

The Employment Brief

Updates in Labor and Employment Law to Help Your Business Succeed.



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Supreme Court Lets Public Employer Look at Employee's Private Texts

By Darrell VanDeusen

In *City of Ontario v. Quon*, 2010 WL 2400087 (U.S. June 17, 2010), the Supreme Court reversed the Ninth Circuit and held that a police sergeant had no reasonable expectation of privacy in text messages transmitted on a department-issued pager and stored by an outside service provider. In so doing, the Court reaffirmed the teachings on workplace privacy articulated in *O'Connor v. Ortega*, 480 U.S. 709 (1987), which established the Fourth Amendment protections involved when searching a public employee's desk.

Here are the salient facts. The City of Ontario, California contracted with a service company to provide wireless text-messaging services. The City distributed two-way pagers to its employees, including Jeff Quon. Before they received the pagers, employees signed an "Employee Acknowledgment" regarding the City's Computer Usage, Internet and E-mail policy. The Acknowledgment stated that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality" when using these resources. The policy did not specifically include pagers.

After Quon and another employee went over the monthly character limit a number of times, the Police Commander let it be known at a meeting that he was done being a "bill collector with guys

going over the allotted amount of characters on their text pagers." The City then conducted an audit of pager usage.

Because the City officials could not access the text messages themselves, they requested transcripts from the service provider. Upon review, it was determined that many of Quon's messages were intended to be "private" and were sexually explicit texts to both his wife and his girlfriend. When he learned that the City had reviewed these texts, he sued alleging that the City's "unreasonable search" violated the Fourth Amendment. A jury disagreed, but the Ninth Circuit reversed and held that, as a matter of law, there had been an unreasonable search. *(continued on page 3)*

NLRB CONSIDERING ELECTRONIC VOTING

By Eric Paltell

Since the passage of the National Labor Relations Act in 1938, the National Labor Relations Board ("NLRB") has used secret ballot on-site elections when employees are considering representation by a labor organization. Under this time-tested booth and ballot box process, elections are held in the employer's work place, where an NLRB official confirms voter identity and ensures that voters make their selection in secrecy, cloaked behind the curtain of a voting booth. On June 9, 2010, the NLRB announced that it is considering implementing "secure *(continued on next page)*

electronic voting services both for remote and on site elections.” The notice from the NLRB -- which came out in a request for proposals from contractors -- may be a signal that the Board is seeking to alter the election process in ways that may favor unions.

For years, unions have sought to expand the use of mail ballot elections, which are used in rare instances with the NLRB (only 150 of 2085 elections in 2008 were conducted by mail ballot). Unions argue that allowing remote, off-site voting expands voter access. However, employers have long feared that any type of off-site voting procedure would be prone to tampering, as voters are subject to union coercion and *de facto* public voting. For example, union supporters could convene a meeting at some off-site location, where employees, in full view of their coworkers, walked up to a computer terminal and cast their vote. Those employees who choose not to attend such a meeting, or insisted on voting in private, could face ridicule and retaliation from their pro-union coworkers.

Another troubling aspect of the NLRB's proposal is the manner in which it was made public. The issuance of a request for information suggests that the NLRB may now be using its procurement authority to avoid the notice and comment procedures for issuing regulations. This could be a new strategy by labor unions to circumvent the legislative obstacles that seem to have stalled the Employee Free Choice Act (“EFCA”), which would have eliminated the secret ballot election.

ADVICE FROM THE BENCH: WHEN NOT TO FILE A DISCRIMINATION CLAIM

By John Bolesta

While conducting legal research for an employment discrimination case we are handling, I stumbled across an opinion

from the United States District Court for the Eastern District of Virginia that was surprisingly frank in its assessment of many cases currently being brought in the courts. The case, *Keegan v. Dalton*, 899 F. Supp. 1503, 1514-1515 (E.D. Va. 1995), involved a Department of Navy employee who was denied long-term training, a benefit that would have afforded her up to one year of intensive study and research programs, with a federal salary, tuition, and travel costs to boot. After disposing of her claims, which essentially alleged she was denied the training because of gender bias, Chief Judge James Spencer concluded the decision by expressing his frustration with the seemingly steady stream of meritless discrimination cases that had been flooding the federal courts:

To the case brought before the Court this day, it is enough to say that the plaintiff's claims fail entirely, and that the case will be dismissed. To the genre of cases to which it belongs, however, there is something more. This case is yet another entrant in a tiresome parade of meritless discrimination cases. Again and again, the Court's resources are sapped by such matters, instigated by implacable parties and prosecuted with questionable judgment by their counsel. It is high time for this to stop. The Court entreats the legal community to pause and reflect, during their pre-filing inquiry and continually as they nurse the case to maturity, whether they can identify any tenable basis for a claim of discrimination other than their client's skin color, age, religion, or gender. Without sufficient evidence of discrimination, that is, an adverse employment decision made because of a protected characteristic (and not simply one that concerns a person exhibiting a protected characteristic), a case under Title VII must fail.

Personality conflicts are a fact of life, occurring in the work-place with the frequency of overly-demanding

supervisors and crushed employee expectations. And yes, discrimination is also alive and well in America today. But one will not unearth invidious distinctions lurking beneath every act of discipline or every denial of advancement. Any attempt to argue otherwise trivializes the laws enacted to eradicate the bigotry that still blocks the path to individual achievement and inhibits our collective advancement.

It also fosters a culture of victims. This Court does not have the power to prevent the rain from falling into anyone's life, and is not about to intercede in every work-place squabble. Where, as here, the law offers no remedy, the responsibility for recovering from the occasional affronts of office life falls at the feet of the complainant. Thus, a person who clings steadfastly to the belief that she has been unjustly wronged, when all the evidence suggests otherwise, risks more than a judicial defeat. She also imperils her own ability to rise above the normal setbacks of life and renders herself ill-prepared to face the next inevitable pitfall. And this self-inflicted wound is far more damaging.

To those souls who still labor under the heavy hand of illegal workplace discrimination, the doors of this Court will remain ever open. The pretenders, though, must learn to wrest control of their own lives from deleterious circumstances without seeking recourse from the courts.

Unfortunately, the continual increase in EEOC charge filings and employment discrimination lawsuits casts serious doubt that the “tiresome parade of meritless discrimination cases” has abated in any way in the fifteen years since Judge Spencer delivered his opinion.

SUPREME COURT RULES TWO-MEMBER NLRB PANEL IMPROPER

By Michael Severino

In *New Process Steel, L.P. v. National Labor Relations Board*, No. 08-1457 (June 17, 2010), the Supreme Court questioned the validity of hundreds of NLRB decisions when it held that the two-member panel that had previously decided cases did so without proper legal authority. Although the Court acknowledged that three-member panels can delegate its authority to two members, the Court ultimately concluded that the termination of the three-member panel also terminated any such authority to delegate. This decision leaves in abeyance approximately 600 cases decided by the two-member NLRB.

The NLRB had only four members in late 2007. Recognizing that two of the four members' terms were to expire at the end of 2007, the four members voted to delegate their authority to a three-member panel. The NLRB reasoned that the remaining two members would constitute a quorum of the newly created three-member panel, and thus, could decide the cases that came before the Board. However, the recess appointment of one of those three members expired at the end of 2007, leaving the remaining two members as the only members of the Board. As a two-member panel, they decided nearly 600 cases until March 27, 2010, when President Obama made two recess appointments.

New Process Steel challenged the authority of the two-member Board. The Supreme Court, analyzing the language of the National Labor Relations Act, recognized that while the NLRA provides that two members may constitute a quorum sufficient to decide cases, such a two-member quorum could only function while there were at least three actual and active Board members (as may be the case when one of the three members is disqualified from a particular case). Once the third member was lost

“permanently”, however, so too was the delegation of authority to the two remaining members. The two-member panel cannot act as a quorum for a defunct three-member panel.

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Employer May Look at Private Texts

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A unanimous Supreme Court (with concurrences from Justices Stevens and Scalia) reversed the Ninth Circuit. The ruling, however, was narrowly tailored to the facts of this case. The Court held that the search was justified by the City's interest in determining whether a monthly character limit for text messages under the City's contract with the service provider was sufficient to meet the City's needs. Further, the scope was reasonable because the review of the text message transcripts was “an efficient and expedient way” to determine whether Quon's exceeding of the monthly character limit was work related.

The most important take away from this case for employers, both public and private, is to have a policy that permits employer access to all employer owned electronic communication tools. Then make sure employees understand that if they want to use electronic communication tools for private communications they should go buy their own.

MARYLAND HEALTHCARE WORKERS PROTECTED BY WHISTLEBLOWER STATUTE

By Randi Klein Hyatt

The Maryland Court of Appeals recently held that a discharged nurse was permitted to assert a wrongful discharge claim under the Health Care Worker Whistleblower Protection Act (HCWWPA), even though she had not reported her concerns to an external

board or agency (such as the State Board of Nursing) and even though her complaints were about co-worker wrongdoing, as opposed to employer wrongdoing.

In *Lark v. Montgomery Hospice, Inc.*, 2010 WL 1915469 (Md. May 13, 2010), a hospice care nurse had spent years making internal complaints against her fellow nurses, complaining that they were not properly completing admissions forms; were not properly documenting patient charts; were administering narcotics to patients without proper authorization or prescription; were sending out narcotic starter packs to unauthorized persons; were not providing proper clinical supervision; and were otherwise failing to comply with various Maryland health care statutes and regulations.

Ms. Lark has raised these issues repeatedly with various supervisors, but apparently to no avail. Ms. Lark did not file any complaints with any external agency, in particular, the State Board of Nursing. Instead, she emailed her concerns to various management officials during the course of her employment, and regularly complained about these issues from September 2006 through April 2007. Ironically, Ms. Lark was discharged on April 14, 2007, for alleged unsafe nursing practices.

Ms. Lark filed suit against her former employer for wrongful discharge. She claimed that she had a duty to bring these issues to the attention of management, which were meant to safeguard patients under her care as a registered nurse, and further, that she would be subject to personal liability and disciplinary action by the State Board of Nursing if she failed to make such reports. The nursing home moved to dismiss the case, arguing that Ms. Lark could not maintain a lawsuit under the Whistleblower Act because she was required to file

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an external complaint with the appropriate board, the State Board of Nursing, and she had not done so. The nursing home also argued that the HCWWPA only protects employee complaints about employer malfeasance and not co-worker misconduct.

The trial court agreed with the employer and dismissed the lawsuit. Indeed, under Maryland law, it has been long-established that whistleblower activity will only support a lawsuit if the whistleblower complaints are lodged with an external agency that has the power to take action against the employer if the alleged wrongdoing is discovered true.

On appeal, the Court of Appeals of Maryland (the state's highest court) reversed the trial court's decision. The court held that an internal complaint to management is enough to trigger protection under the HCWWPA because the language in the statute prohibits retaliation against an employee "who discloses or threatens to disclose to a supervisor or board an activity, policy, or practice of the employer that is in violation of a law, rule or regulation." The court then spent several pages of its decision discussing positively court decisions from other states that recognized the failure to protect employees who raise health concerns, even if only to an immediate supervisor, would stifle the willingness of other employees to complain and would result in inadequate public health protection. Therefore, the unlawful acts that the employee threatens to report include acts committed by fellow employees.

In conclusion, the Court wrote: "A Health Care Employer has a duty to correct violations that endanger the health and safety of patients to whom that employer owes a duty of care. When such violations are reported to one of its supervisors, a Health Care Employer cannot avoid liability under the Act on the ground that the violations it failed or refused to correct were committed by employees who had no authority to

establish the employer's policy." While the employer in this case may ultimately be found justified in its termination decision, the Court of Appeals made clear this would not be a summary judgment decision, but now, a jury question.

S U P R E M E C O U R T A D D R E S S E S T I M E L I N E S S O F T I T L E V I I D I S P A R A T E I M P A C T C L A I M S

By Kelly C. Hoelzer

Title VII of the Civil Rights Act prohibits employers from discriminating against employees on the basis of their race, color, creed, gender, national origin, or religion. There are two essential theories of Title VII discrimination: (1) disparate treatment – where an employer treats an employee or applicant less favorably because of his or her protected characteristic; and (2) disparate impact – where an employer implements a facially neutral employment practice (such as a hiring examination) that deprives certain employees or applicants of the benefits of employment because of their protected characteristic.

Regardless of the theory, however, all employees or applicants, before suing for a violation of Title VII, must first file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC) within 300 days of the last occurrence of an unlawful employment practice. Plaintiffs filing charges outside the 300-day window will likely see their lawsuits dismissed before even reaching the merits of their claims.

In *Lewis v. City of Chicago*, No. 08-974 (May 24, 2010), the U.S. Supreme Court considered whether African-American applicants for entry-level firefighter jobs in Chicago, whom the City refused to consider for available positions due to their scores on the City's hiring test, brought timely discrimination charges.

In holding that they had timely filed their charges, the Supreme Court confirmed that the period for filing a charge runs from the time the employer institutes an employment practice creating an adverse impact, and starts running again each time the employer later "uses" that practice in an employment decision.

The Lewis case goes back to July 1995, when the City of Chicago administered a written test to over 26,000 applications for city firefighter positions. Based on their test scores, the City created a hiring eligibility list which divided the applicants into three categories: "well-qualified," "qualified," or "not qualified." In January 1996, Chicago issued the results of the exam. The test had a disparate impact on minority applicants, who, based on their scores, were five times less likely than white applicants to be hired because they were not in the "well qualified" group.

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U N V E S T E D I N C E N T I V E S T O C K O P T I O N S A R E N O T W A G E S U N D E R M A R Y L A N D W A G E P A Y M E N T L A W

By Clifford B. Geiger

The Maryland Wage Payment and Collection Act (the "Act") requires employers to pay a terminated employee all wages due for work that the employee performed before the termination of employment, on or before the day on which the employee would have been paid the wages if employment had not terminated. A failure to comply with this payment obligation could result in the ex-employee receiving treble damages and attorneys' fees. Therefore, understanding the definition of "wage," and knowing when an employee has complied with all conditions to earn that wage, are critical to developing compensation plans designed to aid employee retention.

Awarding stock options that vest over a
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period of years is one method traditionally used to retain employees. On June 2, 2010, the Court of Appeals for Maryland (the state's court of last resort) issued its decision in *Catalyst Health Solutions, Inc. v. Magill*, 2010 WL 2178750 (Md. June 2, 2010), which addresses whether unvested incentive stock options are wages for purposes of the Act.

In February 2004, Martin Magill accepted a position as Vice President of Sales for Catalyst Health Solutions, Inc. In addition to a yearly salary, Magill's compensation package included the right to acquire stock options to purchase 40,000 shares of common stock pursuant to the company's stock option plan. Magill executed a grant agreement, dated March 1, 2004, which specified the award of options, an exercise price, and a vesting schedule. The stock options vested in equal installments over a period of four years. Under the plan and the agreement, upon termination of employment, the only stock options that could be exercised were those options that had vested on or before the date of termination.

In February 2006, Magill accepted employment elsewhere and resigned. Magill's employment with Catalyst continued for a short time, but after some negotiation over the terms of his separation, Catalyst terminated Magill's employment as of April 5, 2006, just eleven days before 8,750 stock options were scheduled to vest. Magill subsequently attempted to exercise all of his unvested stock options, but he was unsuccessful. Catalyst had blocked his account.

Catalyst asked the Circuit Court for Montgomery County to declare that Magill had no right to exercise any of his unvested stock options. Magill countersued, alleging the company's refusal to allow him to exercise the unvested stock options violated the Act. Relying on *Medex v. McCabe*, 372 Md. 28 (2002), the Circuit Court concluded that the unvested stock options were wages,

that Magill had done everything required to earn the wages, and that under the rationale of *Medex*, the vesting provisions of the grant agreements were void. Judgment was entered in favor of Magill in the amount of \$849,262.50.

The Court of Appeals disagreed and reversed the lower court decision because Catalyst had not promised Magill an unconditional grant of stock. The employer granted stock options in exchange for Magill's services, but the agreement explicitly conditioned the right to exercise the stock options on continued employment until an expressly defined date. Magill's entitlement to the stock options was not subject to the employer's whim or fancy regarding a payment date. Rather, the vesting schedule was a condition agreed upon in advance, to vest on a date certain, and because Magill's employment ended before the stock options vested, Magill did not do everything required to earn them.

NLRB Panel Ruled Improper

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The Supreme Court's decision demonstrates the potential effects of governmental gridlock. While partisan politics likely played a large part in creating the problem, it bears noting that the opinion was written by Justice Stevens – a liberal justice – and joined by its conservative wing. While the decision itself is fairly straightforward, the implications moving forward are not so clear. In particular, the Supreme Court decision remained completely silent as to the fate of the nearly 600 cases that were decided by the now unauthorized two-member panel.

The NLRB did issue a press release shortly after the Supreme Court issued its decision and explained that at least 70 pending appeals of its decisions would be remanded to the Board. The current NLRB will decide the proper means for considering and resolving the cases. Notably, Member Sehaumber's term will

expire this year and Member Liebman's term will expire next year.

APPEALS COURT UPHOLDS PRINCE GEORGE'S COUNTY FURLOUGH ACTIONS

By Eric Paltell

As readers of this newsletter may recall, last August, the United States District Court for the District of Maryland held that Prince George's County, Maryland violated the Contracts Clause of the United States Constitution by furloughing union represented County employees. *Fraternal Order of Police v. Prince George's County Maryland*, 645 F. Supp. 2d 492 (D. Md. 2009). The decision caused great concern for public sector employers throughout the country, as most jurisdictions have been forced to resort to wage freezes, layoffs, and furloughs to combat budget crises. Fortunately, on June 23, 2010, the United States Court of Appeals for the Fourth Circuit reversed the lower court and found that Prince George's County acted

legally when it required approximately 5900 employees to forgo 80 scheduled work hours in Fiscal Year 2009, thereby saving the County 3.85% of the wages due these individuals. *Fraternal Order of Police v. Prince George's County Maryland*, No. 09-2187 (4th Circuit June 23, 2010).

Like most jurisdictions, Prince George's County is required to have a balanced budget each fiscal year. In 2008, the dramatic downturn in the Washington-area housing market, combined with the slumping economy, led to the projection of a \$48 million revenue shortfall for Fiscal Year 2009. To combat the deficit, the County turned to its public employee unions and asked them to forgo scheduled cost-of-living increases. The unions rejected the County's request, than take away scheduled wage increases.

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When, in late 2008, revised revenue numbers looked even worse (the deficit was projected to increase to \$58 million), the County implemented a furlough plan. In enacting the plan, the County relied upon language in the County Code which provides that employees may be required to "take leave without pay as a furlough" when the County Executive determines that revenue shortfalls "require the compensation level of a department, agency, or office to be reduced." However, the County Code also provides that a collective bargaining agreement may include language limiting the County's statutory right to furlough, and in such case, the County Code is amended insofar as it applies to the bargaining unit.

Although the Prince George's County union contracts did not include language limiting the County's right to furlough employees, the unions nevertheless filed suit. On August 18, 2009, Judge Williams of United States District Court ruled in favor of the unions. The County then appealed to the Fourth Circuit Court of Appeals.

In a unanimous decision, the Fourth Circuit disagreed with Judge Williams. The appellate court noted that it was undisputed that, although at one time the collective bargaining agreements contained language prohibiting furloughs, no such language was included in the current agreements. Accordingly, there was no restriction on the County's statutory right to furlough employees. As stated by the court: "simply put, the unions were free to protect any economic or financial expectancy with regard to wages and hours by securing the County's concurrence in a CBA that prohibited such furloughs, just as they previously had done. In essence, therefore, the unions are simply asking for the benefit of a contract provision that was left on the bargaining table."

Although the Fourth Circuit's decision is a major victory for Prince George's County, it is of limited application to other jurisdictions. Unlike many

localities, Prince George's County has language in its code authorizing employee furloughs, and the Fourth Circuit relied upon as language in reversing the lower court. Without such an express statutory authorization to furlough employees, it is quite possible the court may have reached a different conclusion.

Disparate Impact Claims

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Starting in May 1996, Chicago used its hiring list multiple times when hiring firefighters from the "well-qualified" pool. On March 21, 1997, one of the African-American applicants in the "qualified" group filed a discrimination charge with the EEOC, followed by several others. After the EEOC issued right to sue letters in July 1998, they sued Chicago in September 1998. The trial court allowed their case to go forward, but on appeal, the Seventh Circuit reversed, holding that the 300-day limitations period started to run when Chicago created its eligibility pool in January 1996, meaning that the applicants acted too late.

In a unanimous decision, the Supreme Court reversed the Seventh Circuit. Writing for the Court, Justice Scalia held that even though the plaintiffs did not file timely charges challenging the City's adoption of a practice – *i.e.*, the decision to exclude applicants who did not achieve a certain score on the hiring test – they could still bring disparate impact claims in a timely charge challenging the City's later application of that practice.

The Court applied a straightforward Title VII analysis, which states that a plaintiff may establish a disparate impact claim by "showing that the employer 'uses a particular employment practice that causes a disparate impact' on one of the prohibited bases." 42 U.S.C. § 2000e-2(k). Even though the institution of the unlawful hiring practice occurred outside the limitations period, each

subsequent use of that practice gave rise to a separate Title VII claim, triggering a new 300-day window for filing a charge.

The Court acknowledged that employers may now face new disparate impact lawsuits for employment practices in place for years. Justice Scalia concluded, however, it was not the Court's task to "assess the consequences of each approach and adopt the one that produces the least mischief."

KOLLMAN & SAUCIER NAMED ONE OF MARYLAND'S TOP LAW FIRMS

On June 11, 2010, Chambers and Partners announced that Kollman and Saucier has been ranked as one of the top management-side labor and employment firms in Maryland. This is the seventh consecutive year that our attorneys have been honored by Chambers as one of the premier firms in the region. According to clients surveyed by Chambers, "[Kollman and Saucier] is a great firm with knowledgeable lawyers. I'm glad that it's on our side."

In the 2010 rankings, Eric Paltell, Darrell Van Deusen, and Frank Kollman were listed as three of the top experts in employment law in Maryland. Additionally, Eric was one of only six lawyers in the state to receive a "Band 1" ranking--the highest rating possible rating from Chambers. The Chambers survey can be accessed on line at http://www.chambersandpartners.com/USA/Editorial/36634#org_76264