

## Another Brick in the Anonymous Poster Wall

### Digital Media and Data Privacy Law Blog

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As we discussed earlier, courts across the country are now dealing with the question of how state shield laws apply to anonymous commentary on newspaper web sites. Mirroring these cases is a series of cases approaching the issue from the perspective of the people doing the commenting. More specifically, courts are addressing the question of whether anonymous commenters on web sites have a First Amendment right to remain anonymous and, if so, whether the web site hosts have standing to raise those First Amendment rights in countering efforts to compel the hosts to disclose the commenters' identities.

In a significant decision on this issue, a federal judge in the Middle District of Pennsylvania ruled in early December that a newspaper moving to quash a subpoena seeking the identities of anonymous commenters on its web site had standing to assert the First Amendment claims of those commenters. *Enterline v. Pocono Med. Ctr.*, No. 3:08-cv-1934, (M.D. Pa. Dec. 11, 2008).

The underlying case involved a sexual harassment and retaliation claim asserted by Brenda Enterline, an employee of Pocono Medical Center. In October, The Pocono Record published an article about the lawsuit, and, in response, several people with what seemed to be personal knowledge of the claims posted commentary anonymously on the paper's web site. Enterline then subpoenaed the paper for the identities of those commenters. The paper objected on the grounds that: (1) the information was protected by the First Amendment; (2) the information was protected by Pennsylvania's shield statute; and (3) the subpoena did not comply with Rule 45. Because the court found in favor of the paper on its First Amendment argument, it did not address the second and third objections.

The bulk of the court's opinion explains why the newspaper has the standing required to assert the free-speech rights of the commenters. In particular, the question for the court was whether the paper could invoke the doctrine of third-party standing in this case. Under that doctrine, outlined in *Secretary of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 956 (1984), if a party that would normally have standing is prevented by "practical obstacles . . . from asserting rights on behalf of itself," a third party can do so if: (1) it can allege a sufficient injury-in-fact; and (2) it "can reasonably be expected properly to frame the issues and present them with the necessary adversarial zeal." The court ruled that the commenters could not practically assert their own rights in this case without revealing their identities, and since they apparently worked for the defendant, such a disclosure could cost them their jobs. The court also agreed with the newspaper's argument that

the paper's web site fora would lose validity and readership if it was forced to reveal the commenters' identities, and that such a loss would result in decreased readership and advertising revenue. This, the court said, was enough to satisfy the injury requirement. None of the parties disputed that the paper would zealously advocate for the rights of the commenters.

With standing established, the court then addressed the core First Amendment question. Citing *Doe v. 2TheMart.com Inc.*, 140 F. Supp. 2d 1088 (W.D. Wash. 2001), the court used a four-part analysis to decide whether the First Amendment rights of the commenters outweighed the plaintiff's need for the information. The court asked whether:

(1) the subpoena seeking the information was issued in good faith and not for any improper purpose, (2) the information sought relates to a core claim or defense, (3) the identifying information is directly and materially relevant to that claim or defense, and (4) information sufficient to establish or to disprove that claim or defense is unavailable from any other source.

The court in *Enterline* held that the plaintiff had not made a sufficient case that the information sought was unavailable from any other source, especially since the commenters were employees of the medical center and could be identified through normal discovery.

Also in early December, Maryland's highest court heard arguments on whether the host of an online business discussion forum should be forced to reveal the identity of an anonymous commenter who the plaintiff company claims is liable for defamation. This case presents virtually the same facts as the cases outlined in our earlier post -- the plaintiff in a defamation suit serves a subpoena on a third-party web site seeking the identity of anonymous commenters.

Appellant Independent Newspapers, Inc. asked the court to allow the web site to protect the identity of the commenters and to adopt a five-part test borrowed from a New Jersey appeals court's opinion in *Dendrite Int'l v. Doe*, 775 A.2d 756 (N.J. Super. App. Div. 2001). Under that formulation, before requiring disclosure, a court should:

(1) provide notice to the potential defendant and an opportunity to defend her anonymity; (2) require the plaintiff to specify the statements that allegedly violate her rights; (3) review the complaint to ensure that it states a cause of action based on each statement and against each defendant; (4) require the plaintiff to produce evidence supporting each element of her claims; and (5) balance the equities, weighing the potential harm to the plaintiff from being unable to proceed against the harm to the defendant from losing her right to remain anonymous, in light of the

strength of the plaintiff's evidence of wrongdoing.

The Pennsylvania federal court indicated in its opinion in *Enterline* that its four-part test is "similar" to the New Jersey test suggested in the Maryland matter, but it appears that the federal test is actually borrowed from the typical reporter's shield statute and provides more protection to the commenters. In particular, as in *Enterline*, the exhaustion requirement can be a significant hurdle for litigants to overcome.

[Click here](#) for a run-down by the Citizen Media Law Project of other states that have recognized the First Amendment right of Internet commenters to remain anonymous.