A Company's Facebook Snooping Didn't Prevent Critical Trade Secrets Injunction

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Can a former employer's alleged misconduct defeat a request for injunctive relief against former employees when those departing workers take confidential information and clients to another employer? A federal appeals court recently addressed this question in *Scherer Design Group, LLC v. Ahead Engineering LLC* and decided not to apply the "unclean hands" doctrine against the employer in a trade secrets case, clearing the way for the injunction. While not a suggested approach that you should take without consulting with your attorney, the case does present an interesting situation that all employers should familiarize themselves with.

Employer Peeks At Departed Worker's Digital Footprints

Scherer Design Group (SDG) began monitoring the Facebook page of a former employee, Daniel Hernandez, claiming that he left the website open on his company laptop when he resigned. He and two other employees left SDG to work for competing companies started by another former SDG employee, Chad Schwartz. Hernandez and the two coworkers allegedly discussed the new venture on Facebook and "transmitted SDG's documents and information to Schwartz's firms."

SDG had its network administrator examine the computer histories of Hernandez and the two coworkers after they resigned. The administrator was able to access the Facebook page and "installed software that allowed him to monitor Hernandez's Facebook activity without detection." SDG monitored Hernandez's Facebook page for nearly two months, permitting the former employer to view messages that discussed how "SDG's client information and other intellectual property" were obtained by the departed employees.

SDG later sued Hernandez, Schwartz, the two competing companies, and the two former employees who went to work for the competing companies, alleging "breach of the duty of loyalty, tortious interference with prospective business relationships, and misappropriation of trade secrets," among other things. Following expedited discovery and a hearing, a New Jersey federal court granted a temporary restraining order (TRO) and a preliminary injunction that stopped the former employees from contacting SDG's clients.

Appeals Court Clears Way For Social Media Snooping

The former employees appealed the ruling and raised the "unclean hands" defense in seeking to overturn SDG's injunctive relief. Hernandez asserted that he had logged out of his Facebook account

when he resigned from SDG, and a forensic expert provided an opinion that supported Hernandez's assertion.

On February 25, the 3rd Circuit Court of Appeals upheld the lower court's decision. It noted that the party seeking to invoke unclean hands must establish that the opposing party committed an unconscionable act, and that the act is related to the claim upon which equitable relief is sought. It further noted that application of the doctrine to bar injunctive relief was not "automatic or absolute." Rather, the Court of Appeals stated that the unclean hands doctrine was just one of the factors a court must consider in deciding whether to issue injunctive relief, and that the court has the "discretion" to grant injunctive relief even where unclean hands is established.

In this case, it determined that the unclean hands doctrine did not bar injunctive relief for three main reasons:

- First, the court concluded that it "may be reasonable" for an employer such as SDG to access password-protected content on a company laptop.
- Second, the court said that SDG's conduct is arguably not related to the litigation because, "while it goes to Plaintiff's full knowledge of the underlying facts," the alleged breaches of loyalty, tortious interference, and trade secret violations predated SDG's alleged hacking of Hernandez's account, and SDG's actions did not "affect" the alleged violations.
- Finally, the court said that, "on balance," it was not persuaded that "unclean hands" should bar SDG's right to pursue injunctive relief.

What Can You Learn From This Decision?

Although the employer in this case was able to obtain injunctive relief, the monitoring of the former employee's private Facebook page exposed it to several invasion of privacy counterclaims—not to mention the albeit unsuccessful but still-troublesome unclean hands argument. Moreover, some courts have held that social media accounts, like Facebook, are covered by the federal Stored Communications Act (SCA), 18 U.S.C.A. § 2701. See, e.g., *Ehling v. Monmouth-Ocean Hosp. Service Corp.*, 961 F.Supp.2d 659, 666-69 (D.N.J. 2013).

Other courts have held that an employer's unauthorized access of a former employee's emails stored on a password-protected third-party email system violated the SCA even if the former employee's user id and password were stored on the employer's computer. See, e.g., *Pure Power Boot Camp v. Warrior Fitness Boot Camp*, 587 F.Supp.2d 548 (S.D. N.Y. 2008).

Given the potential legal exposure associated with accessing private social media or private email accounts, you should tread carefully before accessing or reviewing the private accounts of current or departed employees. We suggest that you always involve your attorney before taking any such action; feel free to contact any member of our Employee Defection and Trade Secrets Practice Group if you have questions.

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