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PIHRA LEGAL UPDATE – JULY 13, 2010

With the Right Policies in Place, Employees Cannot Have an Expectation of Privacy in Text Messages Sent Through Company-Owned Equipment

In *City of Ontario v. Quon* (U.S. Supreme Court, June 17, 2010), Jeff Quon was a police officer with the City of Ontario. The City provided Quon and other officers with pagers that were contracted through an independent provider, Arch Wireless. As part of that contract, the pagers permitted a certain number of characters to be sent each month. The City also had in place a Computer Usage Internet and Email Policy stating, "the City reserved the right to monitor and log all network activity, including email and Internet use, with or without notice. Users should have no expectation of privacy when using these resources." Although the policy did not specifically cite text messages as part of the Policy, the City advised its employees that it would treat the pager text messages in the same manner as it treated emails. This assertion was communicated orally, and thereafter reiterated in a written summary of the meeting during which the statement was made.

During his second month of using the pager, Quon went over his allotted usage amount. He was advised by the City that his texts would be treated like emails and as such, could be audited. He was also advised verbally by the person responsible for the contract with Arch Wireless that as long as he reimbursed the City for the overage, the City would not audit his text messages. Quon paid the overage charges monthly.

The Chief of Police soon became frustrated with the fact that the Police Department had essentially become a bill collector in relation to the overage charges. The Chief wanted to determine whether the existing character limit was too low. As such, he set out to learn whether officers were being forced to pay for work-related messages or whether they were using the pagers for personal messages. To answer this question, the City requested a transcript of the messages from Arch Wireless. Unlike email messages (which were sent on the City's own computer system), the texts sent on the pagers were transmitted through and stored by Arch Wireless.

The City discovered that Quon used his pager for personal communications about 90% percent of the time. It also found that some of the messages were sexually explicit and

had been sent to a fellow police employee with whom Quon was having a relationship. As a result, Quon was disciplined for his misuse of the pager.

Quon sued the City and Arch Wireless claiming that Arch Wireless violated the Stored Communications Act by turning the text transcripts over to the City, and that the other defendants violated the plaintiffs' Fourth Amendment rights and California privacy law by obtaining and reviewing the transcripts of the text messages.

The Ninth Circuit held that the City violated Quon's right to not be subject to unreasonable search and seizure by reviewing transcripts of his texts. The Supreme Court reversed. While presuming that Quon had a reasonable expectation of privacy, it found that certain warrantless searches do not violate the Fourth Amendment. Namely, the City's audit of text messages (a.k.a. search) was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." Further, the high court found that the scope of the search was reasonable, concluding that reviewing the transcripts was "an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use." The Court noted that: 1) a review of two months of messages was a reasonable time frame; 2) the exclusion of messages sent outside work hours demonstrated that the City was trying not to intrude; 3) Quon was aware and informed of the City's Policy; 4) Quon should have known that his actions were likely to be scrutinized; and 5) a reasonable employee should have expected a periodic audit of the pager messages. As such, the Court held that because the search was motivated by a legitimate work-related purpose and because it was not excessive in scope, it was reasonable.

- ***What This Means To You***

Although this decision focuses on the Fourth Amendment constraints applicable to a government employer, and the Court insists that it not be read as a broad pronouncement in relation to every facet of technology, it nonetheless has important ramifications for private employers and an employee's use of technology. One of the issues in this case was whether the City's written policy advising its employees that there was no expectation of privacy, and the City had the right to monitor the use of its computer and other technological equipment, was modified by the oral representations of its manager. Although the Court refused to address the issue, it is a reminder to employers to not only review their employee handbooks to ensure they have comprehensive inspection and computer usage policies to diminish any privacy expectations, but also to train managers in understanding the implications of making contradictory statements to employees.

Not Every Adverse Employment Action is an Adverse Employment Action

In *Holman v. Altana Pharma US, Inc.* (1st Dist. Ct. App. June 30, 2010), Plaintiff Christine Holman, a pharmaceutical sales representative, sued her former employer, Altana Pharma US, Inc., under the Fair Employment and Housing Act (FEHA). By the time of trial, the only issue left was Holman's claim for retaliation. Holman alleged that she complained to her employer about younger male colleagues receiving preferential treatment. Thereafter, she received a performance warning letter that stated she was no longer considered in "good standing," making her ineligible to participate in any incentive compensation programs until the performance issues were resolved and the warning letter was removed. The court granted Altana's motion for nonsuit.

Although, in general, a negative performance evaluation does not constitute an "adverse employment action" under the Fair Employment and Housing Act, such an action could if the evaluation was used to substantially and materially change the terms and conditions of employment. Here, Holman argued that the warning letter disqualified her from receiving a bonus. However, the Court noted that the question is not whether the letter disqualified her, but rather whether she would have received the bonus "but for" the warning letter. In other words, would Holman have been automatically entitled to a bonus had she not been given the warning letter? The Court concluded that Holman failed to introduce such evidence (and, in fact, Holman left work and never returned, so she could not establish that she would have met the minimum requirements for receiving a bonus for that time period). Nor was there any evidence to establish that Holman would have received a bonus large enough to constitute a "detrimental and substantial effect" on her employment.

There also was no evidence that the warning letter put her in danger of being discharged. Although the letter stated, "[f]ailure to meet these expectations by the assigned timelines will result in further corrective actions pertaining to your employment, up to and including termination," there was no evidence that the warning letter alone would have been grounds for termination.

- ***What This Means To You***

Employers should always be cognizant that their actions may be construed as "retaliation" for engaging in protected activity, such as complaining about discrimination, harassment or whistleblowing. However, not every action that an employer takes needs to be examined under a microscope. Denying an employee a small bonus, or giving an employee constructive criticism or a negative performance evaluation will not, by itself, rise to the level of evidence of an unlawful adverse employment action. However, once an employer implements more serious actions, such as a demotion, denial of a

promotion, or discharge, then the employer should look more closely before taking the action and ask whether the employee could interpret the action as retaliatory for engaging in protected activity, and consult legal counsel before moving forward.

A Legal or Biological Parent-Child Relationship is Not Required for FMLA Leave

On June 22, 2010, the Department of Labor issued an Administrator's Interpretation clarifying the definition of son and daughter under the Family and Medical Leave Act ("FMLA"), stemming from the perceived confusion surrounding how the FMLA applies when there is no legal or biological relationship between a parent and child. The FMLA defines a "son or daughter" as a "biological, adopted, or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is: (A) under 18 years of age; or (B) 18 years of age or older and incapable of self-care because of a mental or physical disability." 29 U.S.C. § 2611(12). The DOL asserts that Congress intended the definition of son or daughter to reflect "the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother. Increasingly, those who find themselves in need of workplace accommodation of their child care responsibilities are not the biological parent of the children they care for, but their adoptive, step, or foster parents, their guardians, or sometimes simply their grandparents or other relatives or adults." *See* S. Rep. No. 103-3, at 22. Congress stated that the definition was intended to be "construed to ensure that an employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child."

As such, the DOL has now clarified that in loco parentis (namely, a person who has put themselves in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through formalities necessary to legal adoption) can be established when an individual provides either day to day care or financial support to a child. The interpretive letter specifically mentions its application to unmarried partners and same sex partners. The fact that the child has a biological parent at home or has both a mother and father does not prevent a finding that an employee with a non-biological relationship is eligible for FMLA leave. The DOL interpretive letter clearly states "neither the statute nor the regulations restrict the number of parents a child may have under the FMLA."

In determining whether an employee is eligible for FMLA leave, the interpretative letter states that "the employer may require the employee to provide reasonable documentation or statement of a family relationship." Such a simple statement is all that is required.

- ***What This Means To You***

The California Family Rights Act has defined the term "child" in a similar manner as the FMLA has defined "son or daughter." The CFRA also generally looks to the FMLA and the interpretations of that law in interpreting the CFRA. Thus, most likely California will follow the DOL's interpretation. As a result, when an employee requests leave to care for a child, the employer should not reject the request simply because the employee does not have a legal document establishing a biological relationship or guardianship over the child. The employer should grant otherwise eligible employees leave if the employee is responsible for the day to day care or financial support of the child.