



DPS Legal Review

June 2010 Legal Services (404) 624-7423 Volume 9 No. 6

SEARCH OF EMPLOYEE'S TEXT MESSAGES HELD REASONABLE

The Plaintiff, an Ontario Police Department ("OPD") Special Weapons and Tactics ("SWAT") officer, received a pager for work from his government employer. A wireless company provided the City of Ontario, California, with service for pagers under a service agreement that allotted a limited number of characters sent or received each month. Usage in excess of the agreed upon amount would result in an additional fee. SWAT team members were given the pagers to help the Team mobilize and respond to emergency situations.

Before getting the pagers, the City announced a Computer Policy which reserved the right to monitor and log all network activity, including e-mail and Internet use, with or without notice. The Policy also provided that users should have no expectation of privacy or confidentiality when using these resources. The Plaintiff signed a statement acknowledging that he had read and understood the Computer Policy.

Within the first or second billing cycles, Plaintiff exceeded his monthly allotment. OPD told the Plaintiff about the overage, reminded him that messages sent on the pagers were considered e-mail that could be audited, and asked for reimbursement for the overage. He paid it, but he continued to exceed his limit. OPD decided to determine if its character limit was too low. OPD contacted its wireless provider and asked for transcripts for two months of Plaintiff's records. OPD's review showed that many of the messages on the Plaintiff's pager were not work related and some were sexually explicit.

This discovery led to an internal affairs investigation to determine whether the Plaintiff was violating OPD rules by pursuing personal matters while on duty. Only Plaintiff's messages sent during work hours were reviewed. In one month, only 57 of 456 messages generated

during work hours were work related. On average, Plaintiff sent 28 messages a day (of which only 3 were work related). Plaintiff was disciplined; he sued, alleging, in part, violation of the Fourth Amendment right to privacy.

HOLDING: The United States Supreme Court held that OPD's warrantless search of the transcripts was reasonable on two grounds. First, the Court held that the search was justified since it was conducted to determine whether the character limit on the City's contract with its wireless provider was sufficient to meet its needs. This was a legitimate work-related rationale. OPD had a legitimate interest in ensuring: a) that employees were not being forced to pay out of their own pockets for work-related expenses, or b) that the City was not paying for extensive personal communications.

Second, the Court held that the scope of the search was not excessively intrusive based upon the justification. The OPD used an efficient and expedient way to determine whether the Plaintiff's overages were the result of work-related messaging or personal use. The Court held that it was reasonable for OPD to review two months of transcripts to determine whether the character limits were sufficient. The Court also held that 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. For example, the Plaintiff could have anticipated that OPD might find it necessary to audit pager messages to assess the SWAT Team's performance in an emergency situation. Because of rapid changes in communication and information transmission, the Court held, "Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, or privacy expectations enjoyed by employees when using employer-provided communications devices." City of Ontario v. Quon, U.S. , 2010 WL 2400087 (U.S.).

RANDOM TAG CHECK

A Morrow Police Department officer was performing random checks of motor vehicle tags through the Georgia Crime Information Center ("GCIC") and the National Crime Information Center. The officer discovered that the owner of the vehicle the Defendant was driving was a male and that he had a suspended driver's license. The officer assumed that the driver was the owner, and he stopped the car. The Defendant produced a Georgia identification card.

The officer checked the status of the Defendant's license and learned it had been revoked and that he was a habitual violator. The Defendant was arrested for driving with a suspended license. During the search incident to the arrest, the officer recovered a clear bag containing suspected marijuana. Later, the officer charged the Defendant with possession of less than one ounce of marijuana. The Defendant moved to suppress the evidence.

HOLDING: The Court held that the particularized and objective basis for the initial stop was information from GCIC that the male owner of the registered vehicle Defendant was driving had a suspended driver's license. Once the stop was made and the officer learned that the Defendant driver was not the vehicle's owner, the officer had a duty to investigate based upon Defendant's failure to produce a driver's license. Humphreys v. State, __S.E.2d__, 2010 WL 2293066 (Ga. App.).

DRAM SHOP ACT

A 24 year-old driver lost control of his vehicle, crossed the center line of the road, and caused a head-on collision with a van traveling in the opposite direction. Six people died in the collision. The driver who caused the accident had a blood alcohol concentration of 0.181. Three of the crash's survivors sued Exprezit!, a convenience store, based on the Georgia Dram Shop Act ("GDSA"). The suit alleged that four hours prior to the crash an Exprezit! convenience store employee sold a 12-pack of beer to the driver who caused the accident (despite the fact that he was noticeably intoxicated).

HOLDING: The Court held that the GDSA did not apply to Exprezit!'s alleged sale of the packaged beer to the negligent driver. The convenience store sold the beer in a closed, packaged container, which was not intended to be consumed on the store premises. The negligent driver could not legally consume the alcohol on

the store premises or in the motor vehicle he drove to the store. The Court held that there was no basis for concluding that the convenience store should have foreseen the driver would soon drive while intoxicated from consuming the packaged beer it sold. Flores v. Exprezit! Stores, __S.E.2d__, 2010 WL 2246292 (Ga. App.).

INQUIRING MINDS

QUERY: Which license suspensions require proof of actual notice?

ANSWER: Proof of actual notice is required for the following suspensions:

- ALS or implied consent
- Failure to appear (pre-January 1, 2010)
- Child support
- School suspension
- Safety responsibility
- Insurance cancellation (no new insurance cancellation suspensions were imposed after October of 2002).

ALS REMINDERS

⊗ A conflict letter from a Petitioner's attorney does not mean that the ALS hearing is automatically continued. At times, an attorney may resolve the conflict and appear for the ALS Hearing. **You must appear** for the ALS hearing **unless the Court continues** the case. If you have questions regarding whether a continuance has been granted, please contact Dee or Beverly.

⊗ **Temporary Driving Permits** – After you take a valid driver's license from a DUI defendant, remember to issue the driver a temporary driving permit. If a DUI defendant has a valid driver's license and a 1205 form is issued, always sign the 30 day temporary driving permit at the bottom of the 1205 form. If a DUI defendant has a valid driver's license and a 1205 form is not issued, attach a 180 day temporary driving permit sticker to the defendant's DUI citation. (See O.C.G.A. § 40-5-67(b)).

⊗ Even when a Petitioner refuses to sign the 1205 form, **you are still required to sign** the temporary permit if the Petitioner has a valid license.

QUOTABLE WISDOM WORKS

"All mankind is divided into three classes: those that are immovable, those that are movable, and those that move."
~ Benjamin Franklin

Published with the approval of Colonel Bill Hitchens. Legal Services: Melissa Rodgers, Director, Lee O'Brien and Jacqueline Bunn, Deputy Directors, and Dee Brophy, ALS Attorney. Send questions/comments to jbunn@gsp.net.