

Third Circuit Rules in Favor of Employer Who Monitored Former Employees' Social Media Accounts

Monday, March 25, 2019

On February 25, 2019, the Third Circuit [held](#) that a New Jersey engineering firm that monitored its former employees' social media accounts was not barred from winning an injunction to prevent four former employees from soliciting firm clients and destroying company information.

In this case, several employees left the engineering firm to start two competing businesses. While still employed with the firm, the employees discussed over social media the possibility of starting a competing venture, and transmitted firm documents and other relevant information outside the firm's network. After the mass resignation, and loss of a key firm client, the firm's network administrator was instructed to examine the former employees' work computers. During this time the administrator allegedly, *inter alia*, reviewed browser history (including deleted activity), accessed personal social media accounts via passwords saved on the computers and installed software allowing him to monitor social media activity without detection.

The third circuit, in a split three-judge panel opinion, upheld the district court's [July decision](#), holding that the firm's monitoring activity did not constitute "inequitable conduct" under the "unclean hands doctrine" to bar the firm from winning its request for injunction. The unclean hands doctrine "applies when a party seeking relief has committed *an unconscionable act* immediately related to the equity the party seeks in respect to the litigation." That said, the court emphasized that even if the firm's monitoring activity did constitute an "unconscionable act", the conduct was not related to the claim upon which equitable relief was sought. In other words, the court's decision was not based on whether the firm's monitoring activity was in fact "unconscionable", but rather whether it related to their injunction request, leaving the door open for such conduct to be considered "unconscionable" under different circumstances.

Although not mentioned in the opinion, New Jersey has a [social media access law](#) that generally prohibits employers from requesting or requiring a current or prospective employee to provide or disclose any user name or password, or in any way provide the employer access to, a personal account. That said, the law includes an exception permitting employers to conduct investigations regarding: work-related employee misconduct based on information about activity on social media; or an employee's actions based on information about the unauthorized transfer of an employer's proprietary, confidential, or financial information to social media. Also not mentioned in the opinion, cases under similar circumstances often invoke federal [Stored Communications Act](#) ("SCA") violations. For example, [in Pure Power Boot Camp, Inc. v. Warrior Fitness Boot Camp](#), a New York district court ruled in a non-compete action that accessing former employees' accounts violated the SCA.

There are many reasons companies monitor employees, including boosting productivity, dissuading cyber-slacking or social "not-working," protecting trade secrets and confidential business information, preventing theft, avoiding data breaches, avoiding wrongful termination lawsuits, ensuring that employees are not improperly snooping themselves, complying with electronic discovery requirements, and generally dissuading improper behavior.

Excessive, clumsy, or improper employee monitoring, however, can cause significant morale problems and, worse,

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create potentially legal liability for invasion of privacy under statutory and common law. Companies should review policies and applicable state and federal law, and tread carefully before embarking on a monitoring program and remember to monitor the monitors.

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