Fall 2010

EDUCATION NEWS

SEARCH OF EMPLOYEE TEXT MESSAGES NOT ILLEGAL

Is it a Fourth Amendment violation for a public employer to review text messages sent by an employee on an employer-provided communication device? In a decision rendered on June 17, 2010, the U.S. Supreme Court found that, under the facts presented, it is not a violation of the employee's rights. This case may significantly impact the relationship between public entities and their employees.

In *City of Ontario, California v. Quon*, the Court reviewed a lawsuit brought by a police officer against the city for whom he worked. The police department of Ontario, California issued alphanumeric pagers to its SWAT team so they could coordinate their efforts through text messages. The police department had a network/internet policy which stated that employees had no expectation of privacy in e-mail and computer use. Through subsequent directives, the department clarified that the policy applied to text messages sent through the pagers. The department's contract with the pager service provider imposed a number of characters which could be sent or received by a pager over a monthly period and imposed a fee for overages. For a period of time, the department permitted officers to pay for the overage charges out of their own pocket, but after several months of collecting reimbursement, the department's chief decided to determine whether the overages were being caused by a too-low limit on text message characters or whether officers were using the pagers to send non-work-related messages. Transcripts were ordered of the messages sent by one officer who went over the limit, Jeff Quon, and after it was determined the vast majority of messages Quon sent and received were unrelated to work, he was subjected to discipline.

In response, Quon filed a lawsuit alleging that the department had infringed his Fourth Amendment right to be free from unreasonable search and seizure, and that the provisions of the Stored Communications Act (SCA) had been violated. After holding a jury trial, the District Court determined that the department's purpose for auditing Quon's records was to see whether the character limit maximums were too low to meet the department's needs, and not to infringe on Quon's privacy, and the court rejected his Fourth Amendment claim. On appeal, the Ninth Circuit Court of Appeals reversed in part and held that the department should have employed less intrusive means for carrying out the purpose of its audit of the text messages. As a result, the Court of Appeals found in favor of Quon.

The U.S. Supreme Court reversed and held that the Fourth Amendment was not violated by the chief's review of Quon's text messages. While the review constituted a "search" under the Fourth Amendment, it was justified to investigate the overage charges. Further, the Court found the search was reasonable and not overly intrusive because reviewing the content of the messages was the most efficient way to determine if the overages were caused by work-related use, and the department audited only two months' worth of Quon's messages and redacted any he sent while off-duty. Finally, the Court determined it was not reasonable for Quon to believe he had complete expectation of privacy as the department informed its officers that messages could be audited and a reasonable person would assume that messages might be audited to see whether the pager was being appropriately used. On these facts, the Supreme Court found the search of Quon's text messages was not illegal.

The Court's holding in *Ontario v. Quon* impacts the rights of public employers in conducting workplace investigations. The Court made clear that if the search is for a justified purpose to advance the employer's interest and is conducted in reasonable fashion which minimizes intrusion, electronic communications of employees can be searched without violating the Fourth Amendment. However, districts should first seek legal counsel before undertaking searches of employee communications. Districts should ensure that existing network/acceptable use policies encompass all district-issued communication devices, and should regularly train their employees concerning the provisions of that policy. Also, Districts must determine a proper justification for a search and must not conduct a search that is more intrusive than necessary or which violates a reasonable expectation of privacy. While the Supreme Court has opened a door for public entities, it is still incumbent on public employers to use that power appropriately.

INSIDE THIS ISSUE:

KEEP POLITICS OUT OF THE WORKPLACE

A School District's right to limit employee free speech was recently upheld by the U.S. Western District Court of Pennsylvania in *Cook v. New Castle Area School District*. *Cook*, a Section 1983 Civil Rights free speech retaliation claim, was a case in which the employee argued that the School District improperly limited his election-related speech to a co-worker during school hours. The Court reiterated that the law is clear that the First Amendment allows a public employer to regulate its employees' speech in ways that it could never regulate speech from a member of the general public. To analyze First Amendment claims, courts apply the test enunciated by the U.S. Supreme Court in *Pickering v. Board of Education*. Under the *Pickering* test, a public employee is protected from adverse employment actions based on speech when that speech: (1) addresses a matter of public concern; and (2) outweighs "the government's interest in the effective and efficient fulfillment of its responsibilities to the public."

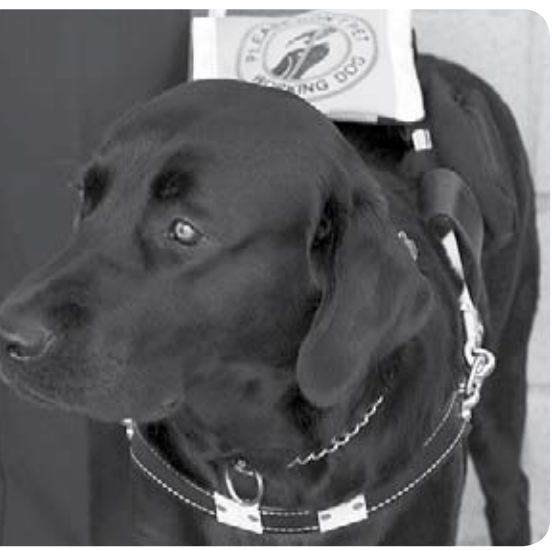
Whether speech is a matter of public concern depends on the content, form, and context of a given statement. A court must consider whether the statement relates to any matter of political, social or other concern to the community, keeping in mind that having free and unhindered debate on matters of public importance is at the core of values protected by the Free Speech Clause of the First Amendment. If the speech is not a matter of public concern, but rather addresses a private matter only, it enjoys no constitutional protection.

In *Cook*, the topic of conversation was the election of the President of the School Board, which was a matter of public concern. However, in applying the second prong of the *Pickering* test, the District Court held that the School District had a compelling interest in the effective and efficient fulfillment of employee responsibilities during work hours. The School District's interest "in maintaining a functional workplace" outweighs the employee's interest in having a casual discussion about a local School Board election with another school employee during work hours. The Court recognized that the election of local officials is obviously a contentious issue that has the potential to create conflict between employees. Therefore, the Court agreed that the School District could limit or regulate the speech because it had a reasonable interest in ensuring that there is a good working relationship between its employees and that its employees are not disrupted during work hours.

If your School District is confronted with a similar free speech issue, the *Cook* decision provides guidance when balancing an employee's free speech rights with a School District's legitimate interest in maintaining an efficient workplace.

REQUESTS FOR SERVICE ANIMALS UNDER THE AMENDED ADA REGULATIONS

In 2008, the Department of Justice submitted draft final rules for Title II of the ADA to add a detailed definition of "service animal" to the Title II regulation at 28 CFR 35.104 and to amend 28 CFR 35 to include a new regulation on service animals. These draft rules were placed on hold in 2009. However, the final rules were recently released by the Justice Department on July 23, 2010. Since requests for service animals for students with disabilities are on the rise, it is important to educate staff on how to handle these requests, especially in light of the new amended ADA regulations. This article addresses issues regarding students enrolled at the school district, not others who may require a service animal to enable them to access the public accommodations provided by the school district.



First, know what constitutes a "service animal." Under the new regulations, a service animal is "any dog that is individually trained to do work or perform tasks for the benefit of an individual with a disability, including a physical, sensory, psychiatric, intellectual, or other mental disability. Other species of animals, whether wild or domestic, trained or untrained, are not service animals for the purposes of this definition." Work or tasks include, but are not limited to, "assisting individuals who are blind or have low vision with navigation and other tasks, alerting individuals who are deaf or hard of hearing to the presence of people or sounds, providing non-violent protection or rescue work, pulling a wheelchair, assisting an individual during a seizure, alerting individuals to the presence of allergens, retrieving items such as medicine or the telephone, providing physical support and assistance with balance and stability to individuals with mobility disabilities, and helping persons with psychiatric and neurological disabilities by preventing or interrupting impulsive or destructive behaviors." The provision of emotional support, well-being, comfort or companionship does not constitute work or tasks.

Next, understand that in Pennsylvania, the use of a "guide or support animal" is recognized as a civil right. The Pennsylvania Human Relations Act provides "the opportunity for an individual…to obtain all accommodations, advantages, facilities and privileges of any public accommodation…without discrimination because of…the use of a guide or support animal because of blindness, deafness or physical handicap of the user…is hereby recognized as and declared to be a civil right which shall be enforceable as set

forth in this act." Courts have held that public schools are places of "public accommodation" within the meaning of Pennsylvania's Human Relations Act, and equal educational opportunity is a civil right enforceable by the Human Relations Commission.

Third, make proper inquiries. The revised regulations provide that "a public entity may ask if the animal is required because of a disability and what work or task the animal has been trained to perform." For students who are enrolled at the District, a School District may also make reasonable inquiries to ascertain the nature or extent of the student's disability or require documentation, such as proof the animal has been certified, trained or licensed as a service animal. These inquiries would not be appropriate for others who require a service animal to access public accommodations.

Next, consider safety issues. The rule states that "a public entity may ask an individual with a disability to remove a service animal from the premises if the animal is out of control and the animal's handler does not take effective action to control it or if the animal is not housebroken." An animal also may be removed if it poses a direct threat, defined in the regulations as "a significant risk to the health and safety of others that cannot be eliminated by a modification of policies, practices or procedures."

Finally, remember your FAPE duty. Even if an animal does not meet the definition of service animal under the ADA, schools still should consider if the animal is required for FAPE. OCR has held that even if the requested service dog did not qualify as a service animal, the district should have considered whether the dog's presence was necessary for the student to receive FAPE. However, in other cases, if a district was able to show it could provide FAPE to a student without the use of a service animal, the courts and OCR have supported the district's decision not to allow the student to bring a service animal to school. For instance, a district did not have to allow a service animal to accompany a student to school to comfort him when he had seizures because his full-time one-on-one aide could perform the same duty.

While the new regulations provide some additional guidance to School Districts in addressing requests for service animals, there are many remaining unanswered questions, such as the scope of a proper inquiry in the school setting, which may result in more OCR investigations and litigation as the new regulations are interpreted and applied.

THE NEW RTKL ON APPEAL

COMMONWEALTH COURT CASES OF INTEREST

As we reported in the Winter 2010 edition of Education News, the Commonwealth Court (Court) issued its first substantive decision on the new Right to Know Law (RTKL) on February 5, 2010 in the case of *Bowling v. Office of Open Records (OOR)*. Since then, while additional appeals have been heard by the Court, only a few impact School Districts' processing of RTKL requests.

A significant development has occurred in *PSEA, et al. v. OOR, et al.*, the case in which the Commonwealth Court preliminarily enjoined OOR, on July 28, 2009, from ordering the release of employee home addresses based on privacy concerns, which was upheld by the Supreme Court on August 17, 2010. In an opinion issued on September 24, 2010, the Commonwealth Court dismissed the action on the grounds that the court lacked jurisdiction on the basis that OOR, a quasi-judicial tribunal, lacks any interest in the outcome of its adjudications and is not an appropriate defendant. With the dismissal of the action, reliance on the underlying July 2009 injunction is not appropriate. PSEA's underlying privacy analysis may still be asserted, but until an appeal is filed which addresses the merits of the privacy issues, it is likely that OOR will resume ordering the release of home addresses.

In *Moore v. Office of Open Records (Dept. of Corrections)*, the Court clarified the meaning of Section 705 of the RTKL which provides that "an agency shall not be required to create a record which does not currently exist." The Court held that under this provision, whether or not a document existed at some point in time is not the proper standard – the standard is whether the document currently exists and is in the possession of the School District at the time of the RTKL request. If a diligent search fails to locate a record, it is safe to respond that the document "does not currently exist."

The Court, in a plurality opinion in *Department of Conservation and Natural Resources of the Commonwealth of Pennsylvania, et al. v. OOR*, reversed three OOR determinations requiring agencies to turn over unredacted copies of private contractors' certified payroll records which would disclose private employees' names and home addresses. Three judges, relying on *Sapp Roofing*, a longstanding precedential case decided under prior law, held that certified payroll records are financial records which must be disclosed, but that private employees' salaries are not a matter of public record. Therefore, it was proper to redact names and addresses of the employees so their personal financial information remained personal. The concurrence argued that the requested records were not even financial records of the agencies and that the employee's interest in privacy outweighed disclosure, thereby favoring a constitutional right to privacy of names and home addresses.

Regarding public access to private entity records when the private entity has entered into a contract with a public entity, the Court has favored public access to such records. In *East Stroudsburg University Foundation et al. v. OOR*, the Court required disclosure of a private, nonprofit foundation's records under Section 506(d)(1) of the RTKL. The Court held that the RTKL is clear that "all contracts that governmental entities enter into with private contractors necessarily carry out a 'governmental function' – because the government always acts as the government." This broad interpretation was challenged by a concurring judge who asserted that the legislature did not intend to make all records related to government contracts records of the agency. In *SWB Yankees, LLC v. Wintermantel*, the Court held that the Multi-Purpose Stadium Authority of Lackawanna County was clearly created for the benefit of the people of the Commonwealth. The fact that it contracted out the operation of its baseball and other entertainment events of the Authority was of no consequence. A third party is in the same position as an agency for purposes of the RTKL under §506(d)(1).

Finally, a word of caution was issued by the Court in *Aston Township v. Signature Information Solutions*. The Court interpreted Section 903(2) of the RTKL which provides that a denial of an RTKL request must include the "specific reasons for the denial, including a citation of supporting legal authority." When the Township attempted to raise an additional basis for denial on appeal, the Court held that the RTKL does not permit a different reason for denial to be raised on appeal. Otherwise, the requirements of Section 903(2) "would become a meaningless exercise." Therefore, in responding to RTKL requests, take all steps necessary to raise all grounds for denial when responding.

Our office will continue to monitor the Commonwealth Court decisions and provide periodic updates on decisions which impact School District operations.

MB&M EDUCATION NEWS

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END OF THE ROAD FOR MANDATE WAIVERS

The experiment to grant school districts exemptions from the mandate provisions of the School Code is over. The 2000 Education Empowerment Act expired on June 30, 2010, and with it, the Mandate Waiver program also lapsed. PDE will not accept or approve any additional mandate waiver applications unless, of course, the program is later reauthorized.

If your school district had a mandate waiver granted prior to June 30, 2010, you may continue to operate under its terms, provided you complete the mandatory program evaluations on an annual basis.

COMMONWEALTH COURT UPHOLDS BOARD REMOVAL

The Fall 2009 Education News discussed a Court of Common Pleas decision in which a Judge removed the North Schuylkill School Board from office after the Board failed to fill a Superintendent vacancy while seeking to have its Solicitor serve as Superintendent. The decision was appealed to Commonwealth Court, which recently affirmed the lower court's decision to remove the Board. For a full analysis of the decision and its implications, please go to the Newsletter section of our website.

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