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LABOR & EMPLOYMENT LAW SECTION

E - U P D A T E S

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Publications Sub-Committee Co-Chairs

### ***YES, EMPLOYEES MAY (SOMETIMES) BE FIRED FOR INCRIMINATING FACEBOOK POSTS***

You probably have read the recent articles warning employers of the dangers of basing employment actions on employees' Facebook posts. While this is good advice, particularly where the posted messages may constitute concerted activity under the NLRA or where the employer is considering accessing an employee's Facebook account without authorization, there still are circumstances in which an employer may legitimately base an employment decision on an employee's Facebook post, as the Sixth Circuit found this month in *Jaszczyszyn v. Advantage Health Physician Network*, (6th Cir. Nov. 7, 2012).

The court held that an employer did not unlawfully retaliate against a worker where it fired her for perceived fraudulent use of FMLA leave. The plaintiff had been on leave because, as she informed her employer, back pain rendered her "completely incapacitated." Yet, while out on leave, the plaintiff (and a friend) posted numerous pictures on Facebook showing her drinking and dancing over a period of at least eight hours at a local festival. Because some of the plaintiff's coworkers were "friends" with her on Facebook, they saw the pictures, became upset by her conduct and reported it to management. The plaintiff was then discharged because management considered such behavior inconsistent with her claim of total disability. Although the plaintiff argued that an issue of fact precluded summary judgment because the photos did not accurately reflect the severe pain she was suffering during the festival, the court held that the employer had an "honest belief" that her behavior was inconsistent with her stated reason for leave and, thus, her termination was not unlawful.

### ***WRITTEN POLICY FOR REPORTING TIME SAVES EMPLOYER FROM FLSA LIABILITY***

An employee who fails to follow her employer's "reasonable" system for reporting missed or interrupted meal breaks cannot recover overtime damages under the FLSA for such time, absent evidence that the employer prevented her from using the system, the Sixth Circuit ruled this month in *White v. Baptist Memorial Health Care Corp.*, No. 11-5717 (6th Cir. Nov. 6, 2012).

First, the court found that the employer's system for reporting missed or interrupted meal breaks was reasonable. Specifically, the employee handbook, a copy of which was provided to the employee, stated that employees working shifts of six or more hours would receive an unpaid meal break that was automatically deducted from their pay checks. However, if a meal break was missed or interrupted because of a work-related reason, the employee would be compensated for the time, provided the employee recorded such time in an "exception log."

Second, the court found that the employee unreasonably failed to follow these time reporting procedures by deciding not to complete the required "exception logs," thereby preventing the employer from knowing its obligation to compensate her and thwarting its ability to comply with the FLSA. Although the employee occasionally told her supervisors that she was not getting her meal breaks, the court noted that she never told her supervisors that she was not being compensated for missing her meal breaks. The court distinguished situations where the employer prevented employees from reporting overtime or were otherwise notified of the employees' unreported work.

These articles were written by **Jay P. Lechner**, a shareholder in Greenberg Traurig's Tampa office and co-chair of The Florida Bar's Labor and Employment Law Section Publications Subcommittee.

**SAVE THE DATE**

# **Advanced Labor Topics 2013**

**April 5 - 6, 2013**

**Hawks Cay Island Resort, Marina & Villas, Duck Key, FL**

**[www.hawkscay.com](http://www.hawkscay.com)**

## **SECTION CALENDAR**

**DECEMBER 18, 2012**

**Audio Webcast**

- **What Employment Lawyers Need to Know About Obamacare (1571R)**

**JANUARY 15, 2013**

**Audio Webcast**

- **Social Media Issues in Employment Law (1572R)**

**FEBRUARY 14-15, 2013**

**13th Annual Update And Certification Review**

The Peabody Orlando, 9801 International Drive, Orlando, FL 32819, [www.peabodyorlando.com](http://www.peabodyorlando.com)

- **13<sup>TH</sup> Labor and Employment Law Annual Update and Certification Review (1445R)**  
2/14-15/2013
- **Executive Council Meeting**  
2/14/2013, 5:00 p.m. to 6:00 p.m.
- **Reception**  
2/14/2013, 6:00 p.m. to 7:30 p.m.

**MARCH 19, 2013**

**Audio Webcast**

- **The Reemployment Assistance Appeal Process (1573R)**

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**APRIL 5-6, 2013**

**Advanced Labor Topics 2013**

Hawks Cay Island Resort, Marina & Villas, Duck Key, FL, [www.hawkscay.com](http://www.hawkscay.com)

- **Advanced Labor Topics 2013 (1523R)**  
4/5-6/2013
- **Executive Council Meeting**  
4/5/2013, 5:00 p.m. to 6:00 p.m.
- **Reception**  
4/5/2013, 6:00 p.m. to 6:30 p.m.
- **Dinner**  
4/5/2013, 6:30 p.m. to 8:30 p.m.

**MAY 14, 2013**

**Audio Webcast**

- **Immigration Law Issues for the Employment Lawyer (1574R)**

**JUNE 4, 2013**

**Audio Webcast**

- **E-Discovery (1575R)**

**JUNE 27, 2013**

**The Florida Bar Annual Convention**

Boca Raton Resort & Club, 501 East Camino Real, Boca Raton, FL 33432, [www.bocaresort.com](http://www.bocaresort.com)

- **Executive Council Meeting**  
6/27/2013, 5:00 p.m. to 6:00 p.m.
- **Reception**  
6/27/2013, 6:00 p.m. to 7:00 p.m.