

Employment & Labor Relations Law



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Steps In-House Counsel May Take to Preserve the Attorney-Client Privilege

By Christina Bost-Seaton

The attorney-client privilege has long been held to apply in the corporate context. *See Upjohn Co. v. United States*, 449 U.S. 383 (1981). Determining the contours of this protection, however, is not simple. Whether the attorney-client privilege protects an in-house counsel's communications is determined on a case-by-case basis, depending on the subject matter of each individual communication. Communications to or from in-house counsel are not protected by the privilege simply because

the in-house counsel is an attorney. For the attorney-client privilege to protect an in-house counsel's communication, the corporate client has the burden of showing that the in-house counsel's communication (1) was made for the purpose of providing legal advice, and (2) that the communication was intended to be, and was in fact, kept confidential. *Pritchard v. County of Erie*, 473 F.3d 413, 419 (2d Cir. 2007); *see also* Restatement (Third) The Law Governing Lawyers § 118.

In-house counsel frequently perform

both a business and a legal function for their employers. Accordingly, many in-house counsel have two corporate titles—for example, assistant general counsel and vice president, or general counsel and secretary. Only in-house counsel's communications in their legal role, however, are subject to the protection of the attorney-client privilege. An in-house counsel's communications relating to his or her business function are not protected by the attorney-client privilege simply because the

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City of Ontario v. Quon—The Supreme Court's First Foray into Digital Privacy

By Cameron G. Shilling

“What are the legal boundaries of an employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friends and family via hand-held . . . electronic devices?” The opening words of the trial judge in *Quon v. Arch Wireless Operating Co., Inc.*, 445 F. Supp. 2d 1116, 1121 (C.D. Cal. 2006), foreshadowed the significance

of the social issues at stake in the lawsuit between Jeff Quon and his employer, the City of Ontario, California. Advocates for businesses and employees eagerly awaited the decision from the Supreme Court, hoping that the justices would embrace the countervailing public policy and personal privacy dilemmas arising from the complexities of a multitude of existing and emerging digital technologies. Companies and their legal counsel desperately needed clear rules establishing the boundaries

between an employer's right to access and review the electronic communications of employees, and an employee's interest in ensuring that his or her personal matters remain private. Also laid at the courthouse steps was a golden opportunity for the high court to furnish sorely needed guidance on a key federal law, called the Stored Communications Act (SCA), which often is the front line for both the attack and defense in digital-privacy disputes.

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Chairs' Column



Arley Harrel



Kimberly Stith

Your chairs of the Employment & Labor Relations Committee prepare this column with a lead time that provides a unique opportunity for a historical snapshot. Macro events in the world such as the Japanese earthquake, tsunami and nuclear disaster, and the bombing of Libya, will be more in the nature of history by the time you read the newsletter.

However, those big-picture events continue to highlight the flatter nature of the world and how we are connected around the globe.

Closer to home, employment and labor relations lawyers watch with considerable interest as the future of collective bargaining is at issue in Wisconsin, and class action lawsuits will likely be further defined as *Wal-Mart v. Dukes* is argued in the U.S. Supreme Court.

Members of this committee, as well as hundreds of other lawyers, are looking forward to learning about the issues facing the employment-practice area, and others, at the Section of Litigation Annual Conference (SAC), being held in Miami Beach, Florida, April 13–16, 2011. The Employment & Labor Relations Committee is heavily involved with this annual meeting.

The committee is involved in the Networking and Discussion lunch on Thursday, April 14. We hope to have an opportunity to meet many members of the committee at that time. As far as the substantive portion of SAC, programs developed and proposed by leaders in the committee have been chosen for two of the programs. On Thursday morning, April 14, the program entitled “Who’s in the Jury Box? Jury Selection and Voir

Dire in Civil and Criminal Trials” will be presented. This program was developed by Darryl G. McCallum, a chair of the Programming Subcommittee of this committee. Darryl practices with the law firm of Shawe & Rosenthal, LLP in Baltimore, Maryland. He has put together an outstanding program, and we are looking forward to it. Another program was also selected for presentation on the hot topic of technology. It is entitled “Why I Can’t Tweet? Proper and Improper Use of Technology in the Courtroom.” This program was developed by Teresa Rider Bolt, also a chair of the Programming subcommittee. Teresa practices with the law firm of Constangy, Brooks & Smith, LLP in Nashville, Tennessee. The topic of this program will include discussions as to jurors and witnesses who are using technology to research, blog, tweet, and post to Facebook, MySpace, and elsewhere, and what should be done, if anything, about this activity. Our committee is also hosting an exposition table on Thursday evening, April 14, from 5:30 to 7:00 p.m. That exposition will feature leaders from all Section of Litigation committees. Attendees will enjoy complimentary cocktails and hors d’oeuvres and learn about each committee function. The event is included in the registration fee.

The next major Section of Litigation event is the ABA Annual Meeting being held August 4–7, 2011 in Toronto, Ontario, Canada. Your committee will plan networking opportunities for that meeting. We urge you to sign up and attend.

The committee continues to be proud of the fine publication currently being sold by the Section of Litigation entitled *Employment Litigation Handbook, Second Edition*. We are proud of it because the editor is our own Hot Topics Subcommittee chair, Cathy J. Beveridge. Cathy is a shareholder with the Fowler White Boggs law firm in Tampa, Florida. She has written extensively on a variety of employment and labor relations matters. We

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Message from the Editors



William C. Martucci



Brian Koji

The articles in this newsletter once again illustrate the dynamic nature of the labor and employment field and those of us who are privileged to practice in this area. The lead article by Christine-Bost Seaton, entitled “Steps In-House Counsel May Take to Preserve

the Attorney-Client Privilege,” sets forth a primer outlining key concerns with respect to attorney-client communication issues. The focus on developments relating to attorney-client privilege for in-house counsel is particularly instructive in its discussion involving the European Court of Justice in the case of *Akzo Nobel Chemicals Ltd. and Akros Chemicals Ltd. v. Commissions of the European Communities*. The impact of globalization on various perspectives of national interests and the interests of corporations in preserving privilege are at a heightened state of concern. A set of practical, instructive guidelines for enhancing the preservation of attorney-client privilege are set forth in this insightful article.

The recent decision by the U.S. Supreme Court in the digital privacy arena is addressed in the article entitled “*City of Ontario v. Quon*—The Supreme Court’s First Foray into Digital Privacy,” by Cameron G. Shilling. Author Shilling notes that the opening comments of the trial judge at the first stage of this litigation

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Attorney-Client Privilege

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in-house counsel is an attorney. *U.S. Postal Serv. v. Phelps Dodge Refining Corp.*, 852 F. Supp. 156, 160 (E.D.N.Y. 1994). As long as the communication is primarily or predominantly of a legal character, however, the privilege is not lost merely because the communication also refers to certain non-legal matters. *Rossi v. Blue Cross & Blue Shield*, 542 N.Y.S.2d 508, 511 (1989).

Some courts have found that when an in-house counsel conducts a negotiation, he or she is acting in a business—rather than a legal—function, and that the attorney-client privilege does not protect the in-house counsel's communications related to the negotiation. See e.g., *Georgia Pacific v. GAF Roofing Mfg. Corp.*, 1996 U.S. Dist. LEXIS 671 (S.D.N.Y. Jan. 25, 1996). Similarly, one court found that a corporation's senior vice president and deputy corporate counsel's communications about whether the corporation should honor a line of credit were not protected by the attorney-client privilege. *MSF Holdings, Ltd. v. Fiduciary Trust Co., Int'l*, 2005 U.S. Dist. LEXIS 34171 (S.D.N.Y. Dec. 7, 2005) (because the emails at issue did not specifically refer to legal principles or contain any legal analysis, the communications were predominantly commercial in nature and not privileged). Additionally, some courts have found a presumption that a lawyer in the corporation's legal department gives predominantly legal advice protected by the attorney-client privilege, while a lawyer working in a business unit within the corporation gives predominantly business advice that is not subject to the attorney-client privilege. See e.g., *Boca Investering P'ship. v. United States*, 31 F. Supp. 2d 9, 12 (D.D.C. 1998).

Thus, notes of business meetings do not become privileged simply because an attorney was in attendance. Similarly, emails sent in the course of the corporation's day-to-day business do not become privileged

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simply because in-house counsel is copied on those emails. In *In re Vioxx Products Liability Litigation*, for example, Merck & Co. argued that the "pervasive regulation" of the pharmaceutical industry required that in-house counsel review virtually every communication and document that left the company. The court found that while "the pervasive nature of governmental regulation is a factor that must be taken into account . . . [corporations] cannot reasonably conclude from the fact of pervasive regulation that virtually everything sent to the legal department . . . will be automatically protected by the attorney-client privilege." 501 F. Supp. 2d 789, 800–801. (E.D. La. 2007).

When considering whether a communication should be protected by the attorney-client privilege, courts also consider whether the communication was kept confidential. This consideration is a waiver-based analysis—that is, by allowing too many employees of the corporation access to a privileged document, the corporation may be deemed to have waived the protection of the attorney-client privilege. Among the factors that courts consider is whether the communication was disseminated only to those employees within the corporation who had a "need to know" the information. *In re Grand Jury Subpoenas*, 561 F. Supp. 1247, 1258–1259 (E.D.N.Y. 1982); *Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854 (D.D.C. 1980). Simply marking a communication as "confidential" does not guarantee that the communication will remain privileged, but such a marking is a factor considered by the courts when making their determination as to whether a communication is subject to the attorney-client privilege. *In re Grand Jury Proceedings*, 2001 U.S. Dist. LEXIS 15646 at *36–37 (S.D.N.Y. Oct. 3, 2001).

Recent Developments

Recently, there have been two troubling attacks upon attorney-client privilege protection for in-house counsel communications.

In *Gucci America, Inc. v. Guess?, Inc.*, a copyright infringement case in the U.S. District Court for the Southern District of New York, Magistrate Judge James L. Cott determined that Gucci could not claim the protection of the attorney-client privilege

for communications seeking or providing legal advice that were sent to or from one of Gucci's in-house counsel who was not an active member of the bar. During the in-house counsel's deposition, he admitted that while he was a member of the California bar, his membership was inactive. Following an investigation, Gucci discovered that the in-house counsel's membership had been inactive for nearly 14 years. Guess moved to compel Gucci to produce all communications to and from the in-house counsel.

Judge Cott, noting that an essential element of the attorney-client privilege is the participation of an attorney, found that the in-house counsel's failure to maintain

an active bar membership meant that he was not an attorney authorized to engage in the practice of law. Further, Judge Cott found that Gucci could not have reasonably believed that the in-house counsel was an attorney who was authorized to practice law because Gucci had failed to exercise the minimal due diligence necessary to confirm that the in-house counsel had maintained an active license. Accordingly, the court found that the attorney-client privilege did not apply to the in-house counsel's communications. *Gucci America, Inc. v Guess?, Inc.*, 2010 U.S. Dist. LEXIS 65871 (S.D.N.Y. June 29, 2010).

This said, on January 3, 2011, Judge

Shira A. Scheindlin rejected Judge Cott's findings, instead ruling that communications between Gucci and its in-house counsel were, in fact, protected by the attorney-client privilege. Judge Scheindlin further found that to "require businesses to continually check whether their in-house counsel have maintained active membership in bar associations before confiding in them simply does not make sense." *Gucci America, Inc. v Guess?, Inc.*, 2011 U.S. Dist. LEXIS 15 (S.D.N.Y. Jan. 3, 2011).

In *Azko Nobel Chems. Ltd. and Akros Chems. Ltd. v. Comm'n of the European Communities*, the European Court of Justice (ECJ), the European Union's highest

Guidelines for Maintaining the Protection of the Attorney-Client Privilege

Steps that in-house counsel can take to increase the likelihood that their communications will be protected by the attorney-client privilege include:

- Educate non-legal employees about the attorney-client privilege, when it applies, and how it can be waived by sloppy business practices. In-house counsel should remind non-legal employees that routine business communications are not privileged simply because they are sent to in-house counsel.
- Clearly label all written communications seeking or providing legal advice as "confidential" and subject to the "attorney-client privilege." These labels should only be used when applicable; overuse of these labels could result in a court finding that such communications do not warrant protection by the attorney-client privilege.
- Avoid funneling all documents through in-house counsel, as a court may interpret this as a bad-faith attempt to withhold discoverable evidence.
- Request that non-legal employees write, at the top of their written communications with in-house counsel, that the communication constitutes a "request for legal advice."
- Similarly, when requesting information from non-legal employees, in-house counsel should write, at the top of any written communication, that "this information is being requested for the purpose of rendering legal advice."
- Where possible, legal and business topics should not be discussed in the same communication.
- When producing documents and creating a privilege log during litigation, in-house counsel should not withhold an entire document as privileged when portions of the document deal only with business information. Rather, in-house counsel should redact and log privileged portions of documents, and then produce the redacted document.

court, found that, in Europe, the attorney-client privilege does not protect legal advice given by in-house counsel from disclosure or discovery in investigations brought by the European Commission. While courts in the United Kingdom (like in the United States) extend the privilege to all lawyers, including in-house counsel, many continental European countries have long held that the attorney-client privilege is restricted to outside counsel, who are believed to be more “independent” and “not bound to the client by a relationship of employment.” The ECJ’s ruling adopts this more restrictive view, stating that the legal landscape “has not

evolved . . . to an extent which would justify a change in the case law and recognition for in-house lawyers of the benefit of legal professional privilege.”

More particularly, the ECJ stated:

An in-house lawyer, despite his enrollment with a Bar or Law Society and the professional ethical obligations to which he is, as a result, subject, does not enjoy the same degree of independence from his employer as a lawyer working in an external law firm does in relation to his client. Consequently, an in-house lawyer is less able to deal effectively with any

conflicts between his professional obligations and the aims of his client.

Azko Nobel Chems. Ltd. and Akros Chems. Ltd. v. Comm’n of the European Communities, C-550/07 P (September 14, 2010).

While the ECJ’s ruling only applies to European Union competition-law investigations by the European Commission, its firm statements as to in-house counsels’ perceived lack of independence indicate that the ECJ is unlikely to extend the attorney-client privilege to in-house counsel anytime soon and gives those who advocate for a more limited application of the privilege another decision supporting their position.

- If there is a fear that litigation may arise with regard to a particular transaction, for example, and in-house counsel have been asked to investigate the facts surrounding that transaction, all the in-house counsel’s documents relating to that investigation should specifically state that they were created “in anticipation of litigation.”
- To minimize the possibility of a court finding that the attorney-client privilege has been waived because the communication was distributed too widely, in-house counsel should be careful to distribute the communication to only those non-lawyers who truly have a “need to know.” In-house counsel should consider having the corporation disable the “reply all” feature on its email client and include in each communication a record as to why that communication needed to be distributed to each of its recipients.
- In-house counsel with both a business and a legal title may want to include only their legal title on any communications transmitted in their legal function. Similarly, when acting as an attorney, in-house counsel may want to include “Esq.” after their names as a further indication that they are acting in their role as an attorney.
- In-house counsel may want to sequester privileged electronic documents in a separate database, or to individually password-protect privileged documents, distributing the password to only those employees with a true “need to know” the information. Paper copies of privileged documents should be kept under lock and key so that they are not accessible to all employees or to the general public.
- The corporation’s document-retention policy should specifically describe the various mechanisms by which the corporation protects privileged documents. More importantly, the corporation must follow its written policy.
- In-house counsel may want to include a disclaimer on emails to protect against inadvertent waiver. While such disclaimers are generally not enforceable, courts may find that they constitute circumstantial evidence that the communication was intended to be kept confidential. In such circumstances, courts may find that the corporation did not waive its attorney-client privilege with regard to the document. Alternatively, courts may find that the attorney-client privilege was waived with regard to the document, but not with regard to all communications related to the subject matter discussed within the document.

Shedding the Aura of Doom and Becoming a Likeable Lawyer

By Carol Dominguez Shay

A client I met for lunch a few weeks ago said good-bye with the following words: “I hope I don’t see you again for a long time because when I see you it means we have trouble.” In other words, clients look forward to meeting with an employment-defense lawyer about as much as they look forward to encounters with the Grim Reaper.

This article is well intentioned and earnest, but it is realistic. You will not magically transform yourself from Grim Reaper to Santa Claus simply by reading these tips. But they are a starting point to help you put down the scythe, shed the aura of doom that your clients may now sense at your appearance, and turn yourself into a welcomed business asset.

These tips simply address the basics of personal and professional interactions with clients. Obviously, many other skills must be honed to develop into a seasoned employment lawyer, and you are encouraged to seek resources to help you acquire and refine those skills.

Like Yourself and What You Do

We’ve all heard the old adage that it’s better to have a treating doctor or a defense lawyer who is a competent jerk, rather than one who is incompetent but friendly. Yes, this is true. But the qualities of likeability and competence are not mutually exclusive.

It’s common sense that a person in any field will be happier and more successful if he or she enjoys the work. If you are having trouble interacting with clients or facing your caseload, ask yourself whether you enjoy practicing employment law. This large body of law offers numerous nooks and crannies for those who want to focus on particular areas. If, for example, you are unhappy dealing with the technicalities of wage and hour claims, is it

possible for you to shift your practice to concentrate on disability or other issues? If you run through the gamut of employment and labor law choices and are still unhappy with the work, consider another area or another profession entirely. Easier said than done, but with life (both your own and your clients’) being short, misery and its consequent effects on your personality are simply not worth it.

On the topic of a short life, try to respect/observe/acknowledge (if you want to choose one, I like respect) the work-life balance. If you start resenting your clients’ problems and the work hours you are putting in to fix them, you will jeopardize your relationships with yourself, your family and friends, your colleagues, and even those pesky clients. Resentment, even the carefully managed kind, eventually expresses itself somehow.

I am ashamed to admit that, in his barely five years on this planet, my son, Nathaniel, has already acted as a mini resentment-expressing “wake up call” on several occasions. Some cringe-worthy and heart rending examples: An 8:30 p.m. phone call to my office asking why I hadn’t come home to tuck him in; a digital kiddy camera full of pictures of me talking, typing, and looking at my BlackBerry, oblivious to the fact that I was being photographed; and a post-bedtime visit to my home office asking me to “put down the computer” and give him a hug. A combination of these incidents, along with thoughts of his sweet, innocent face hastening toward acne followed quickly by beard stubble every time I heard songs such as “Cats in the Cradle” or “There Goes My Life,” led to an immediate job and schedule change. (For attribution purposes: “Cat’s in the Cradle” is the timeless guilt-inducing classic by Harry Chapin about a son too quickly growing older, independent and college-bound, while his father toils at work. “There Goes My Life” is a more recent Kenny Chesney tear jerker about a *daughter* too quickly growing older,

independent, and college-bound). When I asked him for advice for this article, Nathaniel said, “Tell lawyers to take time to pay attention to their kids.”

As Oliver Wendell Holmes correctly noted: “Pretty much all the honest truth-telling there is in the world is done by children.”

Expertise, Competence, Working Knowledge, and the Basics

Establish expertise in at least two areas of employment/labor law, competence in several more, working knowledge of most, and an ability to quickly figure out the basics of the rest. On to the hard facts—a likeable employment lawyer must be able to quickly and efficiently give competent and reliable legal advice. This is more difficult than it sounds.

The scope of “employment law” covers basically anything that happens in the 8–10 hours (or more) millions of individuals devote each day to traveling to and from work, interacting with others during work hours or on company premises, and presumably enjoying the fruits of their labor (salary, benefits, taxes) after the work day is over. Even after the employment relationship ends, there are laws that govern the unemployed or retired. In addition to this enormous body of law, there are infinite ways for employees (from CEOs to the rank and file) in every type of company to create bizarre, sad, scary, and/or hilarious situations. It is impossible for any lawyer to truly “know” all of the employment laws applicable to any given industry in every unique situation.

Here are a *few* issues I (or, in the first case, a Las Vegas colleague) have encountered over the last 14 years of practice:

- Must an employer allow an employee with anxiety problems to bring a boa constrictor to work as a comfort/aide animal?
- Does an Anglo employee’s alleged

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“recovered memories” of going to “pow-wows” with her grandmother as a young child, which she expressed to coworkers before her termination, entitle her to state a claim for national origin discrimination as a Native American?

- Is it an unfair labor practice for an employer to provide a purportedly insufficient supply of toilet paper to the women’s restroom?
- Should an applicant’s failure to disclose his or her guilty plea to the crime of public defecation result in rescission of an employment offer?

To preserve the attorney-client privilege and, more importantly, the very real possibility that my legal advice or defense of these interesting issues could and would be contradicted by all of the *unlikeable* employment attorneys out there, I will not disclose the given answers to these questions.

The point is that the employment lawyer must establish credibility with his or her clients by fielding such strange issues with a rational, legally based response. Developing expertise in at least two broadly applicable areas of employment law (e.g., the Americans with Disabilities Act and the Fair Labor Standards Act), competence in several more, working knowledge of most, and an ability to quickly figure out the basics of the rest will empower an attorney to provide mostly, or at least arguably, sound advice in response to crazy situations.

Establish Trust by Calmly Delivering the Right Advice the First Time

These unique situations, coupled with clients’ seemingly ever-present need for an immediate response, lead me to my next point. The likeable employment attorney must not enable, encourage, or participate in a client’s hysteria no matter how grave the situation. Panicked attorneys deliver bad and injudicious advice very quickly. Such advice is usually based on fear and a faulty expectation that something . . . anything . . . must be done or said at once!

When an employment attorney allows a client’s unfounded sense of urgency to drive the legal strategy or solution, the outcome is likely to be bad for both the client and the attorney. After such hastily delivered

advice is conveyed up the client’s management chain and relied upon for business decisions, it is difficult, embarrassing, and relationship-impairing for an attorney to have to retract his or her initial advice and replace it with a more thoughtful and legally accurate opinion. In other words, research, think, and even consult with others before responding to most issues.

In the rare event that a client truly does need an immediate response (e.g., an employee death or threat of workplace violence), first ensure that your client understands that your advice is based on developing facts and may have to be revisited once the “dust settles.” Next, partner with the client to understand and objectively think through any business needs that may and will affect not only their willingness to follow your legal advice, but any subsequent legal strategy that might be necessary.

For example, in the event of an employee death, the Occupational Safety and Health Administration in most states must be notified within a certain short time frame. But instead of simply delivering this legal directive to an understandably frazzled client, listen to other needs that may appear tangential and non-legal now, but which could affect your defense of the matter in the near future. Aside from the obvious preservation-of-evidence issues, ask about matters such as planned workforce-and-media communications. These concerns are not explicitly legal ones now, but they need your attention. The client needs your analysis and input on how a poorly implemented communication plan could result in a lawsuit by any number of individuals based on theories of employer negligence, defamation, invasion of privacy, etc.

Consider developing either a general or client-specific crisis checklist/plan before a disaster occurs. An objective tool such as this will help you and the client remain calm in times of stress.

Professionalism

Often, employment matters involve personal issues (e.g., an employer singling out and holding an employee accountable for behavior) and money. Not unlike family law, the combination of these two elements makes for high drama and emotion.

When situations get particularly heated and the client has obviously tolerated too much or waited too long before taking action, the client might instruct you to “go for the jugular.” Related to the tip above, you should not let a client’s anger and emotion preempt common sense, sound legal strategy, or professional behavior.

Must an employer allow an employee with anxiety problems to bring a boa constrictor to work as a comfort/aide animal?

Yes, a client may want to immediately terminate an employee who has become hostile, insubordinate, and non-productive. But, although your client may simply be seeking your tacit approval of an action already decided upon, your job is not to jump on the bandwagon. Rather, you must evaluate the facts and the law objectively to help the client understand and consider any legal and business risk that might be overlooked in the heat of the moment. Ultimately, the business decision is the client’s, but you will have done your job if you properly advised of the associated consequences.

As a side note, a directive to be the client’s “pitbull” in court or with opposing counsel should also be avoided. Zealous representation has its place, but the applicable rules of professional conduct are your “floor” of behavior and trump a client’s emotionally charged instruction to do something unprofessional. In fact, when you have an unreasonably angry client, you can use the rules as a shield to explain why you cannot and will not

engage in certain acts or behavior.

If you act according to the above and your client does not follow your advice or fires you, you will have maintained your integrity and performed your job appropriately. Moreover, the satisfaction of knowing these two things relates back to the first principle of living with and liking yourself.

Sense of Humor

After you have established your competence, objectivity, and professionalism, and your clients trust you, it is very helpful for a likeable lawyer to invoke a good sense of humor. This means the ability to laugh at yourself as well as the strange situations you and the client must face together. For me, this is what makes my job not only tolerable, but enjoyable. I like the clients I work with, and I have fun helping them.

Establishing healthy and fun relationships with clients and coworkers is not only a good way to live, but it's also a great marketing tool. When clients enjoy being around you, they will be more likely to call you for preventive and

training reasons, and they will refer you to other clients.

Resources

Here are some recommended resources that may help you on your path to becoming a likeable lawyer:

- **YouTube.** Instead of confusing a client by referring to statutory citations or regulatory prohibitions without context, pull up a clip of *The Office* to illustrate the dangers of certain behavior. There is also a wealth of bad and good deposition examples that, in addition to the standard and necessary preparation, can help you educate a client in a fun and understandable way. And, if your client goes south, (privately) watch the *Seinfeld* clip of lawyer Jackie Chiles admonishing client Kramer for “putting the balm on.”
- **Music.** I love music of all types and regularly use it to get my game on. Consider making a playlist or CD for

yourself of positive, affirming songs to pump yourself up when the going gets tough or when you're preparing for court. It's a bit silly, but it works!

- **Network.** There are thousands of us who have “been there before.” You can find blog discussions, organizations and coworkers to help you think through situations and share resources. Although every situation is unique, you don't have to re-create the wheel when it comes to fashioning a legal strategy or response. Look for and use human and other resources. It will improve your efficiency (to the satisfaction of the client) and will help you see and address potential issues you might not otherwise have thought about.

When you've done all this, you can go home and pay attention to your “kids” (herein defined as yourself, your spouse or partner, your family and friends, your pets, your plants, etc.).

Have fun!

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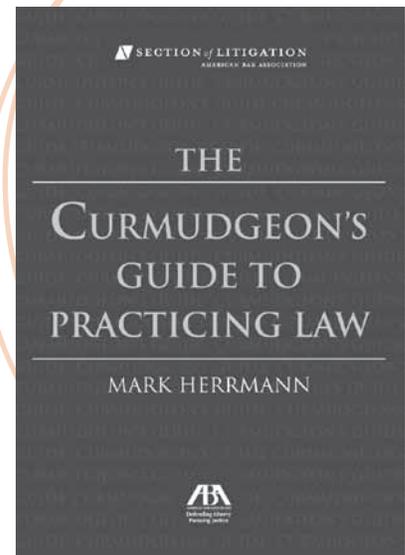
He will make you a better lawyer.

The Curmudgeon's Guide to Practicing Law

MARK HERRMANN

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From the Foreword
Professor Donald A. Dripps
University of San Diego School of Law

Title VII Circuit Review: When “Other Actions” of Employers Become Materially Adverse

By Anthony M. Rainone

Employment law practitioners are familiar with the *McDonnell Douglas* burden-shifting test applicable to intentional discrimination and retaliation claims under Title VII. The test requires, in part, that the plaintiff suffer a materially adverse employment action, which is an action that affects the terms and conditions of employment. A few years ago, in *Burlington Northern & Santa Fe R.R. v. White*, the U.S. Supreme Court interpreted that term to include, for purposes of the anti-retaliation provisions of Title VII, any action that may have “dissuaded a reasonable worker from making or supporting a charge of discrimination.” 548 U.S. 53, 64 (2006).

Where the employer terminates, demotes, refuses to hire, or reduces an employee’s salary, there is no dispute that the employee has suffered a materially adverse employment action under Title VII. But there is often a battle over what can simply be described as “other actions” taken by an employer, which are adverse and affect the terms and conditions of employment yet do not cross the line to become “material.” This issue is often where the summary-judgment battle is fought (and the case won) by one of the parties.

But it is often difficult to determine whether these “other actions” are actionable or are simply part of the petty slights and insults that employees suffer and that courts reject as a basis for liability under Title VII. Complicating matters is that many of us practice in multiple jurisdictions whose courts can have vastly different interpretations of whether an adverse action is materially adverse. To best serve our clients, both in evaluating whether to file a lawsuit as a plaintiff’s attorney or in the early evaluation of the lawsuit by the employer’s attorney, it is critical

to understand how the courts in their jurisdiction are currently interpreting materially adverse employment actions.

This article reviews relevant published decisions throughout the circuit courts of appeals issued in 2010 to understand how each court decided whether those “other actions” constituted a materially adverse employment action. I also note a few published decisions from 2010 where Title VII caselaw regarding adverse employment actions on “other actions” has influenced the same issue under other statutes applicable to the employer-employee relationship.

Title VII and the Circuits in 2010

First Circuit

Starting with the First Circuit, in *Morales-Valllellanes v. Potter*, the court vacated a jury award for the plaintiff on his gender-discrimination and retaliation claims. The plaintiff argued, and the jury agreed, that selective enforcement of a break policy for employees constituted an adverse employment action. The First Circuit disagreed, and it also held that the temporary rotation of the employee’s “preferred distribution” duties to another clerk did not constitute an adverse employment action. And as to the retaliation claim, the court also held that the employer’s changing of the date posting a position in which the plaintiff was interested did not constitute an adverse employment action. In so holding, the court reminded that “[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer’s act or omission does not elevate the act or omission to the level of a materially adverse employment action.” 605 F.3d 27, 35 (1st Cir. 2010).

In another First Circuit decision, *Lockridge v. The University of Maine System*, the court held that the denial of a professor’s request for better office space did not constitute a materially adverse employment action on the plaintiff’s retaliation claim. In reaching this conclusion, the court

reasoned that the denial did not leave the plaintiff in any worse position than that held by similarly situated faculty. 597 F.3d 464 (1st Cir. 2010).

Second Circuit

Turning to the Second Circuit, the court in *Kaytor v. Electric Boat Corp.* found a question of fact as to whether the treatment of the employee prior to her dismissal constituted an adverse employment action. The plaintiff alleged she was effectively demoted, in retaliation for filing an internal discrimination complaint, by being reassigned to work for a person who, in turn, worked for the supervisor about whom plaintiff had complained. Additionally, she was placed in an office containing health hazards, was repeatedly summoned by human resources to meetings that were “superfluous,” was given no work to do, was constantly yelled at by the new supervisor, and was otherwise ostracized. 609 F.3d 537 (2d Cir. 2010).

Sixth Circuit

In the Sixth Circuit, the court in *Spees v. James Marine, Inc.* grappled with a mixed-motives pregnancy-discrimination claim under Title VII. The plaintiff, a welder, was transferred from working in the welding room to the tool room because she was pregnant and, thereafter, was terminated on the same basis. The Sixth Circuit wrote that, in many respects, the transfer did not appear to be materially adverse, noting that the plaintiff received the same salary and benefits, and that the working conditions in the tool room were better than in the welding room (i.e., the summer heat was more tolerable and the plaintiff was not subject to toxic fumes in the tool room). But the record also contained evidence that the transfer to the tool room *could* be seen as a demotion citing to the fact that the plaintiff had to complete a 30-day training course to become a welder whereas no such

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training was required for the tool-room position. Additionally, the plaintiff felt unchallenged by the tool-room position and found it “more boring” than welding. Those facts, coupled with evidence that the transfer to a night shift (the record contained evidence that the plaintiff requested the night shift at the prompting of her supervisor to keep her job) and that plaintiff was not “happy” with the transfer because she was a single mother, provided enough disputed facts to permit a jury to decide if the plaintiff had in fact suffered an adverse employment action. 617 F.3d 380, 391–92 (6th Cir. 2010).

However, one judge in *Spees* dissented from the portion of the majority’s opinion that the transfer to the tool room could constitute an adverse employment action. The dissent disagreed that evidence of the plaintiff’s inconvenience, coupled with her feeling that the new position was less challenging and required less qualifications was sufficient to send the issue to the jury. Rather, the dissent stated that the record showed the transfer was more akin to a “bruised ego,” which is insufficient as opposition to a “significant change in employment status.” *Id.* at 399–401.

Seventh Circuit

The Seventh Circuit had a busy year, publishing three relevant decisions. In *Berry v. Chicago Transit Authority*, the court affirmed a finding that there was no evidence of an adverse employment action for a sex-discrimination claim where the plaintiff made an unsupported allegation that she was not placed on “injured-on-duty status,” which the plaintiff claimed would have entitled her to workers-compensation benefits. 618 F.3d 688 (7th Cir. 2010).

In *Jones v. Res-Care, Inc.*, the plaintiff challenged as retaliatory a corrective-action plan she received that was related to a prior warning for unilaterally varying her work schedule. While the plaintiff conceded that unfair reprimands and negative performance evaluations, absent tangible consequences on employment, do not constitute adverse employment actions, she nonetheless argued that because she subjectively perceived “a palpable tension” when she received the corrective action and the corrective action plan,

this should be sufficient to constitute an adverse employment action. The Seventh Circuit rejected the plaintiff’s argument. 613 F.3d 665 (7th Cir. 2010).

Finally, in *Everroad v. Scott Truck Systems, Inc.*, the Seventh Circuit also commented that a lateral transfer, which did not constitute a demotion in form or substance, involved no reduction in pay, and only involved a minor change in working conditions, could not constitute an adverse employment action as a matter of law. 604 F.3d 471 (7th Cir. 2010).

Eighth Circuit

Traveling to the Eight Circuit, the court affirmed, in a retaliation case, a finding that neither a minor delay in receipt of disability benefits, nor an internal email discussion about the disability benefits, constituted a materially adverse employment action. *Fanning v. Potter*, 614 F.3d 485 (8th Cir. 2010). Similarly, in *Fercello v. County of Ramsey*, the plaintiff unsuccessfully claimed she was functionally demoted in retaliation for complaints of discrimination by, inter alia, the change of her parking-space location and relocation to an office without a window. With regard to the parking space, the court rejected the claim because the plaintiff did not have an assigned parking space prior to complaining of sexual harassment, and the particular spot was assigned to her due to her fear of running into the alleged harassing supervisor. With regard to the office relocation, the court rejected the claim, finding it to be the type of “petty slight” the court had previously held not actionable. Because the plaintiff did not offer any evidence that the relocation rendered her unable to perform her job duties or otherwise interfered with her employment, it was insufficient to constitute a materially adverse employment action. 612 F.3d 1069 (8th Cir. 2010).

Tenth Circuit

In the Tenth Circuit’s 2010 decision of *Johnson v. Weld County, Colorado*, the court addressed, and rejected, a variety of allegations in the context of a retaliation claim. 594 F.3d 1202 (10th Cir. 2010). In particular, the court rejected the plaintiff’s claimed adverse employment actions,

which she described as receiving the “cold shoulder,” people sitting farther away from her at meetings, supervisors being too busy to answer her questions, and workers generally trying to avoid her. The court found these alleged snubs, although unpleasant, could not support a retaliation claim. Likewise, the court also rejected the plaintiff’s claim that she was subjected to retaliation when a supervisor urged her not to consult an attorney, relying upon prior precedent that held that a suggestion that an employee not involve lawyers is not materially adverse for purposes of a retaliation claim. *Id.* at 1217 (citing *Garrison v. Gambro, Inc.*, 428 F.3d 933 (10th Cir. 2005)).

Eleventh Circuit

In an interesting factual scenario in *Alvarez v. Royal Atlantic Developers, Inc.*, the Eleventh Circuit agreed with the plaintiff that she suffered an adverse employment action where she was dismissed sooner than she otherwise would have been in retaliation for sending a letter to the company CEO, complaining of illegal discrimination. The court rejected the plaintiff’s underlying discrimination claim, citing with approval the “Vince Lombardi rule” that “someone who treats everyone badly is not guilty of discriminating against anyone.” The court agreed that the plaintiff was “indiscriminately persnickety” and a perfectionist, which provided a basis for the employer to terminate the plaintiff and, therefore, the discriminatory-termination claim was properly dismissed. But, because that termination occurred sooner as a result of the plaintiff’s discrimination complaint, the employer, which had an entirely defensible discrimination claim, wound up with an indefensible retaliation claim. 610 F.3d 1253 (11th Cir. 2010).

In a more typical factual scenario than *Alvarez*, the Eleventh Circuit in *Howard v. Walgreen Co.* found that a voice mail message left for an employee that his job was in jeopardy did not constitute an adverse employment action on a Title VII retaliation claim. 605 F.3d 1239 (11th Cir. 2010).

D.C. Circuit

The D.C. Court of Appeals issued a number of relevant published decisions regarding this issue in 2010. In *Porter v.*

Shah, the court held that an oral negative interim performance assessment was not a materially adverse employment action but that a negative written performance evaluation accompanied by a performance improvement plan *was*, for purposes of a Title VII retaliation claim. With regard to the oral interim performance assessment, which was never reduced to writing or placed in the plaintiff's personnel file, the court found it did not affect his position, grade level, salary, or promotional opportunities and, therefore, did not suffice to establish a materially adverse employment action. But the court took a different view with regard to the written assessment issued the next year, placed in the employee's personnel file contrary to the employer's policy, and which was accompanied by a performance improvement plan outlining areas for improvement. Under civil-service regulations and company policies, the performance improvement plan could have exposed the plaintiff to removal, reduction in grade, and withholding of a grade increase or reassignment. As a consequence, this action by the employer constituted a materially adverse employment action. 606 F.3d 809 (D.C. Cir. 2010).

In *Pardo-Kronemann v. Donovan*, the D.C. Circuit found a question of fact as to whether an attorney/employee's transfer constituted a materially adverse employment action. The court compared the employee's new position with the prior position in an effort to determine if the positions were sufficiently different. A question of fact was found where, although the plaintiff's salary, benefits, title, and grade remained the same, the record contained evidence that the two attorney positions had significantly different responsibilities. 601 F.3d 599 (D.C. Cir. 2010).

In *Guajacq v. EDF, Inc.*, the employer allowed the plaintiff's employment contract to expire, reassigned her, and then discharged her after she refused to accept the reassignment. The court found that the plaintiff had no right to remain in her position at the expiration of the contract and that the company elected to use the plaintiff's expertise on another project, which the

plaintiff conceded was important for the company. The plaintiff also alleged that her supervisor told her that if she filed a discrimination claim, her career at the company would be "dead." Although the court accepted that a single verbal threat could constitute a materially adverse employment action, it rejected the claim in this case because the record showed that, in context, the company went out of its way before and after the plaintiff filed her complaint to accommodate her despite her "increasing insubordination and refusal to consider any future employment decisions that did not meet her precise demands." According to the court, nothing the company did satisfied the plaintiff and she "persisted in disparaging [her supervisor's] . . . authority and refusing to cooperate with him." 601 F.3d 565, 578 (D.C. Cir. 2010).

Beyond Title VII

The circuits were also busy this year deciding adverse-employment-action issues under several other federal statutes. For example, in *Rodriguez-Garcia v. Miranda-Marin*, the First Circuit affirmed a jury verdict and found, on a First Amendment retaliation claim, that a public employee established an adverse employment action based upon a substantial alteration of job duties and working environment, notwithstanding that the plaintiff's title and salary remained the same. 610 F.3d 756 (1st Cir. 2010).

In *Fincher v. Depository Trust and Clearing Corp.*, the Second Circuit affirmed the dismissal of discrimination and retaliation claims under section 1981. The court acknowledged there "are no bright-line rules with respect to what constitutes an adverse employment action for purposes of a retaliation claim . . ." But the court then stated that "at least in a run-of-the-mine case," an employer's failure or refusal to investigate a discrimination complaint is not considered an adverse employment action in retaliation for filing the complaint. In so holding, the court recognized that the employee's situation had not changed due to the failure to investigate the complaint, but it also left open the

possibility that the refusal to investigate a complaint could constitute an adverse employment action in some circumstances. 604 F.3d 712, 721 (2d Cir. 2010).

In another section 1981 case, the Third Circuit held that a transfer resulting in only a few extra miles' daily commute constituted a "trivial harm" that did not meet the adverse employment standard. *Estate of Oliva v. State of NJ*, 604 F.3d 788 (3d Cir. 2010).

In *Jones v. Oklahoma City Public Schools*, an ADEA retaliation claim, the Tenth Circuit found that a plaintiff established an adverse employment action. The court relied upon a reassignment in which the plaintiff's salary would be decreased by \$17,000 the next year, notwithstanding that her salary would not be reduced during the current year. Further, the plaintiff's vacation benefits were immediately reduced and her retirement benefits would be reduced the following year. Although there was no formal demotion, the court found that she suffered "lost professional prestige and fell to a lower position" in the district's organizational hierarchy. Finally, the court labeled the employer's argument that a five-dollar pay reduction is not sufficient to constitute an adverse employment action, "simply incorrect." 617 F.3d 1273, 1279–80 (10th Cir. 2010).

Finally, in *Moghan v. Napolitano*, the D.C. Circuit applied Title VII retaliation law to a Rehabilitation Act claim. The court found that a supervisor's posting of an employee's Equal Employment Opportunity Commission complaint on the Secret Service's intranet where fellow employees could and did access it, coupled with the increase of the plaintiff's workload to over five times the workload assigned to the plaintiff's coworkers, were efforts designed to keep the plaintiff busy and prevent her from filing complaints, which could fulfill the *Burlington Northern* retaliation standard. 613 F.3d 1162 (D.C. Cir. 2010).

Conclusion

In 2010, the circuit courts continued to show a willingness to look beyond typical adverse employment actions and to consider those "other actions" of the employer

that may have been taken because an employee complained of discrimination or for discriminatory reasons alone. For plaintiffs' lawyers, these cases should assist you in screening potential claims and in valuing existing claims. For the employers' attorneys, understanding your jurisdiction's treatment of the employer's "other actions" is of paramount importance in both defending discrimination claims and for providing guidance to employers to avoid these claims altogether.

Chairs' Column

continued from page 2

understand this handbook is selling briskly and should be considered a resource for the practicing lawyer or others interested in employment litigation.

As committee chairs, we both want to highlight the very substantial contributions of our committee vice chair, Brian Koji. Brian practices with the law firm of Allen, Norton & Blue, P.A. in Tampa, Florida, and serves as chair of the Newsletter Subcommittee, along with Bill Martucci. Brian has been an active participant in this committee for years and can always be counted on to make valuable contributions to the work of the committee.

The chairs are pleased to have you as a part of our membership for the 2010–2011 year, and we strongly encourage you to consider taking an increased role within leadership of the Committee. Please take a look at our committee webpage (available at <http://apps.americanbar.org/litigation/committees/employment>), and we ask you to consider taking an expanding role in publishing an article, proposing a program, or otherwise enhancing the work of the committee. If there is anything the chairs can do to make this committee more useful to you, please let us know. Also, feel free to contact any of the subcommittee leaders who are also listed on the committee webpage.

Arley Harrel
Kimberly Stith

Editors' Message

continued from page 2

foreshadowed the significance of the social issues at stake. As the trial judge noted, "What are the legal boundaries of an employee's privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messed to friends and family via hand-held . . . electronic devices?" Shilling observes that the Supreme Court didn't quite address the fullness of these issues. Nonetheless, the case offers one crucial lesson for business: Well-conceived policies clearly establishing expectations concerning digital privacy in the workplace are essential.

In an article entitled "Shedding the Aura of Doom and Becoming a Likeable Lawyer," Carol Dominguez Shay highlights the qualities of the fine lawyer who enjoys her work and provides extraordinary client service. In the article, Ms. Shay notes that one "will not magically transform oneself from Grim Reaper to Santa Claus simply by reading these tips," but it is a starting point. The objective is to turn yourself into a "welcome business asset." Among her fine points, Ms. Shay highlights the qualities of trust, professionalism, and a sense of humor. Ms. Shay also highlights recommended sources that "may help you on your path to become a likeable lawyer." Finally, Ms. Shay notes the importance of going home and paying attention to your "kids," which she defines as "yourself, your spouse or partner, your family and friends, your pets, your plants, etc." In the final paragraph, Ms. Shay notes: "Have fun!"

Anthony Rainone addresses the recurring issues of what "other actions" may be considered "materially adverse" within the context of employment discrimination and retaliation law. The article is entitled "Title VII Circuit Review: When 'Other Actions' of Employers Become Materially Adverse." In this article, Mr. Rainone reviews the status of the law in various circuits. A number of the decisions in the District of Columbia Court of Appeals, for example, illustrate how fact-specific this area is. The D.C. Circuit has recently held that an oral negative interim performance assessment was not a "materially adverse" employment action, but that a negative written performance evaluation accompanied by a performance improvement plan was a materially adverse employment action for purposes of the Title VII retaliation claim. Beyond Title VII, the article also provides some insights concerning First Amendment issues, section 1981, the ADEA, and the Rehabilitation Act.

As a correction to the Summer 2010 issue, we would like to note that the views expressed in Lisa Hasday's article are solely those of the author and do not necessarily reflect the views of the Department of Justice.

In closing, we note that John W. Robinson IV, an extraordinary committee member and an exceptional leader, recently passed away. John Robinson touched those he knew with inspiration and kindness. We shall strive to carry on his fine work by endeavoring to be leaders and professionals serving our clients and societal interests. John was the standard of professionalism and civility for all of us. We shall miss him.

Brian Koji
William C. Martucci

Ontario v. Quon

continued from front cover

How did the Supreme Court decide these critical issues? It didn't, really. Justice Kennedy explained the high court's trepidation as follows, "Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence and extent of privacy expectations enjoyed by employees when using employer-provided communication devices." *City of Ontario, California v. Quon*, 130 S.Ct. 2619, 2629 (2010).

The facts of the lawsuit and the ensuing court decisions stress the importance of digital-privacy issues.

However, the Supreme Court's first foray into digital privacy was not for naught. The decisions from the trial judge and the court of appeals offer excellent outlines for business managers, IT specialists, and HR professionals to follow when developing risk-management policies and procedures, and when identifying and resolving digital-privacy situations. Also, the Supreme Court did not entirely resist the urge to drop helpful hints about some key business and legal issues here. In fact, Justice Kennedy seeded his opinion with enough insightful comments that he drew a rhetorical objection from Justice Scalia, who commented that, "in saying why it is not saying more, the Court says

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much more than it should." *Id.* at 2635.

One crucial lesson for businesses to learn from this case is they need well-conceived policies establishing expectations for employees with respect to digital privacy in the workplace. One other key lesson is that business people should know enough about the existing and emerging digital technologies to identify potential privacy issues and obtain competent advice before the issues become legal problems. The facts of Quon's lawsuit against the City of Ontario, and the decisions issued by the trial judge, court of appeals, and Supreme Court highlight the importance of these and other digital-privacy issues.

The Facts—The Realities of a Modern Day Workforce

"This case has its genesis in gross malfeasance which, no one disputes, took place in the Ontario Police Department's dispatch center." *Quon*, 445 F. Supp. 2d at 1121. The police department suspected that one of its dispatchers was feeding information to her boyfriend, who was a member of the Hell's Angels motorcycle gang, about a police investigation of the gang. The department ran a sting, having a narcotics officer place a mock call to the dispatcher about the license plate of a known gang member. As soon as the dispatcher received the call, she sent a text message to another police dispatcher, asking the second dispatcher to warn the suspect that the narcotics officer was following him. After doing so, the second dispatcher sent a text informing a third dispatcher, April Florio, that the second dispatcher had taken care of the matter.

In concert with the sting, the city discovered that other police department employees were exchanging illicit text messages. The department had issued pagers to its SWAT team to facilitate coordination and rapid response in emergency situations. Some SWAT team members, including Jeff Quon, incurred overages by repeatedly exceeding their monthly data plans. The department reviewed 46 pages of texts that Quon had sent over a two-month period, and discovered numerous messages he had sent while on duty that "were, to say the least, sexually explicit." Some such texts were sent

between Quon and his wife, Jerilyn (who also was a police officer in the department), while others were exchanged between Quon and his mistress, April Florio.

The department had adopted and disseminated an appropriate written policy concerning its employees' use of department-owned electronic devices, including the use of pagers and the exchange of text messages. The policy stated that the department "reserves the right to monitor and log all network activity"; that the employees' use of the department's computer systems "is not confidential"; that the systems "should not be used for personal or confidential communications"; that information "produced either in hard copy or in electronic form is considered city property"; and, most importantly, that employees "should have no expectation of privacy or confidentiality when using these resources."

Despite this written policy, the department also had an unwritten procedure of not reviewing texts sent on department-owned devices. Even if an officer exceeded his or her data limit, the department did not review the texts if the officer paid the overage. The department only reviewed texts if the officer asked the department to pay the overage on the basis that the excess data usage was job related. Until it decided to review Quon's texts, the department had followed this unwritten procedure.

Jeff Quon, Jerilyn Quon, and April Florio sued the City of Ontario and the officers who had reviewed their texts. They alleged that the city and the officers violated their common-law and constitutional rights to privacy. Jeff Quon also sued Arch Wireless Operating Co., Inc., with whom the department had contracted for text messaging service for department-owned pagers, alleging that Arch Wireless had violated the Stored Communications Act by disclosing his texts to the department.

The Trial Judge's Decision—A Victory for Businesses

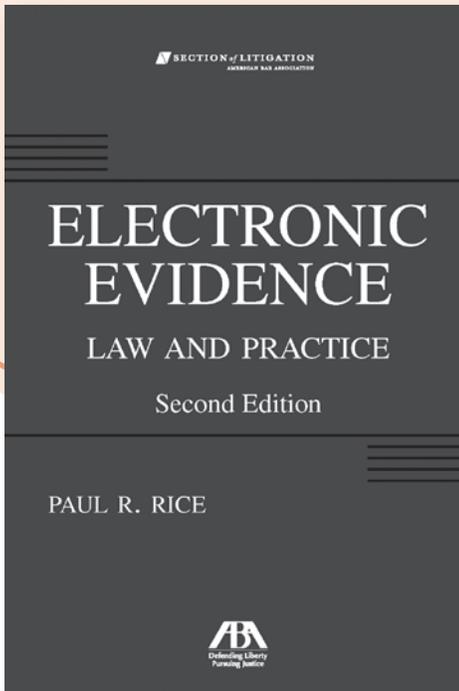
Businesses won a resounding victory in the trial court. The judge dismissed Quon's claim against Arch Wireless, concluding that it had a right to disclose Quon's texts to the department because the department was the subscriber of the text

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message services. While the judge initially found that Quon had a reasonable expectation that the texts he sent using the department-owned pager were private, the judge ultimately concluded at trial that the department was not be liable because it had reviewed the texts in the course of a reasonable workplace investigation. The judge's decision highlights just how technically complex, legally difficult, and fraught with peril digital-privacy issues can be.

Businesses and their legal counsel welcome the guidance that the Court furnished here.

In 1986, Congress enacted a law called the Electronic Communications Privacy Act (ECPA). The purpose of that law is to protect the privacy of electronic communications, just as aural telecommunications are protected by the federal wiretap law. The ECPA thus prohibits unauthorized interception of electronic transmission. At the same time, Congress enacted the Stored Communications Act, the purpose of which is to protect the privacy of certain stored electronic communications.

The problem with the SCA is that it was written over two decades ago, long before the conception of the technologies of today. As the judge explained, because the SCA preceded “the mass use of the Internet and world wide web, its framework is at times ill-suited to address modern forms of communication. . . . Such a clash of technology and the current state of the law” took center stage in Quon’s case.

The SCA classifies a service provider like Arch Wireless as either a “remote computing service” or an “electronic communication system.” A remote computing service has the right under the law to

disclose electronic communications to the subscriber of the service, typically a business or an employer like the City of Ontario. By contrast, an electronic communication system provider may disclose data held by it only if authorized to do so by the author or addressee of the communication. See 18 U.S.C. § 2702(b)(3). Thus, a service provider’s liability under the SCA (and a business’s or employer’s potential aiding or abetting liability) can depend on how these terms are applied in a particular situation. Unfortunately, the SCA’s 1986-based definitions of these terms (suited to email, at best) are often inadequate to classify the technologies that exist just 20 years later (e.g. text and instant messages, web mail, and Facebook and Twitter communications) as well as emerging new technologies (e.g., Android and iPhone applications).

A service provider qualifies as a remote computing service if it provides to the public “computer storage or processing services by means of an electronic communication system.” 18 U.S.C. § 2711(2). Alternatively, an electronic communications system consists of “computer facilities or related electronic equipment for the electronic storage” of “wire or electronic communications.” 18 U.S.C. § 2510(14) and (15). The judge struggled mightily to distinguish these two terms to classify Arch Wireless under the SCA. After a lengthy review of the history of the law and countervailing policy arguments, he ultimately concluded that Arch Wireless met the definition of a remote computing service, because it provided “long-term storage of communications not incidental to the transmission of the communication itself and not meant for backup protection.”

The trial judge’s decision on Quon’s claim for violation of his right to privacy was far less technical, but equally perilous. He would have agreed with the city’s argument that Quon had no reasonable expectation of privacy in his texts if all that had occurred was that he was

informed in writing and in person that the city considered the use of the pagers to fall within its e-mail policy, and that the city would

monitor the use of its pagers, including auditing what messages were sent and received by them at any time. All of this would have put any employee on fair notice that the communications that were transmitted over the pager were, in essence, open to the public for view. *Quon*, 445 F. Supp. 2d at 1140.

But Quon’s expectation of privacy was “fundamentally transformed” by the department’s “conscious decision not to enforce” its policy. Before the department reviewed Quon’s texts, it “did not audit any employee’s use of the pager for the eight months the pagers had been in use. This was true even when overages were involved. [The department] in effect turned a blind eye to whatever purpose an employee used the pager, thereby vitiating [its] policy of any force or substance.” The department’s actions even “could be said to have encouraged employees to use the pagers for personal matters.” The judge therefore found that the department “effectively provided employees a reasonable basis to expect privacy in the contents of the text messages they received or sent over their pagers.”

The judge’s conclusion that Quon had a reasonable expectation of privacy in his texts resulted in that claim proceeding to trial. The jury concluded, however, that the department reviewed the texts in the course of a legitimate workplace investigation to assess if its monthly data limit was sufficient for the business purposes of its police officers. As a result, the judge found that the department’s review of the texts was reasonable under the circumstances, absolving the department of liability.

The Court of Appeals Decision—A Reversal of Fortunes

The victory for businesses was short lived, with round two awarded decisively to privacy advocates. Three judges on the U.S. Court of Appeals for the Ninth Circuit completely reversed the fortunes of the parties.

The judges reinstated Quon’s claim under the SCA, finding that Arch Wireless hosts an electronic communication system and is not a remote computing service. An electronic communication system, the judges reasoned, is nothing more than a

service provider that affords its users “the ability to send or receive wire or electronic communications” using its systems.

On its face, this describes the text-messaging pager services that Arch Wireless provided. Arch Wireless provided a service that enabled Quon . . . to send or receive electronic communications, *i.e.*, text messages. Contrast that [with the] definition for [a remote computing service], which means the provision to the public of computer storage or processing services by means of an electronic communications system. Arch Wireless did not provide to the city computer storage; nor did it provide processing services.

Quon v. Arch Wireless Operating Co., Inc., 529 F.3d 892, 901 (9th Cir. 2008).

The appellate judges also disagreed with the trial judge’s decision on Quon’s privacy claim. They reinstated that claim as well, finding it unreasonable for the department to review the actual texts just to determine if the usage limits were sufficient. There “were a host of simple ways to verify the efficacy of the . . . limit . . . without intruding on Quon’s rights,” they reasoned.

For example, the department could have warned him that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during

that time frame. Alternatively, if the department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to the department to review the redacted transcript. *Id.* at 909.

The decision of the three Ninth Circuit judges displeased some of their colleagues. Seven other judges on that court of appeals asked that case be reconsidered, but were unsuccessful in convincing enough of their colleagues to reconvene the matter. These dissenters raised commonsense reasons why it would have been unreasonable for Quon to expect any privacy in his text messages.

Given that the pagers were issued for use in SWAT activities, which by their nature are highly charged, highly visible situations, it is unreasonable to expect that messages sent on pagers provided for communication among SWAT team members during those emergencies would not be subsequently reviewed by an investigating board, subjected to discovery in litigation arising from the incidents, or requested by the media. . . . In light of these operational realities, a police officer could not reasonably expect to keep communications over a SWAT pager confidential. Rather, Quon could have avoided exposure of his sexually explicit text messages simply by using his own cell phone or pager.

Quon v. Arch Wireless Operating Co., Inc., 554 F.3d 769, 776–77 (9th Cir. 2009).

The marked differences of opinion between the trial judge, the initial three appellate judges, and the seven other appellate judges highlight just how divisive digital-privacy issues often are, and just how technically complex and legally difficult it can be to resolve them, even for the brightest legal minds.

The Supreme Court Decision—Hints for the Future

The Supreme Court’s first decision was that it would not consider one of the main issues in the case. It declined to hear Arch Wireless’s appeal of Quon’s SCA claim, leaving businesses and legal counsel to struggle with the continuing uncertainties inherent in the law and conflicting lower-court precedents.

The high court instead focused solely on Quon’s claim that the city had violated his constitutional right to privacy. All nine justices agreed that the viability of that claim rested on whether the department’s review of Quon’s texts was reasonable under the circumstances (and they found that it was reasonable), not whether Quon could have reasonably expected the texts to be private.

The justices even acknowledged that unnecessary pronouncements about societal expectations of privacy in digital communications would be dangerous. For example, it noted that courts “must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment

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owned by [an] employer. The judiciary risks error by elaborating too fully on the . . . implications of emerging technology before its role in society has become clear.” 130 S.Ct. at 2629. The court further elaborated on the risks of addressing digital privacy:

Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. [For example,] many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency. . . . [As a result,] the law is beginning to respond to these developments, as some states have recently passed statutes requiring employers to notify employees when monitoring their electronic communications. . . . [However, at] present, it is [still] uncertain how workplace norms, and the law’s treatment of them, will evolve.

[T]he Court would have difficulty predicting how employees’ privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. . . . Cell phone and text message communications are so pervasive that some people may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. *Id.* at 2629–30.

Despite clearly understanding the hazards of wading into a sea of digital-privacy issues, Justice Kennedy nonetheless seeded his opinion with helpful hints about some of the most important business and legal factors at issue here. For example, and most

importantly, he stated that an employer’s policies concerning electronic communications in the workplace “will of course shape the reasonable expectations of [its] employees, especially to the extent that such policies are clearly communicated.”

The high court also acknowledged that the differing circumstances of each workplace must inform an employee’s expectations of privacy. For example,

[a]s a law enforcement officer, [Quon] would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the city issued the pagers to Quon and other SWAT team members in order to help them more quickly respond to crises—and given that Quon had received no assurances of privacy—Quon could have anticipated that it might be necessary for the city to audit pager messages to assess the SWAT team’s performance in particular emergency situations. *Id.* at 2631.

Finally, Justice Kennedy recognized that an employer’s legitimate business needs to access and review an employee’s electronic communications impacts the scope of the employee’s reasonable expectation of privacy. In Quon’s case, for example, it would “be necessary to consider whether a review of messages sent on police pagers, particularly those sent while officers are on duty, might be justified for other [legitimate business] reasons, including performance evaluations, litigation concerning the lawfulness of police actions, and perhaps compliance with state open records laws.”

Justice Scalia admonished his colleagues for engaging in such judicial activism, stating that

lower courts will likely read the Court’s self-described “instructive”

expatiation[s] . . . as a heavy-handed hint about how they should proceed. Litigants will do likewise, . . . bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees’ use of electronic media.

Id. at 2635.

Whether advisable or not, businesses and their legal counsel welcome the guidance, limited though it may be, that the Supreme Court furnished here.

The Conclusion—Be Prepared to Address Digital Privacy Issues

Electronic communications invaded our workplaces long ago. It will be (indeed, already is) impossible to avoid facing digital-privacy issues. Businesses should prepare themselves to address these issues before they arise, not after they become legal problems.

To do so, every employer should adopt an electronic-communication policy tailored to the business needs and corporate culture of the company. The policy should, at a minimum, instruct employees that (1) they cannot expect that the communications they have or the data they create on company-owned devices will be private; (2) their communications and data constitute company property; and (3) the company reserves the right to access and review, and does, in fact, periodically access and review, employees’ electronic communications and data on company-owned devices. While the policy can provide an employer with appropriate flexibility, a business must also ensure compliance with its policy to avoid the problems experienced by the City of Ontario with respect to Jeff Quon.

Finally, businesses should also learn to recognize digital-privacy situations that could lead to liability under the ECPA and SCA. Although these two laws are neither unambiguous nor simple to apply, with the assistance of qualified legal counsel, businesses should be able to minimize or avoid risk by planning ahead rather than simply forging ahead.



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