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By **Anthony J. Oncidi***

## City's Search Of Text Messages Was Reasonable Despite Employee's Expectation Of Privacy

*City of Ontario v. Quon*, 560 U.S. ___, 2010 WL 2400087 (2010)

The City of Ontario's Computer Usage, Internet and E-mail Policy provides that use of the city's computers and other electronic equipment, networks, etc., is limited to city-related business, that access is not confidential and "users should have no expectation of privacy or confidentiality when using these resources." Sergeant Jeff Quon, a member of the city's SWAT team, signed an employee acknowledgement of the Policy and attended a meeting in which he and others were informed that text messages were considered to be the same as e-mail and could be audited by the department. However, Quon was later told that the content of his text messages would not be audited so long as he paid the department for any charges associated with texting more than 25,000 characters in a billing cycle. When a lieutenant in the department "grew weary" of being a bill collector for officers who exceeded the 25,000 character limit, the department contacted Arch Wireless and requested transcripts of the text messages. After the department received the transcripts from Arch, internal affairs conducted an investigation to determine "if someone was wasting city time not doing work when they should be." The investigation revealed that many of Quon's messages were personal in nature and sexually explicit.

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Quon and those with whom he had texted sued the city for violating their Fourth Amendment right to be free of an unreasonable search and seizure. In deciding the case, the Supreme Court assumed that Quon had a reasonable expectation of privacy in the text messages and that the city's review of those messages constituted a Fourth Amendment search analogous to a government employer's search of an employee's physical office or work space. Nevertheless, the Court determined that the search of Quon's text messages was reasonable because it was motivated by a legitimate work-related purpose and because it was not excessive in scope. Therefore, the city did not violate the Fourth Amendment in reviewing the text messages. *Cf. Comite de Jornaleros de Redondo Beach v. City of Redondo Beach*, 2010 WL 2293200 (9th Cir. 2010) (city's ordinance prohibiting the act of standing on a street or highway soliciting employment, business or contributions from occupants of an automobile is a valid time, place or manner restriction and does not violate First Amendment rights).

## College Professor's Racially Charged E-Mails Did Not Create Hostile Environment

*Rodriguez v. Maricopa County Cmty. Coll.*, 605 F.3d 703 (9th Cir. 2010)

Professor Walter Kehowski sent three racially-charged emails over a distribution list maintained by the college district where he teaches math. Every district employee with an email address received Kehowski's messages, including plaintiffs in this case – a certified class of the district's Hispanic employees. Plaintiffs sued the district, its governing board and two district administrators, claiming their failure to properly respond to the emails created a hostile environment in violation of Title VII and the Equal Protection Clause. The Ninth Circuit determined as a matter of law that the employees did not establish conduct constituting illegal harassment because "the right to provoke, offend and shock lies at the core of the First Amendment…. Those offended by Kehowski's ideas should engage him in debate or hit the 'delete' button when they receive his emails. They may not invoke the power of the government to shut him up." *See also Holman v. Altana Pharma US, Inc.*, 2010 WL 2599337 (Cal. Ct. App. 2010) (prevailing-party employer in FEHA hostile environment case may recover expert witness fees from plaintiff pursuant to Cal. Code Civ. Proc. § 998, but the amount of the award is subject to "scaling" based upon the relative resources of the parties).

## Merchants Who Sold Employer's Product Were Not Employers Themselves

*Martinez v. Combs*, 49 Cal. 4th 35 (2010)

Plaintiffs are seasonal agricultural workers whom Munoz & Sons had employed during the 2000 strawberry season. The employees sued Munoz and two produce merchants (through whom Munoz sold strawberries) for alleged minimum wage violations. Following Munoz's bankruptcy, plaintiffs contended that the produce merchants were joint employers along with Munoz; that plaintiffs were the third-party beneficiaries of the contract between Munoz and the merchants; and that they were parties to an oral employment agreement with one of the merchants. The California Supreme Court held that although the Industrial Wage Commission's ("IWC") wage orders do generally define the employment relationship in actions to recover unpaid minimum wages, the IWC's definition of "employer" does not impose liability on individual corporate agents acting within the scope of their agency. The Court held that the merchants did not "suffer or permit" the employees to work on their behalf and did not "exercise control over their wages, hours or working conditions." Furthermore, the employees were not third-party beneficiaries of any contract to which Munoz was a party. *See also Schmidt v. Burlington N. & Santa Fe Ry. Co.*, 605 F.3d 686 (9th Cir. 2010) (Burlington Northern may have been employer for purposes of Federal Employers Liability Act claim); *Valladolid v. Pacific Operations Offshore, LLP*, 604 F.3d 1126 (9th Cir. 2010) (workers' compensation benefits provision of the Outer Continental Shelf Lands Act applies to any injury resulting from operations on the outer continental shelf regardless of the site of the injury).

## Class Action Should Have Been Certified As To Claims For Overtime, But Not Meal And Rest Periods

*Faulkinbury v. Boyd & Assocs., Inc.*, 2010 WL 2525710 (Cal. Ct. App. 2010)

Plaintiffs sought to represent and certify a class of 4,000 current and former employees of Boyd & Associates, which provides security guard services throughout Southern California. Plaintiffs alleged that Boyd denied the putative class members off-duty meal periods and rest breaks and that it had failed to include certain reimbursements and an annual bonus payment in calculating the employees' hourly rate of overtime pay. The trial court denied certification as to all three subclasses, and the Court of Appeal affirmed as to the claims for meal and rest periods on the ground that the evidence submitted by Boyd showed the ability of each of its security guards to take breaks depended on individual issues. However, the Court reversed the denial of class certification as to the overtime subclass, reasoning that the trial court abused its discretion to the

extent it decided common issues did not predominate. *See also Munoz v. BCI Coca-Cola Bottling Co.*, 2010 WL 2306419 (Cal. Ct. App. 2010) (parties to class action settlement provided trial court with information necessary to determine settlement was reasonable and fair and to overrule objection); *Solis v. Jasmine Hall Care Homes, Inc.*, 2010 WL 2612692 (9th Cir. 2010) (employer's appeal from partial summary judgment is dismissed for lack of jurisdiction under the final decision rule in case involving alleged violations of the Fair Labor Standards Act).

## Alien Employee Who Was Induced To Come To The U.S. Was Properly Awarded Unpaid Wages

*Singh v. Southland Stone, U.S.A., Inc.*, 2010 WL 2613089 (Cal. Ct. App. 2010)

Gurpreet Singh moved from India to California to work as a general manager for Southland Stone. After Singh resigned and returned to India, he filed suit against Southland and its president (Ravinder S. Johar), alleging various contract and tort claims. The jury awarded Singh more than $980,000 for past and future noneconomic damages, economic damages, unpaid wages and punitive damages. The Court of Appeal affirmed the judgment in part (as to the denial of the breach of contract claim and the award of $6,800 in wages whose payment defendants conditioned upon Singh's signing a release), but otherwise reversed the judgment. The Court reversed the judgment on the claim for breach of the implied covenant of good faith and fair dealing (because Singh was employed at will) and the claim for intentional infliction of emotional distress (because it was barred by the exclusive remedy of the Workers' Compensation Act) and ordered the trial court to enter judgment for defendants on those claims. The Court reversed the judgment and ordered a new trial on the claims for promissory estoppel, misrepresentation to induce relocation for employment, false promise, intentional misrepresentation and concealment because the special verdict findings were inconsistent. The Court also held the damages awarded appeared to be duplicative.

## Fire Dep't Applicants' Title VII Challenge Was Not Barred By Statute Of Limitations

*Lewis v. City of Chicago*, 560 U.S. ___, 130 S. Ct. 2191 (2010)

Plaintiffs in this case (more than 6,000 African-Americans) had applied to serve in the Chicago Fire Department. They challenged as discriminatory the city's decision to hire only applicants who had scored 89 or above on a written examination. The city stipulated that the 89-point cutoff had a "severe disparate impact against African Americans," but argued that the cutoff score was justified by business necessity. Although plaintiffs won at the district court level, the Seventh Circuit Court of Appeals reversed the judgment on the ground that plaintiffs' suit was untimely because the earliest EEOC charge was filed more than 300 days after the only discriminatory act – sorting the scores into the "well-qualified," "qualified" and "not-qualified" categories. The Supreme Court reversed the Seventh Circuit and held that it was sufficient that the City's selection of firefighters occurred within the charging period – even though its adoption of the challenged practice may have occurred at an earlier time. The Court distinguished between disparate treatment claims, which require discriminatory intent, and disparate impact claims such as those present in this case. *See also EEOC v. Peabody W. Coal*, 2010 WL 2572001 (9th Cir. 2010) (EEOC's claim for injunctive relief could proceed against coal company that favored Navajo workers over non-Navajo Indians); *Carver v. Holder*, 606 F.3d 690 (9th Cir. 2010) (employee who alleged age discrimination could not sue to increase the amount of damages obtained by the EEOC without relitigating the issue of liability).

## Distributor May Have Violated Law By Failing To Provide Detailed Written Contract To Salesperson

*Baker v. American Horticulture Supply, Inc.*, 2010 WL 2523638 (Cal. Ct. App. 2010)

Edwin Baker worked as an independent wholesale sales representative for American Horticulture Supply, Inc. ("AHS"). A jury returned verdicts in Baker's favor on his breach of contract and fraud claims, but the trial court ordered a new trial on the grounds of insufficiency of evidence, excessive damages and juror misconduct. The trial court granted AHS's motion for directed verdict as to Baker's statutory claim for violation of the Independent Wholesale Sales Representatives Contractual Relations Act of 1990 (Cal. Civ. Code § 1738.10, et seq.) on the ground that there was no evidence that AHS's violation of the statute was "willful." The Court of Appeal affirmed the trial court's ordering a new trial on

the non-statutory claims, but reversed its dismissal of the statutory claim after concluding that "there is no evidence … the Legislature intended to immunize a nonwillful violation of the Act." The Court noted that AHS had conceded it had failed to comply with the statute in various ways, including failing to specify the method by which the commission was computed, the precise geographical territory assigned, any exceptions to the territory, the circumstances in which charge-backs would be made, etc.

## Dump Truck Owner Involved In Collision May Not Have Been A City Employee

*Bowman v. Wyatt*, 2010 WL 2613079 (Cal. Ct. App. 2010)

Plaintiff Barry A. Bowman filed this case after suffering devastating injuries when his motorcycle collided with a dump truck owned and operated by Tommie Wyatt, Jr. The collision occurred shortly after Wyatt had delivered a load of asphalt to a work site of the City of Los Angeles with which Wyatt was under contract. The jury found that Wyatt was an employee of the city and returned a verdict in Bowman's favor in the amount of $15.7 million. On appeal, the city argued that the trial court had misinstructed the jury on the factors it should consider in determining whether Wyatt was an employee or independent contractor of the city. The Court of Appeal agreed and reversed the judgment as to the city, holding that jury instruction CACI No. 3704 incorrectly states the law because it instructs a jury that the right of control, by itself, is dispositive in determining employee (as opposed to independent contractor) status and does not take into account other factors such as whether the worker is engaged in a distinct occupation or business, the skill required in the particular occupation, whether the worker supplies the tools and the place of work, the length of time for which the services are to be performed, etc. *Cf. Tverberg v. Fillner Constr., Inc.*, 2010 WL 2557558 (Cal. S. Ct. 2010) (independent contractor may not hold hiring party vicariously liable for injuries resulting from contractor's own failure to effectively guard against risks inherent in the contracted work).

## Attorney-Client And Work Product Privileges Were Only Partially Waived

*Hernandez v. Tanninen*, 604 F.3d 1095 (9th Cir. 2010)

Rolando Hernandez alleged claims of race and national origin discrimination based on disparate treatment, retaliation, and a hostile work environment while he was employed as a mechanic in the Fire Shop of the City of Vancouver, Washington. Hernandez sued the city and another employee, Mark Tanninen. Hernandez was initially represented by attorney Gregory Ferguson. Hernandez told Ferguson that Tanninen had witnessed the discrimination and would corroborate his story. Ferguson interviewed Tanninen, who did initially corroborate Hernandez's story, but after speaking with the Deputy Fire Chief, Tanninen decided his getting involved would not be good for the Deputy Fire Chief and "everyone involved." Since Ferguson was a witness to Tanninen's original statements corroborating the allegations, Ferguson referred the case to another attorney. In response to a request for production of documents, Hernandez produced a privilege log referencing 35 documents protected by the attorney-client or work-product privileges or both. Hernandez opposed the city's motion for summary judgment based on affidavits from himself and Ferguson and some of Ferguson's handwritten notes. The district court ruled that any attorney-client or work-product privilege between Hernandez and Ferguson was waived and ordered production of the 35 documents. The Ninth Circuit granted Hernandez's petition for a writ of mandamus and held the district court had erred in finding an unlimited waiver of the attorney-client and work product privileges. The Court held that Hernandez waived privileges only as they pertained to the conspiracy claim against the city and Tanninen (29 U.S.C. § 1985(3)) but not the underlying discrimination and retaliation claims.

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The following Los Angeles attorneys welcome any questions you might have.

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