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Forchelli, Curto, Deegan, Schwartz, Mineo, Cohn & Terrana, LLP

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P R E S E N T S

The COUNSELOR

IN THIS ISSUE

COVER

EMPLOYERS BEWARE: USE OF THE INTERNET OR SOCIAL NETWORKING SITES TO SCREEN PROSPECTIVE EMPLOYEES MAY LEAD TO POTENTIAL CLAIMS BY A REJECTED APPLICANT

PAGE 2

NEWS, APPEARANCES & ARTICLES

PAGE 3

SUCCESSFUL LAWYERS SUCCESSFUL CLIENTS

PAGE 3

FIRM AWARDS

BACK COVER

FIRM AWARDS CONTINUED

IMPORTANT REAL ESTATE TAX NOTICE

The filing period for commencing a tax certiorari proceeding for property in Nassau County began 1/2/11 and ends 3/1/11. If you do not file within this time period, you will have to wait another full year to file. If you are interested in obtaining a reduction in your real estate taxes, please contact John V. Terrana.

EMPLOYERS BEWARE: USE OF THE INTERNET OR SOCIAL NETWORKING SITES TO SCREEN PROSPECTIVE EMPLOYEES MAY LEAD TO POTENTIAL CLAIMS BY A REJECTED APPLICANT

At last count, Facebook had over 500 million active users who spend more than 700 billion minutes a month on the planet's most popular social networking site. With its focus on professional relationships and business development, LinkedIn boasts a membership of over 90 million users, up from 40 million in 2009. Without a doubt, Internet-based social media and social networking have evolved from a popular pastime for college kids to an integral part of most people's lives.

With the increased prevalence of social networking websites, human resources managers and employers are scouring the Internet in droves in search of information about applicants and prospective employees. Indeed, studies conducted on this subject clearly indicate that employers are regularly performing Internet searches to screen applicants. For example, a Microsoft-commissioned survey performed by Cross-Tab in 2010 revealed that 79 percent of United States hiring managers surveyed use the Internet to screen applicants and that 70 percent of those hiring managers had rejected an applicant based on the results. Likewise, a June 2009 CareerBuilder.com study found that 45 percent of employers reported that they use social networking websites to screen applicants, and that 35 percent of employers decided not to offer a job to a candidate based on the content uncovered on a social networking site. From these studies, it is abundantly clear that employers are increasingly relying on the Internet to screen applicants.

From an employer's perspective, the Internet social networking sites especially provides a fast, efficient and inexpensive way to perform an impromptu background check of a prospective employee before or after an interview. Almost everyone now has an Internet "footprint" a virtual deluge of information regarding an individual ranging from the mundane to the exotic (sometimes including pictures). Who hasn't put his or her own name into Google or some other search engine out of curiosity to survey the results?

For an employer, the Internet can be a treasure trove of reliable and important information that can be used legitimately and legally in connection with an employer's decision to interview and/or hire a candidate. For example, a simple

Internet search can be used to confirm the information on an applicant's resume, such as education, positions held at prior employers, etc. A review of an individual's publicly available Facebook page may divulge important information regarding the applicant's work ethic (posting during work hours or posting about non-work-related activities) or attitude toward his or her current or former employer (negative comments or bashing the company and/or co-workers). In the most extreme of examples, a simple Internet search may reveal (by way of photographs or otherwise) that an applicant has a tendency to engage in the use of illegal recreational drugs.

The Internet, however, can also be a potential minefield for employers. The various state and federal civil rights laws prohibit employers from making employment-related decisions based on an individual's race, sex, color, sexual orientation, religion and disability, among a host of other protected categories. On most occasions, an applicant's Internet footprint also includes information relating to their membership in one or more of these protected classes. For example, a review of an applicant's publicly available Facebook page may easily reveal his or her race, color, marital status, religion, disability status and sexual orientation categories that may not be taken into consideration when making an employment decision.

A prospective applicant's mere participation in social media or other Internet activities (such as blogging) should also by itself not form the basis of an employment decision. New York Labor Law § 201-d prohibits employers from discriminating against employees or prospective employees for an "individual's legal recreational activities outside work hours." The statute defines "legal recreational activities" as "any lawful, leisure-time activity, for which the employee receives no compensation and which is generally engaged in for recreational purposes, including but not limited to sports, games, hobbies, exercise, reading and the viewing of television, movies and similar material." Under

this very broad definition, it is likely that an employee's participation in social media or other Internet activities (such as blogging) would be considered a "hobby" and, therefore, protected activity under the statute.

If participation in social media could potentially be considered protected activity under the New York Labor Law, how can this information lawfully be used in making employment decisions? The distinction lies in an examination of the content as opposed to the activity. For example, under most circumstances, an employer should not dismiss an applicant

Continued on page 2



Partner, Christopher G. Gegwich, Esq. concentrates his practice in the areas of labor and employment law.



Associate, Ethan D. Balsam, Esq. focuses his practice in the areas of labor, employment and education law.

solely because he or she maintains a publicly available social networking site. An employer, however, would be well within its rights to disqualify a candidate who, on that same social networking site, posts racist or discriminatory comments or disparages his or her current employer. An employee or applicant should not be disadvantaged solely for participating in a social media site. At the same time, when an employee or applicant's publicly available postings reveal information that may legally be taken into consideration, the employer may utilize such information when making employment decisions.

The wisdom of an employer's decision to review an applicant's Internet presence could prove costly/expensive if an unsuccessful candidate claims that an employer based its decision on discriminatory animus in connection with its review of impermissible information obtained from a social networking website. This concept is not so far-fetched. As discussed above, a routine Internet search might reveal a picture of an applicant participating in a religious ceremony, utilizing a wheelchair or participating in a parade in support of gay rights, all of which arguably may place the applicant in a protected class.

While "failure to hire" cases are not as widespread as other types of employment discrimination, an employers' use of the Internet to screen applicants is likely to produce an increase in litigation. In New York, like many jurisdictions, to sustain a failure to hire claim, an applicant generally must demonstrate that he or she (1) is a member of a protected class, (2) was qualified for the job, (3) was denied the job and (4) the denial occurred under circumstances that give rise to an inference of invidious discrimination. Generally, an applicant can make out a prima facie case if he or she can show that he or she was qualified for the position and it was given to another applicant not in the same protected class. If an applicant is able to make out this prima facie case, the employer is obligated to proffer a legitimate, non-discriminatory reason for its hiring decisions.

To illustrate the point of this article, let's analyze the following hypothetical. Hiring managers at Company X, which is headquartered in New York City, regularly use the Internet to informally screen applicants. While there is no company policy, hiring managers find the Internet to be a resourceful tool to obtain information on applicants that may not be included in his or her resume. It is well known throughout Company X's industry that its hiring managers perform informal Internet searches of applicants. Company X posts an opening on its website for a graphic designer with three years of experience. Joe and Ted, who both currently work as graphic designers for Company Y and have similar qualifications, apply for the position at Company X. On his publicly available Facebook page, Joe has a picture of himself, along with his family, potentially disclosing his membership in multiple protected categories (i.e., race, sexual orientation, religion, etc.). Ted, on the other hand, has a picture of the logo of his favorite sports team on his Facebook page. In considering these applicants, the hiring managers at Company X review both Joe and Ted's Facebook pages. Joe is not interviewed for the position. Ted, on the other hand, is interviewed and receives the job. Soon after Ted is hired, Joe files suit against Company X alleging that his failure to be hired for the graphic designer position was discriminatory.

Under these circumstances, Joe will most likely be able to make out a prima facie case of discriminatory failure to hire sufficient to withstand initial motion practice. In defending the action, Company X will, in all likelihood, claim that Joe was excluded from consideration for legitimate, non-discriminatory reasons. However, during the course of discovery, it will most likely be revealed that Company X's hiring managers reviewed his Facebook page and viewed his profile picture, which, as mentioned above, discloses his membership in a variety of protected categories. Since the hiring managers would have to

admit that they were aware of these protected categories at the time they made the decision to disqualify him, Joe will most likely argue that this was the sole basis for Company X's decision. Once discovery reveals that Company X was aware of such information, it is very hard to argue that such information was not used in connection with the employment decision. So who wins?

At this juncture, it is extremely difficult to predict the outcome of the hypothetical discussed above, as there have been no judicial decisions discussing the interplay between failure to hire claims and companies using the Internet to screen candidates. But, as companies increasingly utilize the Internet to investigate potential hires, it is inevitable that more and more failure to hire claims will be pursued.

Employers seeking to avoid costly, protracted and unnecessary litigation may want to adopt a number of simple processes and procedures for conducting social media and Internet background checks. First, employers may want to institute (and strictly enforce) a policy, wherein all applicants are screened in a uniform manner. This would include, for example, creating lists of social media sites that will be searched for each applicant, lists of lawful information about applicants desired from every search and having neutral parties (non-decisionmakers) conduct the search. Additionally, employers may want to disclose to all applicants, via written notice, that when an application is submitted for consideration, an Internet search will be conducted. Employers should also consider affording applicants with an opportunity to explain and/or confirm any inconsistent or damaging information obtained on the Internet. Finally, employers should consult a labor and employment attorney before making any employment decisions based on information regarding an employee or applicant discovered on the Internet.

FIRM NEWS, APPEARANCES AND ARTICLES

Jeffrey D. Forchelli, John V. Terrana, Daniel P. Deegan and Barbara S. Alesi were interviewed about the Firm in the article entitled, "Forchelli, Curto, Deegan On Top of the World," in *Building Long Island* magazine.

Terence E. Smolev and Mary E. Mongioi's co-authored article, "To the Holder of Antiquity Go the Spoils – Or Do They? was featured in the "Trusts & Estates" special section of the *New York Law Journal*.

Thomas D. Glascock contributed an article about Local Development Corporations (LDCs) in the *New York Real Estate Journal*.

Brian R. Sahn served as moderator for the Commercial Industrial Brokers Society's panel discussion entitled Corporations: How they are viewing their Real Estate Holdings.

Judy L. Simoncic was featured in *Long Island Business News'* annual "Who's Who in Women in Professional Services" section.

Barry C. Feldman's article, "The Federal Estate, Gift and Generation Skipping Transfer Taxes," was published in the *Nassau Lawyer*.

The Firm was ranked the #2 Tax law firm on Long Island by *Long Island Business News*.

Aaron Gershonowitz was noted in the *Albany Times Union* for his participation in a symposium that discussed the BP oil catastrophe.

Kate Sammon Burns' article, "Amended Foreclosure Procedures: How to Comply with Changing Rules," was published in *The Suffolk Lawyer*.

Jack L. Libert was interviewed by Long Island Business News' "Newsmakers" section for rejoining the Firm as counsel.

Jeffrey D. Forchelli and Brian R. Sahn were quoted in the *New York Real Estate Journal* article "Firm Headquarters Achieves LEED Silver."

The Firm hosted the eighth Long Island General Counsel Network event. **Christopher G. Gegwich** led the roundtable discussion "Employment Law Update – Important Developments in Employment Law for New York General Counsel."

Brian R. Sahn was a panelist at the Building Green on Long Island seminar hosted by the Nassau Academy of Law. His topic was green building code and lease provisions in "Green Building" contracts.

Robert H. Groman presented The ABC's of Wills, Estate Tax and Gift Tax to insurance brokers of the John Hancock Financial Network.

Daniel P. Deegan was covered in *Newsday* on January 10, 2011, for securing municipal approvals for cellular telephone antennae infrastructure sought by Firm client NextG from Massapequa Park.

Brian R. Sahn was interviewed by *Long Island Business News* in the article "Offices Battling Green Dilemma."

Anthony B. Barton's article, "Health Care Reform Legislation – Phase I Impact on Business," was the legal corner article for the Long Island Gasoline Retailers Association (LIGRA) newsletter.

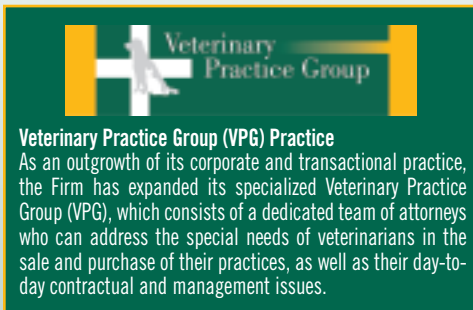
Kathleen Deegan Dickson was interviewed by *Long Island Business News* in the article "TV55, Engel Burman Partner in Melville."

Peter R. Mineo was listed as a "Who's Who in Real Estate Law" by *Long Island Business News*.

The Firm partnered with the Nassau University Medical Center to go on-site and provide gifts to sick children during the holidays. The Firm also contributes to Telecare, Marble Collegiate Church, Jewish Association for Services for the Aged, the Hebrew Free Burial Association and the Jewish National Fund during the holidays.

Aaron Gershonowitz was a panelist at a CLE seminar entitled Participating in New York's State Environmental Quality Review (SEQR) Process which was sponsored by Half Moon LLC, a provider of continuing education seminars.

The Firm was ranked #1 Tax Certiorari law firm on Long Island by *Long Island Business News*.



SUCCESSFUL LAWYERS SUCCESSFUL CLIENTS

REAL ESTATE/LAND USE & ZONING

William F. Bonesso, Daniel P. Deegan and Frank Davis collaborated to obtain approvals from the Town of Hempstead for the total redevelopment of the former Avis Headquarters site. The nearly 22 acre-site is presently occupied by a blighted office and warehouse complex that is an eyesore and an environmental hazard. Through Mr. Bonesso's efforts, variances and site plan approval were obtained to permit a new center which will feature over 300,000 square feet of premier retailers and restaurants. Mr. Deegan and Mr. Davis have worked with the Town of Hempstead IDA to secure various financial benefits including tax incentives for the project, resulting in significant cost savings for the developer.

Peter Alpert represented a firm client in connection with the lease of a 90,000 square-foot building to a subsidiary of a public company.

William F. Bonesso secured variances and special exceptions from the Town of Hempstead Board of Appeals to permit the construction of the first fast-food drive-thru restaurant (Arby's) on Sunrise Highway in Bellmore. Despite the presence of the same neighbors and civic organizations that successfully opposed, a White Castle on Sunrise Highway in Bellmore, Mr. Bonesso was able to reach agreements with these groups through the introduction of creative modifications to the site and conditions to the operation of the restaurant. As a result, the hearing presentation before the Board of Appeals was marked by support from the community groups, instead of opposition, and the franchisee was granted the building design and drive-thru operation he desired.

Jack Libert represented a client before the Hempstead Town Board to rezone property on Atlantic Avenue in Oceanside from a split business/single-family residence district to a multifamily district to permit the construction of a rental apartment building.

Michael S. Stromberg has been retained to represent Five Towns Community Chest. The Five Towns Community Chest is a nonprofit fundraising organization that funds local agencies that provide child care, afterschool programs, senior services, mental health services, care to the chronically ill or disabled, assistance to families in crisis and more.

LITIGATION

Donald Jay Schwartz, Danielle B. Gatto and Richard Goldberg represented Cablevision in a complicated

adverse possession and prescriptive easement action. They obtained an order granting a motion for summary judgment against an adjoining property owner who had been using Cablevision's property claiming that it owned it by adverse possession. The Suffolk County Supreme Court permanently enjoined the property owner from using any of Cablevision's property, directed it to remove all encroachments, including a paved driveway, and determined that the property owner's action constituted a continuing trespass for which Cablevision was entitled to monetary damages.

Andrew E. Curto and Danielle B. Gatto brought a Motion to Dismiss in federal court, seeking dismissal of a complaint filed against our client, a bank and its previous employee. The Complaint alleged federal Racketeer Influenced and Corrupt Organizations Act ("RICO") violations, breach of fiduciary duty under New York law and the Employee Retirement Income Security Act ("ERISA"). The Court agreed with Mr. Curto's argument that the RICO violations were without merit and that the remaining causes of action were barred by the applicable statute of limitations. As a result, the court dismissed in full the action as to the bank and its previous employee and denied plaintiff's motion to replead their RICO claims.

Russell G. Tisman obtained summary judgment dismissing a lawsuit brought against a national trade show contractor client under the strict liability provisions of the New York Labor Law which apply to construction accidents. Queens County Supreme Court dismissed the lawsuit because plaintiff's activity was not structural and he did not come within the special protections of the New York Labor Law.

Andrew E. Curto and Danielle B. Gatto obtained a preliminary injunction and defeated a cross-motion to dismiss on behalf of a local corporation that markets and supports computer software products. The opposing party was restrained from interfering with the local corporation's exclusive and nonexclusive rights to license, market and distribute computer software, and from violating the licensing rights given to Mr. Curto's client during the pendency of the action. Additionally, the opposing party sought to dismiss the corporation's action, alleging that pleadings were not served pursuant to the Hague Convention in Israel. However, the Court resoundingly agreed with Mr. Curto's position and determined that the pleadings were properly served

in Israel. As a result, the action can continue and the opposing party's improper activities were restrained.

Aaron Gershonowitz represented client Northrop Grumman in negotiations with the New York State Attorney General's office regarding remediation of the Babylon Landfill. The State alleged that it spent in excess of \$20 million remediating the landfill and threatened a cost recovery action against a small group of local businesses. The resulting consent order releases the respondents from all potential liability at the site, has no reopener provision and includes a mechanism for the adding of additional parties to thereby minimize the client's share of the State's reimbursement.

CORPORATE AND COMMERCIAL

Joseph V. Cuomo, Anthony B. Barton and Robert H. Groman represented firm client D'Addario & Company, Inc., when it acquired Houston, TX-based Pro-Mark Drumsticks, a leading manufacturer of drumsticks and related products with sales to over 100 countries. D'Addario & Company is a world leader in the design, manufacture and marketing of complete lines of strings for fretted and bowed musical instruments, drumheads, drum practice pads and guitar and woodwind accessories. D'Addario's products are marketed in over 120 countries.

BANKING AND FINANCE

James C. Ricca and Kathryn Sammon Burns obtained summary judgment in a contested commercial foreclosure action in Queens County relating to a \$4 million mortgage on commercial property in Whitestone, NY.

James C. Ricca represented New York Community Bank on a commercial mortgage transaction with Brooklyn Marine Park, a 265-unit co-op in Brooklyn, NY. He also represented the firm client on a large commercial property acquisition mortgage loan for Wheatley Plaza, a popular shopping center in Greenvale, NY.

Kathryn Sammon Burns and James C. Ricca were successful in defending a Lender Liability action in the Second Circuit Court of Appeals. The action was against an institutional lender requesting damages of \$575,000.00. The case was dismissed by the Second Circuit Court of Appeals.

James C. Ricca represented client Community National Bank on a building loan conversion for a commercial shopping center located in Southampton, NY.

FIRM AWARDS AND NEWS

Anthony V. Curto was presented with the 2010 "Telecare Award of Excellence." He was honored as a leader in business, along with Mel Karmazin of Sirius XM Radio Inc., and Rabbi Marc Gellman.



Attorney Andrea Tsoukalas Named Partner

"We are pleased to have Andrea as our Partner. She started at the Firm in 2005 and has proven to be a smart, talented and highly capable lawyer. Lawyers such as her are the future of the Firm," noted Managing Partner Jeffrey D. Forchelli.

FIRM AWARDS CONTINUED



Long Island Business News honored partner James C. Ricca (bottom center) with their annual *Fifty Around 50 Award*. He was honored for his leadership in business, mentoring, and commitment to the community. He was accompanied by his wife and Firm colleagues at the event.



The Commercial Industrial Brokers Society of Long Island (CIBS) honored Daniel P. Deegan (Left) as Associate Member of the Year at its annual meeting. (Right, David F. Chinitz, CIBS Treasurer)

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