Mitchell & Sheahan, P.C.

July 2010 Newsletter

In This Issue

Mitchell & Sheahan, P.C.

80 Ferry Blvd. Suite 102
Stratford, CT 06615

Phone: 203.873.0240

www.MitchellAndSheahan.com

Robert B. Mitchell

Margaret M. Sheahan

Welcome to our July 2010 newsletter.

Our newsletter features two articles.

The first article, written by Attorney Margaret Sheahan, discusses the Supreme Court's June 17, 2010 "sexting" decision.

The second article, written by Attorney Robert Mitchell, discusses hiring process background checks.

The Supreme Court's "Sexting" Decision
By Margaret M. Sheahan

Ontario v. Quon has drawn a great deal of interest since its inception in a federal district court in California. The chief plaintiff in the case was a police officer for the City of Ontario, who spent work-time on personal text messaging, including explicit "sexting." He got caught and punished. He and his correspondents sued alleging, among other things, illegal search and seizure by his municipal employer.

The Ontario, California Police Department issued its SWAT team pagers capable of receiving and sending text messages. The employees were advised that texts would be treated the same as email, under the Department's existing electronic communications policy, that is, they would be subject to Departmental inspection. When some officers' usage exceeded the Department's announced ceiling in the first few months, the supervisor gave them an opportunity to pay for the overage. Officer Quon followed this course. Later, tired of collecting checks from overusing officers, the supervisor spoke to the Chief, who decided that the Department should determine if police business use exceeded the ceiling. So, the Department asked the pager service provider for transcripts of two months of the texts of the two over-users, one of whom was Quon. The initial review revealed that Quon had a high volume of personal texts, some of which were sexually explicit. This prompted an Internal Affairs investigation, which segregated, counted and, again, reviewed the texts Quon sent and received, while on duty. Internal Affairs concluded that the vast majority of Quon's on-duty texting was personal and some of it was sexually explicit (exchanged with his then-wife, from whom he was separated, his girlfriend and a co-worker).

Quon was disciplined.

Then came the lawsuit against the City, the Department, the Chief, the supervisor and the paging service provider. The primary claims and the ones carried forward on appeals were the claims for unconstitutional search and seizure against the employer-connected Defendants for reading the text messages, and for violation of the Stored Communications Act ("SCA") by the paging service provider for disclosing the text messages. The district court trial resulted in dismissal of the Stored Communications Act claim against the paging service provider for disclosing the transcripts, and a judgment for the City defendants because their inspection of the transcripts was a reasonable search.

The 9th Circuit Court of Appeals reversed all the trial court results and Quon won. The paging service provider was denied certiorari by the Supreme Court (note 1 below.) but the case of the public employer and individuals went forward for review of the constitutional principles involved.

The Supreme Court had to decide whether, as Quon claimed, his public employer violated the 4th amendment guarantee against unreasonable governmental search and seizure by reading his text messages. The application of 4th Amendment principles to government employment was settled long ago. In 1987, a plurality of the Court decided 4th Amendment workplace search cases require a two-part analysis: first, whether the "operational realities" of the particular workplace create a reasonable expectation of privacy for the employee, and second, whether the government's "intrusion on that expectation 'for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct'" is reasonable under the circumstances. Slip op. at p. 8 (internal citation omitted). Justice Scalia, however, whose concurrence was necessary to the result in that 1987 case, used a simpler analysis, namely, finding that government workers' offices are entitled to an expectation of privacy as a general matter without need for an "operational realities" assessment and that "government searches to retrieve work-related materials or to investigate violations of workplace rules - searches of the sort that are regarded as reasonable and normal in the private-employer context - do not violate the Fourth Amendment." Id.

The Supreme Court's Quon decision, issued on June 17, 2010, was written by Justice Kennedy and joined by all the Justices but Scalia, who concurred in the judgment and in part of the decision. The majority and Justice Scalia agreed that even assuming that Quon was justified in expecting privacy of his text messages, the search itself was not unreasonable and so there was no 4th Amendment violation. The majority, however, included some "instructive" discussion of the expectation of privacy analysis. (Justice Scalia took issue with this discussion, arguing that the Court should not do more than identify a question it need not decide, lest its extraneous musings influence the development of the unreached question in the courts below.)

The "extra" discussion of these issues that Justice Scalia so abhors, though, concerns the very meat that most employment

lawyers were hoping this case would address. First, is the question of whether the Court's earlier decisions about the expectation of privacy a government employee enjoys in his desk and office are really applicable to the electronic sphere? Justice Kennedy summarizes arguments on both sides of the question, citing to assertions from various briefs filed in the case, but offers no answers. Another important issue is what circumstances might inspire or defeat an expectation of privacy. Justice Kennedy ticks off important questions this might entail. Did the supervisor's offer to accept payment for overage use override the electronic communications policy? Would the employer's potential obligation to review or disclose text messages to comply with other legal obligations, such as, to answer citizens' police misconduct charges or to assess the efficiency of emergency response, destroy any reasonable expectation that the messages were truly private? The majority opinion articulates several such questions but answers none.

All in all, the decision does little beyond putting Officer Quon back on the hook and instructing public employers on how to limit investigations of employee's electronic communications they feel compelled to undertake. For the rest of us curious souls, we must content ourselves that eight Supreme Court justices think the questions we are asking are good ones.

(note 1) SCA obligations differ for providers of Electronic Communication Service ("ECS") and Remote Computing Service ("RCS"). Both can disclose private communications with the consent of the addressee or sender, but only the RCS provider can disclose with the consent of the subscriber. Since the Police Department was the subscriber, the provider (Arch Wireless) needed to be an RCS to escape liability. An ECS provides message sending and receiving capability to its customers and may store messages temporarily to facilitate transmission or as backup. An RCS, by contrast, provides storage and processing services to its customers. The distinction can get fuzzy when the actual technology is examined. Arch argued that because its archiving lasted beyond the life of the message itself, it must have been storage service, rather than mere backup. The 9th Circuit held Arch was an ECS, finding no evidence the Police Department charged Arch with a storage role. The moral for employers is to determine whether access to communications records is part of any electronic provider's package before signing on the dotted line.

Employment Basics: The Hiring Process - Background Checks
By Robert B. Mitchell

Building on my comments last month about the advisability of employers seeing that each employee have a contract, we are going to continue with a series of short pieces on basic aspects of the hiring, disciplinary and termination processes. My remarks today concern background checks.

The first question, of course, is why would an employer want to do background checks of potential employees? There are many reasons, but a few of the most often mentioned include:

- Negligent hiring suits - If an employee's actions hurt people or property, the employer may be liable. Workplace violence is an example of employee conduct that can lead to employer liability. The threat of these lawsuits provides ample reason for an employer to be cautious in checking out an applicant's past.
- Child Abuse and Abduction cases - New laws in almost every state require criminal background checks for anyone working with children. Connecticut, for example, requires all public school employees to submit to state and national criminal history record checks. Additionally, both Little League Baseball and the Pop Warner Football League, require annual background checks for all league employees and volunteers.

- Fear of Terrorism since the September 11, 2001 attack.
- Heightened scrutiny of corporate executives and officers since the Enron, Madoff and other scandals.
- False and misleading information contained on employee application forms - It has been estimated that up to 40% of all resumes contain false or tweaked information. Background checks provide a useful double-check of an applicant's veracity and basic honesty.

For these reasons and more, employers often want to look back into a potential employee's past history; the history of his or her credit worthiness, employment, possible criminal acts and reputation for integrity and dependability.

Employers need to know that there are severe strictures placed on the background check by the Federal Government and several of the States. If a background check is undertaken, the employer has to be careful not to trip itself. Background checks can be broken down into two broad types: (1) checks carried out by the employer itself, using its own resources; and (2) checks carried out by outside paid providers. Few small to medium-sized employers have the wherewithal to undertake background checks on their own. Most rely on outside vendors. When such third parties are concerned, the background check becomes subject to regulation under the federal Fair Credit Reporting Act. It is also subject to State regulation in many jurisdictions. The FCRA defines the background check as a "consumer report." If a report is prepared about a person's character, general reputation, personal characteristics or mode of living in which the information is obtained through interviews with neighbors, friends or associates, it is termed an "Investigative Consumer Report."

A myriad of information is available from a well-done consumer report. Some of the information includes:

- Driving Records
- Vehicle registration
- Credit records
- Criminal records
- Social Security number
- Education records
- Court records
- Worker's compensation
- Bankruptcy
- Character references
- Neighbor interviews
- Medical records
- Property ownership
- Military records
- State licensing records
- Drug test records
- Past employers
- Personal references
- Incarceration records
- Sex offender lists

Some things are not permitted to be included:

- Bankruptcies after 10 years
- Civil suits, civil judgments, and records of arrest, from date of entry, after seven years
- Paid tax liens after seven years
- Accounts placed for collection after seven years
- Any other negative information (except criminal convictions) after seven years

However, the above reporting restrictions imposed by the FCRA do not apply to jobs with an annual

salary of $75,000 or more a year. (FCRA §605(b)(3)).

In Connecticut, "erased" criminal charges cannot be included either. Indeed, by law, an employment applicant may respond "No" to any inquiry about having any convictions if they have been "erased" and that negative answer must be held to have been truthful.

The real purpose of the FCRA is not to encourage or discourage background checks, but to insure that the information obtained is as accurate as possible and to give the individual consumer notice of what is being presented to the potential employer (and anyone else with an interest).

The FCRA requires that an employer obtain written permission for a background check from the applicant. This must be done on a document that is separate from any other application documents. If medical information is to be included in the check, as further specific notice of this must be given. In the case of an investigative consumer report, the employer must tell the individual that a written report will contain the results of personal interviews, and that he or she has a right to request more details about the "nature and scope" of the report. If the employee or applicant does ask for additional information, the employer must provide a written disclosure within five days of receiving that request that tells that person how to obtain a copy of his or her file.

If any adverse action is considered, based in whole or in part on the Consumer Report - that is, denying the job applicant a position (or for that matter terminating an employee, rescinding a job offer, or denying a promotion) - the employer must take the following steps, which are explained further in the Federal Trade Commission's web site,
www.ftc.gov/bcp/edu/pubs/business/credit/bus08.shtm

- **Before** the adverse action is taken, the employer must give the applicant a "pre-adverse action disclosure," which includes a copy of the report and an explanation of the consumer's rights under the FCRA. This gives the employee an opportunity to refute the negative information in the consumer report and, perhaps, change the decision itself.
- **After** the adverse action is taken, the individual must be given an "adverse action notice." This document must contain the name, address, and phone number of the employment screening company, a statement that this company did not make the adverse decision, rather that the employer did, and a notice that the individual has the right to dispute the accuracy or completeness of any of the information in the report.

There are somewhat modified procedures for truck drivers and other positions that are subject to regulation by the U.S. Department of Transportation.

A key point is that these "adverse decision" provisions are triggered if a negative applicant decision is taken in whole or "in part" because of adverse information obtained through the background check. In any instance where an employer has obtained a negative consumer report on an applicant, the employer would be wise to assume that it will be held to have rejected that applicant, at least in part on the basis of that negative information, whatever the real reason might have been. It is better to provide the applicant with notice of the impending negative act, then to face liability after-the-fact for not having done so. It would be difficult at best, to prove that the adverse consumer report had nothing to do with the employer's decision. In most cases, it would likely be close to impossible, and there are consequences for an employer who is held to have violated the FCRA. Civil liability for damages to the applicant, fines imposed by the government and awards of attorneys' fees are all remedies that the courts can make available to the unhappy, rejected applicant.

Background checks can be a valuable tool in insuring that an employer builds the best workforce possible, but they can also be a trap for the unwary. For many employers, the best course is likely to be forming a relationship with a reputable employment screening company. This will go a long way, but not completely, to relieving the employer from some of the more arduous FCRA compliance requirements.

The final issue that employers must consider if they are going to do background checks, concerns

the need to protect the information that is obtained. The Federal Trade Commission has issued guidance as to how employers should dispose of such paperwork. The purpose is to keep the applicant or employee's personal information confidential. A failure to protect such information can expose the employer to severe liability.

Background checks are a useful tool of workforce management, but they can be a two-edged sword that should be handled very carefully by the concerned employer.

We hope you find these articles helpful and informative. As always, please contact us with any questions or concerns.

Sincerely,

Mitchell & Sheahan, P.C.

Disclaimer

These materials have been prepared by Mitchell & Sheahan, P.C., for informational purposes only and are not intended and should not be construed as legal advice. This information is not intended to create, and receipt of it does not constitute, a lawyer-client relationship. Internet subscribers and on-line readers should not act upon this information without seeking professional counsel. Do not send us information until you speak with one of our lawyers and get authorization to send that information to us. In accordance with applicable rules, this material may be considered advertising.