

# Workplace Privacy Issues

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**Employee right to privacy**

**v.**

**Employer's right to monitor**

# Increased use of social media and technology

- What are the employers' risks associated with monitoring employees' use of computers and electronic devices?
- Can employees who use employer-issued equipment for their personal use expect privacy?

# Overview

- Privacy Statutes
- Recent case law
- Important implications for employers

# Privacy Statutes

- **Public or government employees**
  - U.S. Constitution and Bill of Rights
  - Some state constitutions, not Delaware
- **Private employees**
  - Electronic Communications Privacy Act of 1986
  - Stored Communications Act
  - Computer Fraud and Abuse Act

## 19 *Del. C.* § 705

- No employer shall monitor or intercept any telephone conversation or transmission, electronic mail or transmission or internet access or usage of an employee without giving notice to the employee first
- 2 types of notice permitted under statute

When an employer views  
electronic  
communications on a  
third party server

# City of Ontario v. Quon

- Police department issued pagers to SWAT team
- Allowed certain number of messages, overages would incur a fee
- Jeff Quon – repeatedly went over the number of text messages permitted; offered to pay the extra fees
- City conducted an audit

# City of Ontario v. Quon

- Results of the audit
  - Non-work-related messages
  - Sexually explicit
  - On duty time
- Referred to Internal Affairs

# ***City of Ontario v. Quon***

- Quon filed suit
- District Court- jury trial to determine the purpose of the audit
- Jury found for the employer
- 9<sup>th</sup> Circuit – reversed; found for employee
- Supreme Court – reversed; found for employer

# Supreme Court Analysis

- (1) Did the employee have a reasonable expectation of privacy?
- (2) Was this an unreasonable search under the 4<sup>th</sup> Amendment?

# Did the Employee have Reasonable Expectation of Privacy?

- The parties disagreed
- Employer – had a policy in place
- Employee – the policy was not enforced, the Chief told Quon no audit if he paid the overages

# Did the Employee have Reasonable Expectation of Privacy?

- Court took a narrow approach
- Did not decide the issue on the extent a employee has a privacy right
- Court assumed that the employee had a reasonable expectation of privacy and went on with the analysis

# Was the Employer's Review of the Text Messages Unreasonable?

- Test: whether the search was justified at its inception
- The search was necessary for a non-investigatory work-related purpose
- Yes, justified- in order to determine whether character limit on the pager plan was sufficient to meet the police department's needs

# Was the Scope of the Employer's Review of the Text Messages Unreasonable?

- Reasonable in scope
- Efficient, expedient
- Not excessively intrusive
- Quon was told that his messages could be audited
- Used for emergency- could look at the effects of the pagers on a quick response
- As a police officer, could expect his actions could come under legal scrutiny

# Supreme Court's Conclusion

- Employer was motivated by a legitimate work-related purpose
- Search was not excessive in scope
- “[T]he Court also concludes that the search would be ‘regarded as reasonable and normal in the private-employer context’ . . . .”

# Implications for employers

- Policy
  - establishing the level of privacy expectations
  - specifying the different electronic devices covered by the policy.
- Warning about reviewing content of electronic communications
  - legitimate, work-related purpose
  - Not excessive in scope

# Email Communications and Attorney/Client Privilege

- What happens if you search the employee's email communications and find emails from the employee to his/her attorney?
- Are those emails protected under the attorney/client privilege?

# ***Stengart v. Loving Care Agency***

(N.J. Supreme Court 3/30/10)

- Employee was sending emails from her personal account from her work computer to her outside attorneys
- Employer read the contents of her emails about a lawsuit against the employer for discrimination

# ***Stengart v. Loving Care Agency***

- NJ Supreme Court – employee had a reasonable expectation of privacy
- Their policy did not address personal, web based emails at all
- Employers can monitor and regulate usage of workplace computers, but no basis to read specific contents of personal privileged attorney/client communications in order to enforce the corporate policy

# ***Stengart v. Loving Care Agency***

## Implications for employers:

- Policy banning personal email accounts accessed through company equipment
- Warn employees that contents of emails sent via personal accounts can be forensically retrieved and read by the company
- Can acknowledge the occasional use of personal email
- Ensure that emails on personal email are company property

# ***Brown-Criscuolo v. Wolfe***

(D. Conn. 2009)

- School principal had concerns about Superintendent's administration of special education programs
- While principal was on extended medical leave, Superintendent accessed her email account and found a letter the principal had sent to her attorney regarding her concerns
- Employee sued under 4<sup>th</sup> Amendment

# ***Does the Employee have a reasonable expectation of privacy?***

- 1) does the corporation maintain a policy banning personal or other objectionable use
- (2) does the company monitor the use of the employee's computer or e-mail
- (3) do third parties have a right of access to the computer or e-mails
- (4) did the corporation notify the employee, or was the employee aware, of the use and monitoring policies?

# ***Brown-Criscuolo v. Wolfe***

- District policy: granted “limited expectation of privacy” to contents of the employee’s personal files; referred to monitoring the system to determine if disciplinary or legal violations occurred

# ***Brown-Criscuolo v. Wolfe***

- The Court found in the employee's favor
- The Court held the district did not routinely monitor the email accounts and the superintendant did not access her account for a disciplinary investigation
- The principal had a reasonable expectation of privacy, including her communication with her attorney

# **VanAlstyne v. Electronic Scriptorium Limited**

- Employer (president) accessed former employee's (VP) personal email account
- After former employee had filed three lawsuits against ESL alleging employment related claims
- Jury found for the former employee and awarded compensatory and punitive damages and attorneys' fees

# Video Surveillance

Is an employer permitted to set up video surveillance of employees?

# *Hernandez v. Hillsides, Inc.*

- 2 female employees of a 24-hour residential facility for abused and neglected children discovered a video camera in the office
- They were not notified of the video equipment in office
- Sued employer for invasion of privacy

## ***Hernandez v. Hillsides, Inc.***

- The Court held that the women had a reasonable expectation of privacy in their office
- The intrusion would not be highly offensive to a reasonable person because of limited nature and the employer's reason for it
- Found in favor of the employer

# ***Robbins v. Lower Merion School District***

filed February, 2010

- Class action students and parents against Lower Merion School District for invasion of privacy for viewing students at home through webcams on District-issued laptops
- Students were never made aware that the District could remotely activate the webcam

# ***Robbins v. Lower Merion School District***

- Nov. 11, 2009 a teacher informed a student that the District believed the student had engaged in improper behavior in his home
- Cited as evidence- the photo from the webcam embedded in his laptop
- News articles - district viewed students at home at least thousands of times and that some teachers and students were aware of ability to spy

# How Courts Evaluate Privacy Issues

- How is the employer's policy written?
- Are the employee's notified of the use and monitoring procedures?
- How is the employer's policy enforced?
- Reasonable and non-excessive?
- Balancing between employee rights to privacy vs. employer's right to monitor

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