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Technology - Konop v. Hawaiian Airlines, Inc.

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CASE SUMMARY

TECHNOLOGY

KONOP v. HAWAIIAN AIRLINES, INC.

2001 U.S. APP. LEXIS 191. (9TH CIR. JAN 8,
2001)

I. INTRODUCTION

In *Konop v. Hawaiian Airlines Inc.*,¹ the United States Court of Appeals for the Ninth Circuit held that the unauthorized access of the content of a secure website is a violation of the Wiretap Act and the Stored Communications Act.² This is the first case to determine whether unauthorized accessing of a secure private website is a violation of the Wiretap Act.³ This decision is contrary to an earlier decision by the Fifth Circuit in *United States v. Turk*,⁴ which held that the Wiretap Act required contemporaneous transmission and acquisition of the communication.⁵

¹ See *Konop v. Hawaiian Airlines, Inc.*, 2001 U.S. App. Lexis 191 (9th Cir. Jan 8, 2001). The appeal from the United States District Court for the Central District of California was argued and submitted on June 8, 2000 before Circuit Judges Robert Boochever, Steven Reinhart, and Richard A. Daez. The decision was filed on January 8, 2001. Boochever authored the opinion.

² See *id.* at *25.

³ See *id.* at *7.

⁴ 526 F.2d 654 (5th Cir. 1976).

⁵ See *Konop*, 2001 U.S. App. Lexis 191, at *8.

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The Ninth Circuit concluded that the scope of protection under the Wiretap Act and the Stored Communications Act depends on the degree of intrusion, not on whether the communication is in transit or storage.⁶ Subsequently, content on a secure website is an “electronic communication” within the meaning of the Acts and is therefore protected from unlawful interception.⁷ The Ninth Circuit also concluded that defendant’s unlawful interception of the content on plaintiff’s secure website, followed by its disclosure to an opposing union faction and engagement in coercion and intimidation, raised a triable issue of fact, and remanded Konop’s claims under the Railway labor Act.⁸

II. FACTS

Robert Konop (“Konop”), a pilot for Hawaiian Airlines, Inc. (“Hawaiian”), established a website on which he posted bulletins criticizing Hawaiian, its officers, and the Air Line Pilots Association (“ALPA”) for negotiating labor concessions.⁹ Konop encouraged other pilots to consider alternate union representation because ALPA supported a proposal by Hawaiian for wage concessions.¹⁰ Access to Konop’s website was limited to certain Hawaiian employees who were required to log on with a user name and password provided by Konop.¹¹ Before issuing a password to potential viewers, Konop also required each viewer to agree not to disclose the contents of Konop’s website.¹²

In December 1995, James Davis, Vice-President of Hawaiian (“Davis”) approached a Hawaiian pilot, Gene Wong (“Wong”), seeking permission to use Wong’s name to access Konop’s website.¹³ With Wong’s permission Davis used Wong’s

⁶ See *id.* at *12.

⁷ See *id.* at *25.

⁸ See *id.* at *42-43.

⁹ See *id.* at *2.

¹⁰ See *Konop*, 2001 U.S. App. Lexis 191, at *30.

¹¹ See *id.* at *3. Hawaiian managers and union representatives were denied access to Konop’s website. See *id.*

¹² See *id.* Before obtaining a password, potential users of Konop’s website were required to click a button which indicated agreement to the terms of use, which included a non-disclosure clause. See *id.*

¹³ See *id.*

name to log on and view Konop's website.¹⁴ Consequently, when Davis logged onto Konop's website he indicated that he agreed to the website's terms and conditions.¹⁵

Shortly thereafter, Konop received a call from Reno Morella ("Morella"), the union chairman of ALPA, regarding the contents of Konop's website.¹⁶ Morella informed Konop that Bruce Nobles ("Nobles"), president of Hawaiian, had called him because he was distressed by the contents of Konop's website.¹⁷ Based on his conversation with Morella, Konop believed that Nobles had obtained access to his website and was now threatening to sue Konop for defamation.¹⁸

As a result, Konop took his website down for the rest of the day.¹⁹ However, he restored the website the next day, still uncertain of how Nobles had acquired access to his website.²⁰ After examining his access logs, Konop learned that Davis had logged on as Wong.²¹ Meanwhile, Davis had obtained permission from another pilot, James Gardner ("Gardner"), to log on using his name.²² From December 1995 through April 1, 1996, Konop records indicated over twenty log-ins by Davis, as Wong, and at least fourteen more as Gardner.²³

III. PROCEDURE

Konop filed suit against Hawaiian at the United States District Court for the Central District of California, alleging violation of the Railway Labor Act,²⁴ the Wiretap Act,²⁵ and

¹⁴ See *id.* at*3. Wong had never used the site, and had never agreed to Konop's terms of use or the terms of Konop's non-disclosure agreement. See *id.*

¹⁵ See *Konop*, 2001 U.S. App. Lexis 191, at *3. The Ninth Circuit presumed that Davis indicated consent to Konop's terms of use for the website by clicking a button. See *id.*

¹⁶ See *id.*

¹⁷ See *id.* According to Morella, Nobles was upset by Konop's allegations of fraud, and by other criticisms contained in Konop's website. See *id.*

¹⁸ See *id.* at *4.

¹⁹ See *id.*

²⁰ See *Konop*, 2001 U.S. App. Lexis 191, at *4.

²¹ See *id.*

²² See *id.*

²³ See *id.* at *4.

²⁴ See 45 U.S.C. § 151-188 (2000).

²⁵ See 18 U.S.C. §§ 2510-2520 (2000).

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the Stored Communications Act;²⁶ all of which arose from Davis' viewing of Konop's website.²⁷ In addition, Konop brought claims against Hawaiian based on his allegation that Hawaiian imposed a medical coverage suspension in retaliation to his opposition to proposed labor concessions.²⁸ The district court granted summary judgment to Hawaiian on all but the last claim.²⁹ However, after a short bench trial, the district court entered judgment against Konop for his claim of retaliatory suspension.³⁰

Subsequently, Konop appealed the summary judgment and the judgment entered against him on his retaliatory suspension claim to the United States Court of Appeals for the Ninth Circuit.³¹ Konop argued that Davis accessed his website under false pretenses and thus violated both the Wiretap Act and the Stored Communications Act.³² In addition, Konop argued that Hawaiian violated the Railway Labor Act by its unauthorized access to and disclosure of the content on his website.³³ On January 8, 2001, the Ninth Circuit reversed and remanded the district court's summary judgment concerning Konop's claims under the Wiretap Act, the Stored Communications Act, and the Railway Labor Act.³⁴ However, the Ninth Circuit upheld the district court's summary judgment against Konop on his claim of retaliatory suspension.³⁵

IV. NINTH CIRCUIT'S ANALYSIS

A. WIRETAP ACT AND STORED COMMUNICATIONS ACT CLAIMS

Protection against eavesdropping through modern electronic communications is governed by the Wiretap Act and the Stored Communications Act.³⁶ The Wiretap Act prohibits

²⁶ See *id.* §§ 2701-2710.

²⁷ See *Konop*, 2001 U.S. App. Lexis 191, at *4. Konop also alleged numerous state law tort claims. See *id.*

²⁸ See *id.*

²⁹ See *id.* at *5.

³⁰ See *id.*

³¹ See *id.* at *1.

³² See *Konop*, 2001 U.S. App. Lexis 191, at *5.

³³ See *id.*

³⁴ See *id.* at *2.

³⁵ See *id.*

³⁶ See *id.* at *6.

unauthorized “interception” of “electronic communications.”³⁷ The Stored Communications Act prohibits unauthorized “access” to a “facility through which an electronic communication service is provided.”³⁸ Since the civil damages differ substantially between the Wiretap Act and the Stored Communications Act,³⁹ the Ninth Circuit had to determine whether Davis’ use of Konop’s website under false pretenses was an unauthorized interception, or access, or both.⁴⁰ This issue was one of first impression for the Ninth Circuit.⁴¹

1. Interpretation of the Wiretap Act

First, the Ninth Circuit focused on the Wiretap Act’s definition of interception.⁴² In its original form, the Wiretap Act prohibited any person from “willfully intercept[ing], endeavor[ing] to intercept, or procur[ing] any other person to intercept, any wire or oral communication”⁴³ The Wiretap Act defined “wire communication” as “any communication made . . . through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection.”⁴⁴ An “oral communication” was “any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception”⁴⁵ “Intercept” meant “the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device.”⁴⁶

In an earlier Fifth Circuit case, *United States v. Turk*,⁴⁷ the term “intercept” had received a narrow construction.⁴⁸ In *Turk*, the Fifth Circuit determined whether an interception of

³⁷ See *Konop*, 2001 U.S. App. Lexis 191, at *6 (citing 18 U.S.C. § 2511).

³⁸ See *id.* (citing 18 U.S.C. § 2701).

³⁹ Compare 18 U.S.C. § 2250 with 18 U.S.C. § 2707. Civil penalties are greater under the Wiretap Act than under the Stored Communications Act. See *Konop*, 2001 U.S. App. Lexis 191, at *6.

⁴⁰ See *Konop*, 2001 U.S. App. Lexis 191, at *6-7.

⁴¹ See *id.* at *7.

⁴² See *id.*

⁴³ 18 U.S.C.A. § 2511(a) (West 1970) (amended 1986).

⁴⁴ *Id.* § 2510 (1).

⁴⁵ *Id.* § 2510 (2).

⁴⁶ *Id.* § 2510 (4).

⁴⁷ 526 F.2d 654 (5th Cir. 1976).

⁴⁸ See *Konop*, 2001 U.S. App. Lexis 191, at *8.

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a communication included playing back a tape-recorded conversation which had been recorded by a third party.⁴⁹ The Fifth Circuit held that it did not and that no interception had occurred, because the logic and policy of the Wiretap Act required contemporaneous transmission and acquisition of the communication.⁵⁰

Whether an interception requires transmission and acquisition to be contemporaneous was vital to analyzing Konop's claim.⁵¹ Under the original Wiretap Act, as interpreted by *Turk*, there could never be an "interception" from the downloading of the information stored on web servers.⁵²

2. Scope of Protection Under the Wiretap Act and the Stored Communications Act

To determine whether *Turk's* contemporaneity requirement was persuasive dicta, the Ninth Circuit discussed the subsequent amendments to the Wiretap Act by the Electronic Communications Privacy Act ("ECPA").⁵³ Title I of the ECPA amended the Wiretap Act by prohibiting unauthorized "interception" of "electronic communications."⁵⁴ Title II of the ECPA created the Stored Communications Act, prohibiting unauthorized "access" to "a facility through which an electronic communication service is provided."⁵⁵

Of importance was the expansion of the definition of "wired communication."⁵⁶ The definition was expanded to include "any electronic storage of such communication."⁵⁷ Additionally, the amended ECPA created exceptions to the catch-all category of "electronic communication."⁵⁸ These included "any transfer of signs, signals, writings, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectric or photooptical

⁴⁹ See *Turk*, 526 F.2d at 658.

⁵⁰ See *Konop*, 2001 U.S. App. Lexis 191, at *8.

⁵¹ See *id.* at *9.

⁵² See *id.*

⁵³ See *id.*

⁵⁴ 18 U.S.C. § 2511.

⁵⁵ *Id.* at § 2701.

⁵⁶ See *Konop*, 2001 U.S. App. Lexis 191, at *10.

⁵⁷ See *id.*

⁵⁸ See *id.*

system. . . .”⁵⁹

The Ninth Circuit then determined whether the amended definition of “intercept” under the Wiretap Act squared with weaker protection afforded under the Stored Communications Act.⁶⁰ The Ninth Circuit referred to its holding in *United States v. Smith*,⁶¹ where the issue was whether stored communications were protected under the Wiretap Act.⁶²

In *Smith*, the Ninth Circuit rejected the Fifth Circuit’s definition of “intercept” in *Turk* because it was difficult to “square” with the Wiretap Act’s new definition of “wire communications.”⁶³ The amended definition included “stored communications,” which rendered the *Turk* requirement of contemporaneity meaningless.⁶⁴ Therefore, the Ninth Circuit determined that the term “intercept” under the Wiretap Act and “access” under the Stored Communications Act must be conceptually and qualitatively different.⁶⁵

Moreover, the Ninth Circuit explained that intercept means acquiring the contents of a communication, while access merely involves being in a position to acquire the contents of a communication.⁶⁶ Hence, the scope of protection under the Acts depends on the degree of intrusion, not on whether the communication is in transit or storage.⁶⁷ Applying *Smith’s* definition of “interception” to electronic communication would render the unauthorized acquisition of the contents of a secure website an interception, and as such a violation of the Wiretap Act.⁶⁸

⁵⁹ *Id.*

⁶⁰ *See id.*

⁶¹ 155 F.3d 1051 (9th Cir. 1988).

⁶² *See Konop*, 2001 U.S. App. Lexis 191, at *10.

⁶³ *See id.* at *11.

⁶⁴ *See id.*

⁶⁵ *See id.* at *12. The Fifth Circuit’s definition of interception required contemporaneous transmission and acquisition of a wire communication. *See Turk*, 526 F.2d at 658.

⁶⁶ *See Konop*, 2001 U.S. App. Lexis 191, at *12.

⁶⁷ *See id.*

⁶⁸ *See id.* at *12-13. In *Steve Jackson Games v. United States Secret Service*, the Fifth Circuit, the only court to have decided this issue, concluded that Congress intended the ECPA to carry forward *Turk’s* requirement of contemporaneity. *See id.* (citing *Steve Jackson Games v. United States Secret Serv.* 26 F.3d 457, 461 (5th Cir. 1994)). Therefore, an unauthorized acquisition of another person’s secure website content would not be an “interception” because the content acquired was a “stored com-

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3. Acquisition Need Not Be Contemporaneous With Transmission

The Ninth Circuit then analyzed whether “intercept” has the same meaning when applied to either wire or electronic communications.⁶⁹ The Ninth Circuit first noted that the Wiretap Act provides only one definition of “intercept,” and that definition does not expressly include *Turk*’s requirement of contemporaneity.⁷⁰ In addition, the *Turk* contemporaneity requirement is not included in the ECPA’s legislative history, nor has it been widely adopted by other circuit courts.⁷¹ Therefore, Congress did not intend to require *Turk*’s “contemporaneity” requirement into its amended definition of intercept.⁷²

4. Exceptions

Under the Wiretap Act, not all viewing of a website constitutes in an unlawful interception.⁷³ For example, accessing an electronic communication readily available to the general

munication.” See *Konop*, 2001 U.S. App. Lexis 191, at *13. In reaching its decision, the Fifth Circuit had relied on the exclusion of “stored communication” within the definition of protected “electronic communications.” See *id.* However, the Ninth Circuit was not persuaded by the Fifth Circuit that Congress intended to have one definition of “intercept” govern “wire communications,” while another definition of “intercept” governed “electronic communications.” See *id.* Although the definition of “electronic communications” does not expressly include stored communications, the Ninth Circuit determined that protection was implied because electronic communication cannot be successfully completed otherwise. See *id.* at *15 (citing Tatsuya Akamine, *Proposal for a Fair Statutory Interpretation: Email Stored in a Secure Provider Computer is Subject to an Interception Under the Federal Wiretap Act*, 7 J.L. & Pol’y, 550-51 (1999)).

⁶⁹ See *Konop*, 2001 U.S. App. Lexis 191, at *12-13.

⁷⁰ “Intercept” means the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device. See *Konop*, 2001 U.S. App. Lexis 191, at *14. (citing 18 U.S.C. § 2510(4)).

⁷¹ See *Konop*, 2001 U.S. App. Lexis 191, at *14. The Ninth Circuit found only one apparent adoption the *Turk* definition of “intercept” by a circuit court prior to the passing of the ECPA. See *Konop*, 2001 U.S. App. Lexis 191, at *14 (noting *United States v. Shields*, 675 F.2d 1152, 1156 (11th Cir. 1982)).

⁷² See *Konop*, 2001 U.S. App. Lexis 191, at *14.

⁷³ See *id.* at *20.

public is not a violation.⁷⁴ Additionally, obtaining appropriate consent does not constitute a violation.⁷⁵

The Ninth Circuit readily discounted the classification of Konop's website as being available to the general public.⁷⁶ Konop required user names and passwords to restrict access to his website.⁷⁷ Therefore, absent consent, Davis' access of Konop's website was a violation of the Wiretap Act.⁷⁸

The Ninth Circuit then determined whether Davis had obtained consent to access Konop's website.⁷⁹ The Wiretap Act provides that consent must be given by "one of the parties to the communication."⁸⁰ A party to a communication is defined as "a person or group participating in an action or affair."⁸¹

Hawaiian claimed that Wong's consent, as an authorized user of Konop's website, entitled Davis to view the contents of the website.⁸² However, only pilots who identified themselves, created passwords, and agreed to the website's terms in return for access to the Konop website were parties to an agreement with Konop.⁸³ Wong did not identify himself, create a password, or agree to the website's terms, and therefore was not party to an agreement with Konop.⁸⁴ As Konop never gave Wong permission to use the website, Wong could not have given Davis his consent.⁸⁵

Hawaiian argued that Konop gave implied consent to Davis by failing to disable Wong and Gardner's access to the

⁷⁴ "It shall not unlawful . . . for any person . . . to intercept or access an electronic communication made through an electronic communication system that is so configured that such electronic communication is readily accessible to the general public." 18 U.S.C. § 2511(2)(g)(i).

⁷⁵ See *Konop*, 2001 U.S. App. Lexis 191, at *21.

⁷⁶ See *id.* at *20-21.

⁷⁷ See *id.* at *21.

⁷⁸ See *id.*

⁷⁹ See *id.* at *21-25.

⁸⁰ 18 U.S.C. § 2511 (2)(d).

⁸¹ See *Konop*, 2001 U.S. App. Lexis 191, at *21-22 (citing *Merman Webster's Collegiate Dictionary* 1322 (Delux ed. 1987)).

⁸² See *Konop*, 2001 U.S. App. Lexis 191, at *21. In the alternative, Hawaiian claimed that Davis later received consent from Gardner. See *id.* at *23. Nevertheless, Gardner's consent did not give Davis prior consent that could excuse Davis' previous access of the website as "Wong." See *id.*

⁸³ See *id.* at *23.

⁸⁴ See *id.*

⁸⁵ See *id.* at *23.

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website after discovering Davis' conduct.⁸⁶ In *United States v. Van Poyck*,⁸⁷ the Ninth Circuit held that consent "may be 'implied in fact' from surrounding circumstances indicating that the [party] knowingly agreed to the surveillance."⁸⁸ While Konop suspected that Hawaiian management had accessed his website, he did not know how or by whom until months later.⁸⁹ The Ninth Circuit determined that because these facts were open to interpretation, this issue should have been decided by the finder of fact and not on summary judgment.⁹⁰ Nevertheless, the Ninth Circuit concluded that any implied consent Davis might have received had not been given prior to Davis' first visit to Konop's website.⁹¹

5. Conclusion

In conclusion, the Ninth Circuit held that information contained on secure websites is an "electronic communication" which is protected from "unauthorized interception under the Wiretap Act."⁹² Further, Konop had successfully raised material issues of fact concerning whether Davis had consent to view Konop's website, and whether Davis had violated the Stored Communications Act by acquiring unauthorized access.⁹³ Therefore, the district court had erred in granting summary judgment for Hawaiian on Konop's claims under the Wiretap Act and the Stored Communications Act.⁹⁴

⁸⁶ See *id.* at *24-25.

⁸⁷ 77 F.3d 285, 292 (9th Cir. 1996).

⁸⁸ See *Konop*, 2001 U.S. App. Lexis 191, at *24 (quoting *Van Poyck*, 77 F.3d at 292). The Ninth Circuit also considered a broader definition of "parties to a communication" which included intended, as well as actual, recipients of the communication. See *Konop*, 2001 U.S. App. Lexis 191 at *22. However, the additional steps required to gain access to Konop's website indicate that not all Hawaiian pilots were intended parties. See *id.* at *23. As Wong never took these steps, he was merely a potential recipient and thus not an intended recipient of Konop's website content. See *id.* at *22-23.

⁸⁹ See *Konop*, 2001 U.S. App. Lexis 191, at *24-25.

⁹⁰ See *id.* at *25.

⁹¹ See *id.*

⁹² See *id.*

⁹³ See *id.*

⁹⁴ See *Konop*, 2001 U.S. App. Lexis 191, at *25.

B. RAILWAY LABOR ACT CLAIM

The second issue the Ninth Circuit considered was whether Hawaiian had violated the Railway Labor Act ("RLA").⁹⁵ The RLA prohibits "interference, influence, or coercion by either party over the designation or representatives by the other."⁹⁶ The RLA also prohibits any carrier from interfering in any way with the organization of its employees.⁹⁷ Konop claimed Hawaiian violated the RLA by (1) interfering with Konop's organizing efforts through Davis' unauthorized access of Konop's website, (2) wrongfully assisting the ALPA by disclosing the contents of his website, and (3) engaging in coercion and intimidation by threatening to file suit against Konop based on the content of his website.⁹⁸ Before analyzing Konop's allegations, the Ninth Circuit determined whether the district court had erred in dismissing Konop's RLA claims on grounds that it lacked jurisdiction over the claims.⁹⁹

1. *Subject Matter Jurisdiction*

Federal courts lack subject matter jurisdiction over RLA disputes arising from collective bargaining agreements ("CBA") which are considered "minor" claims which must be brought to arbitration.¹⁰⁰ However, claims that arise under statutory provisions are not "minor" claims, and may be brought directly in district court.¹⁰¹ The Ninth Circuit deter-

⁹⁵ See *id.* at *26.

⁹⁶ 45 U.S.C. § 152.

⁹⁷ See *id.*

⁹⁸ See *Konop*, 2001 U.S. App. Lexis 191, at *26.

⁹⁹ See *id.* at *27.

¹⁰⁰ See *id.* at *27. The RLA establishes a mandatory arbitral mechanism for "the prompt and orderly settlement" of two classes of disputes, major and minor. See 45 U.S.C. §151(a). Major disputes are those concerning rates of pay and rules or working, and they relate to 'the formation of, or attempt to secure, collective bargaining agreements. See *Conrail v. Railway Labor Executives Ass'n*, 491 U.S. 299, 302 (1989) quoting *Elgin, J. & E. R. Co. v. Burley*, 325 U.S. 711, 723 (1945)). "Minor" disputes, "grow out of grievances or out of the interpretation or application of agreements covering rates of pay, rules, or working conditions." 45 U.S.C. §151(a). Minor disputes involve "controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." See *Hawaiian Airlines, Inc. v. Norris*, 512 U.S. 246, 252-53, 256 (1994).

¹⁰¹ See *Konop*, 2001 U.S. App. Lexis 191, at *28. (citing *Fennessy v. Southwest Airlines*, 91 F.3d 1359, 1362 (9th Cir. 1996)).

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mined that “Konop had presented specific statutory claims based on violations of the RLA.”¹⁰² Konop’s RLA claims were not subject to arbitration, and hence are within the court’s jurisdiction.¹⁰³

2. Protected Activity

Once the issue of jurisdiction had been resolved, the Ninth Circuit addressed Hawaiian’s argument that it had not interfered with any protected organizing activity.¹⁰⁴ It contended that Konop posted articles which seriously criticized Hawaiian’s managers and their wage concession proposals on his website.¹⁰⁵ These articles also suggested an alternative union representation to the current ALPA representation.¹⁰⁶ Labor organizing activity in publications loses protection if the publication contains defamatory statements.¹⁰⁷

Hawaiian claimed that Konop’s statements were defamatory and known to be false.¹⁰⁸ The Ninth Circuit scrutinized each of the alleged defamatory statements to determine whether the publications were defamatory or false or whether they were protected under the RLA.¹⁰⁹ As to the first and second statements, the Ninth Circuit classified them as rhetori-

¹⁰² See *Konop*, 2001 U.S. App. Lexis 191, at *29.

¹⁰³ See *id.*

¹⁰⁴ See *id.* at *30.

¹⁰⁵ See *id.*

¹⁰⁶ See *id.*

¹⁰⁷ See *Konop*, 2001 U.S. App. Lexis 191, at *31 (citing *Linn v. United Plant Guard Workers of Amer., Local 114*, 383 U.S. 53, 61 (1966)). Employers covered under the RLA are not subject to the provisions of the NLRA. See *Konop*, 2001 U.S. App. Lexis 191, at *31. However, courts look to the NLRA and the cases interpreting it for guidance in interpreting the RLA. See *Brotherhood of Ry. Trainmen v. Jacksonville Terminal Co.*, 394 U.S. 369, 383 (1969). The Ninth Circuit saw no reason not to apply the rule regarding protected activities announced in *Linn* in the context of the RLA. See *Konop*, 2001 U.S. App. Lexis 191, at *31.

¹⁰⁸ See *Konop*, 2001 U.S. App. Lexis 191, at *32. The allegedly defamatory statements included: (1) “Nobles does his ‘dirty work . . . like the Nazis during World War II,’ ” (2) “Soviet Negotiating Style Essential to Nobles Plan!,” (3) “Nobles is ‘one incompetent at the top,’ ” (4) “Nobles ‘has very little skill and little ability with people . . . In fact, with as few skills as Nobles possesses, it is difficult to imagine how he got this far,’ ” and (5) “Nobles Suspected in Fraud!” and “Hawaiian Air president, Bruce Nobles, is the prime suspect in an alleged fraud which took place in 1991.” See *id.* at *32.

¹⁰⁹ See *id.* at *32-35.

cal hyperbole, which is protected under federal labor law.¹¹⁰ The third and fourth statements were classified as opinions, which are also protected under federal law.¹¹¹ As to the last statement, the Ninth Circuit concluded that Hawaiian did not show that Konop published it with knowledge of falsity.¹¹² Absent a showing of malice, the Ninth Circuit determined that Konop's publications were protected under the RLA.¹¹³

3. Specific Violations

After establishing that Konop's activities may constitute protected organizing activity under the RLA, the Ninth Circuit addressed Konop's RLA claims.¹¹⁴ Konop alleged that Hawaiian had violated his rights under the RLA by (1) interfering with his organizing efforts through its unauthorized access of his website, (2) wrongfully supporting one labor group in favor of another by informing the ALPA of his website's content, and (3) engaging in coercion and intimidation by threatening to sue him for defamation.¹¹⁵ Hawaiian argued that Konop lacked sufficient evidence of these violations.¹¹⁶ The Ninth Circuit disagreed.¹¹⁷

a. Access of website

Without legitimate justification, employers are prohibited from engaging in surveillance of union organizing activities.¹¹⁸

¹¹⁰ See *id.* at *32.

¹¹¹ See *id.* at *32-33.

¹¹² See *id.* at *34.

¹¹³ See *Konop*, 2001 U.S. App. Lexis 191, at *34.

¹¹⁴ See *id.* at *35.

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.*

¹¹⁸ See *Konop*, 2001 U.S. App. Lexis 191, at *36. Section 8(a)(1) of the National Labor Relations Act states that it is unfair labor practice for an employer "to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7." 29 U.S.C. § 158(a)(1). In *California Acrylic Industries v. NLRB*, 150 F.3d 1095 (9th Cir. 1998) the Ninth Circuit explained that eavesdropping is generally prohibited because it has a tendency to "create fear among employees of future reprisals" and it is this tendency, and not the actual chilling of protected activities, that therefore "chills an employee's freedom to exercise" rights under federal labor law. See *California*, 150 F.3d at 1099.

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Furthermore, labor law prohibits eavesdropping on a conversation between an employee and a union representative.¹¹⁹ Finding no distinction between eavesdropping on a conversation and the unauthorized viewing of an employee's secure website, the Ninth Circuit determined that Konop had "raised a material issue of triable fact" regarding Hawaiian's interference with Konop's union organizing activity.¹²⁰

b. Disclosure to opposing union

Konop's second RLA claims alleged that Hawaiian had improperly assisted an opposing labor faction by disclosing the contents of Konop's website to Morella, the chairman of ALPA.¹²¹ Under the RLA, an employer is prohibited from assisting one union faction over another.¹²² Although Hawaiian argued that Konop had failed to present sufficient evidence that Nobles had made such a disclosure or was even familiar with the contents of Konop's website, the Ninth Circuit found otherwise.¹²³

First, Morella stated that Nobles had contacted him regarding the contents of Konop's website.¹²⁴ Second, Noble confirmed that he had contacted Morella concerning the effects that Konop's "inaccurate attacks on the proposed labor agreements" would have on the ratification.¹²⁵ As such, Nobles had effectively conceded that he contacted Morella to help ensure

¹¹⁹ See *Konop*, 2001 U.S. App. Lexis 191, at *36 (citing *National Labor Relations Board v. Unbelievable Inc.*, 71 F.3d 1434, 1435-39 (9th Cir. 1995) (in which the Ninth Circuit found that an employer had violated the National Labor Relations Act by engaging in the unfair labor practices of eavesdropping on private conversations between employees and a union representative).

¹²⁰ See *Konop*, 2001 U.S. App. Lexis 191, at *36. The Ninth Circuit also rejected Hawaiian's claim that its surveillance of Konop's website to correct false or misleading statements were justified under the RLA, the Wiretap Act, or the Stored Communications Act. See *id.* at *37. Nor did the Ninth Circuit accept Hawaiian's claim that Davis' access to Konop's website did not violate the RLA because Konop did not appreciably limit his activities. See *id.* The Ninth Circuit found no authority to support such a requirement. See *id.*

¹²¹ See *id.* at *38.

¹²² See *id.* at *39 (citing *Barthelemy v. Air Lines Pilots Ass'n.*, 897 F.2d 999, 1009 (9th Cir. 1990)).

¹²³ See *Konop*, 2001 U.S. App. Lexis 191, at *39-41.

¹²⁴ See *id.* at *39-40.

¹²⁵ See *id.* at *40.

that ALPA would prevail over Konop's opposing faction.¹²⁶ The Ninth Circuit held that under these facts, Konop presented a triable issue of fact on the issue of whether Hawaiian violated the RLA by improperly providing assistance to ALPA.¹²⁷

c. Threat of defamation suit

Konop's third RLA claim alleged that Nobles had engaged in unlawful coercion and intimidation by threatening to sue him for defamation.¹²⁸ An employer violates the RLA by filing or threatening to file a lawsuit against an employee concerning union organizing activities.¹²⁹ Hawaiian argued that Konop failed to present sufficient evidence that Nobles had ever threatened Konop with a lawsuit.¹³⁰ However, Morella had stated, in his declaration, that Nobles advised him to caution or inform Konop of the possibility of a defamation suit.¹³¹ Morella relayed Nobles' warning to Konop.¹³² Based on these facts, the Ninth Circuit found that Konop had raised a triable issue of fact that Nobles violated the RLA by engaging in coercion and intimidation by threatening Konop with a defamation suit.¹³³

4. Conclusion

The Ninth Circuit concluded that the district court had erred in granting summary judgment against Konop for his RLA claims.¹³⁴ The Ninth Circuit determined that the court had jurisdiction over the claims.¹³⁵ Furthermore, Konop had raised a triable issue of fact regarding whether Konop's or-

¹²⁶ See *id.*

¹²⁷ See *id.* at *40-41.

¹²⁸ See *Konop*, 2001 U.S. App. Lexis 191, at *41.

¹²⁹ See *id.* (citing *Diamond Walnut Growers, Inc. v. NLRB*, 53 F.3d 1085, 1089-90 (9th Cir. 1995) (finding employer's defamation lawsuit against union violated 29 U.S.C. §159(a)(1)); Also citing *GHR Energy Corp. v. NLRB*, 924 F.2d 1055 (5th Cir. 1991) (analyzing whether employer's threat to sue employee for defamation violated NLRA)). See *Konop*, 2001 U.S. App. Lexis 191, at *41.

¹³⁰ See *Konop*, 2001 U.S. App. Lexis 191, at *41.

¹³¹ See *id.* at *42.

¹³² See *id.*

¹³³ See *id.*

¹³⁴ See *id.* at *43.

¹³⁵ See *Konop*, 2001 U.S. App. Lexis 191, at *42.

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ganizing activities were protected under the RLA and whether Hawaiian had violated the RLA by: 1) accessing Konop's website, 2) disclosing its content to an opposing union faction, and 3) threatening to file suit against Konop.¹³⁶

C. RETALIATION CLAIM

Konop claimed that his subpoenas for corroborating witnesses were improperly quashed, which caused the district court to enter summary judgment against him in his claim that Hawaiian had violated the RLA when it placed him on sick leave in retaliation for the content of his website.¹³⁷ "A litigant whose subpoenas have been improperly quashed must . . . show prejudice."¹³⁸ While finding that a question exists over whether the district court's remarks in a pretrial hearing constituted an order to quash subpoenas, the Ninth Circuit held that Konop had failed to show that he had been prejudiced by any order quashing subpoenas.¹³⁹

V. IMPLICATIONS OF THE DECISION

Any person or company which maintains a website not generally accessible to the public may benefit from this decision. Additionally, as the Ninth Circuit made no distinction between eavesdropping and accessing a web site under false pretenses, employers gaining unauthorized access to an employee's secure website in an attempt to interfere with organizing activities will violate both the RLA and the Wiretap Act.¹⁴⁰ An employee's unauthorized access to or disclosure of the content of an employer's secured website may also be considered Wiretap Act violations.¹⁴¹

The Ninth Circuit's requirements under the Wiretap and Stored Communications Acts are relatively minimal.¹⁴² To en-

¹³⁶ See *id.* at *42-43.

¹³⁷ See *id.* at *42.

¹³⁸ See *id.* at *43. See also *Casino Foods Corp. v. Kraftco Corp.*, 546 F.2d 301, 302 (9th Cir. 1976).

¹³⁹ See *Konop*, 2001 U.S. App. Lexis 191, at *43-44.

¹⁴⁰ See *Konop*, 2001 U.S. App. Lexis 191, at *36.

¹⁴¹ See Judy Greenwald, *Lawyer's watching the airline case, Court expands wiretap law*, Bus. Ins. at <http://www.businessinsurance.com/archives/> (January 2001).

¹⁴² See *id.*

sure protection from unlawful interception or access of content on a secure website, web hosts should adhere to the following guidelines: 1) limit the number and/or scope of intended users,¹⁴³ 2) require user names and passwords,¹⁴⁴ 3) require that all viewers accept the terms and conditions of use for the website,¹⁴⁵ 4) the terms of use must include a non-disclosure agreement.¹⁴⁶

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¹⁴³ See *Konop*, 2001 U.S. App. Lexis 191, at *21.

¹⁴⁴ See *id.*

¹⁴⁵ See *id.*

¹⁴⁶ See *id.*

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