PERSPECTIVES

Fall 2008

A periodic newsletter from the Labor & Employment Practice Group of Dickinson Mackaman Tyler & Hagen, P.C.

Employer's Search of Employee's Text Messages Found to Be Unconstitutional by Ninth Circuit Court of Appeals

by HELEN C. ADAMS

The City of Ontario contracted with Arch Wireless to provide wireless text messaging services to certain city employees, including members of the police department. The City provided those employees with two-way alphanumeric pagers. Police officers Quon and Trujillo were two of the employees who were provided pagers.

Although the City had no official policy governing text messaging by use of the pagers, the City did have a general "Computer Usage, Internet and E-mail Policy" (the "Policy") applicable to all employees. The Policy stated that all city-owned computers and other equipment were to be used only for official business and indicated that usage for personal benefits was a violation of the Policy. The Policy also advised employees that computer usage may be monitored and that employees had no expectation of privacy with respect to any messages they sent or received over City equipment.

Quon had received the Policy and signed an acknowledgment several years before the City acquired the pagers. Quon also attended a meeting where a Police Department Commander informed everyone that pager messages were considered e-mail and covered under the Policy, but Quon later stated that he did not recall that information being shared at the meeting.

Even though the City did not have an official policy dealing specifically with the pagers, the City did have an informal policy governing use of the pagers. If an employee with an assigned pager went over the monthly text allotment, the employee was required to pay the overage charges unless the pager had been used solely for business purposes. If an employee declined to pay the overage amount by claiming only business usage, the actual messages would be audited to determine if any personal usage had occurred. In essence, the City employed a "pay the monthly overage charges and we won't monitor" policy.

Quon went over the monthly allotment at least three or four times. Each time, Quon was advised that he needed to pay the overage charges, which he did on each occasion. In August of 2002, Quon again exceeded the monthly allotment, but this time the City requested the text message transcripts from Arch Wireless for auditing purposes. After the City reviewed the messages, it was determined that Quon had exceeded his monthly allotment and that many of the messages were personal in nature and were often sexually explicit.

Quon sued the City, arguing that the search of his text messages was unconstitutional under the Fourth Amendment because Quon had a reasonable expectation of privacy in the text messages. The Ninth Circuit Court of Appeals agreed that the search by the City was unconstitutional as a matter of law. *Quon, et al. v. Arch Wireless, et al.* (9th Cir. June 18, 2008). In reaching its conclusion that Quon's expectation of privacy in the text

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messages was reasonable, the Ninth Circuit relied on the informal "pay the monthly overage charges and we won't monitor" policy that the City had adopted.

Employer Notes: Although the Fourth Amendment prohibition on unreasonable searches and seizures applies only to public sector employees, both public and private sector employers can learn from the *Quon* decision. In the private sector, the courts still analyze whether an employee had a reasonable expectation of privacy with respect to any searches the employer conducted. In performing this analysis, the courts look at the employer's policies, both formal and informal, to determine if the employee was on notice that employer equipment would be monitored and that information stored on such equipment was not confidential as to the employee.

Employers should insure that written policies governing employee usage of employer equipment are written broadly enough to include not only current equipment but also new technology acquired by the employer. If you have not reviewed your company policy on equipment usage, this article may serve as the catalyst for such review. In addition to the written policy, employers also should have employees sign an acknowledgment form governing equipment usage when new equipment is assigned to the employees.

Probably the most important lesson from *Quon* is that employers need to actually follow and enforce the written policies they implement. For example, if an employer prohibits employees from making personal long distance phone calls, the employer should not have an informal policy that allows employees to reimburse the company for such personal long distance calls. Inconsistent or nonexistent policy enforcement sends mixed messages and may enable an employee to successfully argue that his employer invaded the employee's privacy by reviewing personal e-mails, phone calls, text messages, voicemails, etc.

GINA Restricts Employer's Collection, Use and Disclosure of Genetic Information

by MEGAN J. ERICKSON

President Bush signed into law the Genetic Information Nondiscrimination Act (GINA) on May 21, 2008. When it becomes effective with regard to employers on November 21, 2008, it will create a new series of causes of action under the non-discrimination laws based on "genetic" information. Iowa employers are reminded that at the present time, Iowa Code Section 729.6 prohibits any employer in this state from directly or indirectly soliciting, requiring or administering a "genetic test" as a condition of employment, and from in any way affecting the employment of an individual who has obtained a genetic test. That Iowa statute may by its terms be enforced through a civil action.

Iowa was not alone in having such legislation, and indeed there was piecemeal legislation on the subject of genetic testing at the federal level. According to the findings made by Congress accompanying GINA, federal legislation establishing a national, uniform standard was needed to (1) better protect the public from discrimination, (2) alleviate concerns about potential discrimination, and (3) thus allow individuals to take advantage of genetic testing, technologies, research, and new therapies without reservation.

GINA restricts the collection, use, and disclosure of genetic information. When it becomes effective with regard to employment, GINA will apply to all employers subject to Title VII of the Civil Rights Act of 1964, as amended. That is, it will essentially apply to

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all employers with 15 or more employees.

The Act broadly defines "genetic information" to include information about an employee's genetic tests, the genetic tests of an employee's family members, and the existence of a disease or disorder in the employee's family members. The definition of genetic information specifically excludes information about a person's age or sex. "Family member" is broadly defined to include an employee's dependents, and the first-, second-, third-, and fourth-degree relatives of the employee and employee's dependents.

GINA imposes a number of restrictions upon employers.

- Employers may not discriminate against employees or prospective employees in hiring, firing, compensation, or other terms or conditions of employment based on genetic information.
- Employers may not disclose genetic information. Employers must apply the same confidentiality protections to genetic information as apply to confidential medical records under the Americans with Disabilities Act. (Employers must treat genetic information as confidential, on separate forms, in separate files, and with access strictly limited to a "need to know" basis.)
- Employers are also prohibited from requesting, requiring, or purchasing genetic information about an employee or an employee's family member.
- An employer does not violate GINA by using, acquiring, or disclosing medical information that is *not* genetic information, including information about a manifested disease, disorder, or pathological condition of an employee or employee family member, even if that information might have a genetic basis. However, an employer might be liable under other laws for doing so.

There are a number of exceptions to the bar against an employer's acquisition of genetic information. Among the situations where GINA's prohibition against acquiring genetic information does not apply are:

- The employer offers certain health or genetic services such as a wellness program if: (1) the employee provides prior, knowing, voluntary, and written authorization, (2) only the employee or family member receiving genetic services and the professional providing such services receive individually identifiable information concerning the results of such services, and (3) any individually identifiable genetic information is only available for purposes of such services and is not disclosed to the employer unless in aggregate terms;
- The employer requests or requires family medical history to comply with the requirements of the Family and Medical Leave Act of 1993 or such requirements under state family and medical leave laws;
- The employer purchases documents commercially and publicly available (including newspapers, magazines, periodicals, and books, but not including medical databases or court records) that include family history;
- The information involved is to be used for genetic monitoring of the biological effects of toxic substances in the workplace, but only if (1) the employer provides written notice of the genetic monitoring, (2) the employee provides prior, knowing, voluntary, and written authorization or the genetic monitoring is required by federal or state law, (3) the employee is informed of individual monitoring results, (4) the monitoring is in compliance with any federal genetic monitoring regulations or state genetic monitoring regulations where the state is implementing genetic monitoring regulations under the authority of OSHA, and (5) the employer, excluding any licensed health care professional or board certified genetic counselor involved in the genetic monitoring program, receives the results of the monitoring only in aggregate terms that do not disclose the identity of specific employees.

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Similarly, GINA provides exceptions to the prohibition against ***disclosing*** genetic information. Disclosure of genetic information is allowed:

- To the employee or family member upon written request;
- To an occupational or other health researcher, if the research is properly conducted;
- To the extent necessary to comply with medical leave laws;
- To government entities investigating GINA compliance, if relevant to the investigation;
- To comply with a court order, so long as certain safeguards have been met; and
- To a public health agency because an employee's or employee's family member's contagious disease presents an imminent hazard of death or life threatening illness, and if the employee (or family member) is notified of the disclosure.

GINA follows a remedial scheme similar to that of Title VII of the Civil Rights Act, requiring employees to file administrative

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Employers Have Burden of Proof in RFOA Defense of Disparate Impact Claims

by REBECCA BOYD DUBLINSKE

Government contractor Knolls Atomic Power Laboratory was ordered by the federal government to reduce its workforce. In response, it terminated 31 employees. Thirty of the 31 employees were 40 years of age or older. Twenty-eight of the employees sued under the Age Discrimination in Employment Act ("ADEA"), claiming that Knolls had engaged in both disparate treatment (which requires intent to discriminate) and disparate impact (which requires a discriminatory result). Disparate impact claims allow plaintiffs to recover under the ADEA if the employer classifies employees without respect to age, but "if the classification adversely affects the employee because of that employee's age." As part of the disparate impact claim, the Knolls employees relied on an expert witness's study that concluded the results of the process that led to their terminations was so skewed according to the age of the employee that it would rarely occur by chance. In addition, of the criteria used by the managers in rating the pool of employees that were to be possibly terminated, the scores for "flexibility" and "critical skills" required the most discretion by the managers and were the firmest statistical ties to the outcome of which employees were selected for termination.

The U.S. Supreme Court in *Meacham v. Knolls Atomic Power Laboratory* found that if an employer wants to use the defense that it applies certain criteria for the terminations (or failure to hire or promote – depending on the adverse employment action in issue), it has the burden to raise it as an affirmative defense and has the burden of proof that the criteria are, in fact, "reasonable factor[s] other than age" ("RFOA"). That is, the employer can successfully defend an adverse impact claim if the outcome "was attributable to a non-age factor that was 'reasonable.'" The underlying focus in these types of cases is whether the criteria used by the employer was "reasonable."

The Court also found the use of the "business necessity" rule often applied in other types of civil rights claims is not applicable to disparate impact claims.

As a practical matter, this decision places a higher burden on employers in adverse impact age discrimination claims. Employers must carefully analyze employment decisions such as terminations and promotions that affect more than one employee to determine whether the outcome adversely affects employees age 40 and over. If there is an adverse impact on that age group, the employer should examine whether the criteria used are reasonable and were applied in an objective manner.

2008 Employment Law Client Seminar Preview

Watch for your invitation to Dickinson's 2008 Employment Law Client Seminar in your mail in mid-September. We will present this year's seminar at Stoney Creek Inn & Conference Center in Johnston, Iowa, from 8:45 a.m.-4:15 p.m. on Thursday, October 16. This year's program will feature an in-depth interactive session on workplace investigations and retaliation claims, as well as updates on recent case law, the Iowa Smokefree Air Act and more. As always, the day will provide opportunities to network with fellow professionals and interact with and ask questions of our attorneys. We are looking forward to seeing and visiting with you there.

Threat of Retaliation Claims Continues to Rise

by JILL R. JENSEN-WELCH

Like the rain and rising rivers in Iowa this past June, retaliation claims continue to threaten employers. Recent U.S. Supreme Court decisions make retaliation claims easier than ever for workers to make and to win. Wise employers will take heed to avoid being flooded with retaliation claims.

Retaliation Rivers (statutes) and Rain (court decisions)

Retaliation is any adverse action that follows a protected activity, where there is a causal connection between the two. As the U.S. Supreme Court clarified in its 2006 decision, *Burlington Northern & Santa Fe Railway Co. v. White*, 126 S. Ct. 2405, 165 L. Ed. 2d 345, the adverse action must be materially adverse such that it might dissuade a reasonable worker from engaging in protected activity. Protected activity includes making or supporting a complaint of illegal conduct.

Sources of this protection are found in the intricate and complex web of laws that expressly prohibit retaliation against workers who engage in otherwise protected conduct. A few of the federal laws in this web include Title VII, the Age Discrimination in Employment Act ("ADEA"), the Americans with Disabilities Act ("ADA"), the Family and Medical Leave Act ("FMLA"), the Uniformed Services Employment and Reemployment Rights Act ("USERRA"), the False Claims Act ("FCA"), and many more. Many state, county, and city laws also prohibit retaliation in the workplace.

In addition, employment retaliation prohibitions are constantly being added to the law. For example, in August 2008, President Bush signed the Consumer Product Safety Improvement Act of 2008 ("CPSIA"). This law includes protection for employees who report what they reasonably believe to be a violation of this law; it also protects other employees who participate in proceedings related to alleged violations of this law. Manufacturers, private labelers, distributors, and retailers of consumer products are governed by the new CPSIA. This illustrates another point: There are industry-specific laws with retaliation protections, as well as general employment laws that prohibit retaliation for all employers who meet that law's requirements (such as Title VII, which governs employers with 15 or more employees).

Feeding the rivers of retaliation statutes is the rain of court decisions interpreting them. Sometimes the court decisions bring rain that widens the protections of the law; at other times, they bring dry conditions that shrink the banks of the laws. Recently, the U.S. Supreme Court has been hearing more retaliation claims than ever, and their decisions indicate receptiveness to them. Let's examine the two most recent decisions of 2008.

Still Waters Run Deep: Retaliation as a Form of Discrimination

If you think the waters of retaliation are still, realize that still waters run deep. Recently, the U.S. Supreme Court expanded discrimination laws to include retaliation protection even though the laws themselves did not include it. This occurred in the two cases, both decided on May 27, 2008, of *Gomez-Perez v. Potter*, 128 S. Ct. 1931, and *CBOCS West, Inc. v. Humphries*, 128 S. Ct. 1951. This kind of retaliation rainmaking can be particularly disconcerting for employers because the courts see causes of action that do not appear in the plain language of the law.

- *Gomez-Perez v. Potter* (ADEA). Gomez-Perez transferred from one post office location in Puerto Rico to another. When she tried to transfer back to her original location and job, her position was converted to part-time and filled with a younger worker. She complained that this had been done because of her age. After that, Gomez-Perez said her supervisor accused her of groundless complaints (including an accusation of sexual harassment), her name was written on sexual harassment posters, her working hours were drastically reduced, and her co-workers told her to go back to where she belonged. Age and retaliation claims were filed under the authority of the ADEA. The question for the Supreme Court was whether the ADEA prohibited retaliation against federal government employees. When the ADEA was first passed in 1967, it protected only private sector employees. In 1974, the ADEA was amended, and one of those amendments included extending the ADEA's coverage to employees of the federal government. Rather than merely change the definition of covered employees and covered employers to encompass federal employees, the 1974 amendment created a separate and distinct section to the ADEA for them. This new section prohibited only age "discrimination" — it did not mention retaliation at all. The Court held that retaliation is a type of discrimination and is included within statutory prohibitions against discrimination, even if not expressly mentioned in the statute. The six-member majority said retaliation against a person because she has complained of age discrimination is just another form of age discrimination, and that prohibiting discrimination quite naturally includes discrimination on account of having complained about that very discrimination. This decision is particularly important because the federal government is the largest employer in the nation. There are approximately 684,000 career employees at the U.S. Postal Service (which does not include temporary or contract

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workers), and another 1.8 million non-post office federal employees, making ADEA retaliation protections now available to about 2.5 million additional persons.

- *CBOCS West, Inc. v. Humphries* (42 U.S.C. Section 1981). Humphries claimed he was dismissed from his job as assistant manager of a Cracker Barrel restaurant because of his race and because he had complained that the dismissal of another black employee was due to race. Humphries filed race and retaliation claims under both Title VII and 42 U.S.C. Section 1981. Section 1981 prohibits race discrimination in the making and enforcement of contracts, including employment contracts. In a 7-2 decision, the Supreme Court held that retaliation protection is included within Section 1981, even though Section 1981 does not say anything about retaliation. The *Humphries* decision is particularly important for three reasons. First, Section 1981 covers all employers, regardless of size, while Title VII covers only those employers with 15 or more employees. Second, while Title VII imposes damage caps based on the size of the employer, damages are unlimited in Section 1981 claims. Finally, Section 1981 claims may be filed in court up to four years after the alleged race discrimination or retaliation occurred, whereas Title VII requires the filing of such charges within 300 days of occurrence.

The Forecast: Clarifying "Protected Activity"

The forecast calls for more "rain," as the Supreme Court is set to hear yet another retaliation case this year: *Crawford v. Metropolitan Government of Nashville and Davidson County*. At issue in this case is whether the anti-retaliation provision of Title VII protects a worker from being dismissed because she ***cooperated*** with her employer's ***internal*** investigation of sexual harassment. The Second Circuit held Crawford was not protected from retaliation because the case involved a mere internal investigation in which Crawford was a witness. Yet, EEOC guidance and decisions from at least five other federal courts of appeal would have protected her from retaliation based on her cooperation with an internal investigation. Oral argument is set for October 8, 2008. We expect this decision will set boundaries on what kinds of "protected activities" will shroud a worker with retaliation protection. Based on the approach the current Court has taken in its recent retaliation decisions, *Crawford* very well may succeed in reversing the Second Circuit.

Flood Control Measures/Levees

There are several risk management measures employers can take to prevent retaliation claims.

1. *Policies*: Employers absolutely must have written anti-retaliation policies. Many employers include anti-retaliation provisions within their EEO and harassment policies. That is necessary, but not sufficient in today's workplace. In addition, anti-retaliation provisions should be included in other policies that touch on employment laws containing retaliation protections. More and more, the employer's best practice is to include a stand-alone anti-retaliation policy in the employee handbook and/or personnel policies manual.

2. *Training*: A second "must have" preventative measure is anti-retaliation training. Like policies, anti-retaliation content should be included in training programs that cover workplace discrimination, harassment, safety, etc. Even better is stand-alone anti-retaliation training explaining what retaliation is, providing examples of it, discussing when retaliation becomes an issue, and providing guidance on what to do when retaliation may have occurred.

3. *Employment Reference Checks*: The possibility of retaliation is heightened when providing employment references for current and former employees. It is best for employers to adopt policies and practices to tightly control employment reference checks. This includes centralizing the responsibility in one area or person (such as Human Resources), training that person in proper procedures, verifying the validity of the reference check being sought, standardizing the information to be released, obtaining the workers' written permission for releasing information, and documenting all references given.

4. *Rehire Policies*: Another employment activity that can carry the risk of retaliation claims is indicating whether former employees are eligible for rehire. If an employee is deemed ineligible for rehire because of his/her prior protected activities, then failure to rehire, or telling prospective employers of that status as part of a reference check, may result in a retaliation claim. While a policy or practice of never rehiring former employees is the best way to combat this risk, it is not always practical or realistic. Instead, consider eliminating the "eligible for rehire" category from forms and systems, or very carefully defining what conditions will render a former employee ineligible for rehire, being sure to exclude workers' protected activities from that list.

5. *Workplace Culture*: A working environment that promotes productivity, professionalism, and that welcomes complaints will go a long way toward retaliation prevention. Employees need to feel comfortable enough to bring forward concerns about any conduct they believe, in good faith, may be illegal, unethical, or unsafe. This includes knowing when, where, and to whom (employers must provide more than one person) to go with problems. Reports of problems, or direct observation of problems by supervisory staff, need

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to be taken seriously and investigated where appropriate, with due considerations and protections provided for all involved. If employees fear retaliation from blowing the whistle, standing up for one's self, or cooperating with an investigation, employers will lose the opportunity to become aware of and fix problems before they become too hot to handle. This can result in unnecessary turnover and other operational costs.

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complaints prior to suit. However, GINA specifically does not permit a claim of genetic information discrimination based on disparate impact. The damage award structure under GINA is similar to that of Title VII.

GINA does ***not*** preempt state laws with stricter requirements.

The Equal Employment Opportunity Commission is supposed to promulgate regulations by May of 2009. In the intervening period prior to the law becoming effective with regard to employment, it is suggested employers:

- Update antidiscrimination provisions in all policies, handbooks, training programs, and equal employment opportunity statements to include "genetic information."
- Review workplace policies and interview policies regarding inquiry into and collection of genetic information. Do not inquire into family medical histories or potential genetic information. Even if you believe your inquiry or collection meets one of the enumerated exceptions (such as FMLA compliance), proceed with caution and limit the scope as much as possible. Note that an employer's sincere concern in asking an employee about a sister's breast cancer or a father's battle with colon cancer could potentially result in later litigation. Evaluate the need for revisions to forms, applications, medical records requests, and other documents.
- Revisit policies on storage and release of potential genetic information.
- Conduct training for supervisors, human resources personnel, and other employees — particularly those who may encounter other employees' genetic information — to educate them on the implications of GINA.

Chambers USA Rankings Warrant Thank You to Clients

We offer sincere thanks to you, our clients, for your generous comments that resulted in our firm being very well represented in the recently released 2008 edition of *Chambers USA: America's Leading Lawyers for Business.* Dickinson was one of only three firms in Iowa to receive a "Band 1" ranking — the highest ranking awarded — in the area of Labor & Employment. In addition, the firm was one of only eight in Iowa to be ranked in every area researched by Chambers USA: Labor & Employment, Corporate/M&A, Litigation, and Real Estate. Eight Dickinson attorneys received individual recognition in this year's publication.

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Again, thanks to all of you who shared your assessment of our firm and attorneys with Chambers and Partners. We were humbled by your generous comments and consider it a privilege to work for such fine clients. We also welcome your direct evaluations and remind you that you have a standing invitation to let us know how we can serve you better.