THE EMPLOYER'S ADVISORY

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TO SEXT OR NOT TO SEXT...

Jeff Quon, a police sergeant and SWAT Team member with the City of Ontario (California) Police Department (OPD), went ballistic when the text messages sent and received from his City-owned pager were reviewed by his superiors–maybe it was the sexually explicit text messages to and from his wife...and his girlfriend... that propelled his outrage. Oops.

In 2001, the City issued pagers to the SWAT Team with limited texting to aid in mobilizing and responding to emergencies. At that time, all employees were well aware that text messages were considered public information by the OPD and eligible for auditing; there was no expectation of privacy or confidentiality.

Over the next year, Quon and others repeatedly surpassed their monthly texting limits, and for a time, personally paid for their excess usage. But Steven Duke, the officer who collected the excess payments, eventually told Police Chief Lloyd Scharf that he was "tired of being a bill collector." So, Scharf looked into whether the existing texting limit was too low – resulting in the officers having to pay for sending work-related messages – or if the overages were for personal reasons. He ordered transcripts of Quon's texts sent during August and September, 2002. Duke, Scharf and Quon's immediate supervisor reviewed the transcripts, finding numerous personal messages, including the sexually explicit ones.

OPD Internal Affairs then investigated whether Quon was violating OPD rules by pursuing personal matters while on duty (before the review, all messages sent off-duty were redacted). Quon had sent 456 messages during work hours in one month alone, of which 57 were work-related. This violated OPD rules and so OPD disciplined Quon.

Quon brought suit against the City, the OPD, and Scharf, alleging that the OPD's review of his text messages violated his Fourth Amendment rights (unreasonable search and seizure). After lower courts issued conflicting decisions, the case was argued before the U.S. Supreme Court on April 19, 2010.

The Supreme Court determined that the City's review of Quon's messages was, indeed, reasonable, as the search was ordered to determine whether the texting limit was sufficient to meet the City's needs, which was a legitimate, work-related

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rationale (note that, if the purpose for the audit had been to determine if Quon was using his pager to play games and waste time, then the audit may not have been constitutionally reasonable). The City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pocket for work-related expenses, but also that the City was not paying for extensive personal usage. Further, reviewing the transcripts was an efficient and expedient way to determine whether Quon's overages were the result of work-related messages or personal use; no matter that there were other ways to obtain the same information. Also, the fact that the OPD had only reviewed a two-month sampling and had redacted all messages sent while Quon was off-duty meant that the review was not excessively intrusive. Finally, as to Quon's reasonable expectation of privacy, a reasonable employee would be aware that sound management principles might require the audit of messages to determine whether the pager was being used appropriately.

Lesson: Make sure it is crystal clear to your employees, both in writing and orally, that text messages sent on company-owned or leased conveyances are not confidential and are subject to audit (as well as all other communications sent via any company-owned or leased electronic communications).

TIPS ABOUT TIPS

The Fair Labor Standards Act (FLSA) requires employers to pay their nonexempt employees at least $7.25 an hour. But the FLSA, § 203(m), permits employers to take advantage of a "tip credit" in order to meet the federal minimum wage requirements with respect to "tipped employees." A "tipped employee" is defined as "any employee engaged in an occupation in which he 'customarily and regularly' receives more than $30 a month in tips." Under this tip credit, an employer may pay a tipped employee cash wages of only $2.13 per hour ($4.22 in Colorado), and take credit for an employee's tips to make up the difference between the cash wage and minimum wage that the employer owes its employees.

But the FLSA also requires the employer to satisfy two prerequisites in order to utilize the tip credit allowance. First, the employer *must inform* the employee of its intent to implement the tip credit provisions of §203(m), and, second, all tips received by an employee *must be retained by the employee*. Thus, to the extent employers establish a tip pool, the employer cannot require employees to share tips with employees who do not customarily and regularly receive tips, such as management or food preparers.

The rigidity of these requirements was the subject of a recent case – *Pedigo v. Austin Rumba, Inc*. ("ARI"). In that case, the Court denied ARI's right to use a tip credit because it had not "informed" its employees of its intent to do so under §203(m). ARI argued that the employees were all "aware" of the tip credit, as evidenced by fact that some employees had filled in as "desired wage" on their application forms, "$2.13 plus tips." The Court rejected this argument, explaining that "[f]irst and foremost, the problem with [ARI's] argument is that [the FLSA] does not require employees to be *aware* of the tip credit provisions. Rather, it affirmatively requires employers to *inform* employees of the provisions contained in section 203(m)." 2010 WL 2730462 (W.D.Tex.2010).

Conversely, there was affirmative evidence that ARI did not inform its employees of §203(m) as the Employee Manual admonished its employees that "tips or suggestions about tipping will not be

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discussed at any time." Although the Manual contained a section entitled "Timeclock, Payroll, Tips," it failed to provide any information pertaining to a tip credit. Accordingly, the Court determined that ARI did not satisfy the first requirement to "inform" employees.

The employees also argued that ARI failed to meet the second requirement because ARI required its tipped employees to share their tips with other employees who do not "customarily and regularly receive tips." Specifically, in this case, the employees claimed that ARI's inclusion of preparation cooks and dishwashers in the tip pool violated this second §203(m) requirement. And with respect to this issue, the Court ruled that it could not conclude that the dishwashers' and prep-cooks' primary duties entailed direct customer-service functions, nor could ARI establish that these two positions customarily and regularly received tips. Accordingly, the Court ruled that ARI could not use tip credit to meet minimum wage and owed its employees the difference.

Practical Tip. Employers who plan to use the tip credit should put this information in writing and provide it to all tipped employees. Include this information in your employee manual and keep a signed acknowledgment from your employees that they received the manual. Finally, don't permit managers and employees who do not deal directly with the customers to participate in any tip pools.

PREVENTION IS GOOD!

As a general rule, employers are vicariously liable for a supervisor's sexual harassment of employees. But as one company recently proved, when the harassment does not culminate in an adverse tangible employment action (firing, demotion, transfer, etc.) employers can avoid liability or limit damages by showing they exercised reasonable care to prevent and promptly correct harassing behavior and by showing that the employee victim unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer.

Office Depot was sued by two employees, Mott and Brackett, who claimed the same supervisor sexually harassed them by making inappropriate comments. Mott did not report the harassment to management, but did tell a store manager at another store about the harassing comments. This manager reported the complaint to human resources, who also received an anonymous call on the company's complaint hotline. Office Depot immediately began an investigation into the matter and the supervisor was ultimately terminated. Brackett did not complain to management and did not participate in the investigation.

As it turned out, this same supervisor was previously disciplined by Office Depot for making inappropriate comments to an employee and for viewing pornographic material on an Office Depot computer (not to mention he was terminated for stealing and disciplined for threatening to kill an employee by a previous employer).

Significantly, however, Office Depot had a written policy defining the prohibited behavior, explaining procedures for investigating and resolving harassment complaints, and assuring employees there would be no retaliation. Office Depot also had a complaint hotline as an alternative reporting mechanism. Both Mott and Brackett were aware of Office Depot's hotline and policy.

Ultimately, the Court held in Office Depot's favor. It found that Office Depot exercised reasonable care by first disciplining the supervisor

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for his prior indiscretions (the court noted there was nothing Office Depot could do about the problems with his previous employer) and was not required to terminate the supervisor at the first instance of a complaint of sexual harassment. More importantly, the Court found that Mott and Brackett did not use the complaint procedure provided by Office Depot and they had no reasonable justification for failing to do so. Therefore, the Court granted summary judgment for Office Depot and dismissed the claim.

So, despite the fact that Office Depot's supervisor was clearly harassing employees, Office Depot was able to avoid liability by having a written policy with adequate reporting mechanisms, by promptly conducting an investigation and taking appropriate disciplinary action, and by showing that the complaining employees failed to use the reporting mechanisms provided.

Note: If a supervisor's harassment results in a tangible adverse employment action against the victim, this defense cannot be used and an employer can be held vicariously liable. In the *Office Depot* case, the employees argued that their pay was reduced, and therefore the harassment culminated in a tangible employment action. But the Court held that the pay reduction was the result of a company wide payroll refresh program that was unrelated to harassment or complaints thereof, permitting Office Depot to assert the defense that they took reasonable care to prevent harassment and that the employees failed to take advantage of the opportunities provided to them.

SHOWING IS NOT SELLING

Sally sells sea shells by the sea shore for no salary, just commissions. More precisely, Sally SHOWS sea shells to surfers and sand worshipers on the sea shore to stimulate their shopping for sea shell products sold at her employer's Sea Shell Store in the Shopping Center. She gives the surfers and sand worshipers a slip of stationary with the Sea Shell Store's address and the words "Sally says sell me sea shells at a 20% savings!" Sally earns 10% of every sale at the Sea Shell Store to surfers and sand worshipers showing the salesperson Sally's slip. (Repeat this scenario swiftly seven times!)

The question is, does Sally qualify as an "outside salesperson," exempt from minimum wage and overtime requirements of the Fair Labor Standards Act (FLSA)? The Sea Shell Store certainly hopes so, since it does not keep track of Sally's hours of work, pay her overtime, or guarantee that she will make even minimum wage. Sally likes the arrangement because she is a free spirit, not bound by time clocks or shoes.

Under the FLSA, an outside salesperson is someone whose primary duty is making sales or obtaining orders or contracts for services or for the use of facilities for which a consideration will be paid by the client or customer; and who is customarily and regularly engaged away from the employer's place of business in performing such primary duty.

Considering that Sally works outside, away from her employer's place of business, and that her primary duty is promoting the sale of sea shells, surely she qualifies as an exempt outside salesperson? The rub is that Sally doesn't actually "sell" anything. Someone inside the business facility is responsible for consummating the sale. This fact prevents Sally from being an exempt outside salesperson, at least according to a recent U.S. District Court decision in *Jirak v. Abbott Laboratories, Inc.*, 2010 WL 2331098 (June 10,

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2010). She must receive minimum wage or above for each hour worked and overtime for working over 40 hours in a workweek.

The *Jirak* case concerned pharmaceutical representatives whose job is meeting with physicians and their staff, educating them on the benefits of their drug company's products for various medical conditions, and encouraging the physicians to prescribe the drugs for their patients. The pharmaceutical representatives make no sales and get no signed contracts for sale. The physicians purchase nothing. Rather, the sale occurs when the patient takes the physician's prescription to the pharmacy and pays some staggering amount for the product. Because the pharmaceutical rep's work is promotional, designed to stimulate sales that will be made by someone else, it was deemed non-exempt.

The Court explained that "promotion work" is exempt work when it is directed toward consummation of the employee's own sales. However, promotional activities designed to stimulate sales that will be made by someone else, are not exempt outside sales work. A "sale" for the purpose of the outside sales exemption requires a consummated transaction directly involving the employee for whom the exemption is sought.

Other examples of "sales" persons who do not sell are college recruiters whose duties included "selling" the school and "inducing" student applicants to sign enrollment applications and pay a $50.00 application fee. The Department of Labor opined that this position is not outside sales because it is more analogous to sales promotion work: "[l]ike a promotion person who solicits customers for a business, the college recruiter identifies customers and induces their application but does not make a contractual offer of its educational services to the applicant." Similarly, the DOL contends that "selling the concept of donating to a charity does not constitute 'sales' for purposes of the outside sales exemption because the solicitors do not obtain orders or contracts and the exchange of a token gift for the promise of a charitable donation is not a 'sale'." DOL Opinion Letter 1998 DOLWH LEXIS 17, at *3, 7; 2006 WL 1698305, at *2.

Closer to home, the 10th Circuit in which Colorado is located, held in *Clements v. Serco, Inc.* 530 F.3d 1224 (10th Cir. 2008), that military recruiters were not exempt outside salespersons and were entitled to overtime because they had no authority to "close the sale" by obtaining commitments and actually enlisting recruits.

LESSON: Employers should avoid separating the duties of promoting sales and closing the deal for employee positions that are compensated on a commission basis without recording hours worked, guaranteeing minimum wage and overtime rates for working in excess of 40 hours per workweek. Remember, if the exempt status is challenged, it is the employer's burden to prove that the outside sales exemption (or any FLSA exemption) applies. The exemptions are narrowly construed against the employer, and the exemptions are applied only where it plainly and unmistakably comes within the FLSA's terms and spirit to deny the employee overtime.

In our example, Sally could qualify as an exempt outside salesperson if the employer entrusted her with the actual sea shell products and let her collect money on the sea shore in exchange for transferring ownership of the sea shells to the surfer dudes and sand worshipers.

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Q & A

Q. Sue has worked only 11 months and has been less than a stellar employee. In fact, we considered firing her, but hadn't gotten around to making a decision when she told us that she has to have a hip sugery next month. She requested 12 weeks of FMLA leave for this, beginning on her one year anniversary. She is an at-will employee, so can we let her go now for no cause before she becomes eligible for FMLA?

A. "Houston, we have a problem." Although employment-at-will means that either the employee or employer can terminate the employment relationship with or without cause or prior notice, an employer cannot terminate an at-will employee for an illegal reason. Because you did not decide to fire this employee before she requested FMLA leave, if you fire her now, it will appear that you terminated her to interfere with her taking FMLA leave. That's illegal. Even though she is not yet qualified for FMLA, several courts have held that an employee can make a retaliation claim under FMLA when the employee is employed for less than twelve months but requests the leave to begin more than one year after employment. Deal with her performance problems in the same manner you would if she had not requested FMLA. Give written warning and an opportunity to improve performance. You do not have to put up with poor performance just because the employee has requested FMLA, but don't rush a termination decision to avoid FMLA leave. *Gleaton v. Monumental Life Ins. Co.*, 2010 WL 419921 (D.S.C., 2010).

Q. The U.S. Department of Labor determined that our Office Manager is not "exempt" from overtime because he only supervises one other person and doesn't manage the company. We paid him $1,000 salary per workweek, and it was understood that this salary covered all hours worked whether that was 60 hours or 20 hours in a workweek. Nevertheless, the DOL says we must pay overtime for the hours worked in excess of 40, on top of the salary, because he is non-exempt. How do we compute the overtime owed?

A. Overtime is normally 1.5 times the regular rate of pay per hour. But there are regulations and case law supporting using the fluctuating workweek (FWW) method of computing overtime owed to someone paid on a salary basis. FWW will reduce your liability by over 2/3rds because instead of paying 1.5 times the regular rate for each overtime hour, you pay only .5 times. To use the FWW method, there must be a clear understanding of the employee and employer that the fixed salary is guaranteed and covers all hours worked rather than just 40 hours or some other fixed weekly work period. The additional overtime compensation is .5 times the regular rate of pay for that week for each overtime hour. The regular rate per hour is determined by dividing the salary by the number of hours worked that workweek. The more time worked, the lower the regular rate of pay per hour. For example, at 40 hours the regular rate is $25 per hour ($1,000/40 hrs). If your employee works 50 hours, his regular rate is $20 per hour ($1,000 / 50 hrs). The overtime owed for that week is $100 (.5 x $20 x 10 hrs). This amount is $150 less than what would be owed if the salary applied only to 40 hours per week and the additional 10 hours of overtime was paid at 1.5 times that regular rate (1.5 x $25 x 10 hrs = $250). To ensure a "clear understanding," explain in your handbook that overtime for non-exempt employees paid on a salary basis is computed by the FWW method because the salary covers all hours worked. 2010 WL 3024880; 29 CFR § 778.114.

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