
ROSSWAY MOORE & TAYLOR

ATTORNEYS AND COUNSELORS AT LAW

JOHN E. MOORE, III*
BRADLEY W. ROSSWAY
HELEN E. SCOTT
MICHAEL J. SWAN
JAMES A. TAYLOR, III*
THOMAS W. TIERNEY**

2101 INDIAN RIVER BOULEVARD, SUITE 200
VERO BEACH, FLORIDA 32960
TELEPHONE (772) 231-4440 FACSIMILE (772) 231-4430
Web site: www.verobeachlawyers.com

SHANNON BANITT
PATRICK FARRAH
JONATHAN FITZGERALD
LISA GALLAGHER
DEBORAH MARTIN-LEE
KEVIN ROLLIN

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*also admitted in
The District of Columbia
**also admitted in California

LEGAL AND LEGISLATIVE UPDATE

The following is provided as a complimentary service to the firm's clients. It is designed to assist the reader in keeping informed of selected developments in employment law. It is not intended to be nor is it a treatment of all new developments in the field of labor and employment law. Applicability to a particular situation depends upon an investigation of the specific facts and more exhaustive study of the applicable laws than can be provided in this format. This summary is not intended to be a substitute for legal advice.

Privacy Rights

Supreme Court Affirms Employer's Right to Search Employee's Text Messages

The Supreme Court ruled unanimously that the City of Ontario, California's search of a police sergeant's text messages to his colleagues and to a woman with whom he was having an affair was reasonable, and not a violation of his constitutional privacy rights. The City had distributed two-way pagers to employees. It had a written policy limiting the use of all City-owned computers and related equipment, software, programs and systems to City business. It also warned that the City's email system was not confidential but had no official policy covering text messaging. The police chief caused a text message audit to be performed to determine whether the overages they were experiencing were caused by personal use of the pagers or if the City needed to increase the character limit of the text messages due to the volume of work-related communications. The investigation found that many of the sergeant's messages were

personal, sexually explicit, and occurred on City time.

The sergeant sued alleging violations of the federal Stored Communications Act, the Fourth Amendment to the Constitution, and the California Constitution. The Supreme Court assumed that the City's review constituted a search within the meaning of the Fourth Amendment. The court then found that the City's search did not violate the Fourth Amendment by obtaining and reviewing the transcripts. Although as a rule, warrantless searches are per se unreasonable under the Fourth Amendment, there are a few, well-delineated exceptions including the special needs of the workplace. The court found that the search was justified at its inception because there were reasonable grounds for suspecting that it was necessary for a non-investigatory work-related purpose. Reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether the sergeant's overages were the result of work-related messaging or personal use. Further, it was not excessively intrusive

because all messages sent outside of working hours were redacted and the City read only those sent or received during on-duty hours. *City of Ontario v. Quon*, No. 08-1332, (S. Ct. June 17, 2010)

Family & Medical Leave Act

Department of Labor Issued Interpretative Letter No. 2010-3

On June 22, the Wage and Hour Division of the U.S. Department of Labor issued an interpretation letter (No. 2010-3) clarifying the definition of "son or daughter" under the Family and Medical Leave Act (FMLA), as it relates to "a child of a person standing *in loco parentis*." The agency had received several requests for interpretation of whether leave may be taken by employees lacking a biological or legal relationship to a child. The new guidance provides that a person may be eligible for unpaid FMLA leave for the birth or placement of a child, or to care for a son or daughter with a serious health condition, even if that person has no biological or legal relationship with the child. A simple statement asserting that the requisite family relationship exists is all that is needed in situations such as *in loco parentis* where there is no legal or biological relationship." However, the letter also states, "It is the Administrator's interpretation that the regulations do not require an employee who intends to assume the responsibilities of a parent to establish that he or she provides both day-to-day care and financial support in order to be found to stand *in loco parentis* to a child." The fact that a child has a mother and a father does not prevent a finding that an employee with a non-biological relationship is eligible for FMLA leave. "Congress intended the definition of 'son or daughter' to reflect 'the reality that many children in the United States today do not live in traditional 'nuclear' families with their biological father and mother.'" The employee who actually has day-to-day responsibility for caring for a child is entitled to leave even if the employee does not have a biological or legal relationship to that child. "Neither the statute

nor the regulations restrict the number of parents a child may have under the FMLA."

In loco parentis is commonly understood to refer to "a person who has put himself in the situation of a lawful parent by assuming the obligations incident to the parental relation without going through the formalities necessary to legal adoption. It embodies the two ideas of assuming the parental status and discharging the parental duties." Courts have enumerated factors to be considered in determining *in loco parentis* status; these factors include the age of the child; the degree to which the child is dependent on the person claiming to be standing *in loco parentis*; the amount of support, if any, provided; and the extent to which duties commonly associated with parenthood are exercised. For example, where an employee provides day-to-day care for his or her unmarried partner's child (with whom there is no legal or biological relationship) but does not financially support the child, the employee could be considered to stand *in loco parentis* to the child and therefore be entitled to FMLA leave to care for the child if the child had a serious health condition. The same principles apply to leave for the birth of a child and to bond with a child within the first 12 months following birth or placement.

Employee Demoted Upon Return from FMLA

Before taking maternity leave, employees of a regional vice president voiced complaints about her management style. During her leave, morale improved considerably in her region and her interim replacement discovered a lot of administrative problems that had occurred on the vice president's watch including expense reports that had been ignored. In ruling for the employer, the Eleventh Circuit Court explained that despite the temporal proximity of the events, the company demoted the vice president for reasons unrelated to her maternity leave. The court added that an employee's right to reinstatement under the FMLA is not absolute. If the employer discovers past

performance problems while the employee is on leave, the FMLA does not require the employer to ignore them. *Schaaf v. SmithKline Beecham Corp.*, 602 F.3d 1236 (11th Cir. 2010)

Employees Absences Reduced Hours Worked in Previous 12 Months Below 1250

An employee was fired for excessive absences under the company's no-fault attendance policy. She claimed that her firing violated the FMLA. The employer countered that she was not eligible for FMLA because she had not worked 1250 hours in the previous 12 months. The employee alleged that she would have been covered if the time she missed due to her absences was credited. The Court disagreed. It agreed that an employee cannot be penalized by being deprived of a benefit that has accrued to her by working. However, in this case, the company did not count time on leave of any kind toward the 12 months that are measured under its no-fault attendance policy unless the employee met the 1250 hour minimum required by the FMLA. An employee who works for the company for eleven months and is absent the other month cannot add the month she was on leave in order to obtain a benefit available to employees who worked 12 months. *Bailey v. Pregis Innovative Packaging, Inc.*, 600 F.3d 748 (7th Cir. 2010)

Pretext for Discrimination

Employer's Changing Story Dooms It

An employee alleged she was not promoted because of her age. In response to the EEOC charge, the employer cited the employee's consistently mediocre performance as the reason for its decision. In defense of the lawsuit that followed, the employer alleged that the reason for its decision was that the employee lacked managerial and marketing experience. The employer offered no evidence at trial of the employee's performance

deficiencies. The jury concluded that, because of the employer's changing story, the reason offered at trial was a pretext for discrimination. *Jones v. National American Univ.*, No. 09-3007 (8th Cir. 2010)

Miscellaneous

Fair Credit Reporting Act

Effective July 1, 2010, employers that provide consumer information to consumer reporting agencies must follow a new joint final rule promulgated by the Federal Trade Commission and several other federal agencies. Although a "furnisher" typically is a bank or credit card company, there are situations where an employer will be a furnisher within the meaning of the FCRA. As a result, employers that provide payroll and other employee-related information to consumer reporting agencies in connection with outsourced services, such as unemployment processing and reference checking, will be considered "furnishers" within the meaning of the FCRA and, therefore, subject to applicable federal and any comparable state law regulations. In addition, employers that outsource these functions to consumer reporting agencies must comply with the new final rule, which requires an employer to implement and maintain policies and procedures designed to ensure the accuracy and integrity of information provided to these agencies. The final rule expands on the FCRA and now permits "direct disputes" to the employer and allows an employee to challenge the accuracy or completeness of information contained in a consumer report by contacting his or her current or prior employer. It further requires employers to conduct a reasonable investigation to determine the validity of the employee's dispute. The employer must complete the investigation and report back to the employee within 30 days of receiving notice of the dispute.