The Gavel

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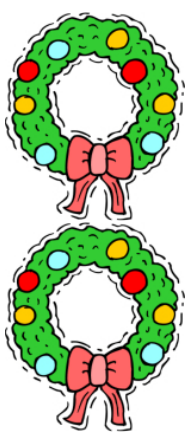
A periodic newsletter on legal issues for clients and friends of **David B. Forest, P.C.**
45670 Village Blvd., Shelby Township, Michigan 48315 (586) 532-6100



Happy Holidays to you and yours; and may your New Year be everything you hope it can be!

What articles do YOU want in *The Gavel*?

We've been publishing *The Gavel* since 1995. Sometimes, we get a little stumped about what to write that interests readers. A client came up with a simple solution: "Why not ask the readers what kind of articles they would like to read? What issues would they like to see addressed?" Ingenious!

So, clients and friends, what are the articles you would like to read in our next *The Gavel*? What are issues you would like to see addressed? Please let us know. You can call, write, e-mail (the link is on the website), fax, whatever. *Disclaimer: Nothing in this newsletter is intended to be or is a substitute for legal advice.*

Grandparent Visitation

The status of grandparents and what role they are to play in court ordered child visitation has been in flux for some years. **It appears that the issue of grandparent's rights has finally been resolved**.

For years, Michigan operated under a statute that said a court could grant grandparents visitation with the (minor) grandchildren if this would be in the best interest of the child.

However, a similar statute from the State of Washington was struck down by the US Supreme Court in 2000. As expected, the Michigan Supreme Court subsequently ruled that our grandparents' visitation statute was also unconstitutional, on basically ths same grounds as the Washington decision.

Legislators and advocates worked on filling this void in Michigan's laws, and the state finally passed a revised grandparent's visitation statute, one that appears to pass muster with the Constitution. The new law allows grandparents to seek visitation with their grandchild when:

(a) someone other than the child's parents has legal custody;
(b) the child's parents have never been married, but paternity has been established;
(c) the grandparent has provided an established custodial environment for the child within one year of petitioning for visitation;
(d) A divorce, separation, or annulment involving the child's parents is pending (or final); or
(e) the child's parent (who is the child of the grandparent) is deceased.

However, <u>there is a more difficult standard that has to be met in order for a court to order grandparent visitation</u>. The new law mandates the following safeguards: (1) the presumption that a fit parent acts in the best interest of the child; (2) deference to the parent's decisions regarding grandparent visitation; and (3) the burden is now on the grandparent to disprove these presumptions in a particular case.

Perhaps even more difficult, **if two fit parents sign an affidavit stating their joint opposition to grandparent visitation, the burden to overcome the presumptions becomes virtually impossible**. All that is left to challenge is whether both parents are fit, a difficult task indeed.

In summary, while there is a new grandparent visitation law that will fit some difficult circumstances, in many instances the grandparents face a tougher challenge than under the old law.

Source: Macomb County Bar Briefs.

Employee *Blogging*

OK, if you are like many others, your first question may be: What is blogging? It is creating and maintaining an on-line diary of sorts (sometimes called a Weblog, hence *blog* for short). The blogger posts entries onto their own blog, which is available to anyone with access to the Internet. Many have daily entries, some are less frequent. Many blogs also contain pictures or illustrations to go along with the written entries. The range of topics on blogs is as wide as one can imagine. From personal observations to customer complaints or praises, to dishing dirt on another, all of it is out there

to be seen by anyone with internet access.

Though the question of why? is a fair one, the issue of who? and what? may be relevant to employers.

What happens if an employee uses a blog to engage in online ranting about their employer? Some bloggers have caused major embarrassment to their employers. Reportedly, a flight attendant for an airline posted suggestive pictures of herself taken inside one of the airplanes. Other employees for other companies have posted complaints about working for the company, operations, etc. Conversely, some companies have encouraged their employees to include the company in their blogs, as a form of 'free' advertising. While blogging can be a marketer's dream, it can also be nightmare to others. Trade secrets may be inadvertently (or intentionally) placed into the public domain.

There is no defined set of laws that constitutes the 'law of blogging'. However, it is reasonable to assume that the principles and laws forming about e-mails [see discussion in *The Gavel*, issue 1-04], along with common law, will form the basis for a new set of laws. Just as an employer can monitor any electronic communication (like e-mails) on its internal system, it seems logical that it could do the same with blogs.

If the employer does not have an existing policy regarding electronic communications in the workplace, it should adopt a policy *right away*. The policy should address who owns electronic communications, if personal e-mails or blogs can be done on company time and/or with company equipment, etc. If blogging is allowed during company time or with company property, the employer should have the right to monitor, edit or suspend the blogs.

Other company policies should address e-mails and blogs within confidentiality agreements, defamation/ disparagement and anti-harassment policies, as well as the general guidelines regarding use of the company name, logo, etc.

The trickier question is: <u>What can be done about an employee who blogs about the company on the employee's own time on their own computer?</u>

A private blogger will (correctly) assert freedom of speech. They are free to write or say almost anything they want on an individual computer, and no one can stop them. True .... **but there can be consequences for utilizing freedom of speech**. The primary consequence is that the blogger is also liable for what is written. What appears on a blog can be the basis for a defamation action, loss of employment, etc. Unless an employee has a written contract or comes under a collective bargaining agreement, each employee in Michigan is an "**at will**" employee. As was discussed in an earlier article [see *The Gavel*, 2-99], this means that the employee is free to leave the employer 'at will', <u>and</u> that the employer can terminate the employee 'at will'. <u>Writing disparaging things about your employer in a blog seems to be a sure way for your employer to *will* that the blogging employee cease being employed</u>. There are a few specific exceptions to this, such as if the employee blogging is about wages, hours or union organizing, the blogger is protected under the NLRA; or if the blog is being used for whistle blowing purposes.

If an employer is unclear, they should seek legal counsel. *Source: Lawyer's Weekly.*

CASE IN POINT:

Read the Fine Print

Tom Waits, a singer/songwriter of some renown, is credited with the phrase "the large print giveth, and the small print taketh away" (*Step Right Up*, 1976). That advice could have helped an unsuccessful litigant when he sued his employer for age discrimination.

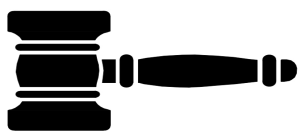
Five months <u>before</u> being hired, Mr. Clark completed an employment application form. Included on the application was a provision that if he had any claim or lawsuit against his employer, he had 6 months in which to bring it. The Plaintiff's signature on the application was also an acknowledgment that if he was hired, the application form would become part of his employment record.

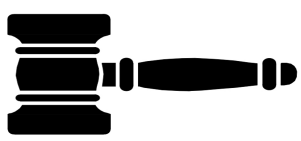
In 2001, Mr. Clark 'retired', though apparently against his own wishes. In 2003, he sued his former employer for age discrimination under Michigan's civil rights laws. <u>The employer brought a motion to throw</u>

his case out, because the 6 month clause meant his lawsuit was now time-barred. The motion was granted, and Mr. Clark appealed.

On appeal, his main argument was that the time limitation was not reasonable. However, the Michigan Court of Appeals held (in a 2-1 descision) that since the Michigan Supreme Court had overruled this *reasonableness rule* in a different contract case, then the same idea (reasonableness is not a defense) should also apply to this contract. So long as the clause was not unconscionable, Mr. Clark was stuck with what he signed 5 months before he was even hired.

Moral of this case: it pays to read the fine print, because it can take away some large rights. Clark v Daimler-Chrysler Corp.





➥REFERRALS If you are pleased with the **service and professionalism** you have received from our office, it would be greatly appreciated if you passed the good word along. **Referrals are always appreciated and encouraged**, and we look forward to the opportunity to serve your associates and friends. If we cannot immediately service their needs, we will be happy to **refer them to the appropriate attorney specializing** in their specific area of need. However, if you have not been pleased, contact us directly!

David B. Forest, JD, MBA
Attorney and Counselor at Law
(586) 532-6100
(586) 532-6104 fax

WWW.FORESTLAW.COM