funded candidates and their supporters by imposing a disincentive on the exercise of political speech. The Court found that Arizona’s interest in “leveling the playing field” was not sufficiently compelling to justify the constitutional burden on free speech.

Borough of Dureya v. Guarnieri, No. 09-1476 (June 20, 2011)

The Supreme Court unanimously reversed the Third Circuit in this case, holding that a public employee may not sue a government employer under the First Amendment’s petition clause unless the employee’s petition relates to a matter of public concern. The Court resolved a dispute between the circuits about whether the “public concern test” limits a public employee’s petition clause claim in the same way that it limits a claim under the free speech clause. The Court held that it does.

Brown v. Entertainment Merchants Ass’n., No. 08-1448 (June 27, 2011)

In this 7–2 decision, the Supreme Court affirmed the Ninth Circuit and

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held that California Assembly Bill 1179, which prohibits the sale or rental of violent video games to minors under the age of 18, violates the First Amendment. In doing so, the Court explicitly recognized that video games qualify for First Amendment protection and rejected the argument that violent video games should be categorized alongside historically unprotected speech, such as obscenity and fighting words. “Minors are entitled to a significant measure of First Amendment protection,” noted Justice Scalia in the majority opinion, “and only in relatively narrow and well-defined circumstances may government bar public dissemination of protected materials to them.”

J.D.B. v. North Carolina, No. 09-11121 (June 16, 2011)

In this 5–4 decision, the U.S. Supreme Court reversed the North Carolina Supreme Court and held that a child’s age must be considered when conducting *Miranda*’s custody analysis. The petitioner, a 13-year-old student, was removed from his seventh-grade classroom by a uniformed police officer on detail at the school, taken to a closed-door conference room, and questioned by police and school administrators for more than 30 minutes before confessing to theft-related crimes. Before the questioning began, the student was not informed of his *Miranda* rights, was not given the opportunity to call his legal guardian, and was not told that he was free to leave.

On appeal of his subsequent conviction, the student argued that his confession should be suppressed because he had been interrogated in a custodial setting without being afforded *Miranda* warnings. His conviction was upheld by the North Carolina Supreme Court, which declined to consider his age relevant

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The purpose of this publication is to provide information on current developments in civil rights and constitutional law. Readers are advised to verify sources and authorities.

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Employees' Use of Social Media in Private Sector Employment

Rarely a day goes by without another altercation in the on-going dispute between private sector employers and employees over the "right" to freely engage in the use of social media in connection with employment. Employees tend to believe that what they post, tweet, and blog about on their Facebook, Twitter, and blog sites is their own business (including negative comments about their bosses, employers, co-workers, etc.). Not surprisingly, employers are diligently attempting to defend their ability to discipline or discharge employees who make disparaging comments about managers, products, services, or co-workers on social media; who disclose confidential information about the company using social networking sites or social media; or who engage in social media activities not related to work when on paid work time or while using the employer's communication systems and equipment.

To date, the dispute appears too close to call—both employers and employees have won significant skirmishes in federal courts, and the National Labor Relations Board is poised to weigh in shortly.

Before addressing relevant legal issues, let's look at the explosion in social networking.

Explosion in Social Networking

While there are hundreds of social networking sites and forms of social media, much of the legal debate currently centers on the "Big 3": Facebook, LinkedIn, and Twitter. At present, Facebook claims to have more than 500 million users, and the average user has 130 "friends" and engages with Facebook more than 15 hours per month. More than 200 million users access Facebook via a mobile device (e.g., iPhone, Droid). More than 100 million people reportedly use LinkedIn. According to LinkedIn, 73 of the Fortune 100 companies use LinkedIn during the hiring process, and executives from

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all the Fortune 500 companies are LinkedIn members. Twitter, which currently reports more than 55 million users, has a 140-character maximum "tweet" (with an optional details pane that provides additional information, deeper context, and embedded media). Users can instantly "tweet" about any subject the user chooses, or simply "follow" someone on Twitter without tweeting.

The most comprehensive national survey concerning social media use in employment to date (Deloitte Ethics and Workplace Survey, 2009) reported significant employee use of social media, as follows: 22% used social media at least five times per week; 15% admitted to personal use at work; 77% admitted to using Facebook during working hours; and 87% admitted no business reason for such Facebook use. These statistics undoubtedly have increased significantly in the past two years, as the number of users of all forms of social media rapidly increases every month.

Employment-Related Legal Issues and Potential Claims

There are a multitude of legal issues and potential claims concerning employees' non-business use of social networking, including the following:

Defamation. Defamation is a factual false statement that is communicated to a third party and tends to subject a person to "hatred, contempt or ridicule" or tends to "diminish the esteem, respect, goodwill or confidence" in which the person is generally held by the community. *Reesman v. Highfill*, 327 Or. 597, 603, 965 P.2d 1030 (1998) (quoting *King v. Manplascino*, 276 Or. 501, 504, 555 P.2d 442 (1976)).

Unauthorized use or disclosure of confidential information, including

inadvertent disclosure or disclosure of information in "bits and pieces."

"Whistleblower" protection. Sources are the federal Sarbanes-Oxley Act (protection for employees of publicly traded companies who provide evidence of fraud) and ORS 659A.199 (protection for good-faith report of information that employee believes is evidence of violation of law, rule, or regulation).

Hostile work environment/discrimination. An employer may be liable for an employee's statements on a social networking site, especially if the statements are made while on paid time or while using the employer's communications systems or equipment.

See, for example, *Blakely v. Continental Airlines*, F. Supp. 2d 598 (D. N.J. 2000), which held that the employer had a duty to prevent defamatory statements made by its employees on the company's online "bulletin board" when the statements were intended to or likely to injure an employee. In this case, derogatory and insulting remarks about a female employee were posted by male employees on the pilots' Crew Members Forum, which was accessible to all Continental pilots and crew members through an outside Internet service provider approved by Continental and which pilots were required to use to obtain flight schedules and assignments.

See also the complaint filed in 2010 by an employee of the New York Jets football team against former Jets quarterback Brett Favre, for allegedly "sexting" her using his cell phone. The employee claimed that when Favre played for the Jets he sent voicemails, text messages, and photos of his penis to her. The National Football League investigated, eventually fining Favre \$50,000 (for his failure to cooperate with the investigation). The case was settled.

Retaliation. Examples may include "de-friending" an employee from

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Facebook or making derogatory statements about an employee on a social networking site after the employee complains about an alleged unfair employment practice.

Violation of HIPAA (Health Insurance Portability and Accountability Act). This claim involves the disclosure of personal health information through social media.

Invasion of privacy, which may include sharing or re-publishing "private" information originally posted on a social networking site.

See, for example, *Moreno v. Hanford Sentinel, Inc.*, No. F054138 (Cal. Ct. App., 5th Dist., April 3, 2009). Moreno posted a "rant" about her California hometown on her MySpace page. The court held that Moreno could not state a claim for invasion of privacy against her employer because her MySpace posting was available to the public, even though she had intended the posting only for her MySpace friends and removed the posting after six days, and the posting did not include her last name. Noting that her MySpace page did include her identity and photo, the court found that once the rant was posted on MySpace, it was available to the public and, consequently, she could not have had a reasonable expectation of privacy.

See also *Thygeson v. U.S. Bancorp*, No. CV 03-467-BR, 2004 WL 2066746 (D. Or. 2005), which involved an employee who used the company's electronic systems to access and view sexually oriented and obscene material, which he also transmitted to subordinate employees via the employer's systems. The court held that U.S. Bancorp's access of Thygeson's "personal" folder on the company's computer did not constitute an invasion of privacy. The court found that Thygeson could not have had a reasonable expectation of privacy in the emails that he sent and received using his U.S. Bancorp office email account, even though he saved them

in a folder labeled "personal," because they were not password protected.

Violation of the National Labor Relations Act (NLRA). This has become a hot topic as employers grapple with how to balance employees' section 7 rights with the employer's interest in regulating employees' employment-related use of social networking.

Section 7 of the NLRA prohibits employers from disciplining or otherwise retaliating against non-supervisory, non-management employees who engage in "concerted activity" for the purpose of "mutual aid or protection." "Concerted activity" is generally defined as activity engaged in with the authority of other employees. Employees, therefore, must work together in order for their activity to qualify as concerted. There must also be a nexus between the activity and the employees' interests as employees. "Mutual aid or protection" requires that employees be attempting to improve the terms and conditions of their employment or their positions as employees through channels outside the immediate employee-employer relationship, including, for instance, discussions with co-workers about wages, benefits, working hours, the employer's facility, dress codes, and job assignments.

A social media case involving these section 7 rights that received wide media attention last fall was *American Medical Response of Connecticut, Inc., and International Brotherhood of Teamsters, Local 443*, No. 34-CA-12576 (October 27, 2010). In this case, an employee had been asked by her employer to write a response to a customer complaint. The employee subsequently made disparaging and critical statements about her supervisor on her Facebook page; several of her co-workers responded and also made similar remarks about the supervisor on the employee's Facebook page. The employee subsequently was discharged.

The union then filed an unfair labor

practice charge with the National Labor Relations Board (NLRB) alleging, among other things, that the employer's policy on blogging and Internet posting violated section 7 of the NLRA because it discouraged employees from engaging in concerted activities. At issue were the following policy prohibitions:

Employees are prohibited from posting pictures of themselves in any media, including but not limited to the Internet, which depicts the Company in any way, including but not limited to a Company uniform, corporate logo or an ambulance, unless the employee receives written approval from the EMSC Vice President of Corporate Communications in advance of the posting;

Employees are prohibited from making disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors.

The NLRB investigation found that the employee's Facebook postings constituted protected concerted activity, and that the company's blogging and Internet posting policy violated section 7 because it constituted interference with employees in the exercise of their right to engage in protected concerted activity. In particular, the NLRB took issue with the portion of the policy prohibiting "disparaging, discriminatory or defamatory comments when discussing the Company or the employee's superiors, co-workers and/or competitors."

Just prior to the NLRB hearing, the parties settled. As part of the settlement, the employer agreed to revise its "overly broad" rules to ensure that they do not improperly restrict employees from discussing their wages, hours, and working conditions while not at work. Additionally, the employer agreed that it would not discipline or discharge employees for engaging

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in those discussions.

This settlement caused minor shock waves because it was often inaccurately reported as meaning that employers were prohibited from barring employees from making derogatory or disparaging comments about the employer or its personnel on social media sites. The settlement, however, affected only the particular employer and union, and because it is not an official NLRB decision, its precedential impact, if any, is limited.

The NLRB has continued to weigh in on the issue of employees' use of social media in relation to section 7 rights. For example, the NLRB Office of the General Counsel issued an Advice Memorandum in December 2010 in *Sears Holdings (Roebucks)*, No. 18-CA-19081, which found that Sears's social media policy did not violate the NLRA. The policy prohibited "[d]isparagement of company's or competitors' products, services, executive leadership, employees, strategy, and business prospects." The difference between this opinion and the NLRB's conclusions in the *American Medical Response* case seems to turn on the language of the challenged policy provision, which set forth only one of several fairly specific social media activities that Sears prohibited. Others included, for example, the disclosure of confidential or proprietary company information, reference to illegal drugs, and use of obscenity or profanity. The Sears policy also included language stating, "The intent of this Policy is not to restrict the flow of useful and appropriate information, but to minimize the risk to the Company and its associates."

Similarly, the NLRB issued an Advice Memorandum in April 2011 recommending dismissal of an unfair labor practice charge alleging that a newspaper reporter had been unlawfully terminated for Twitter posts involving the reporter's employer (the *Arizona Daily Star*). In *Lee Enterprises, Inc.*, Case No. 28-CA-23267, the employee, a public safety reporter,

posted Twitter messages mocking his paper's sports editors, joking about homicides in Tucson, Arizona, and insulting other local media outlets. One tweet said, "No overnight homicides? WTF? You're slacking Tucson."

The newspaper did not have a written social media policy but terminated the reporter following an investigation in which he was initially suspended and told not to tweet about "anything work-related."

The NLRB Division of Advice concluded that the reporter's termination did not violate section 8(a)(1) of the NLRA because his inappropriate Twitter posts "did not involve protected concerted activity." More specifically, the division noted that his posts did not relate to the terms and conditions of his employment, nor did his tweets attempt to involve other employees in employment-related issues.

Discipline and Discharge for Statements on Social Media

In general, employers are allowed to discipline and discharge employees for work-related statements made using social media. See, e.g., *Simonetti v. Delta Air Lines*, 1:05-CV-2321 (N.D. Ga. 2005) (Delta flight attendant discharged following employer's discovery of what Delta characterized as suggestive pictures of the employee in her Delta uniform posted on the employee's personal blog).

Currently, there are no specific Oregon state statutes limiting employers' rights in this regard. There are, however, two particular federal statutes about which employers should be aware in relation to employees' use of social media.

The Stored Communications Act (SCA, 18 USC § 2701) regulates when an electronic communication service provider may share the contents of, or other information about, a customer's email and other electronic communications to private parties. The SCA establishes liability for anyone who "intentionally accesses without authorization a facility through which an

electronic communication service is provided." See, for example, *Pietrylo v. Hillstone Restaurant Group*, No. 06-5754, 2009 WL 3128420 (D. N.J. 2009), in which a group of employees successfully sued their ex-employer for a violation of the SCA (despite losing on their invasion-of-privacy claims). The employer, through its managers, had intentionally or purposefully, but without authorization, accessed an employee chat group on MySpace.com, using another employee's MySpace password. (The appellate court found that the jury could reasonably infer from the employee's testimony that she gave the manager her MySpace password only because she felt coerced and thought she might be in trouble if she did not.)

The Computer Fraud and Abuse Act (CFAA, 18 USC § 1030) is a criminal statute permitting a company that suffers damage or loss by reason of data theft to maintain a civil action against the violator for damages and injunctive relief.

Regulating and Monitoring Employees' Use of Social Media

An employer's ability to monitor and/or regulate what employees say or post about the employer using social media primarily depends on the employee's expectation of privacy. This is especially true when the employer's electronic systems, equipment, or Internet access are at issue. The key is to manage expectations about when the use of the employer's systems and equipment is "private" and when the statement made using social media is "private."

A California court recently ruled that an employee who used her employer's email system to send messages to her attorney concerning litigation against her employer waived the attorney-client privilege by using the employer's email system because there was no expectation of privacy in doing so. *Holmes v. Petrovich Development Co.*, C059133 (Cal.

CONTINUED ON PAGE 8

by the President of the United States in time of war or national emergency.”

HB 2241 was passed in the House unanimously and in the Senate by a 29–0 vote. It was signed by the governor on April 14, 2011, and took effect that day, based on a declaration of emergency.

HB 3482: Leave to Address Issues Arising from Harassment; State Government Employees, Right to Representation

House Bill 3482 amends ORS 659A.270, 659A.272, 659A.280, and 659A.290 to require covered employers (those employing six or more employees in Oregon) to allow eligible employees (those who have worked an average of more than 25 hours per week for at least 180 days immediately preceding leave) to take unpaid leave to address issues arising from harassment, including criminal harassment under ORS 166.065 and harassment as defined under BOLI regulations.

This legislation expands on the previously existing leave entitlement at ORS 659A.272 for victims of domestic violence, sexual assault, or stalking. The statute’s requirement to make “reasonable safety accommodation” for those individuals, added by 2009 Senate Bill 928, now also applies to victims of harassment under HB 3482. The legislation also expands the definition of “victim of stalking” to include an individual who has obtained a court’s stalking protective order or temporary protective order under ORS 30.866.

HB 3482 also amends ORS chapter 240 to allow certain state employees in unclassified or exempt service to be accompanied by an individual they select to be present during any interview with the employee requested by the employer.

HB 3482 was passed in the House 45–15 and in the Senate 28–0. It was signed by the governor on August 2, 2011, and took effect that day, based on a declaration of emergency.

HB 2721: Spiritual Treatment as a Criminal Defense

House Bill 2721 eliminates a provision in ORS 419B.100 that allows a parent to use as a defense to certain crimes “treatment by prayer or spiritual means” when the victim is under 18 years of age. It also modifies the effect of reliance on spiritual treatment in determining whether a youth is subject to the juvenile court’s dependency jurisdiction.

HB 2721 was passed in the House 59–0, passed in the Senate 25–5, and repassed in the House with Senate amendments by a 59–0 vote. It was signed by the governor on June 9, 2011, and took effect that day, based on a declaration of emergency.

HB 3650: Health Care, Oregon Integrated and Coordinated Health Care Delivery System

House Bill 3650 aims to transform the care patients receive through the Oregon Health Plan to emphasize preventive care and to reduce waste, inefficiency, and unnecessary costs. It establishes an Oregon Integrated and Coordinated Health Care Delivery System to replace managed care systems for recipients of medical assistance by Jan. 1, 2014.

The bill requires the Oregon Health Authority to develop a proposal for consideration by the Legislative Assembly for health care processes related to coordinated care organizations. The bill requires the Oregon Health Authority to seek federal approval to allow enrollment of individuals who are dually eligible for Medicare and Medicaid into coordinated care organizations, and requires those organizations to use patient-centered primary care homes to the extent possible. The bill increases general fund appropriations made to the Oregon Health Authority and the Oregon Department of Human Services.

HB 3650 was signed by the governor on July 6, 2011. The law took effect on July 1, 2011, based on a declaration of emergency.

SB 99: Health Care, Oregon Health Insurance Exchange Corporation

Senate Bill 99 establishes the Oregon Health Insurance Exchange Corporation as a public corporation; specifies its duties, functions, and powers; and requires it to deliver a business plan before the convening of the 2012 regular session of the Legislative Assembly. The legislation establishes the Oregon Health Insurance Exchange Fund and continuously appropriates moneys in the fund to the corporation for the purpose of carrying out its duties. The intent of the legislation is to provide a central marketplace through which individuals and small businesses have access to high-quality, affordable health care.

SB 99 was passed in the Senate 24–5 and in the House 48–12. It was signed by the governor on June 17, 2011, and took effect that day, based on a declaration of emergency.

SB 557: Sexual Assault Victims, Treatment

Senate Bill 557 requires the district attorney of each county to organize a sexual assault response team and requires each team to adopt protocols addressing sexual assault response. SB 557 also requires certain health care facilities to adopt policies for treatment of acute sexual assault patients. In addition, SB 557 requires certain health care facilities that perform forensic medical examinations of sexual assault patients to adopt guidelines developed by the Sexual Assault Task Force and to employ or contract with a sexual assault forensic examiner trained to satisfy the certification requirements of the Oregon SAE/SANE Certification Commission.

The bill was passed in the Senate 23–6 and passed in the House unanimously. It was signed by the governor on June 23, 2011, and took effect on July 1, 2011, based on a declaration of emergency.

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HB 3309: Ex-Convicts, On-the-Job Training Program

House Bill 3309 authorizes the Oregon Department of Corrections to establish an on-the-job training program for ex-offenders and allows the department or a county to enter into agreements with public or private employers to provide training.

HB 3309 was passed in the House unanimously and in the Senate by a 27-0 vote. It was signed by the governor on August 2, 2011, and took effect that day, based on a declaration of emergency.

HB 2792: Firearms, Petitions for Relief from Bar to Owning, Vehicles

House Bill 2792 modifies the provision under which a person barred from owning or buying a gun under state law may petition for relief from that bar. The bill states that a court may not grant relief to a person

who has been convicted of a person felony involving the use of a firearm or deadly weapon; to a person who has been convicted of an offense listed in ORS 137.700; or to a person currently serving a felony sentence or who has served a felony sentence in the one-year period preceding the filing of the petition. [Note: federal law still prohibits gun possession by any person "who has been convicted in any court of, a crime punishable by imprisonment for a term exceeding one year." 18 USC § 922(g)(1).]

The bill also specifies that a firearm located on a motorcycle, an all-terrain vehicle, or a snowmobile is not "readily accessible" for purposes of determining unlawful possession under firearm law when the handgun is in a locked container within or affixed to the vehicle or the handgun is equipped with a trigger lock or other locking mechanism that prevents the

discharge of the firearm.

HB 2792 also requires that by no later than Dec. 31, 2011, the Department of State Police must submit a report on the rate at which it is providing to the federal government relevant information to be used in background checks related to firearms.

HB 2792 was signed by the governor on August 2, 2011, and took effect that day, based on a declaration of emergency. ♦

Dan Grinfas is of counsel to the Portland employment law firm Buchanan Angeli Altschul & Sullivan LLP. Please contact him if you would like a summary of bills that were introduced but not enacted, including legislation on abortion, constitutional rights, hate crimes, health care, firearms, immigration law, the Oregon Family Leave Act, religious clothing, wage discrimination, and workplace communications.

Civil Rights Section Presents Public Forum on Bullying

On June 2, the OSB Civil Rights Section presented "Beating Bullying: A Harassment & Bullying Prevention Program." The event was co-sponsored by the OSB Diversity

Section and hosted by Roosevelt High School in Portland.

Panelists shared personal stories as well as general resources and information for students who have experienced bullying.

Joyce Liljeholm, of the Oregon Safe Schools and Communities Coalition, spoke about the right to feel safe at school, resources for students who are targets of bullying, and how to speak up rather than passively witness bullying. Favor Ellis, of the Sexual & Gender Minority Youth Resource Center, spoke about the needs of GLBTQ youth, who are at higher risk for all types of adolescent struggles. Khalil Edwards, of Parents, Families & Friends of Lesbians & Gays (PFLAG) Portland Black Chapter, spoke about his own coming-out experience.

Jay and Todd Dunn, of Family and Community Together, who are brothers and high school students, spoke about their campaign to stop the use of the "R-word." Todd, who has Down Syndrome, described actions by his school and fellow students that have made him feel

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included. Mercedes White Calf, a student at the University of Oregon, described her experience growing up with both Native American and African American heritage, and the

impact that one dedicated teacher had on her ability to transcend family and economic hardships, as well as bullying.

Bob Joondeph, of Disability Rights Oregon, described the legislative process that led to the enactment of Oregon's anti-bullying statute, as well as its current requirements. Bill Williams, an assistant U.S. attorney for the District of Oregon, described the federal Department of Justice's efforts to combat bullying.

The Civil Rights Section thanks all the presenters, the staff at Roosevelt High School, and Voodoo Doughnuts for the gracious contributions of time, energy, and doughnuts (!) that made this event a success. It was inspiring and educational for students, parents, and other members of the community.

For more information about the program, contact Sarah Radcliffe at sradcliffe@oregonlawcenter.org. ♦

Sarah Radcliffe, an attorney at the Oregon Law Center, is the chair-elect of the Civil Rights Section.

Super. Ct., 3rd Dist., January 13, 2011). In that case, the employer explicitly told employees that they did not have a right to privacy in personal email sent by company computers and that the company could inspect email sent on its servers anytime. The company never issued any policy contradicting its position. Under these circumstances, the court found that even though the “operational reality” was that the company was not actually monitoring employee email traffic, that fact was immaterial and there was no privacy expectation.

Social Media Policies

Establishing and adhering to a policy concerning the use of social media and social networking sites is generally the most effective way for an employer to regulate and monitor employees’ use of social media. Initially, an employer must decide whether the goal is to regulate such use as it relates to the workplace. A central question that should be addressed in any policy is whether employees are allowed to access social networking sites or engage in the personal use of social media while on paid working time. Additionally, are employees permitted to use the employer’s electronic systems or equipment, or the employer’s Internet access, for non-work social networking? If employees are allowed that use or access, employers are well advised to address the issue of privacy expectations up front.

Privacy expectations should be managed through policy and general communication, clearly and consistently applied. Specifically, and assuming employees are permitted to use paid working time and/or the employer’s electronic equipment, systems, or Internet access for social media purposes, employers should emphatically state in writing that there is no expectation of privacy when using the employer’s equipment, systems, or access. This aspect of a social media policy is similar to the employer’s existing policy regarding email, voice mail, Internet access, etc. Additionally, employers should reserve the right to monitor and review messages and content created, sent, or stored using the employer’s systems, equipment, and Internet access.

Employers also should consider policy provisions requiring that any personal posting made on company time or equipment include the employee’s disclaimer that his or her views are personal and not those of the employer; comply with applicable company policies (regarding electronic communications, confidentiality, harassment/discrimination, etc.); include no references to company clients or customers without express advance written permission; adhere to all copyright laws, and provide cites to sources as appropriate; and include no company logos or trademarks without express advance written permission from the company. ♦

Anne E. Denecke of Denecke Employment Law represents employers in a wide variety of employment and labor law issues, including employment-related aspects of the use of social media.

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to the determination of whether he was in police custody. A divided U.S. Supreme Court reversed, reasoning that a child’s age “is far more than a chronological fact,” and that it “would have affected how a reasonable person . . . would perceive [his] freedom to leave.”

Kasten v. Saint-Gobain Performance Plastics Corp., No. 09-834 (March 22, 2011)

The Supreme Court vacated a ruling of the Seventh Circuit in this 6–2 decision, holding that an employee may bring an anti-retaliation suit under the Fair Labor Standards Act (FLSA) based on alleged retaliation for making oral complaints to an employer. In this case, the employee brought suit for retaliation after being terminated from employment in the wake of oral complaints to the employer about wage and hour violations. The district court granted summary judgment to the employer, finding that the FLSA’s protection from retaliation for “filing” a complaint did not extend to oral complaints to the employer. The Seventh Circuit affirmed and the Supreme Court reversed, reasoning that the purpose of the FLSA would be frustrated by such a narrow reading and that the FLSA’s requirement that an employer receive fair notice of an employee’s complaint can be met by oral, as well as written, complaints. ♦

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