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# Pennsylvania Legal Update

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## Online Anonymity

Posting comments online—whether on news websites or blogs—may not be as anonymous as you might hope or expect. Recently a Pennsylvania appeals court explained when a judge can

site, and they typically posted using pseudonyms rather than their real names. The website owner had control of a database that included the email addresses and names given by the people who registered on the site.

website owner sued a former city council president, claiming that the former council president had defamed him on a political website and made terroristic and death threats against him. In response,

The case started when the

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*The case started when the website owner sued a former city council president, claiming that the former council president had defamed him on a political website and made terroristic and death threats against him.*

order disclosure of the identities of individuals who posted anonymous comments on a news website.

A website owner had created an independent website that regularly published news and articles critical of local government. Readers were invited and encouraged to register as members of the site. Registered members could create unique usernames and post comments under those names. Only registered members could post comments to the

## Confidentially Speaking

When you contact your lawyer's office seeking advice and speak to a receptionist, secretary, or paralegal, are your words protected by the attorney-client privilege? The Pennsylvania courts and the Rules that govern lawyer ethics say firmly that they are.

To be privileged, your statements to your lawyer's employee must have been made to initiate an attorney-client relationship with your lawyer or to secure ongoing legal advice. Your statements must have been made in privacy—you may lose the privilege by speaking within hearing of strangers. If your statements are found to be within the privilege, Pennsylvania law prohibits the use of the statements against you in court. In addition, confidentiality is a two-way street: Your lawyer's communications to you are also confidential and privileged.

Whenever you speak to your attorney or to his or her staff, you should be sure to do so in private. Discussing your legal affairs over the phone in a public place where you can be overheard or making statements in front of other people in your lawyer's reception area must be avoided. The protection of the privilege is valuable and can be jeopardized or limited by loose or loud talk.

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## Worker Can Sue Dumpster Company

An industrial plant worker who fell while walking near a dumpster outside the plant where he worked won the right to take his claims against the plant's cafeteria food service operators to trial. While most work-related injuries are compensable only through workers' compensation benefits, injured workers do have the additional right to sue third parties whose negligence or recklessness contributed to their injuries.

In this case, the worker slipped on what appeared to be cooking oil that had leaked from the dumpster. He testified that he fell suddenly when his feet "came out from underneath" him all at once and he landed "hard on his hands and knees." His hands were sticky and smelled of cooking oil immediately after the fall. The injured man claimed that the food service company's careless dumping of cooking oil had been the cause of his fall.

The court noted that the food service company's first obligations were directly to the plant operator. The court also observed that generally, a party to a contract does not become liable to third parties if the contract is breached. But where strangers to a contract are at risk of harm if a party does not perform its contractual obligations carefully, the laws of negligence do extend liability to the contract party.

In this case, plant management employees testified that the plant managed the dumpster but that plant regulations required that the food service company place cooking oil in trash bags or sealed pails. On the day of the injured man's fall, plant employees noticed that there was an old box of cooking oil in the dumpster that had not been

sealed in a pail or trash bag. Plant employees also testified that because of the hazards ice poses to trash collectors, holes had been drilled in the bottoms of the dumpsters to prevent ice buildup in winter and that the food service company was aware of the holes.

The court found that the food service company had contracted with the plant to provide for the safe disposal of cooking oil according to plant procedures. The court found further that the injured man was en-

titled to present at trial his claims that the food service company's failure to dispose of the cooking oil safely had caused his injuries.

If you are injured at work or elsewhere, be sure to carefully review which persons and entities are involved in, and what their responsibilities are for, maintaining the safety of the place where you were injured. If you are an employer, make sure that your contracts with service providers clearly define the standards of workplace safety.

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## Unemployment Compensation and Willful Misconduct

The Pennsylvania Unemployment Compensation Law provides that employees fired for "willful misconduct" are not eligible for unemployment benefits. Pennsylvania's appellate courts have published opinions that provide guidance to both employers and employees on what constitutes willful misconduct.

Willful misconduct can come from a single incident and can occur even when apparently minor rules are broken by the employee unintentionally. In one case, a truck driver hit a light standard while backing up, causing an undetermined amount of damage to the company truck and more than \$6,000 in damage to the light standard.

The employer had a policy requiring its drivers to walk completely around their trucks before backing up; the employer fired the driver for failing to have followed

that rule. The fired driver explained that he had stopped to make a business-related call and then backed the truck up without walking around it, assuming that it was safe to back up. He argued that his failure to walk around the truck was negligent but was not willful, since he had not made a deliberate decision to break the rule.

The court disagreed. Noting that there was no "mistake" in the employee's conduct, the court focused on the fact that the driver knew of the rule and simply disobeyed it.

But an employee who posted two signs at the workplace referring to fellow employees as "morons" won his unemployment claims when the court found that "moron" is not a threatening word

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## Tax Sale Traps

Pennsylvania Tax Claim Bureaus offer two-year delinquent properties to tax sales in September and October every year. The properties that go unsold are usually put up for a final sale in the following year. All tax sales are full of risks for unwary buyers. Before bidding on a property at tax sale, you should be thoroughly familiar with the

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*Before bidding on a property at tax sale, you should be thoroughly familiar with the current physical condition of the property.*

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current physical condition of the property, having personally seen it and preferably having inspected it. While you cannot trespass on private property, it is worthwhile to approach the owner for information and permission to inspect. You should also be aware of the existence of mortgages or other tax liens that may survive the sale.

An interesting example of the perils of tax sales had an unhappy ending for a novice purchaser. A Pennsylvania man purchased a property at tax sale, only to later discover that it had been condemned and that a trailer park on the property was closed due to the failure of the on-site sewage treat-

ment facility. On making these discoveries after having purchased the property, the man demanded his money back from the county tax claim bureau, and when the bureau refused to refund the purchase price, he sued.

The bureau defended its position, claiming that it had no obligation to advise bidders at real estate tax sales of condemnations or sewage problems. Further, it claimed that since thousands of properties are put up for tax sale each year, it would be economically unfeasible for the bureau to investigate and report accurately on the condition of each property.

The court noted that while private sellers have obligations to disclose their knowledge of the condition of their property, such requirements would be a "heavy burden" on tax claim bureaus—a burden not yet imposed by the legislatures and not one that could be dictated by the courts.

It is wise to secure legal advice on the laws about tax sales before buying. While some exceptional real estate bargains can be encountered at tax sales, differentiating the bargains from the fiascos can be accomplished only by thorough investigation and a keen understanding of tax sale laws.

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## Unemployment

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or one "totally outside the bounds of what one might expect to hear in a large and busy warehouse."

In that case, the fired employee was concerned that fellow employees might try to use an inoperable and hazardous battery. He posted a sign that read "To the moron who can't read this, do not use this battery." Prior to his posting his strongly worded sign, employees had torn his "Do Not Use" signs off several defective batteries.

When an employee complained to the human resources director on the assumption that he was the target

of the moron signs, the sign poster was fired for breaking the workplace rule against "threatening, intimidating or coercing" fellow employees. The court found that the use of abusive, vulgar, or offensive language in the workplace is willful misconduct even where the employer does not have a specific rule prohibiting rough language.

However, where offensive or profane language is provoked or amounts to a minor event, it does not constitute willful misconduct. In the case of the sign poster, the appeals court decided that the moron signs were purposed toward conveying the urgent need for caution and were not threatening or coercive.

*Resolution of legal issues depends upon many factors, including variations of facts and interpretations of Pennsylvania law. This newsletter is not intended to provide legal advice on specific subjects, but rather to provide insight into legal developments and issues. The reader should always consult with legal counsel before taking action on matters covered by this newsletter.*

## Online Anonymity

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the former council president countersued, claiming that the website owner had regularly published numerous defamatory statements about her that had injured her reputation and caused her personal humiliation, political harm, and embarrassment.

The former council president named nearly 100 additional defendants in her suit, all identified simply as John Doe, all of whom were anonymous posters on the website owner's website. Simultaneously with the filing of her countersuit, the former council president also filed a petition to compel the website owner to immediately disclose all the names of his website members, identifying each by real name, email address, and pseudonym.

The trial court first ordered the website owner to preserve all his data about the website members, pending a full hearing. The judge then ordered the former council president to narrow her request by specifically identifying the particular posted messages that she claimed had defamed her. He also ordered the website owner to promptly forward the court filings to all the registered members on the website by email so that all the individual posters would have notice of the pending proceedings.

Once the former council president had identified the particular postings that she claimed were defamatory, the judge issued a court order requiring each website member involved in those limited posts to file a written objection to the disclosure within 30 days of receiving the court papers from the website owner by email.

After further proceedings, the trial court ordered the website owner to disclose the names and identities of some of the anonymous message posters. The trial judge recognized that the First Amendment protects the right to speak anonymously but noted that an individual's right to protect his or her own good name is also constitutionally protected. Defamation law, the judge said, "reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty."

The trial judge also observed that the U.S. Supreme Court has extended defamation liability to Internet communications. The Supreme Court has said that through the Internet anyone "can become the town crier with a voice that resonates farther than it could from any soapbox."

On appeal, because disclosure of anonymous posters' identities had not yet been addressed by any Pennsylvania appeals court, the appeals court returned the case to the trial judge with specific directions. The appeals court created a four-factor test that Pennsylvania trial judges should henceforward apply in all similar cases.

First, the court noted that anonymous posters are entitled to receive notice of the case and to have an opportunity to object to the disclosure of their identities before the decision about disclosure is made.

Second, disclosure as to particular posters should be ordered only if their particular posted messages appear to be defamatory.

Third, the party seeking disclosure must sign a sworn statement that the information is essential to his or her case and is otherwise unavailable.

Fourth, the trial judge must balance the interests of all parties. Balancing the parties' interests focuses on how defamatory the posted comments were, how many comments were posted, and how likely it is that the party seeking disclosure will prevail in the case. The trial judge must also consider that comments about matters of public importance or critical of public officials are entitled to heightened protection from disclosure because public comment on public issues is entitled to "robust protection" under the First Amendment.

The appeals court declared that because debate on public and political matters "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials," trial judges must tolerate spirited public comments. Comments online directed to private persons and private matters warrant less tolerance in the analysis of whether the content of the comment is defamatory.

If you post comments on any websites or blogs using a pseudonym, you can't be confident that your identity will remain private. Be careful to tone down your rhetoric when commenting on private people or events. But while political speech is more protected than comments on private matters are, even political postings can lead to the disclosure of your identity if a trial judge finds disclosure to be fair.

Methods exist to trace your posting to your home or office computer even if you register on the website under a false name. Using a workplace computer to post defamatory comments can lead to workplace sanctions or even termination.