

## Court of Appeal Affirms KHIP Summary Judgment for Employer

The Fifth District Court of Appeals in Fresno has issued an opinion affirming the summary judgment KHIP won for its client in a case that tested the boundaries of the workplace in the age of smart phones.

The employer in the case is a national pharmacy chain. One of the employer's managers hired the plaintiff to work as a pharmacist for the employer. The manager had become acquainted with the plaintiff while she was still in pharmacy school. They maintained a close personal friendship. After the plaintiff became dissatisfied working for a competitor, the manager helped the plaintiff land a job with KHIP's client.

After she was hired, the plaintiff and the manager continued their friendship. Like many contemporary relationships, theirs included frequent texting about a variety of personal matters. They socialized outside work, met for lunch and coffee, and attended family gatherings such as birthday parties and holiday celebrations. Most of their communication occurred through texting on their personal cell phones.

After 11 p.m. one Friday night, the plaintiff was at home on her couch, sitting next to her husband, when the manager initiated a text exchange by asking how her week went. The manager had been drinking heavily with his "wine club" at a hotel and was black-out drunk. Their text exchange turned to the topic of alcohol, a common topic between them. The manager sent pictures of his wine, bragging about how much he was drinking and how expensive the wine was. The plaintiff engaged in the talk, saying "I'll take the first bottle" and telling him she was "doing the same" with vodka. Finally, after several more messages about drinking and celebrating New Year's Eve, the manager sent the plaintiff inappropriate pictures of his anatomy.

In her lawsuit, the plaintiff claimed that the manager's inappropriate texts constituted "workplace harassment." She argued that the use of texts by the manager to communicate about work expanded the scope of the workplace beyond the confines of the store.

KHIP Partner Thomas K. Hockel filed summary judgment arguing that the texts were not "workplace harassment." The trial court agreed, finding that the texts "indisputably occurred outside the workplace and outside of work hours" and "were spawned from a personal exchange that arose from a friendship." Accordingly, the court granted the employer's motion for summary judgment in favor of the employer on all of the plaintiff's claims. The plaintiff appealed.

Applying *State Dept. of Health Services v. Superior Court* (2003) 31 Cal.4th 1026, 1041, the appellate court affirmed summary judgment, finding that the plaintiff had failed to raise a triable issue of material fact with respect to the required showing that the supervisor was acting in the capacity of a supervisor in the text exchange in which he sent the inappropriate texts. Instead, the appellate court found that the errant texts arose out of an "extensive texting relationship" that predated their working together. The appellate court's opinion is important in an era where employees and managers frequently use texts to communicate with one another. While the Fair Employment and Housing Act makes employers strictly liable for harassment by a supervisor, that only applies where the supervisor is acting in the capacity of a supervisor when the harassment occurs. (*Health Services, supra*, 31 Cal.4th at p. 1041.) An employer is not strictly liable for a supervisor's acts of harassment that result from a completely private relationship unconnected with the employment and not occurring in the workplace or during normal working hours.