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Facebook Users Beware: Even Posts You Claim Not To Have Written Can Haunt You

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Koryn M. McHone
Of Counsel

Warning

In yet another case emphasizing the growing impact of social media on the workplace, the U.S. Court of Appeals for the Seventh Circuit affirmed summary judgment in favor of an employer who terminated its employee based on its honest belief that he had posted a disparaging comment on Facebook, which created workplace concerns. Specifically, in *Smizer v. Community Mennonite Early Learning Center*, found here, the Plaintiff (a male) claimed that the Defendant – *whose Director was the Plaintiff's own mother* – had discriminated against him on the basis of his sex after he was terminated in relation to an alleged offensive Facebook posting attributed to him, but which he denied having written.

In a strange series of events, the alleged Facebook post arose after a lengthy family dispute as to whether the Plaintiff's sister should regain custody of her son – which she did, and which the Plaintiff supported despite the wishes of both his mother/boss and his grandmother (who volunteered for Defendant). Though the actual post itself was not presented as evidence, nor was Plaintiff's authorship of the alleged post ever proven, numerous employees of Defendant claimed to have seen the purported message, which included obscenities directed at those within Plaintiff's family who had opposed the custody decision. The drama arising from the alleged post was further elevated after a former employee of Defendant sent the text of the alleged post directly to Plaintiff's nephew (who purportedly had not wanted to return to his mother) and word of such email got back to Plaintiff's mother. She, in turn, contacted Defendant's board of directors and sought Plaintiff's termination for a host of reasons, including her belief that he had created a hostile work environment, had brought family drama into the workplace, and had made others (his mother and grandmother) feel unsafe.

In response to his termination, Plaintiff claimed that his sex – not some family dispute – was the true reason for his termination. In support of such contention, Plaintiff alleged that: (1) he had been disciplined in the past for wearing open-toed shoes, whereas women had not; (2) he was the one accused of accessing porn in the workplace when pornographic content was found to have been stored on a shared computer and was told the blame was attribute to him because "Women don't like porn"; and (3) revenue concerns had arisen when families chose not to enroll their two-year old children because Plaintiff was a male and would be responsible for their supervision, which had prompted Plaintiff's mother to allegedly comment that the Chairman of the board had referred to Plaintiff as a "liability."

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In upholding summary judgment, the Seventh Circuit noted that Defendant had not relied on any history of performance issues to justify the termination, thus resolution of the claim turned solely on whether Plaintiff could establish Defendant's reason to be a pretext for discrimination; in other words, did Defendant honestly believe Plaintiff had written the post when it terminated him? As Plaintiff failed to overcome evidence of communications between Plaintiff's mother and to the Chairman containing the text from Facebook and expressing concern over what they believed he had written, and that those concerns triggered the termination, pretext was not found. The Seventh Circuit did note, however, that the outcome may have been different had the Plaintiff presented evidence to substantiate the accusation that he had been labeled a "liability" in the past due to his sex. Despite the strange twists in this case, this case serves as an important reminder that the growing use of social media continues to creating new challenges for both employees and employers alike.