

IN THE UNITED STATES DISTRICT COURT FOR THE
EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

AMERICA ONLINE, INC.,)
)
 Plaintiff,)
)
 v.) Civil Action No. 99-1186-A
)
)
 NETVISION AUDIOTEXT, INC.,)
 d/b/a CYBER ENTERTAINMENT)
 NETWORK, ET AL.,)
)
 Defendants.)
)

O R D E R

THIS Matter is before the Court on Defendant Netvision Audiotext, Inc.'s motion to dismiss Count XII of the Amended Complaint (Negligent Hiring and Negligent Retention). The issue before the Court is whether a claimant states a claim for negligent hiring and negligent retention where the claimant does not allege physical injury to a person, but only alleges physical injury to property or chattels. The Court holds that a claimant states a claim for negligent hiring and retention where it alleges physical injury or harm to chattels. The Court further holds that allegations that a computer system or services are made unavailable, its services are interrupted, or the system is altered are sufficient to allege physical harm to a computer system. Accordingly, it is hereby

ORDERED that Defendant Netvision Audiotext, Inc.'s Motion to Dismiss is DENIED.

The facts relevant to this case are that Plaintiff America Online, Inc. ("AOL") provides a proprietary, content-based online computer service to paying subscribers. AOL's service enables its members to pursue online activities, such as using electronic mail ("email") and accessing the Internet. AOL's central computer system that processes email messages is located in Northern Virginia. Email sent to and from AOL members is processed through and stored in the central computers in Virginia.

Defendant Netvision Audiotext, Inc. d/b/a Cyber Entertainment Network ("CEN") is a private corporation that owns and operates web sites containing adult entertainment content. CEN is based in Fort Lauderdale, Florida. CEN has an affiliate or "webmaster" program through which CEN contracts with individuals to obtain customers for CEN's websites. The webmasters contract with CEN through sign up sheets and obtain account codes imbedded in electronic advertising banners and hypertext links. The banners and hypertext links permit online users that visit webmaster websites to access sometimes sexually explicit invitations to become CEN customers by just a click of the mouse.

AOL alleges that CEN, certain CEN owners, officers, directors, and employees, and the webmasters have acted in concert to transmit millions of unsolicited bulk email ("u.b.e.")

messages advertising adult websites to AOL and its members. The u.b.e. messages advertise CEN's adult websites through graphic pictures and words, and contain the hypertext links to the sites where viewers can subscribe to the adult content. AOL alleges that transmission of these u.b.e. messages are a part of CEN's business model. AOL contends that CEN solicits its webmaster affiliates in a manner that encourages the webmasters to use u.b.e. to secure customers for CEN. AOL alleges that CEN and its affiliates transmit u.b.e. messages indiscriminately to AOL members without regard to whether the member has any desire to view adult material, or whether the member account is accessible to children. AOL asserts that webmasters send u.b.e with misleading information in the subject and sender lines in order to mislead AOL subscribers as to the origin of the u.b.e. AOL also asserts that webmasters send u.b.e. with AOL addresses in the sender line to give AOL members the impression that the u.b.e. messages are legitimate email messages from AOL customers.

AOL has filed suit against CEN and others, alleging that the transmission of the u.b.e., also known as "spamming," causes AOL to bear the cost of advertising CEN's adult websites, creates a false and damaging perception that AOL is the source of, endorses, or condones the defendant's bulk mailing practices, and shifts to AOL and its members the costs in computer and staff resources to transmit CEN's promotional messages. Specifically,

AOL alleges 13 different causes of action that stem from the u.b.e. practices: Computer Fraud (Count I), Computer Trespass (Count II), Theft of Computer Services (Count III), Distributing Bulk E-Mail Software (Count IV), Trafficking in AOL Passwords (Count V), Unauthorized Accessing of Protected Computers (Count VI), Impairing Computer Facilities (Count VII), False Designation of Origin (Count VIII), Dilution of Interest in "AOL" Mark (Count IX), Trespass to Chattels (Count X), Common Law Conspiracy (Count XI), Negligent Hiring and Negligent Retention (Count XII), and Unjust Enrichment and Constructive Trust (Count XIII).

CEN argues that the Court should dismiss AOL's negligent hiring and negligent retention claim because AOL does not allege physical injury to persons, and only alleges loss of reputation, pecuniary damages, and customers. CEN asserts that Virginia law applies to AOL's claims because the law of the place of the wrong (i.e., where the injury was suffered) governs. See *Rahmani v. Resorts Int'l Hotel, Inc.*, 20 F. Supp. 2d 932, 937 (E.D. Va. 1998). CEN asserts that in order to prove a claim of negligent hiring or negligent retention under Virginia law, AOL must show that "the employer is principally liable for negligently placing an unfit person in an employment situation involving an unreasonable risk of harm to others." *J. v. Victory Tabernacle Baptist Church*, 372 S.E.2d 391, 394 (Va. 1988). The unreasonable risk of harm element requires "the threat of serious and

significant physical injury." *Parker v. Geneva Enterprises, Inc.*, 997 F. Supp. 706, 713 (E.D. Va. 1997). CEN notes that the relationship that AOL alleges exists between CEN and its affiliates is one of company to independent contractor. In the company-to-independent-contractor context, the Virginia Supreme Court looks to the Restatement (Second) of Torts for a definition of what constitutes physical harm to third persons. See *Phillip Morris, Inc. v. Emerson*, 368 S.E.2d 268, 278 (Va. 1968) (citing RESTATEMENT (SECOND) OF TORTS § 411); RESTATEMENT (SECOND) OF TORTS § 411 (1965) (hereinafter "RESTATEMENT"). CEN argues that federal cases that address the Restatement, and the illustrations set out by the Restatement, all involve personal physical injury. See, e.g., *Chavis v. Finnlines, Ltd., O/Y*, 576 F.2d 1072, 1081 (4th Cir. 1978). CEN also argues that Virginia cases that address negligent hiring and retention concern claims involving physical injury to people. See, e.g., *Majoran v. Crown Central Petroleum Corp.*, 539 S.E.2d 426 (Va. 2000). Other states have also held that physical harm is a necessary element of a negligent hiring claim. See, e.g., *McDonnell v. Music Stand*, 886 P.2d 895 (Kan. 1994).

In opposition, AOL argues that physical harm to a person is not necessary under Virginia law to plead a claim of negligent hiring and retention. AOL argues that the Restatement draws a distinction between "physical harm" in general and "bodily harm."

See RESTATEMENT § 411 (providing for employer liability for physical harm to third persons); RESTATEMENT § 7 (defining "physical harm" as used throughout the Restatement as "physical impairment of the human body, or of land or chattels"). AOL argues that physical harm includes physical impairment to chattels, and because AOL has alleged physical harm to its computer systems, AOL states a claim for negligent hiring and negligent retention. AOL contends that the "bodily harm" that CEN erroneously argues is necessary is merely a subset of "physical harm." See RESTATEMENT § 7 cmt. e.

AOL asserts that none of the cases CEN cites suggests that physical harm is limited to bodily harm. See, e.g., *McDonnell*, 886 P.2d 895; *Gurnsey v. Conklin Co.*, 751 P.2d 151 (Mont. 1988). Cf. *Courtney v. Ross Stores, Inc.*, 1998 WL 972192, *1 (Va. Cir. Ct. 1998) (indicating that the presence of bodily harm in all reported Virginia cases does not proscribe the existence of the tort of negligent hiring when the injuries are not to the body). Furthermore, many state cases referring to Restatement § 411 involve injury to tangible property, with no injury to the human body. See, e.g., *Dexter v. Town of Norway*, 715 A.2d 169 (Me. 1998) (damage to building and chattels); *Levy v. Currier*, 587 A.2d 205 (D.C. 1991) (damage to townhouse).

AOL further asserts that Virginia statutory law supports AOL's position that physical injury to a person is not necessary.

In the Virginia Code, "physical injury" can occur to property as well as persons. See VA. CODE § 18.2-152.4(5) AOL notes that it incorporated the language of the Virginia Code and pled computer trespass for CEN's intent to cause "physical injury to the property of another." See *id.*

AOL asserts that AOL states a claim for negligent hiring and retention in alleging harm to its computers and computer system because physical damage is not limited to physical destruction or harm to circuitry, but also includes the loss of access, use, and functionality. See *American Guarantee & Liability Ins. Co. v. Ingram Micro, Inc.*, 2000 WL 726789, *2 (D. Ariz. Apr. 19, 2000) (citing the federal Computer Fraud and Abuse Act); *American Online, Inc. v. National Health Care Discount, Inc.*, 121 F. Supp. 2d 1255, 1274 (N.D. Iowa 2000).

In rebuttal, CEN argues that no Virginia court has ever relied upon or alluded to the statutory definition of "physical harm" upon which AOL relies. CEN contends that, nevertheless, even if this Court were to consider the definition of "physical harm" to include injury to property, AOL has not alleged the requisite "serious and significant physical injury" to property for AOL's claim of negligent hiring and negligent retention to survive. See *Parker*, 997 F. Supp. at 713 (requiring "serious and significant physical injury" for negligent hiring claim). CEN argues that AOL's allegations that its computer or computer

systems are "vulnerable" and have been "burdened" are not allegations of injury, let alone allegations of serious and significant injury. See WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 1323 (1985) (defining "vulnerable" as open to attack or capable of being wounded, thereby indicating that injury has not yet occurred). CEN argues further that AOL's claims do not involve the requisite elements of risk and physical harm associated with negligent hiring and retention claims. CEN contends that it is the risk of the dangerousness of the task for which a company hires an independent contractor that makes up the essence of the tort. See, e.g., *Phillip Morris*, 368 S.E.2d 268. Therefore, AOL's claims of alleged advertising practices resulting in vulnerability and burdening of its computer system does not state a claim for negligent hiring or retention.

CEN also asserts that AOL does not demonstrate physical damage by citing *National Health Care Discount* and *American Guarantee* because: (1) AOL does not allege that its system was made unavailable or inoperable, as in *American Guarantee*; and (2) the issue in *National Health Care Discount* was what constituted "damage," not whether the damage was "physical," as is the issue here. See *National Health Care Discount*, 121 F. Supp. 2d at 1274; *American Guarantee*, 2000 WL 727789, at *2-3.

DISCUSSION

Standard of Review

In reviewing a Rule 12(b)(6) motion to dismiss, the Court accepts the Amended Complaint's factual allegations as true and considers the Amended Complaint and its allegations in the light most favorable to the non-moving party. See *Mylan Lab., Inc. v. Matkari*, 7 F.3d 1130, 1134 (4th Cir. 1993). Courts generally view motions to dismiss via Federal Rule of Civil Procedure 12(b)(6) with disfavor. See 5A CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1356 (2d ed. 1990). Therefore, the Court does not grant a motion to dismiss for failure to state a claim unless it appears to a certainty that the plaintiff cannot prove any set of facts in support of its claim which would entitle it to relief. See *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957).

Analysis

The Court holds that AOL has stated a claim for negligent hiring and retention because physical harm includes harm to property, not just bodily harm. See RESTATEMENT (SECOND) TORTS § 7. There is no indication that an allegation of bodily harm is a required element of negligent hiring and retention in Virginia. As both parties note, the courts have looked to the Restatement (Second) of Torts to assess negligent hiring and retention claims. See *Phillip Morris, Inc.*, 368 S.E. 2d at 278 (citing

RESTATEMENT § 411). Section 411 states:

An employer is subject to liability for physical harm to third persons caused by his failure to exercise reasonable care to employ a competent and careful contractor

(a) to do work which will involve a risk of physical harm unless it is skillfully and carefully done, or

(b) to perform any duty which the employer owes to third persons.

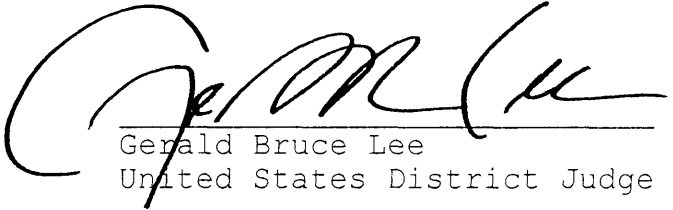
RESTATEMENT § 411. Section 7 of the Restatement (Second) of Torts clearly states that the "physical harm" for which an employer is subject to liability is physical impairment to the human body, or of property. See *id.* § 7 ("The words 'physical harm' are used throughout the Restatement of this Subject [Torts] to denote the physical impairment of the human body, or of land or chattels."). Furthermore, the "physical injury" that AOL alleges by incorporation as a part of its negligent hiring and retention claim is described by the Virginia Code as injury that can occur to "the property of another." See VA. CODE § 18.2-152.4(5). Therefore, AOL need not allege physical injury to a person's body to state a cause of action for negligent retention and hiring.

The Court further holds that AOL has sufficiently pled serious physical harm to its computer system to state a cause of action for negligent hiring and retention. See *Parker*, 997 F. Supp. at 713 (stating that Virginia Supreme Court has held that "unreasonable risk of harm to others" element of negligent hiring claim requires the threat of serious and significant physical injury) (citing *Davis v. Merrill*, 112 S.E. 628 (Va. 1922);

Weston's Adm'x v. Hospital of St. Vincent of St. Paul, 107 S.E. 785 (Va. 1921)). As noted above, physical impairment to chattels is one form of physical harm or injury. See RESTATEMENT § 7. Federal courts have held that significantly burdening a computer system in the way that CEN is alleged to have done here amounts to serious physical impairment of the computer system. See, e.g., *American Guarantee*, 2000 WL 726789, at *2-3 (citations omitted). This Court disagrees with CEN's assessment that *American Guarantee* is distinguishable from the instant case, and finds that the Arizona district court's reasoning is applicable to this context. The *American Guarantee* court explicitly held that "physical damage" to a computer or computer system occurs when a computer's data is unavailable, when the computer services are interrupted, and when a computer's network is altered. *Id.* AOL has alleged all of these things with regard to its network. (Am. Compl. ¶ 146 (alleging generally "irreparable injury"); Am. Compl. ¶¶ 106, 133 (alleging interruption of services and unavailability of data in the form of deprivation to AOL and its Members of legitimate use of the computer system).) Therefore, AOL has pled sufficiently the physical harm element of a negligent hiring and retention claim. Therefore, CEN's motion to dismiss Count XII is denied.

The Clerk is directed to forward a copy of this Order to
counsel of record.

Entered this 22nd day of March, 2001



Gerald Bruce Lee
United States District Judge

Alexandria, Virginia
03/22/01