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Management Update

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Supreme Court Hears Oral Arguments in Text Messaging Case

The U.S. Supreme Court heard oral arguments on Monday, April 19, 2010, in the first case to address an employee's right to privacy in the text messages he sent from an employer-provided pager. In Quon v. Arch Wireless (9th Cir. 2008), the lower court held that the City of Ontario (California) violated a police officer's Fourth Amendment privacy rights by printing and reading the officer's salacious text messages. The Supreme Court granted review of the Ninth Circuit's decision against the City late last year.[1] The oral argument not only provided Court observers rare with insight into the Court's thinking on a developing area of the law but also provided observers with a glimpse into the technological awareness of the individual justices.[2]

Analyzing the Justices' questions at an oral argument is a little like reading tea leaves; however, their questions can be instructive on the issues that the Court has prioritized in this case. Justice Roberts, for example, seemed to suggest through a hypothetical question that if no governing employment policy existed, an employee could reasonably assume that his text messages would remain private, even if the messages were sent from the employer's pager.[3] Justice Ginsberg also seemed to value the City's written policies by asking about a City memo that stated text messages were to be treated in the same fashion as e-mail. These views from two justices on opposite sides of the political spectrum highlight the importance of well-drafted company policies that explicitly address all types of technologies.

Prudent employers will also consistently enforce their written policies. Justice Roberts hinted at such when he asked whether the Court should "follow the written policy or the policy [the City] allegedly enforced in practice." Justice Sotomayor directly questioned the judiciousness of the government's suggestion that only a written employment policy on text messages was needed to destroy an employee's right to privacy in those messages, without addressing the realities of the workplace.

Although Quon will be decided in the public employment context, the decision will likely affect private employers and their policies towards text messages. After all, in 2009, Americans sent 1.5 trillion text messages – almost 4 billion text messages daily.[4] Consequently, text messaging already affects all employers – both public and private – and therefore employers should revise and enforce their policies with respect to text messages as soon as possible. We will update you when the Court issues its decision in this case.

If you have any questions regarding the issues addressed in this article or other labor or employment related issues, please contact the author, **Adam Klarfeld**, **aklarfeld@fordharrison.com**, 612-486-1705, or the Ford & Harrison attorney with whom you usually work.

[1] The Supreme Court chose not to address Arch Wireless' appeal. [2] Justice Roberts at one point asked, "what is the difference between the pager and the e-mail?" [3] The City did not have a specific policy governing the use of the pages, but the City had a general policy that all "City-owned equipment, computer peripheral, city networks, the Internet, e-mail, or other city-related computer services []" would be reviewed and audited by the City. [4] Source: CTIA-The Wireless Association.

Supreme Court to Determine "Cat's Paw" Theory in USERRA Case

The U.S. Supreme Court recently agreed to review a decision of the Seventh Circuit Court of Appeals in which the lower court held that the "cat's paw" theory of discrimination was not applicable to a former employee's discrimination claim brought under the Uniformed Services Employment and Reemployment Rights Act (USERRA). See *Staub v. Proctor Hospital*, (Case no. 09-400; *cert. granted* April 19, 2010). Specifically, the former employee asked the Supreme Court to determine "In what circumstances may an employer be held liable based on the unlawful intent of officials who caused or influenced but did not make the ultimate employment decision?"

The "cat's paw" theory of discrimination is named after a 17th century fable in which a manipulative monkey convinces an unsuspecting cat to retrieve chestnuts from a fire. The cat burns its paw getting the chestnuts, while the monkey devours them one by one. In discrimination cases, courts have used this theory to impose liability on an employer for the discriminatory animus of a non-decision maker where that person so influenced the decision maker that the decision maker was nothing more than a puppet or "cat's paw" for the biased non-decision maker.

In *Staub*, the Seventh Circuit held that the cat's paw theory of liability is appropriate only where: (1) the non-decision maker exerted "singular influence" over the decision maker and: (2) the decision maker's review was "anything but independent." The Seventh Circuit also held that "where a decision maker is not wholly dependent on a single source of information, but instead conducts its own investigation into the facts relevant to the decision, the employer is not liable for an employee's submission of misinformation to the decision maker."

The Seventh Circuit held that there was insufficient evidence in *Staub* to support a verdict against the hospital under the cat's paw theory because a reasonable jury could not find that the non-decision maker in that case held singular influence over the decision maker. Further, the court held that the decision maker conducted her own investigation before deciding to terminate Staub. Although the court acknowledged that the decision maker's investigation could have been "more robust," it stated that it does not require the decision maker to be "a paragon of independence." Because there was

no evidence of military-based animus by the decision maker, the court entered judgment in favor of the hospital.

The Seventh Circuit has adopted a narrow interpretation of when the cat's paw theory of discrimination can be applied, while other federal appeals courts have applied less stringent standards. The Supreme Court's decision in this case should clarify the law on this issue.

Supreme Court Hears Oral Argument on Who Should Decide Whether Arbitration Agreement is Unconscionable

On April 26, 2010, the U.S. Supreme Court heard oral arguments on the issue of whether it is for a court or the arbitrator to determine whether an arbitration agreement is unconscionable. See *Rent-a-Center West, Inc. v. Jackson* (Case no. 09-497). The Supreme Court granted certiorari to review the decision of the Ninth Circuit, which held that the court has exclusive jurisdiction to determine the issue of unconscionability, even though the parties' arbitration agreement gave the arbitrator that authority.

In this case, Rent-a-Center and Jackson entered into an arbitration agreement under which both parties agreed to submit to arbitration all claims they might have arising out of Jackson's employment with Rent-a-Center. The parties' arbitration agreement gave the arbitrator exclusive authority to resolve any dispute relating to the interpretation, applicability, enforceability, or formation of the arbitration agreement, including any claim that all or part of the agreement is void or voidable.

Jackson was subsequently terminated and sued Rent-a-Center in federal court, claiming race discrimination and retaliation. Rent-a-Center moved to compel arbitration of the discrimination claims. Jackson responded, claiming the arbitration agreement was unenforceable because it was both procedurally and substantively unconscionable. The trial court held that the issue of unconscionability was for the arbitrator to decide and granted the motion to compel arbitration, dismissing the lawsuit. The Ninth Circuit reversed the trial court's decision, holding that the mere allegation that an arbitration agreement is unconscionable requires the district court, and not the arbitrator, to determine that issue, even where the arbitration agreement's express terms delegate that determination to the arbitrator.

In its brief to the Supreme Court, Rent-a-Center argued that the Ninth Circuit's decision is not compatible with prior Supreme Court decisions holding that clear and unmistakable agreements to commit gateway issues to the arbitral forum are fully enforceable under the Federal Arbitration Act (FAA). In response, Jackson argued that these Supreme Court cases only stand for the proposition that challenges to the scope of the arbitration agreement may be delegated to arbitrators. Jackson argued that the issue of unconscionability should be determined by a court, as are other issues regarding the validity and enforceability of arbitration agreements under Section 2 of the FAA.

This decision could have a significant impact on employers who utilize mandatory arbitration agreements. We will keep you updated on the status of the case. If you have any questions regarding this case or other labor or employment law issues, please

contact the Ford & Harrison attorney with whom you usually work or **John Allgood**, **jallgood@fordharrison.com**, 404-888-3832.

Court Emphasizes That Evidence of Training Is a Must

For over 10 years, employers have been able to avail themselves of an affirmative defense to sexual harassment allegations by an employee against a supervisor/manager in those situations where no tangible adverse employment action has been taken against the employee. This defense is known as the *Faragher/Ellerth* defense, and can be invoked where the employer can demonstrate that: (1) it exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998); *Burlington Indus. v. Ellerth*, 524 U.S. 742, 764-65 (1998). The vast majority of employers have anti-harassment policies including reporting procedures and protocols for employees to follow, have disseminated those policies and procedures to all employees, and have required employees to acknowledge receipt of the policies. However, the adoption, dissemination and acknowledgment of receipt of the policy by the employee may not be sufficient for employer to invoke the affirmative defense.

Recently, in *Bishop v. Woodbury Clinical Laboratory*, No. 3:08-cv-1032 (M.D. Tenn. 2010), the court rejected the employer's *Faragher/Ellerth* affirmative defense despite the fact that the employer had an existing anti-harassment policy that was published and provided to all of its employees. The employee admitted that she had received the policy and had been directed to read it. She claimed, however, that she did not read the policy or understand the reporting requirements. The court noted that there was no evidence offered to demonstrate that the employee or her supervisor received any training on the sexual harassment policy and reporting obligations. Thus, the court concluded that the employer failed to establish that it was entitled to invoke the *Faragher/Ellerth* affirmative defense as it could not demonstrate that it exercised reasonable care to prevent and promptly correct any sexually harassing behavior.

This case clearly highlights the employer's obligations to take reasonable care – not only must the employer have an effective anti-harassment policy and reporting procedures disseminated to its employees, but it should also conduct anti-harassment training for its employees and supervisors to ensure they all understand the policy and procedures. Just passing out the policy is not enough.

While this decision is not binding on courts outside of the Middle District of Tennessee, it is possible other courts will follow the court's reasoning in *Bishop*. In these increasingly litigious times, it is more important than ever for employers to institute these mechanisms to ensure that its existing policy will be deemed "reasonable," therefore permitting the employer to fully protect itself.

If you need assistance in this area or if you have questions regarding sexual harassment policies, please feel invited to contact **Louis Britt**, **lbritt@fordharrison.com**, 901-291-1516, or the Ford & Harrison attorney with whom you usually work.

Ford & Harrison Provides Guidance on Health Care Reform Law

The Patient Protection and Affordable Care Act and the Health Care and Education Reconciliation Act of 2010 impose numerous requirements on employers, health care providers and health insurance providers. Ford & Harrison attorneys have prepared the following documents discussing the impact of the new law, which are available on our web site:

- Chart Summarizing Health Care Reform Act Requirements, available at: **http://www.fordharrison.com/files/FHHealthCare2010.pdf**, prepared by **Daniel Sulton**, **dsulton@fordharrison.com**.

- White Paper Discussing Employment-Related Obligations Imposed by Health Care Reform Law, available at: **http://www.fordharrison.com/files/FHEmploymentRelatedProvisionsPPACA.pdf**, prepared by **Daniel Sulton**, **dsulton@fordharrison.com**, **Isabella Lee**, **ilee@fordharrison.com**, and **Lucas Asper**, **lasper@fordharrison.com**.

- White Paper Discussing the Impact of Health Care Reform on Individual and Small Business Taxes, available at: **http://www.fordharrison.com/files/WhitePaper042010.pdf**, prepared by **Jeffrey Ashendorf**, **jashendorf@fordharrison.com**.

- Legal Alert: Health Care Reform Enacted, available at: **http://www.fordharrison.com/shownews.aspx?show=5947**, prepared by **Daniel Sulton**, **dsulton@fordharrison.com**.

Third Extension of COBRA Premium Subsidy Extends Availability Through May 31, 2010

Extended now for the third time[1], the availability of the COBRA premium subsidy has been extended through May 31, 2010. Late on April 15, 2010, President Obama signed H.R. 4851, the Continuing Extension Act of 2010. Final passage in the House of Representatives (votes 289-112) and in the Senate (votes 59-38) ensured that several government programs would be extended, including the COBRA premium subsidy.

Under the Continuing Extension Act, the eligibility period for the 65% COBRA premium subsidy is available to individuals that are involuntarily terminated from employment through May 31, 2010. The bill also provides transition relief for individuals who lost their jobs between March 31, 2010 and the date of enactment. Specifically, the Act provides that individuals who were involuntarily terminated between April 1, 2010 and April 15, 2010 are also eligible to receive the subsidy. Therefore, a group health plan must extend a COBRA special election period to any individual who experienced an involuntary

termination of employment between April 1, 2010 and April 15, 2010. The special election period begins on April 15, 2010, and ends 60 days after the date that the Notice of Special Election Period is provided to the Assistance Eligible Individual.

As far as the Notice of Special Election Period that should be distributed to the individuals terminated between April 1, 2010 and April 15, 2010, a plan administrator must provide the general COBRA Notice, including a statement of the availability of the premium reduction for individuals that are involuntarily terminated from employment through May 31, 2010, within 60 days of enactment of the Act (by June 14, 2010). If the plan administrator has already distributed the general COBRA Notice to these individuals, then the plan administrator may simply send a supplemental notice notifying these individuals that the premium subsidy will now be available to individuals involuntary terminated through May 31, 2010, and that they are eligible for the special election period.

The Bottom Line:

It is unclear at this point in time whether Congress will consider a longer extension of the COBRA premium subsidy. There are currently two separate bills before Congress that each propose to further extend the COBRA subsidy eligibility period through June 30, 2010, or year end. In the meantime, employers and plan administrators should:

1. Update COBRA Notices and group health plan communication materials to include information regarding the extension of the subsidy eligibility period through May 31, 2010.
2. Monitor the Department of Labor website (**http://www.dol.gov**) for updated model COBRA notices. Employers and plan administrators can then tailor the updated model COBRA notices to meet the administrative procedures and other requirements of the group health plan.
3. Identify all employees who were involuntarily terminated between April 1, 2010 and April 15, 2010. With respect to these individuals, provide an updated COBRA Notice notifying them of the extended eligibility period and their special election period **on or before June 14, 2010**.

If you have any questions regarding this article please contact the author, **Lindsay O'Brien**, **lobrien@fordharrison.com**, 904-357-2005, or any member of Ford & Harrison's **Employee Benefits** practice group.

[1] As background information, the COBRA premium subsidy was first established as part of the American Recovery and Reinvestment Act of 2009 (the "ARRA") to provide nine months of premium assistance for COBRA and state health continuation coverage to individuals who were involuntarily terminated from employment and, as a result, lost group health coverage between September 1, 2008 and December 31, 2009. Our Legal Alert regarding the basic provisions of the ARRA can be viewed by following this link: **http://www.fordharrison.com/shownews.aspx?show=4526**. The Department of Defense Appropriations Act then extended the maximum subsidy period from 9 months to 15 months, and extended the eligibility period of the subsidy through February 28, 2010. Our Legal Alert regarding the Department of Defense Act can be viewed by following this link: **http://www.fordharrison.com/shownews.aspx?show=5718**.

Signed on March 2, 2010, the Temporary Extension Act of 2010 extended the COBRA subsidy through March 31, 2010. Our Legal Alert entitled "COBRA Subsidy Extended Through March 31, 2010" can be viewed by following this link: **http://www.fordharrison.com/shownews.aspx?show=5899**.