Another Day at *The Office:*

Practice Management Lessons Learned from the Media

Willamette Valley Inns of Court

March 18, 2010

Team Martinez

Privacy Issues

Enrolled
Senate Bill 1045

Sponsored by Senator ROSENBAUM, Representative KOTEK; Senators BATES, BONAMICI, DEVLIN, DINGFELDER, EDWARDS, MORRISETTE, PROZANSKI, SHIELDS, Representatives BAILEY, BUCKLEY, DEMBROW, DOHERTY, GELSER, GREENLICK, HARKER, HOLVEY, HOYLE, KAHL, KOMP, NOLAN, STIEGLER, TOMEI, VANORMAN (Presession filed.)

CHAPTER .....

AN ACT

Relating to use of credit history for employment purposes; creating new provisions; amending ORS 659A.885; and declaring an emergency.

Be It Enacted by the People of the State of Oregon:

SECTION 1. Section 2 of this 2010 Act is added to and made a part of ORS chapter 659A.

SECTION 2. (1) Except as provided in subsection (2) of this section, it is an unlawful employment practice for an employer to obtain or use for employment purposes information contained in the credit history of an applicant for employment or an employee, or to refuse to hire, discharge, demote, suspend, retaliate or otherwise discriminate against an applicant or an employee with regard to promotion, compensation or the terms, conditions or privileges of employment based on information in the credit history of the applicant or employee.

(2) Subsection (1) of this section does not apply to:

(a) Employers that are federally insured banks or credit unions;

(b) Employers that are required by state or federal law to use individual credit history for employment purposes;

(c) The employment of a public safety officer who is a member of a law enforcement unit, who is employed as a peace officer commissioned by a city, port, school district, mass transit district, county, Indian reservation, the Criminal Justice Division of the Department of Justice, the Oregon State Lottery Commission or the Governor and who is responsible for enforcing the criminal laws of this state or laws or ordinances related to airport security; or

(d) The obtainment or use by an employer of information in the credit history of an applicant or employee because the information is substantially job-related and the employer's reasons for the use of such information are disclosed to the employee or prospective employee in writing.

(3) An employee or an applicant for employment may file a complaint under ORS 659A.820 for violations of this section and may bring a civil action under ORS 659A.885 and recover the relief as provided by ORS 659A.885 (1) and (2).

(4) As used in this section, "credit history" means any written or other communication of any information by a consumer reporting agency that bears on a consumer's creditworthiness, credit standing or credit capacity.

SECTION 3. ORS 659A.885 is amended to read:

659A.885. (1) Any person claiming to be aggrieved by an unlawful practice specified in subsection (2) of this section may file a civil action in circuit court. In any action under this subsection, the court may order injunctive relief and any other equitable relief that may be appropriate, including but not limited to reinstatement or the hiring of employees with or without back pay. A court may order back pay in an action under this subsection only for the two-year period immediately preceding the filing of a complaint under ORS 659A.820 with the Commissioner of the Bureau of Labor and Industries, or if a complaint was not filed before the action was commenced, the two-year period immediately preceding the filing of the action. In any action under this subsection, the court may allow the prevailing party costs and reasonable attorney fees at trial and on appeal. Except as provided in subsection (3) of this section:

(a) The judge shall determine the facts in an action under this subsection; and

(b) Upon any appeal of a judgment in an action under this subsection, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (3).

(2) An action may be brought under subsection (1) of this section alleging a violation of ORS 25.337, 25.424, 171.120, 408.230, 476.574, 652.355, 653.060, 659A.030, 659A.040, 659A.043, 659A.046, 659A.063, 659A.069, 659A.082, 659A.088, 659A.103 to 659A.145, 659A.150 to 659A.186, 659A.194, 659A.199, 659A.203, 659A.218, 659A.230, 659A.233, 659A.236, 659A.250 to 659A.262, 659A.277, 659A.290, 659A.300, 659A.306, 659A.309, 659A.315, 659A.318 or 659A.421 **or section 2 of this 2010 Act**.

(3) In any action under subsection (1) of this section alleging a violation of ORS 25.337, 25.424, 659A.030, 659A.040, 659A.043, 659A.046, 659A.069, 659A.082, 659A.103 to 659A.145, 659A.199, 659A.230, 659A.250 to 659A.262, 659A.290, 659A.318 or 659A.421:

(a) The court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or $200, whichever is greater, and punitive damages;

(b) At the request of any party, the action shall be tried to a jury;

(c) Upon appeal of any judgment finding a violation, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (1); and

(d) Any attorney fee agreement shall be subject to approval by the court.

(4) In any action under subsection (1) of this section alleging a violation of ORS 652.355 or 653.060, the court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or $200, whichever is greater.

(5) In any action under subsection (1) of this section alleging a violation of ORS 171.120, 476.574, 659A.203 or 659A.218, the court may award, in addition to the relief authorized under subsection (1) of this section, compensatory damages or $250, whichever is greater.

(6) Any individual against whom any distinction, discrimination or restriction on account of race, color, religion, sex, sexual orientation, national origin, marital status or age, if the individual is 18 years of age or older, has been made by any place of public accommodation, as defined in ORS 659A.400, by any employee or person acting on behalf of the place or by any person aiding or abetting the place or person in violation of ORS 659A.406 may bring an action against the operator or manager of the place, the employee or person acting on behalf of the place or the aider or abettor of the place or person. Notwithstanding subsection (1) of this section, in an action under this subsection:

(a) The court may award, in addition to the relief authorized under subsection (1) of this section, compensatory and punitive damages;

(b) The operator or manager of the place of public accommodation, the employee or person acting on behalf of the place, and any aider or abettor shall be jointly and severally liable for all damages awarded in the action;

(c) At the request of any party, the action shall be tried to a jury;

(d) The court shall award reasonable attorney fees to a prevailing plaintiff;

(e) The court may award reasonable attorney fees and expert witness fees incurred by a defendant who prevails only if the court determines that the plaintiff had no objectively reasonable

basis for asserting a claim or no reasonable basis for appealing an adverse decision of a trial court; and

(f) Upon any appeal of a judgment under this subsection, the appellate court shall review the judgment pursuant to the standard established by ORS 19.415 (1).

(7) When the commissioner or the Attorney General has reasonable cause to believe that a person or group of persons is engaged in a pattern or practice of resistance to the rights protected by ORS 659A.145 or 659A.421 or federal housing law, or that a group of persons has been denied any of the rights protected by ORS 659A.145 or 659A.421 or federal housing law, the commissioner or the Attorney General may file a civil action on behalf of the aggrieved persons in the same manner as a person or group of persons may file a civil action under this section. In a civil action filed under this subsection, the court may assess against the respondent, in addition to the relief authorized under subsections (1) and (3) of this section, a civil penalty:

(a) In an amount not exceeding $50,000 for a first violation; and

(b) In an amount not exceeding $100,000 for any subsequent violation.

(8) In any action under subsection (1) of this section alleging a violation of ORS 659A.145 or 659A.421 or alleging discrimination under federal housing law, when the commissioner is pursuing the action on behalf of an aggrieved complainant, the court shall award reasonable attorney fees to the commissioner if the commissioner prevails in the action. The court may award reasonable attorney fees and expert witness fees incurred by a defendant that prevails in the action if the court determines that the commissioner had no objectively reasonable basis for asserting the claim or for appealing an adverse decision of the trial court.

(9) In an action under subsection (1) or (7) of this section alleging a violation of ORS 659A.145 or 659A.421 or discrimination under federal housing law:

(a) "Aggrieved person" includes a person who believes that the person:

(A) Has been injured by an unlawful practice or discriminatory housing practice; or

(B) Will be injured by an unlawful practice or discriminatory housing practice that is about to occur.

(b) An aggrieved person in regard to issues to be determined in an action may intervene as of right in the action. The Attorney General may intervene in the action if the Attorney General certifies that the case is of general public importance. The court may allow an intervenor prevailing party costs and reasonable attorney fees at trial and on appeal.

SECTION 4. Section 2 of this 2010 Act and the amendments to ORS 659A.885 by section 3 of this 2010 Act become operative on July 1, 2010.

SECTION 5. The Commissioner of the Bureau of Labor and Industries may take any action before the operative date specified in section 4 of this 2010 Act that is necessary to enable the commissioner to exercise, on and after the operative date specified in section 4 of this 2010 Act, all the duties, functions and powers conferred on the commissioner by section 2 of this 2010 Act and the amendments to ORS 659A.885 by section 3 of this 2010 Act.

SECTION 6. This 2010 Act being necessary for the immediate preservation of the public peace, health and safety, an emergency is declared to exist, and this 2010 Act takes effect on its passage.

Passed by Senate February 15, 2010

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Secretary of Senate

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President of Senate

Passed by House February 22, 2010

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Speaker of House

Received by Governor:

.....M.,....., 2010

Approved:

.....M.,....., 2010

.....
Governor

Filed in Office of Secretary of State:

.....M.,....., 2010

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Secretary of State

Not Reported in F.Supp.2d, 2008 WL 5093140 (E.D.Pa.)
(Cite as: 2008 WL 5093140 (E.D.Pa.))

C
Only the Westlaw citation is currently available.

United States District Court,
E.D. Pennsylvania.
Stacey SNYDER, Plaintiff
v.
MILLERSVILLE UNIVERSITY, et al., Defendants.
Civil Action No. 07-1660.

Dec. 3, 2008.

West KeySummary
Colleges and Universities 81 ⇐9.30(2)

81 Colleges and Universities
81k9 Students
81k9.30 Regulation of Conduct in General
81k9.30(2) k. Speech and Assembly; Demonstrations. Most Cited Cases

Constitutional Law 92 ⇐2010

92 Constitutional Law
92XVIII Freedom of Speech, Expression, and Press
92XVIII(Q) Education
92XVIII(Q)2 Post-Secondary Institutions
92k2009 Student Speech or Conduct
92k2010 k. In General. Most Cited Cases
A student teacher enrolled in a public university teaching program did not have her First Amendment free speech rights violated when the teaching program failed to certify her allegedly due to web pages about her found on the Internet. Because of her status as a teacher, the student teacher was subject to freedom of speech that touched on public concern. The student teacher's website posting was not speech that touched on matters of public concern, but rather the posting was only related to personal matters. U.S.C.A. Const.Amend. 1.

Mark W. Voigt, Law Office of Mark W. Voigt, Plymouth Meeting, PA, for Plaintiff.

Barry N. Kramer, Office of General Counsel, Philadelphia, PA, for Defendant.

MEMORANDUM

DIAMOND, District Judge.

***1** Plaintiff Stacey Snyder alleges that Defendants-five Millersville University administrators-violated her First Amendment right to freedom of expression. Having held a two day non-jury trial, I enter judgment for Defendants and offer my supporting factual findings and legal conclusions. Fed.R.Civ.P. 52.

PROCEDURAL HISTORY

From June 2002 until May 2006, Plaintiff attended Millersville University, where she majored in education. On May 13, 2006, after Defendants determined that Plaintiff had not successfully met the prerequisites for obtaining the degree of Bachelor of Science in Education, they allowed Plaintiff to graduate from MU with a Bachelor of Arts in English. Plaintiff unsuccessfully appealed that decision to Dr. Jane S. Bray, Dean of MU's School of Education and Dr. Vilas A. Prabhu, MU's Provost and Vice President for Academic Affairs.

On April 25, 2007, Plaintiff filed a Complaint in this Court against Millersville University, Bray, Prabhu, and J. Barry Girvin, her supervisor in MU's Student Teaching Program. She included three state law claims, and also alleged that Defendants had violated her First Amendment free speech rights and her Fifth and Fourteenth Amendment due process rights. 42U.S.C. § 1983.

On September 17, 2007, I dismissed Plaintiff's claims against MU with prejudice on Eleventh Amendment sovereign immunity grounds. (Doc.

No. 15). I gave Plaintiff leave to amend: (1) her ambiguous claims against the remaining Defendants in their individual capacities; and (2) her request for relief against those same Defendants in their official capacities. *Will v. Mich. Dep't of State Police,* 491 U.S. 58, 71 n. 10, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989); *Melo v. Hafer,* 912 F.2d 628, 635 (3d Cir.1990), *aff'd* 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991).

On October 12, 2007, Plaintiff filed a Second Amended Complaint, again alleging that Bray, Prabhu, and Girvin, acting in their individual and official capacities, violated her First Amendment free speech rights and her Fifth and Fourteenth Amendment due process rights. Plaintiff also brought several state law claims against Defendants in their individual capacities. I dismissed the Fifth and Fourteenth Amendment claims, ruling that Defendants had afforded Plaintiff adequate process. (Doc. No. 23). I also dismissed Plaintiffs state law claims as non-cognizable and barred by sovereign immunity. I denied Defendants' Motion to Dismiss as to Plaintiff's First Amendment claim.

On March 18, 2008, Plaintiff filed a Third Amended Complaint, adding as Defendants Dr. Judith Wenrich, MU's Student Teaching Coordinator and Director of Field Services, and Dr. Beverly Schneller, the Chair of MU's English Department. Plaintiff alleged that Defendants Bray, Prabhu, Girvin, Wenrich, and Schneller violated her First Amendment free speech rights. She sought monetary damages from Defendants in their individual capacities and injunctive relief from Defendants in their official capacities.

On April 11, 2008, Defendants moved for summary judgment. I granted Defendants' Motion in part, ruling that qualified immunity barred Plaintiff's claims against Defendants in their individual capacities. (Doc. No. 39).

***2** On May 6 and May 7, 2008, I conducted a non-jury trial on Plaintiff's claim for mandatory injunctive relief against Defendants in their official capacities. Plaintiff asks me to compel Defendants to: (1) award her a BSE and the teaching credits that will enable her to seek teaching certification from the Pennsylvania Department of Education; and (2) "take all necessary steps" to ensure that the PDE approves Plaintiff's application for initial teaching certification. (Doc. No. 31 at 18-19.)

Under PDE regulations, Defendants do not have the authority to award Plaintiff a BSE or the teaching credits she seeks, nor can they recommend her for initial teaching certification. Moreover, Defendants did not violate her First Amendment rights. Accordingly, I conclude that Plaintiff is not entitled to mandatory injunctive relief.

FINDINGS OF FACT

In the summer of 2002, when she was twenty-two, Plaintiff enrolled at Millersville University as a full-time student. She majored in biology for one year before switching to English and, eventually, to education. (Tr. May 6, 2008 at 4-5.) As part of the required education curriculum, in 2005 Plaintiff completed various field assignments at area schools, where she observed teachers and taught two mini-lessons. (Tr. May 6, 2008 at 6-7, 9, 11.) During the entire Spring Semester of 2006, Plaintiff was enrolled in MU's Student Teaching Program, which entailed considerably greater responsibilities, including lesson and curriculum planning, teaching a full course load, and administering exams. (Tr. May 6, 2008 at 25), (Tr. May 7, 2008 at 13-15), (Pl.'s Exs. 4, 5). She anticipated that upon her successful completion of the Student Teaching practicum, she would receive a BSE on May 13, 2006.

Millersville University's Practicum Requirements

The Pennsylvania Department of Education closely regulates the training and certification of those who seek to become public school teachers. MU's policies and requirements reflect those regulations. For instance, MU requires that every student who seeks a BSE must successfully complete a Student

Teaching placement. (Tr. May 6, 2006 at 204, 233-235, 245-248), (Tr. May 7, 2008 at 117-124). This reflects the PDE's regulation providing that every applicant must complete a "Department-approved teacher preparation program"-which must include a "full-time student teaching experience"-before seeking initial teaching certification from the PDE. 22 Pa.Code §§ 49.82(b)(2), 354.25(f); (Pl.'s Ex. 4 at 9). The regulations also provide that each applicant for initial teaching certification must receive a recommendation for certification from his or her university. *Id.* § 49.82(b)(4). MU cannot recommend a candidate for initial teaching certification without confirming that he or she has "achieved at least a satisfactory rating" in Student Teaching. (Doc. No. 45, App.1), (Tr. May 6, 2008 at 235), (Tr. May 7, 2008 at 134-136).

Plaintiff's Student Teaching Assignment

***3** On January 16 and 17, 2006, Plaintiff attended MU's student teacher orientation conducted by Drs. Bray and Wenrich. (Tr. May 6, 2008 at 12), (Pl.'s Ex. 9). Plaintiff there received a copy of the Millersville University Guide to Student Teaching. (Tr. May 6, 2008 at 14), (Pl.'s Ex. 4). Plaintiff read and understood that manual before she began student teaching. (Tr. May 6, 2008 at 111.) The Guide provides that MU student teachers are required to "maintain the same professional standards expected of the teaching employees of the cooperating school" and to "fulfill as effectively as possible every role of the classroom teacher...." (Pl.'s Ex. 4 at 7.) The Guide also provides that the "student teacher is a guest of the cooperating school." (Pl.'s Ex. 4 at 7.) During the January orientation, Bray explained that student teachers are "novice teachers." (Tr. May 7, 2008 at 139:4.)

In January 2006, Plaintiff was assigned to student teach at Conestoga Valley High School, where full-time CV faculty member Nicole Reinking would serve as her Cooperating Teacher. (Tr. May 6, 2008 at 15-16). In Mid-January, Plaintiff met with Reinking in the CV Teachers' Lounge. (Tr. May 6, 2008 at 16, 113). Reinking reviewed plans for the Semester and discussed Plaintiff's responsibilities. (Tr. May 6, 2008 at 16). Reinking also gave Plaintiff a Teacher's Edition of the course book and a copy of the final exam for one of the courses Plaintiff would teach. (Tr. May 6, 2008 at 113-114), (Tr. May 7, 2008 at 11-12). From the time Plaintiff began as a CV student teacher in January 2006 through May 2006, she took no classes at MU. (Tr. May 6, 2008 at 129.) Plaintiff followed the CV school year calendar (rather than the MU academic calendar), and was responsible for conforming to Reinking's schedule. (Tr. May 7, 2008 at 14.)

After spending her first weeks observing Reinking's twelfth grade English classes, Plaintiff "started [her] teaching experience." (Tr. May 6, 2008 at 20:8-9), (Tr. May 7, 2008 at 12). Within two months, Plaintiff was responsible for teaching two courses while Reinking observed. (Tr. May 6, 2008 at 23, 126). Plaintiff also taught another CV literature course, where she was the "sole teacher" and had "complete responsibility for the students." (Tr. May 6, 2008 at 126:9-13.) By April 2006, Plaintiff taught a "full load" of courses at CV. (Tr. May 6, 2008 at 117-118, 126), (Tr. May 7, 2008 at 13). Her responsibilities included "writing out the lesson plans and getting the documents ready for the students," as well as understanding material "well enough to teach [it] back to the students." (Tr. May 6, 2008 at 25:2-9), (Tr. May 7, 2008 at 16). Plaintiff referred to the pupils in those CV classes as "my students," and thought that they believed her to be "their official teacher." (Pl.'s Ex. 51.) Plaintiff considered the other CV teachers-with whom she attended faculty meetings-to be her colleagues. (Tr. May 6, 2008 at 93:2.)

Mid-Placement Evaluations

***4** Throughout the practicum, Plaintiff experienced great difficulty with respect to her competence and over-familiarity with her students. Those diffi-

culties were described in Plaintiff's evaluations, and would eventually lead to the difficulties that caused Plaintiff to bring this lawsuit.

J. Barry Girvin was Plaintiff's MU Supervisor during her time at CV. He was responsible for observing Plaintiff in the classroom and for evaluating her teaching. Girvin observed Plaintiff seven times during the Semester. (Tr. May 6, 2008 at 187.) Plaintiff's "problems with discipline and also with content" concerned him. (Tr. May 6, 2008 at 187:20-21.) He noted that she had difficulty maintaining a formal teaching manner. (Tr. May 6, 2008 at 190-191.) Plaintiff explained at trial that Girvin helped her understand the importance of "putting [her] foot down." (Tr. May 6, 2008 at 20:24.) Girvin had advised her not to let the students "walk all over" her, and to remember "I'm the teacher, they're the students." (Tr. May 6, 2008 at 28:20-22).

At the middle and end of Plaintiff s CV placement, Girvin evaluated her work in two separate forms-an MU evaluation and a PDE 430. (Tr. May 6, 2008 at 185-186.) Girvin completed Plaintiff's mid-placement evaluation on March 21, 2006. He indicated that Plaintiff showed "good" or "reasonable" progress in most professionalism categories, but needed to work on appropriate communication with others-including students, supervisors, and cooperating teachers-and on establishing "proper teacher-student boundaries." (Pl.'s Ex. 45 at 1.) Girvin rated Plaintiff's overall performance "satisfactory." (Pl.'s Ex. 46 at 4-5.) He found her professionalism "superior," but her classroom environment "unsatisfactory," and indicated that she needed to employ a "more 'down to business' approach" with the students. (Pl.'s Ex. 46 at 2.) Plaintiff understood that she needed to attain satisfactory ratings in all PDE 430 categories before MU could recommend her for Pennsylvania teaching certification. (Tr. May 6, 2008 at 30.)

Throughout the practicum, Reinking criticized Plaintiff's competence-especially her ignorance of basic grammar, punctuation, spelling, and usage-her inadequate classroom management, her poor understanding of the subjects she attempted to teach, and her inappropriate manner with students. (Tr. May 7, 2008 at 16-39.) Reinking found that on several occasions Plaintiff would "make up an answer" or "give the wrong answer" to student questions about literature or grammar. (Tr. May 7, 2008 at 32:9-20.) Reinking believed that the students were aware of Plaintiff s errors. (Tr. May 7, 2008 at 32:22-33:4.)

On March 20, 2006, Reinking completed her mid-placement evaluation of Plaintiff. (Pl.'s Ex. 65.) She indicated that Plaintiff needed "significant remediation" in several areas, including preparation, performance, and student learning. (Pl.'s Ex. 65 at 1-3.) Reinking noted that Plaintiffs lesson plans had "[m]any errors," and that "[t]oo many students are left behind as a result of ineffective lessons." (Pl.'s Ex. 65 at 1-2.) Reinking indicated that Plaintiff's professionalism showed "reasonable" or "good" progress, and that Plaintiff was interested in "getting to know her students on a personal level." (Pl.'s Ex. 65 at 1.) Reinking was concerned, however, that at times Plaintiff's efforts to "share her personal life" with the students crossed into "unprofessionalism." (Tr. May 7, 2008 at 21:8-11), (Pl.'s Ex. 65 at 1-2). Reinking thought it especially inappropriate that Plaintiff told an English class that her Valentines Day had been "ruined" when she encountered her former husband while dining out with her boyfriend. (Tr. May 7, 2007 at 22.) Reinking also noted that when Plaintiff could not control classroom behavior, she resorted to "talking over the students." (Pl.'s Ex. 65 at 1-2.) Reinking cited two instances when Plaintiff shouted "Shut-Up" at the students. (Pl.'s Ex. 65 at 2.)

***5** It was apparent from Plaintiff's trial testimony that she greatly disliked Reinking, believing her criticisms to be unfair. (Tr. May 6, 2007 at 66, 70-74.)

Plaintiff's MySpace Webpage

During the January orientation, Bray and Wenrich

cautioned the student teachers not to refer to any students or teachers on their personal webpages. Wenrich described a student teacher's dismissal from his practicum after he had posted information about his Cooperating School on his personal webpage. (Tr. May 6, 2008 at 231-232.) Wenrich recounted this incident because she wanted the student teachers to understand that "schools have the prerogative to remove student teachers from their placements." (Tr. May 6, 2008 at 232:1-3.) Plaintiff remembered that Wenrich directed her not to post information about her students or her Cooperating Teacher on her personal webpage. (Tr, May 6, 2008 at 139-140.)

Contrary to the advice and directives she received, Plaintiff sought to communicate about personal matters with her CV students through the MySpace webpage that she maintained throughout her CV placement. On several occasions, she informed the students during class that she had a MySpace webpage. (Tr. May 7, 2008 at 37-38.) Plaintiff also informed Reinking that she had discovered that "a lot of [her] students were on [MySpace]." (Tr. May 6, 2008 at 66-67 .) Reinking warned Plaintiff that it was not proper to discuss her MySpace account with the students, and urged Plaintiff not to allow students to become involved in her personal life. (Tr. May 7, 2008 at 38.)

In early May 2006, Plaintiff learned that one of her CV students had recognized and approached Plaintiff's friend Bree while off campus. (Tr. May 6, 2008 at 53.) Plaintiff believed that the student had recognized Bree from photos posted on Plaintiff's MySpace webpage. Plaintiff testified that she confronted the student, informing her that it was "unacceptable to talk to [her] teacher's friends and relatives outside of school basis." (Tr. May 6, 2008 at 67:21-22.) Plaintiff testified it was "inappropriate" for her student to look at a teacher's MySpace account because "there's a boundary line and there's personal information on there that [the student] should know not to look at as a student." (Tr. May 6, 2008 at 69:8, 69:16-18.) Plaintiff explained that although the student could properly have looked at the webpage of a personal acquaintance, it was improper to look at Plaintiff's webpage because Plaintiff was "a person of a higher standard." (Tr. May 6, 2008 at 69:19-24.)

Plaintiff's suggestion that she had heeded the direction of Reinking and others not to share personal information with her students through her webpage was belied by Plaintiff's May 4, 2006 MySpace posting:

> First, Bree said that one of my students was on here looking at my page, which is fine. I have nothing to hide. I am over 21, and I don't say anything that will hurt me (in the long run). Plus, I don't think that they would stoop that low as to mess with my future. So, bring on the love! I figure a couple of students will actually send me a message when I am no longer their official teacher. They keep asking me why I won't apply there. Do you think it would hurt me to tell them the real reason (or who the problem was)?
>
> ***6** (Pl.'s Ex. 51.)

Although Plaintiff denied at trial that Reinking was "the problem" at CV, that denial was not credible. (Tr. May 6, 2008 at 141-43.) Plaintiff acknowledged at trial that "my students" referred to her CV students. (Tr. May 6, 2008 at 139-140.) Plaintiff thus wanted "[her] students" to know that "their official teacher" had "nothing to hide" respecting her difficulties with Reinking. (Pl.'s Ex. 51.)

Plaintiff's posting also included a photograph that showed her wearing a pirate hat and holding a plastic cup with a caption that read "drunken pirate." (Pl.'s Ex. 51.) At trial, Plaintiff explained that she had a "mixed beverage" in the cup. (Tr. May 6, 2008 at 52.) She believed that the photograph showed her with a "stupid expression on my face ... giving the peace sign ... expressing myself at the moment, basically, peace, love, happiness...." (Tr. May 6, 2008 at 52:7-12.)

Plaintiff testified at trial that the photograph and caption had an entirely personal meaning. (Tr. May 6, 2008 at 52.) She also acknowledged that her May 4th posting was not directed at any CV administrators or anyone that she had "professional [contact] with ...." but was "really directed [to her] best friends." (Tr. May 6, 2008 at 55:22-24, 56:7-11.)

On Friday, May 5, 2006, another CV teacher accessed Plaintiff's MySpace account and saw Plaintiff's May 4th posting. (Tr. May 7, 2008 at 44.) The teacher showed the posting to Reinking, who believed that the last lines referred to her. (Tr. May 7, 2008 at 47.) Reinking also thought that it was inappropriate for a student teacher to invite her students to view a photograph of herself drinking alcohol. (Tr. May 7, 2008 at 67.) Reinking showed the posting to her CV Supervisor, Deann Buffington. (Tr. May 7, 2008 at 49.) At trial, Buffington stated that Reinking was "very upset." (Tr. May 7, 2008 at 88:7.) Buffington thought Plaintiffs posting represented a "blatant act of insubordination against Mrs. Reinking ." (Tr. May 7, 2008 at 100:23-24.) Before the May 5th conversation, Reinking had reported to Buffington that she had been frustrated "on numerous occasions" by Plaintiff's lack of preparation, "inappropriate or unprofessional behavior," and problems with grammar and language. (Tr. May 7, 2008 at 81:25-82:3, 84), (Pl.'s Ex. 48).

Buffington contacted Acting CV Superintendent Kim Seldomridge and told him of Plaintiffs MySpace posting and of Plaintiff s "other problem areas in the way of professional responsibilities." (Tr. May 7, 2008 at 89.) Seldomridge instructed Buffington to tell Plaintiff that she could not return to CV until her final evaluation. (Tr. May 7, 2008 at 88.) Seldomridge also told Buffington to ask Reinking to prepare a list of Plaintiff's other unprofessional actions. (Tr. May 7, 2008 at 90.)

Conestoga Valley Does Not Allow Plaintiff To Complete The Practicum

On Monday, May 8, 2006, Buffington phoned Plaintiff at home and informed her that an issue had arisen respecting Plaintiff's professionalism. (Tr. May 6, 2008 at 41.) Buffington told Plaintiff not to return to CV "under any circumstance[s]" until Thursday, May 11, 2006, when she would receive her final evaluation. (Tr. May 6, 2008 at 41:17-22.) According to Buffington, Conestoga Valley's administration "really did not want [Plaintiff] at [the] school at that point." (Tr. May 7, 2008 at 92:14-15.) Buffington then told Girvin that CV had barred Plaintiff from campus. On May 9, 2006, Buffington asked Reinking to document Plaintiff's "unprofessional behavior." (Tr. May 7, 2008 at 63:5-8), (Pl.'s Ex. 48).

*7 After speaking with Buffington, Plaintiff phoned Girvin, who suggested she think about what could have caused her difficulties at CV. (Tr. May 6, 2008 at 42.) Plaintiff testified that the "only thing that [she] could think of that would be in question was [her] MySpace account." (Tr. May 6, 2008 at 42:15-16.) Plaintiff spoke with Girvin again on May 9, 2006. He told her that she might not graduate or that she might not receive a BSE. (Tr. May 6, 2008 at 54:15-17.)

On May 9th, Plaintiff also wrote an email to Reinking "concerning student paperwork ... documents that [she] would have been accountable for if [she] was in the school." (Tr. May 6, 2008 at 44:12-17), (Pl.'s Ex. 55). On May 10, 2008, Plaintiff emailed a letter to Reinking, Girvin, Buffington, Wenrich, Bray, and Seldomridge regarding the "situation that has been evolving over the past three days." Plaintiif stated, "I am the only person to blame. I have to take full responsibility for my actions and live with the consequences determined by the administrative staff in Conestoga Valley High School and Millersville University." (Pl.'s Ex. 56 at 2.) Plaintiff went on:

> Secondly, It is necessary that I present not only an apology to those involved, but also all present the positive experiences ... I have excelled in my own personal life by interacting with the community, especially with elementary-aged functions ... All

> of these experiences ... show essential qualities of a teacher: professional interaction with staff and students inside and outside the school duration ... I look forward to seeing each and everyone of you to discuss and elevate this issue.

(Pl.'s Ex. 56 at 2.)

The grammar and usage errors in Plaintiff's letter disturbed Buffmgton. (Tr. May 7, 2008 at 93.) On May 11, 2006, Buffington wrote a note to Girvin stating, "this young woman, in my opinion, should not pass Student Teaching ... It will be no surprise to me if our excellent teachers here at CV do not volunteer again to serve as cooperating teachers for Millersville students." (Tr. May 7, 2008 at 98), (Pl.'s Ex. 52).

That same day, Buffington, Girvin, and Reinking met with Plaintiff at CV for the final evaluation of her student teaching. Buffington criticized Plaintiff's teaching competence, especially her inadequate subject knowledge. (Tr. May 6, 2008 at 50.) Buffington then showed Plaintiff her MySpace posting, which Buffington described as "unprofessional," and asked Plaintiff what she would have done if one of her students had seen the posting. (Tr. May 6, 2008 at 51:8-10.) After Buffington left the meeting, Plaintiff reviewed her final evaluations with Reinking and Girvin. Although they mentioned Plaintiff's "drunken pirate" photo, they were far more concerned with the posting's text. Both Girvin and Reinking believed that in remarking about "the real reason (or who **the problem was)" Plaintiff had referred to** Reinking. (Tr. May 6, 2008 at 58), (Tr. May 7, 2008 at 47, 206).

***8** In her final evaluation, Reinking rated Plaintiff's professionalism as "unsatisfactory," and noted that Plaintiff "evidenced some aspects of poor judgment during the Semester, especially in regard to one specific instance." (Pl.'s Ex. 59 at 1), (Tr. May 7, 2008 at 62-63). Reinking also rated Plaintiff "unsatisfactory" in several areas of preparation because Plaintiff did not demonstrate strong general education, knowledge, or an in-depth understanding of the subject matter. (Pl.'s Ex. 59 at 1), (Tr. May 7, 2008 at 46-47). She rated Plaintiff as "competent" or "superior" in all other categories. (Pl.'s Ex. 59 at 2-3.) In Girvin's final PDE 430 evaluation, **which he completed on May 12, 2006, Girvin rated Plaintiff as "competent" or "superior" in all categories except professionalism, which he described as "unsatisfactory" based on "errors in judgment" (Pl.'s Ex. 58), (Tr. May 6, 2008, at 77:9-12, 208). He** noted that Plaintiff did not communicate effectively with "students, colleagues, para-professionals, related service personnel, and administrators," and had not shown an ability to "cultivate professional relationships with school colleagues." (Pl.'s Ex. 57 at 4.) He gave Plaintiff satisfactory or superior ratings in all other categories. (Pl.'s Ex. 57.)

At trial, Reinking, Girvin, and Buffington all testified credibly that they believed Plaintiff had acted unprofessionally in criticizing Reinking-her Cooperating Teacher-on her webpage. (Tr. May 6, 2008 at 206; May 7, 2008 at 47, 100-101, 206).

Millersville University Is Unable To Award Plaintiff a BSE Degree

Conestoga Valley decided to bar Plaintiff from campus because Buffington and Reinking believed that Plaintiff: (1) had disobeyed Reinking by communicating about personal matters with her students through her webpage; (2) had acted unprofessionally by criticizing Reinking to her students in the May 4th posting; and (3) had otherwise performed incompetently as a student teacher. No one at MU had anything to do with that decision. Once CV did not allow Plaintiff to complete the practicum, however, MU could not award Plaintiff a BSE degree.

For instance, Girvin could not, consistent with MU's PDE-approved course of study, pass Plaintiff in Student Teaching because she had not completed the course. (Tr. May 6, 2008 at 204:15-24.) Plaintiff understood that she could not pass Student

Teaching because CV had removed her from her placement. (Tr. May 6, 2008 at 134:22-25.) Rather than fail her, however, Girvin allowed Plaintiff to withdraw from **Student Teaching. (Tr. May 6, 2008 at 208-209.)**

As MU's Director of Field Services, Wenrich did not have the authority to reinstate Plaintiff into the practicum. The Millersville University Guide to Student Teaching provides that in consultation with a Cooperating Teacher and University Supervisor, Wenrich has "the authority to change or terminate" a Student Teaching assignment "if professional conduct is not maintained." (Pl.'s Ex. 4 at 7.) Wenrich does not have authority, however, to pass someone in the Student Teaching Program and award her the requisite student teaching credits once that person has been removed from his or her placement. (Tr. May 6 2008 at 248:8-14, 245:17-23, 247:22-24.) Moreover, as Wenrich explained at trial, under MU's PDE-approved course of study, no one at Millersville University had the authority to give Plaintiff a BSE "on the basis of that work she had done." (Tr. May 6 2008 at 248:8-14, 245:17-23, 247:22-24.)

***9** Wenrich and Girvin spoke with Plaintiff on May 12, 2006 and explained that because she had not met MU's state-mandated Student Teaching requirement, she could not receive a BSE. (Tr. May 6, 2008 at 75, 233, 243:9-10, 247:22-24). Wenrich told Plaintiff that she had spoken with English Department Chair Schneller, and they had thought of a way to "move credits around" so that Plaintiff would receive a BA in English "instead of just no degree at all." (Tr. May 6, 2008 at 80:10-19, 234.) This was consistent with the way Wenrich had handled similar situations involving other students. (Tr. May 6, 2008 at 234.)

After meeting with Wenrich and Girvin, Plaintiff scheduled an academic appeal with Bray, the University's PDE Teacher Certification Officer. Plaintiff then met with Schneller and signed transfer credits so that she could receive a BA in English. (Tr. May 6, 2008 at 83-84), (Pl.'s Ex. 70). Once Schneller changed Plaintiff's general education credits to English Department credits, Plaintiff qualified for a BA degree in English. (Tr. May 6, 2008 at 85.) Schneller informed Plaintiff that "she went to bat" for Plaintiff because she felt that Plaintiff had "worked hard and that [she] ... deserved something instead of nothing." (Tr. May 6, 2008 at 84:10-12.) On May 13, 2006, Plaintiff graduated from Millersville University with a BA in English. (Pl.'s Ex. 2.)

On May 15, 2006, Plaintiff met with Wenrich and Bray to appeal the decision to grant her a BA instead of a BSE. Bray explained why she could not overturn Wenrich's decision: by failing to complete Student Teaching, Plaintiff had not fulfilled MU's state-mandated prerequisites for obtaining a BSE. (Tr. May 7, 2008 at 124.) Apart from Plaintiff's failure to complete the practicum, the unsatisfactory evaluation she received on her final PDE 430 also constituted a failure of Student Teaching. (Tr. May 7, 2008 at 122.) Accordingly, Bray denied Plaintiff's appeal on May 15, 2006. (Pl.'s Ex. 62.)

As Teaching Certification Officer, Bray has a legal responsibility to recommend candidates to the Pennsylvania Department of Education for initial teaching certification. Bray fulfills this responsibility by completing a PDE Form 338C, which requires the Certification Officer to verify that a candidate has "achieved at least a satisfactory rating on the final PDE 430." (Doc. No. 45, App. 1, PDE Form 338), (Pl.'s Ex. 4 at 18), (Tr. May 7, 2008 at 134-135). Bray does not have the authority to change that evaluation. (Tr. May 7, 2008 at 121-122, 140), (Pl.'s Ex. 16 at 2). Accordingly, Bray could not recommend Plaintiff for initial teaching certification.

Plaintiff appealed Bray's denial to Prabhu, who, on February 21, 2007, held an academic appeal hearing at which Plaintiff was represented by counsel. On March 26, 2007, Prabhu denied the appeal, concluding that the dispute respecting Plaintiffs BSE had been resolved appropriately by allowing her to graduate timely with a BA. (Pl.'s Ex. 63 at 3.) He

also determined that Plaintiff was not eligible for teaching certification because she had failed "to satisfy the proficiency standards of the Pennsylvania Department of Education." (Pl.'s Ex. 63 at 1.)

During Her Time At CV. Plaintiff Was A "Teacher" More Than A "Student"

***10** As I discuss below, whether Plaintiff was a student or a teacher during the practicum is relevant to her First Amendment claim. This question appears to be one of law and fact, to be resolved by the finder of fact. *See Hennessy v. City of Melrose,* 194 F.3d 237, 245 (1st Cir.1999) (examining factual context of practicum relationship before concluding that plaintiff was entitled to the legal protections of a public employee).

From January through May 2006, Plaintiff did not attend any courses at MU. (Tr. May 6, 2008 at 129.) Her responsibilities arose entirely from her full-time assignment to CV. She followed the CV school calendar (not the MU calendar). (Tr. May 7, 2008 at 14.) CV relied upon Plaintiff in much the same way it relied on its full-time teachers. Plaintiff planned lessons and was responsible for teaching three separate English courses. (Tr. May 6, 2008 at 16 .) Although she was observed by Reinking in two of the courses, Plaintiff taught the third course entirely by herself. (Tr. May 6, 2008 at 126:9-13.) She taught from the Teacher's Edition of the course book. (Tr. May 6, 2008 at 113-114), (Tr. May 7, 2008 at 11-12). Plaintiff attended in-service meetings, faculty meetings, and special school events. (Tr. May 7, 2008 at 14-15), (Pl.'s Ex. 4 at 7). She used the Teachers' Lounge. (Tr. May 6, 2008 at 113.) Others, including CV students, perceived Plaintiff to be a teacher. Plaintiff learned at the practicum's outset that she was required to "maintain the same professional standards expected of the [CV] teaching employees." (Pl.'s Ex. 4 at 7.) Indeed, Plaintiff considered herself a teacher and believed the pupils in her CV classes were her students. (Tr. May 6, 2008 at 139-140.)

During the Spring 2006 Semester, Plaintiff was also a student at MU, student teaching so that she could obtain her BSE. Her CV-related activities plainly dominated her professional life during those five months, however. She had no assignments from MU unrelated to the practicum, and devoted virtually all her time to fulfilling her responsibilities at CV. In these circumstances, I find that during her CV Student Teaching Placement, Plaintiff was an apprentice more akin to a public employee/teacher than a student.

CONCLUSIONS OF LAW

Plaintiff proceeds under § 1983, which allows suits against persons acting under color of state law for constitutional violations. 42 U.S.C. § 1983; *W. v. Atkins,* 487 U.S. 42, 50, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988) ("[A] public employee acts under color of state law while acting in his official capacity or while exercising his responsibilities pursuant to state law."). Plaintiff argues that her First Amendment right to free expression protected the text and photograph in her May 4th MySpace posting. She alleges that Bray, Girvin, Prabhu, Wenrich, and Schneller, as administrators of a public university, violated her rights because the MySpace posting "played a substantial part" in both their decision to deny her the BSE and their "refus [al] to take the necessary steps" to ensure that she received PDE teacher certification. (Doc. No. 45 at 24.) Plaintiff seeks mandatory injunctive relief against Defendants in their official capacities, demanding that they award her a BSE degree and recommend her to the Pennsylvania Department of Education for initial teaching certification.

***11 As I have found, Defendants do not have the authority to award Plaintiff a BSE because she failed to complete Student Teaching. As a result,**

Plaintiff is not eligible for initial teaching certification. Moreover, Defendants did not violate Plaintiff's First Amendment right to free expression. Accordingly, I deny her demand for mandatory injunctive relief.

A. Injunctive Relief-Standards

A plaintiff seeking a permanent injunction must demonstrate: (1) actual success on the merits of the underlying dispute; (2) irreparable injury; (3) the inadequacy of remedies available at law; (4) that the balance of hardships between the plaintiff and defendant weigh in favor of injunctive relief; and (5) that the public interest would not be disserved by the injunction. *See eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391, 126 S.Ct. 1837, 164 L.Ed.2d 641 (2006); *Shields v. Zuccarini,* 254 F.3d 476, 482 (3d Cir.2001); *Ciba-Geigy Corp. v. Bolar Pharmaceutical Co., Inc.,* 747 F.2d 844, 850 (3d Cir.1984). Injunctive relief is an "extraordinary remedy which should be granted only in limited circumstances." *Am. Tel. and Tel. Co. v. Winback and Conserve Program, Inc.,* 42 F.3d 1421, 1427-28 (3d Cir.1994) (quotations omitted). Mandatory injunctions, which require defendants to take some affirmative action, are "looked upon disfavorably and are generally only granted in compelling circumstances." *Florham Park Chevron, Inc. v. Chevron U.S.A., Inc.,* 680 F.Supp. 159, 166 (D.N.J.1988).

Under § 1983, a plaintiff raising a First Amendment claim may seek related injunctive relief-such as reinstatement to remedy past violations-against state actors in their official capacities. *See Melo v. Hafer,* 912 F.2d 628, 630 (3rd Cir.1990), *aff'd* 502 U.S. 21, 112 S.Ct. 358, 116 L.Ed.2d 301 (1991) (in a § 1983 action against a public official, plaintiffs properly sought reinstatement for wrongful termination in violation of their First Amendment and due process rights); *see also Dwyer v. Regan,* 777 F.2d 825, 836 (2d Cir.1985) (plaintiff entitled to reinstatement if he establishes wrongful termination).

B. Availability Of Relief

In her Third Amended Complaint, Plaintiff demands that I order the MU Defendants to award her a BSE and the teaching credits she needs to obtain a teaching certificate, and to recommend her to the Pennsylvania Department of Education for initial teaching certification. I believe this demand is akin to the requests for reinstatement in *Melo* and *Dwyer.* Plaintiff is not entitled to injunctive relief, however. Under PDE regulations, the Millersville University administrators against whom she has chosen to proceed lost the authority to grant her a BSE once Conestoga Valley did not allow her to complete Student Teaching. Plaintiffs demand that I nonetheless order MU to recommend her for certification would be impermissibly futile.

The MU Defendants Do Not Have The Authority To Grant Plaintiff a BSE

As I have discussed, under PDE regulations, Plaintiff cannot obtain her BSE without successfully completing a Student Teaching placement. 22 Pa.Code § 49.82**(b)(2), 354.25(f). Plaintiff argues that because only several days remained in the practicum when** CV terminated her, "[f]or all practical purposes" she successfully completed her Student Teaching Placement. (Doc. No. 45 at 27.) I disagree. The evidence is undisputed that CV did not allow Plaintiff to complete her Student Teaching placement. The evidence is also undisputed that no one at MU could compel CV to allow Plaintiff to complete the practicum. Accordingly, under those same regulations MU does not have the authority to award Plaintiff the requisite student teaching credits or grant her a BSE because MU cannot give her a passing grade in a practicum she did not complete.

***12** Although CV **administrators did not allow Plaintiff to complete the practicum, Plaintiff has decided not to sue anyone at Conestoga Valley. As I explain below, that decision was strategic. In proceeding instead only against individuals**

who do not have the authority to afford her the desired relief, however, Plaintiff's request for a mandatory injunction necessarily fails. *See, e.g., Okpalobi v. Foster,* 244 F.3d 405, 431 (5th Cir.2001) ("[I]f the suit is against the wrong officials, no claim for injunctive relief has been stated."); *see also Williams v. Dovle,* 494 F.Supp.2d 1019, 1024 (W.D.Wis.2007) ("[A] claim for injunctive relief can stand only against someone who has the authority to grant it.").

Ordering Defendants To Recommend Plaintiff For Certification Would Be Impermissibly Futile

Over the course of this litigation, Plaintiff has repeatedly altered her demand for relief, as her lack of entitlement to the relief she most recently sought became apparent. Thus, when it became apparent at trial that the MU Defendants lacked the authority to award Plaintiff a BSE once CV barred her from campus, I asked if Plaintiff wished to amend her Complaint a fourth time to include Defendants from CV. (Tr. May 7, 2008 at 246-47). Plaintiff did not do so. Instead, she submitted a Proposed Order with her Proposed Findings and Conclusions in which she does not mention her demand that I compel Defendants to award her a BSE. Rather, she identifies in greater detail the actions the MU Defendants must take to recommend Plaintiff for initial teaching certification. (Doc. No. 45 at 28.) Plaintiff now demands that I order: (1) Girvin to complete a new PDE 430 giving Plaintiff a "superior" rating in professionalism; (2) Bray to complete a new PDE 338C certifying that Plaintiff received a satisfactory rating on her PDE 430 and recommending her for initial teaching certification; **and (3) all MU Defendants to "cooperate fully with any PDE inquiry into Plaintiffs application for teacher certification." (Doc. No. 45 at 28.)**

As I have discussed, under PDE regulations, the MU Defendants do not have authority to pass Plaintiff in Student Teaching or award her a BSE. It is less clear, however, as to whether they have the authority to recommend Plaintiff to the PDE for initial teaching certification. MU uses the PDE 430 to evaluate a candidate's performance in Student Teaching. The University uses the PDE 338C to recommend candidates for initial teaching certification by verifying that the candidate received at least a satisfactory rating on the PDE 430. Neither the PDE 430 nor the PDE 338C contemplates the unusual situation presented here, however. Although Girvin testified that CV's decision to bar Plaintiff from campus played a "significant" role in his evaluation, he did not testify that he was required to give Plaintiff an unsatisfactory rating on her PDE 430 as a result of CV's decision. (Tr. May 6, 2008 at 208.) The PDE regulations do not address the question. It is thus possible (albeit quite unlikely) that Girvin could have given Plaintiff a satisfactory rating on her PDE 430 even though she was barred from CV.

***13** The MU Defendants thus may have the authority to recommend Plaintiff for initial teaching certification. Plaintiff assumes that once MU makes this recommendation: (1) she will be eligible for initial certification under PDE regulations; and (2) that, as a practical matter, the PDE will grant Plaintiff initial teaching certification without inquiring as to whether she actually completed her Student Teaching assignment. Plaintiff's first assumption is incorrect; her second assumption is contrary to the public interest.

Plaintiff assumes that because the regulations require "completion of a teacher certification program, not a student teaching assignment," her failure to complete the practicum will not prevent her from obtaining PDE certification, provided she has a recommendation from MU. (Doc. No. 45 at 26.) This is simply incorrect. Each applicant for certification must complete "a Department-approved teacher preparation program," which must include a "minimum 12 week full-time student teaching experience." 22 Pa.Code § 49.82(b)(2), 354.25(f). Because Plaintiff did not complete MU's PDE-approved teacher preparation program-which requires successful completion of Student Teaching-she is

ineligible under PDE regulations for certification. **Accordingly, assuming *arguendo* that MU officials have the authority to recommend Plaintiff to the PDE, she would remain ineligible for certification. In these circumstances, ordering MU to recommend Plaintiff to the PDE would be pointless and impermissibly futile.** *See Virginian Ry. Co. v. Sys. Fed'n No. 40,* 300 U.S. 515, 550, 57 S.Ct. 592, 81 L.Ed. 789 (1937) ("[A] court of equity may refuse to give any relief when it is apparent that that which it can give will not be effective or of benefit to the plaintiff."); *United States v. Bernard Parish,* 756 F.2d 1116, 1123 (5th Cir.1985) ("It is black letter law that an injunction will not issue when it would be ineffectual."); *see also Migliore v. City of Lauderhill,* 415 So.2d 62, 65 (Fla.Dist.Ct.App.1982) ("Neither mandamus nor injunctive relief is available to require the performance of a futile act."); *Levine v. Black,* 312 Mass. 242, 44 N.E.2d 774, 775 (Mass.1942) ("It is a principle of wide application that relief by injunction will not be granted where the granting of it would be but a futile gesture....").

Plaintiff apparently believes that because the Pennsylvania Department of Education will automatically certify her upon receiving MU's recommendation, her request for relief is not futile. Plaintiff emphasizes Bray's testimony that after receiving a recommendation for teaching certification from the candidate's university, the PDE typically does not inquire independently into a candidate's qualifications. (Doc. No. 45 at 23.) Accordingly, because my Order requiring Millersville University to submit a new PDE 338C would effectively conceal Plaintiff's failure to complete the practicum, it would result in the PDE's approval of Plaintiff's application.

***14 I believe Plaintiff's proposed deception of the Pennsylvania Department of Education would "disserve the public interest" and so would be an impermissible abuse of this Court's equitable powers. *MercExchange,* 547 U.S. at 391; *see also Gidatex, Sr.L. v. Campaniello Imps., Ltd.,* 82 F.Supp.2d 126, 131 (S.D.N.Y.1999) (under the doctrine of unclean hands, "[a] court may deny injunctive relief ... where the party applying for such relief is guilty of conduct involving fraud, deceit, unconscionability, or bad faith related to the matter at issue" in the litigation);** *see also Ne. Women's Ctr., Inc. v. McMonagle,* 868 F.2d 1342, 1354 (3d Cir.1989) (in applying the doctrine of unclean hands to a plaintiff s request for affirmative injunctive relief, "courts are concerned primarily with their own integrity ... and with avoiding becoming the abettor of iniquity") (quotations omitted). **Accordingly, I will not order the MU Defendants to make it possible for Plaintiff to subvert PDE regulations.**

C. First Amendment

Finally, regardless of MU's authority to forgive Plaintiff's failure to complete the practicum, she is not entitled to mandatory injunctive relief because Defendants did not violate her First Amendment rights. Plaintiff's free speech claim triggers different tests, depending on whether she was a "teacher" or a "student" when she created her MySpace posting. The Supreme Court and the Third Circuit afford the speech of public employees-like public school teachers-First Amendment protection if their speech relates to matters of public concern:

> So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively.

Garcetti v. Ceballos, 547 U.S. 410, 411, 126 S.Ct. 1951, 164 L.Ed.2d 689 (2006); *see also Pickering v. Bd. of Ed.,* 391 U.S. 563, 568, 88 S.Ct. 1731, 20 L.Ed.2d 811 (1968); *Brennan v. Norton,* 350 F.3d 399, 412 (3d Cir.2003). By contrast, to promote academic freedom, these same Courts confer First Amendment protection on all student speech unless school officials can make out a specific and significant fear that the challenged speech would sub-

stantially disrupt or interfere with the work of the school or the rights of other students. *Tinker v. Des Moines Indep. Cmty. Sch. Dist.,* 393 U.S. 503, 509, 89 S.Ct. 733, 21 L.Ed.2d 731 (1969), *Saxe. v. State Coll. Area Sch. Dist.,* 240 F.3d 200, 211 (3d Cir.2001); *see also DeJohn v. Temple Univ.,* 537 F.3d 301, 314 (3d Cir.2008) ("[T]he First Amendment rights of speech and association extend to the campuses of state universities.") (quoting *Widmar v. Vincent,* 454 U.S. 263, 268-69, 102 S.Ct. 269, 70 L.Ed.2d 440 (1981)).

If I determine that Plaintiff was a public employee or a teacher when she created her MySpace posting, she would be obligated to show that the posting related to matters of public concern to receive First Amendment protection. *See Connick v. Myers,* 461 U.S. 138, 147, 103 S.Ct. 1684, 75 L.Ed.2d 708 (1983). If I determine that Plaintiff was a student when she created the posting, Defendants would bear the burden of showing that they had a constitutionally valid reason for regulating her speech beyond "a mere desire to avoid ... discomfort and unpleasantness." *Tinker,* 393 U.S. at 509; *DeJohn,* 537 F.3d at 317 ("a school must show that speech will cause actual, material disruption before prohibiting it").

***15** I have found that Plaintiff's role as a student teacher at CV was akin to that of a public employee. This is in accord with the First Circuit's analysis in *Hennessy v. City of Melrose,* 194 F.3d 237 (1st Cir.1999). There, an elementary school terminated a college student from his student teaching placement because of comments he made during the practicum. *Id.* at 242-43. The elementary school thus precluded Mr. Hennessy from passing the university course in which he was enrolled. *Id.* at 243. The First Circuit determined that although Hennessy was in the practicum as part of his university training, he was not "in any meaningful sense a pupil," and his position as a student teacher "more nearly approximated that of an apprentice" who was entitled to the First Amendment protections afforded public employees. *Id.* at 245. Other courts have also rejected the First Amendment claims of those removed from their practicum placements because of speech that did not touch on matters of public concern. *Miller v. Houston County Bd. of Educ.,* No. 06-940, 2008 WL 696874, *13 (M.D.Ala. March 13, 2008) (same): *see also Watts v. Fla. Int'l Univ.,* 495 F.3d 1289, 1293 (11th Cir.2007) (graduate student terminated from his placement in a hospital counseling practicum was a public employee); *Andersen v. McCotter,* 100 F.3d 723, 726 (10th Cir.1996) (student intern working for college credit in a penitentiary was a public employee in relation to the penitentiary officials who terminated him from the program). Plaintiff notes that unlike the plaintiffs in these cases-who sued their practicum administrators-she has not proceeded against anyone at CV. Plaintiff's strategic choice does not alter my analysis of her posting, however. Like the plaintiff in *Miller,* Plaintiff's challenged speech concerned the school where she taught, not the university where she was enrolled as a student. 2008 WL 696874, at *13. In these circumstances, whether Plaintiff's MySpace posting was protected speech does not turn on her choice of defendants.

Plaintiff contends that because she was enrolled at Millersville University in May 2006, and because her MySpace posting had academic consequences at MU, she is entitled to a student's First Amendment protections. In support, she offers a decision that high school administrators violated a student's First Amendment rights when they suspended him for **writing an insulting document** about a teacher on his personal computer. *Killion v. Franklin Reg'l Sch. Dist.,* 136 F.Supp.2d 446, 457 (W.D.Pa.2001); (Doc. No. 45 at 24). That decision is inapposite. Unlike Mr. Killion, who was only a student, Plaintiff was a student teacher who explicitly acknowledged in her MySpace posting that she was the "official teacher" of "[her] students." Like the Plaintiff in *Hennessy,* Plaintiff was not "in any meaningful sense a pupil" during the practicum. 194 F.3d at 245. Accordingly, I believe Plaintiff's status is indistinguishable from the student teacher

plaintiffs in *Hennessy, Miller, Watts,* and *Andersen.* Like these plaintiffs, **when Ms. Snyder created her challenged posting, she was more a teacher than a student. 194 F.3d at 245, 495 F.3d at 1293, 100 F.3d at 726, 2008 WL 696874, at *13.**

***16 In these circumstances, insofar as Plaintiff's posting touched on any matter of public concern, it was protected by the First Amendment *Garcetti,* 547 U.S. at 419; *Pickering,* 391 U.S. at 568; *Brennan,* 350 F.3d at 412. Plaintiff conceded at trial, however, that her posting raised only personal matters.** (Tr. May 6, 2008 at 55:22-24, 56:7-11.) Accordingly, the First Amendment does not protect Plaintiff's MySpace posting. *Connick,* 461 U.S. at 147 (federal court is not the appropriate forum in which to review the wisdom of a personnel decision taken when a public employee speaks upon matters of a personal interest); *Brennan,* 350 F.3d at 412 (the First Amendment does not protect public employees' purely personal speech). Defendants' response to the posting thus did not violate Plaintiff's First Amendment rights.

In sum, Plaintiff has not prevailed on the merits of her First Amendment claim. Accordingly, she has not shown a legal entitlement to a mandatory injunction against the Millersville University Defendants. *See Ciba-Geigy Corp.,* 747 F.2d at 850.

VERDICT

I return a verdict in favor of Defendants and against Plaintiff. Plaintiff's request for injunctive relief is denied.

An appropriate Order follows.

ORDER

AND NOW, this 3rd day of December, 2008, Judgment is hereby entered in favor of Defendants and against Plaintiff.

The Clerk's Office shall close this case for statistical purposes.

E.D.Pa.,2008.
Snyder v. Millersville University
Not Reported in F.Supp.2d, 2008 WL 5093140 (E.D.Pa.)

END OF DOCUMENT

236 F.3d 1035, 166 L.R.R.M. (BNA) 2195, 142 Lab.Cas. P 10,872, 01 Cal. Daily Op. Serv. 199, 2001 Daily Journal D.A.R. 311
(Cite as: 236 F.3d 1035)

United States Court of Appeals,
Ninth Circuit.
Robert C. KONOP, Plaintiff-Appellant,
v.
HAWAIIAN AIRLINES, INC., Defendant-Appellee.
No. 99-55106.

Argued and Submitted June 8, 2000
Filed Jan. 8, 2001

Airline pilot who maintained a secure website where he posted bulletins critical of his employer, its officers, and his incumbent union brought action against employer, alleging that, when its vice president gained unauthorized access to the site under false pretenses and disclosed its contents, employer violated the Wiretap Act, the Stored Communications Act, and the Railway Labor Act (RLA), and that employer violated the RLA by suspending him in retaliation for his website activities. The United States District Court for the Central District of California, J. Spencer Letts, J., granted summary judgment against pilot on all claims except the retaliation claim and, after bench trial, entered judgment against pilot on that claim as well. Pilot appealed. The Court of Appeals, Boochever, Circuit Judge, held that: (1) addressing an issue of apparent first impression, the unauthorized viewing of a secure website constitutes an unlawful "interception" of an electronic communication in violation of the Wiretap Act, as well as unlawful "access" of an electronic communications facility in violation of the Stored Communications Act; (2) material issues of fact existed regarding pilot's claims of unauthorized interception and access; (3) RLA claims that pilot pressed on appeal were not "minor" disputes subject to mandatory arbitration, and so the district court had subject matter jurisdiction over them; (4) material issue of fact existed as to whether pilot's development and maintenance of his website constituted protected activity under the RLA; (5) material issue of fact existed as to whether employer interfered with pilot's organizing activity, in violation of the RLA, by accessing the website under false pretenses; (6) material issue of fact existed as to whether employer disclosed the contents of pilot's website to the opposing labor faction, thereby assisting one union faction over another in violation of the RLA; (7) material issue of fact existed as to whether employer threatened to sue pilot for defamation, thereby engaging in coercion and intimidation in violation of the RLA; and (8) district court did not abuse its discretion by allegedly quashing pilot's subpoenas of witnesses in connection with the bench trial on his retaliatory suspension claim under the RLA.

Affirmed in part, reversed in part, and remanded.

***1040** Robert C. Konop, Pro se, Playa del Rey, California, plaintiff-appellant.

Marianne Shipp, Gibson, Dunn & Crutcher, Irvine, California, for the defendant-appellee.

Appeal from the United States District Court for the Central District of California; J. Spencer Letts, District Judge, Presiding. D.C. No. CV-96-04898-SJL (JGx).

Before: BOOCHEVER, REINHARDT, and PAEZ, Circuit Judges.

BOOCHEVER, Circuit Judge:

Robert Konop ("Konop") appeals: (1) the district court's grant of summary judgment against Konop on his claim that Hawaiian Airlines, Inc. ("Hawaiian") violated the Wiretap Act, 18 U.S.C. §§ 2510-2520, and the Stored Communications Act, 18 U.S.C. §§ 2701-2710, by viewing Konop's secure website under false pretenses; (2) the district court's grant of summary judgment against Konop on his claims that Hawaiian violated the Railway

Labor Act, 45 U.S.C. § 152, by gaining unauthorized access to and disclosing the contents of Konop's website; and (3) the district court's judgment, following a bench trial, entered against Konop on his claim that ***1041** Hawaiian suspended him in retaliation for his website activities in violation of the Railway Labor Act.

We conclude that, with respect to Konop's claims under the Wiretap Act and the Stored Communications Act, and his statutory claims under the Railway Labor Act which were dismissed on summary judgment, Konop has raised a triable issue of fact. We reverse and remand with respect to those claims. As to Konop's retaliation claim under the Railway Labor Act, which proceeded to trial, we affirm the district court's judgment.

FACTS

Konop, a pilot for Hawaiian, maintained a website where he posted bulletins critical of his employer, its officers, and the incumbent union, Air Line Pilots Association ("ALPA"). Many of those criticisms related to Konop's opposition to labor concessions which Hawaiian sought from ALPA. Because ALPA supported giving management concessions to the existing collective bargaining agreement, Konop encouraged others via his website to consider alternative union representation.

Konop controlled access to his website by requiring visitors to log in with a user name and password. Konop provided user names to certain Hawaiian employees, but not to managers or union representatives. To obtain a password and view the site, an eligible employee had to register and consent to an agreement not to disclose the site's contents.

About December 14, 1995, Hawaiian vice president James Davis ("Davis") contacted Hawaiian pilot Gene Wong ("Wong") and asked permission to use Wong's name to access Konop's site. Davis claimed he was concerned about untruthful allegations that he believed Konop was making on the site. Wong had never logged into the site to create an account, and had never agreed to Konop's terms of use and nondisclosure conditions. When Davis accessed the site using Wong's name, he presumably clicked a button indicating that he was Wong and agreed to Konop's terms and conditions.

Later that day, Konop received a call from the union chairman of ALPA, Reno Morella. Morella told Konop that Hawaiian president Bruce Nobles ("Nobles") had contacted him regarding the contents of Konop's website. Morella related that Nobles was upset by accusations that Nobles was suspected of fraud and by other disparaging statements published by Konop. From this conversation with Morella, Konop believed Nobles had obtained the contents of his website and had threatened to sue Konop for defamation based on statements contained on the website.

After speaking with Morella, Konop took down his website for the remainder of the day. He placed it back online the next morning, however, without having learned how Nobles had obtained the information discussed in the phone call. Konop claims to have learned only later from the examination of system logs that Davis had accessed the site using Wong's name.

In the meantime, Davis continued to view the site using Wong's name. Later, Davis also logged in with the name of another pilot, James Gardner ("Gardner"), who had similarly consented to Davis' use of his name. Through April 1, 1996, Konop claims that his records indicate over twenty log-ins by Davis (as Wong) and at least fourteen more by Gardner or Davis (as Gardner).

Konop filed suit alleging numerous state law tort claims along with labor and wiretap claims arising out of Davis' viewing and use of his website. Konop also brought claims arising out of a medical suspension that he alleges was imposed in retaliation for his opposition to proposed labor concessions. The district court granted summary judgment to Hawaiian on all but this last claim of retaliatory

suspension, and entered judgment against Konop on that claim after a short bench trial.

On appeal, Konop argues that the district court erred in granting summary judgment for Hawaiian on his claims that Davis' unauthorized viewing of the website ***1042** violated the Wiretap Act, 18 U.S.C. §§ 2510-2520, and the Stored Communications Act, 18 U.S.C. §§ 2701-2710. Konop also argues that Hawaiian was not entitled to summary judgment on his claim that the acquisition and subsequent use of the site's contents by Davis and Nobles was unlawful under the Railway Labor Act, 45 U.S.C. § 152. Finally, Konop challenges the judgment entered against him on his retaliatory suspension claim, also brought under the RLA, on the ground that the district court improperly quashed subpoenas for witnesses that Konop sought to have testify on his behalf.

ANALYSIS

I. Wiretap Act and Stored Communications Act Claims.

Konop argues that Hawaiian vice president Davis, by accessing Konop's secure website under false pretenses, intercepted an electronic communication in violation of the Wiretap Act, as amended by the Electronic Communications Privacy Act, and accessed an electronic communications facility in violation of the Stored Communications Act.

Protection against eavesdropping on modern electronic communications was added to the Wiretap Act and enacted in the Stored Communications Act by the Electronic Communications Privacy Act of 1986, Pub.L. No. 99-508, 100 Stat. 1848 ("ECPA"). Title I of the ECPA amended the Wiretap Act to prohibit unauthorized "interception" of "electronic communications." 18 U.S.C. § 2511. Title II of the ECPA created the Stored Communications Act, which prohibits unauthorized "access" to "a facility through which an electronic communication service is provided." *Id.* at § 2701.

Civil damages are substantially greater under the Wiretap Act than under the Stored Communications Act. *Compare* 18 U.S.C. § 2520 *with* 18 U.S.C. § 2707. As such, it is a significant question whether using false pretenses to view a website constitutes unlawful interception in violation of the Wiretap Act, or unlawful access in violation of the Stored Communications Act, or both. It is also one of first impression.

The Fifth Circuit has characterized the Wiretap Act as "famous (if not infamous) for its lack of clarity." *Steve Jackson Games, Inc. v. United States Secret Serv.,* 36 F.3d 457, 462 (5th Cir.1994). We have noted that the Fifth Circuit "might have put the matter too mildly. Indeed, the intersection of the Wiretap Act and the Stored Communications Act is a complex, often convoluted, area of the law." *United States v. Smith,* 155 F.3d 1051, 1055 (9th Cir.1998), *cert. denied,* 525 U.S. 1071, 119 S.Ct. 804, 142 L.Ed.2d 664 (1999) (citations omitted).

A. Enactment and Interpretation of Wiretap Act.

Our way through this statutory thicket begins with the Wiretap Act as it was written and interpreted prior to its amendment by the ECPA. As originally enacted, the Wiretap Act sanctioned "any person who ... willfully intercepts, endeavors to intercept, or procures any other person to intercept, any wire or oral communication...." 18 U.S.C.A. § 2511(a) (1970). The Wiretap Act defined "wire communication" as "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or other like connection." *Id.* at § 2510(1). An "oral communication" meant "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." *Id.* at § 2510(2). "Intercept" was defined as "the aural acquisition of the contents of any wire or oral communication through the use of any electronic, mechanical, or other device." *Id.* at § 2510(4).

The term "intercept" received a narrow construction in the influential case of *United States v. Turk,* 526 F.2d 654 (5th Cir.1976). At issue in *Turk* was whether police intercepted a communication when ***1043** they played back a tape of a telephone call that had been previously recorded by a third party. The Fifth Circuit held no unlawful interception occurred. The court explained that the logic and policy of the Wiretap Act "require participation by the one charged with an 'interception' in the contemporaneous acquisition of the communication." *Id.* at 658.[FN1]

> FN1. The court reasoned:
>
> > The words "acquisition ... through the use of any ... device" suggest that the central concern is with the activity engaged in at the time of the oral communication which causes such communication to be overheard by uninvited listeners. If a person secrets a recorder in a room and thereby records a conversation between two others, an "acquisition" occurs at the time the recording is made.... [If] a new and different "aural acquisition" occurs each time a recording of an oral communication is replayed[, it] would mean that innumerable "interceptions," and thus violations of the Act, could follow from a single recording.
>
> *Turk,* 526 F.2d at 658.

A requirement that transmission and acquisition be contemporaneous would be fatal to Konop's claim that Hawaiian violated the Wiretap Act by gaining unauthorized access to his website. There is ordinarily a period of latency between the initial transmission of information for storage on a web server, and the acquisition of that information by its recipients. If interception requires that acquisition and transmission occur contemporaneously, then unauthorized downloading of information stored on a web server cannot be interception.

B. Enactment and Interpretation of ECPA.

The law by which such acts of downloading are judged has changed significantly, however, since *Turk* read its contemporaneity requirement into the Wiretap Act. The variety of acts constituting interception was expanded by Title I of the ECPA from "aural acquisition" of protected communications to "aural *or other* acquisition" of protected communications. 18 U.S.C. § 2510(4) (1986) (emphasis added). The ECPA also reclassified and redefined the types of communications protected from interception. The definition of "wire communication" was narrowed from "any communication" made over the wires to "any *aural* transfer" made over the wires, *id.* at § 2510(1) (emphasis added), but the definition was also expanded to include "any electronic storage of such communication." *Id.* In addition, the ECPA added a catch-all category of "electronic communication" defined, with certain exceptions, as "any transfer of signs, signals, writing, images, sounds, data, or intelligence of any nature transmitted in whole or in part by a wire, radio, electromagnetic, photoelectronic or photooptical system...." *Id.* at § 2510(12).

In *United States v. Smith,* 155 F.3d 1051 (9th Cir.1998), *cert. denied,* 525 U.S. 1071, 119 S.Ct. 804, 142 L.Ed.2d 664 (1999), we considered the effect of these amendments on the meaning of "intercept" under the Wiretap Act. We also considered the relation of interception to the new offense of unauthorized access to stored communications facilities under the Stored Communications Act. At issue in *Smith* was whether the Wiretap Act required suppression of a tape of phone messages retrieved without authorization from the defendant's voice mailbox.

The government argued in *Smith* that the ECPA was not intended to repudiate *Turk* 's requirement that acquisition must be contemporaneous with transmission to constitute interception under the Wiretap Act. Instead, maintained the government, Congress intended ECPA Titles I and II to establish a distinction between the strong protection of com-

munications in transmission afforded by the Wiretap Act (which provides for suppression of unauthorized intercepted wire communications, *see* 18 U.S.C. § 2518(10)(a)), and the weaker protection of communications in storage afforded by the Stored Communications Act (which does not provide for suppression, *see* 18 U.S.C. § 2708). *See Smith,* 155 F.3d at 1056-57.

Rejecting these arguments, we found *Turk* 's narrow definition of "intercept" ***1044** difficult to square with the amended Wiretap Act's definition of "wire communication." If "the term 'intercept' necessarily implies contemporaneous acquisition, then the portion of § 2510(1) that specifically defines 'wire communication' as including stored information is rendered essentially meaningless because messages in electronic storage cannot, by definition, be acquired contemporaneously." *Id.* at 1058.

The terms "intercept" under the Wiretap Act and "access" under the Stored Communications Act, we concluded, are not "temporally different, with the former, but not the latter, requiring contemporaneity; rather the terms are conceptually, or qualitatively, different." *Id.*

> The word "intercept" entails actually acquiring the contents of a communication, whereas the word "access" merely involves being in position to acquire the contents of a communication. In other words, "access" is, for all intents and purposes, a lesser included offense (or tort, as the case may be) of "interception."

Id. (alterations omitted). Under this scheme, the Wiretap Act and the Stored Communications Act do not discriminate between wire communications based on whether they are in transit or storage, but instead attach different consequences to invasions of privacy based on degrees of intrusion.

If *Smith*'s definition of "intercept" applies to electronic communications, then a person's unauthorized acquisition of the contents of a secure website would constitute an interception in violation of the Wiretap Act. The only circuit court to have decided the issue, however, has held that "intercept" does not mean the same thing when applied to electronic communications as when applied to wire communications. The Fifth Circuit, in *Steve Jackson Games v. United States Secret Service,* 36 F.3d 457 (5th Cir.1994), concluded that, with respect to electronic communications, Congress intended the ECPA to carry forward the *Turk* definition of "intercept" as contemporaneous acquisition. The court noted that the ECPA defines "electronic communication" as a "transfer" of signals, and that "unlike the definition of 'wire communication,' the definition of 'electronic communication' does not include electronic storage of such communications." *Id.* at 461.

We endorsed the reasoning of *Steve Jackson Games* in *Smith,* and this would ordinarily end our inquiry. Though electronic communications were not at issue in *Smith,* and our endorsement of *Steve Jackson Games* in that case was therefore not essential to our holding, we do not lightly reconsider persuasive dicta, even if they do not bind us. But confronting the issue squarely for the first time in this case, we find ourselves unpersuaded that Congress intended one definition of "intercept" to govern "wire communications," and another to govern "electronic communications."

C. Acquisition Need Not Be Contemporaneous with Transmission.

We first note that the Wiretap Act provides but a single definition of "intercept," and that definition does not expressly contain or suggest the contemporaneity requirement read into it by *Turk. See* 18 U.S.C. § 2510(4). Though silence is consistent with the presumption that Congress acts with awareness of prevailing judicial constructions when it reenacts or amends a law, *see Native Village of Venetie I.R.A. Council v. State of Alaska,* 944 F.2d 548, 554 (9th Cir.1991), the *Turk* contemporaneity rule had not gained wide currency when Congress passed the ECPA.[FN2] Nor does any reference to *Turk* or

contemporaneity appear in the statute's legislative history.[FN3]

> FN2. We have found only one apparent adoption of *Turk* 's reading of "intercept"-and that in passing-by a circuit court prior to the ECPA's passage on October 21, 1986. *See U.S. v. Shields,* 675 F.2d 1152, 1156 (11th Cir.1982).
>
> FN3. Intent to carry forward the rule in *Turk* is suggested at first glance by the pronouncement in the Senate Report on the ECPA that the "definition of 'intercept' under current law is retained with respect to wire and oral communications except that the term 'or other' is inserted after 'aural.' " S.Rep. No. 99-541, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3567. But the caveat referring to the insertion of text in the statute indicates that "current law" was meant to denote the text of the statute itself, and not necessarily any particular judicial interpretation of "intercept."

***1045** The textual basis for the Fifth Circuit's conclusion in *Steve Jackson Games,* that stored electronic communications are not protected from interception under the Wiretap Act, is that the statute defines "electronic communication" as a "transfer" of information without expressly including storage of information. In contrast, the corresponding definition of "wire communication" does expressly include storage of information. It is plausible, however, that the express inclusion of stored communications in the definition of "wire communication" was intended not for purposes of contrast, but for clarification. The language was a late subcommittee addition to the draft ECPA to ensure that voice mail and similar stored wire communications would be protected as wire communications. *See* S.Rep. No. 99-541, 99th Cong., 2d Sess. (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3566.

This addition was necessary because, as one commentator has noted, wire communication does not necessarily include storage of that communication. Tatsuya Akamine, *Proposal for a Fair Statutory Interpretation: E-Mail Stored in a Service Provider Computer Is Subject to an Interception Under the Federal Wiretap Act,* 7 J.L. & Pol'y 519, 550-51 (1999). Electronic communication, on the other hand, cannot successfully be completed without being stored. *Id.* at 561 (" 'Electronic storage' is a part of the entire communication process, and thus, the definition of 'electronic communication' impliedly covers 'electronic storage,' whether or not that definition includes the specific reference to 'electronic storage.' "). Therefore, it was not necessary for Congress to explicitly include the concept of storage in its definition of electronic communication.

We are wary of attributing subtle purpose and indirection to the language of a statute that appears to have been crafted with little of either. In other instances, where Congress has provided lesser protection for electronic communications, it has done so straightforwardly, and for discernable reasons. Electronic communication service providers must divulge communications in certain circumstances as an incident to their services, for example, and the Wiretap Act expressly permits them to do so. *See* 18 U.S.C. § 2511(3)(b); 1986 U.S.C.C.A.N. at 3580. No expectation of privacy attaches to electronic communications made available through facilities readily available to the public, and interception of such communications is also expressly permitted under the Wiretap Act. *See* 18 U.S.C. § 2511(2)(g)(i). A suggestion by the Justice Department resulted in a provision emphasizing the unavailability of suppression, where not constitutionally required, as a remedy for unlawful interception of electronic communications. *See* 18 U.S.C. § 2518(10)(c); 1986 U.S.C.C.A.N. at 3577.

No similarly straightforward provision of the Wiretap Act affords stored electronic communications a lesser degree of protection from interception than stored wire communications. We know of no

reason why Congress might have wished to do so. An electronic communication in storage is no more or less private than an electronic communication in transmission. Distinguishing between the two for purposes of protection from interception is "irrational" and "an insupportable result given Congress' emphasis of individual privacy rights during passage of the ECPA." Thomas Greenberg, *E-Mail and Voice Mail: Employee Privacy and the Federal Wiretap Statute,* 44 Am. U.L.Rev. 219, 248-49 (1994).

A 1996 amendment to the Wiretap Act also suggests Congress understood electronic***1046** communications to include stored communications unless specified otherwise. The amendment appended a proviso to the Wiretap Act's definition by specifying: " 'electronic communication' ... does not include ... electronic funds transfer information stored by a financial institution...." 18 U.S.C. § 2510(12)(D). The exclusion of certain kinds of stored information from the definition of electronic communication implies that Congress understood the term in ordinary circumstances to include stored information. This understanding is stated expressly in the conference report to the amendment: "[The amendment] will allow law enforcement to obtain [stored] bank records through the usual grand jury subpoena, or other court order procedure, *without requiring a wiretap order* for these purposes." H.R. Conf. Rep. No. 104-518, 104th Cong., 2d Sess. (1996), *reprinted in* 1996 U.S.C.C.A.N. 924, 944, 956-57 (emphasis added). It is perfectly clear that the framers of the Wiretap Act's current definition of "electronic communication" understood that term to include communications in transit and storage alike.

We believe that Congress intended the ECPA to eliminate distinctions between protection of private communications based on arbitrary features of the technology used for transmission. Reflecting on technological developments of the 1980s with which the old Wiretap Act had failed to keep pace, the Senate Report on the ECPA lamented:

> Today, we have large-scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing. A phone call may be carried by wire, by microwave or fiber optics. It can be transmitted in the form of digitized voice, data or video. Since the divestiture of AT & T and deregulation, many different companies, not just common carriers, offer a wide variety of telephone and other communications services. It does not make sense that a phone call transmitted via common carrier is protected by the current federal wiretap statute, while the same phone call transmitted via a private telephone network such as those used by many major U.S. corporations today, would not be covered by the statute.

1986 U.S.C.C.A.N. at 3556-57. It makes no more sense that a private message expressed in a digitized voice recording stored in a voice mailbox should be protected from interception, but the same words expressed in an e-mail stored in an electronic post office pending delivery should not.

We conclude that it would be equally senseless to hold that Konop's messages to his fellow pilots would have been protected from interception had he recorded them and delivered them through a secure voice bulletin board accessible by telephone, but not when he set them down in electronic text and delivered them through a secure web server accessible by a personal computer. We hold that the Wiretap Act protects electronic communications from interception when stored to the same extent as when in transit.

D. Exceptions.

Our holding does not mean that an unlawful interception occurs every time someone views a web page. Among the Wiretap Act's many exceptions, one provides: "It shall not be unlawful ... for any person ... to intercept or access an electronic communication made through an electronic communication system that is configured so that such electron-

ic communication is readily accessible to the general public." 18 U.S.C. § 2511(2)(g)(i). This exception does not exempt Davis' conduct, however, because Konop's website was configured to require user names and passwords that were available only to certain nonmanagement Hawaiian employees.

Another exception provides that it is not a violation of the Wiretap Act to intercept an electronic communication where "one of the parties to the communication has given prior consent to such in***1047** terception...." *Id.* at § 2511(2)(d). Hawaiian claims that Wong was an authorized user of Konop's website whose consent entitled Davis to view its contents. Konop does not dispute that Wong, as a Hawaiian pilot, was able to set up an account by identifying himself, creating a password, and agreeing to the website's terms of use, which restricted disclosure of its contents to any other person. But Hawaiian concedes that Wong never actually took these steps before Davis used his name to view Konop's website.

It does not follow from the fact that Wong was eligible to gain access to the website that he was a "party" to its contents. Neither the statute nor the case law hazards a definition of "parties to the communication," but Webster's relevantly defines "party" as "a person or group *participating* in an action or affair." *Merriam Webster's Collegiate Dictionary* 1332 (Deluxe ed.1998) (emphasis added). Never having accepted Konop's offer to furnish access to the website in exchange for a promise of confidentiality, Wong never actually participated in any communication with Konop.

"[P]arties to the communication" might also be construed to include not just the actual authorized recipients of a communication, but also its intended recipients. This usage would be consistent with portions of the Wiretap Act that, for example, permit service providers to divulge the contents of communications "with the lawful consent of the originator or any addressee or intended recipient of such communication." 18 U.S.C. § 2511(3)(b)(ii); *see also id.* at § 2702(b)(3) (permitting divulgence of stored communications "with the lawful consent of the originator or an addressee or intended recipient of such communication, or the subscriber in the case of remote computing service.").

Yet it would still be a mistake under this broader definition to characterize Wong as an intended recipient of the contents of Konop's website merely because Konop included Wong's name on the list of pilots eligible to create passwords and log in. The additional steps that one with such an account had to take in order to gain access to the site indicate that the intended recipients of Konop's website contents were not all Hawaiian pilots for whom such provisional accounts had been provided, but only those who agreed to Konop's terms of use. Because Wong was at most a potential recipient at the time that Davis initially viewed the contents of the website, Wong was not one of the "parties to the communication" of the website's contents under even a broad construction of the term.

Hawaiian claims alternatively that, even if Wong's consent to view the website were not effective, Davis later received consent to view the site from another Hawaiian pilot, Gardner. The circumstances under which Gardner obtained a password for Davis are not at all clear, and may require factual development on remand. Gardner did not in any case give Davis " *prior* consent," *id.* at § 2511(2)(d) , that could excuse Davis' earlier acts of interception using Wong's log-in account.

Hawaiian also argues that Konop himself gave implied consent to viewing by Davis when he failed to disable Wong's and Gardner's names after learning of Davis' actions. Consent "may be implied in fact from surrounding circumstances indicating that the [party] knowingly agreed to the surveillance." *U.S. v. Van Poyck,* 77 F.3d 285, 292 (9th Cir.1996) (quotations omitted).

> The circumstances relevant to an implication of consent will vary from case to case, but the compendium will ordinarily include language or acts which tend to prove (or disprove) that a party

> knows of, or assents to, encroachments on the routine expectation that conversations are private. And the ultimate determination must proceed in light of the prophylactic purpose of [the Wiretap Act]-a purpose which suggests that consent should not casually be inferred.

Griggs-Ryan v. Smith, 904 F.2d 112, 117 (1st Cir.1990) (cited in ***1048***Van Poyck,* 77 F.3d at 292). The existence of implied consent is a question of fact that can be resolved on summary judgment only when "the events material to the issue of prior consent are straightforward, hence effectively uncontroverted." *Id.* at 117.

Here, Konop explains that although he suspected that Hawaiian management accessed his system shortly after the first incursion occurred, he did not know how and by whom this had been accomplished until months later. The circumstances surrounding Konop's efforts to restrict access to his website are sufficiently open to interpretation that the question of implied consent should have gone to the finder of fact. In any event, like Gardner's after-the-fact consent, any implied consent by Konop was not given prior to Davis' initial visit to the website.

E. Conclusion.

The contents of secure websites are "electronic communications" in intermediate storage that are protected from unauthorized interception under the Wiretap Act. Konop has raised material issues of fact whether Davis had appropriate consent to view Konop's website. Because Konop has raised material issues of fact regarding his claims of interception under the Wiretap Act, he has also raised material issues of fact regarding his claims that Davis committed the lesser included offense of unauthorized access in violation of the Stored Communications Act. The district court erred in granting summary judgment for Hawaiian on Konop's Wiretap Act and Stored Communications Act claims.

II. Railway Labor Act Claims.

Konop appeals the district court's grant of summary judgment to Hawaiian on his claims under the Railway Labor Act, 45 U.S.C. §§ 151-188 ("RLA"). The RLA prohibits "interference, influence, or coercion by either party over the designation of representatives by the other." 45 U.S.C. § 152 (Third). It also declares "it shall be unlawful for any carrier to interfere in any way with the organization of its employees, or to use the funds of the carrier in maintaining or assisting or contributing to any labor organization, labor representative, or other agency of collective bargaining...." *Id.* at § 152 (Fourth).

Konop asserts three claims under 45 U.S.C. §§ 152 (Third) and (Fourth) of the RLA. First, Konop alleges that Hawaiian interfered with his organizing efforts by viewing his website under false pretenses. Second, Konop alleges that Hawaiian wrongfully assisted a labor group by disclosing the contents of Konop's website to a union leader who supported the concessionary contract. Third, Konop alleges that Hawaiian engaged in coercion and intimidation by threatening to file a defamation suit against Konop based on statements contained on Konop's website. The district court dismissed these claims on the alternative grounds that it lacked jurisdiction over the RLA claims, and that Konop failed to support them with evidence sufficient to withstand summary judgment.

A. Subject Matter Jurisdiction.

Federal courts lack subject matter jurisdiction over disputes which are "grounded in the collective bargaining agreement" and "involve controversies over the meaning of an existing collective bargaining agreement in a particular fact situation." *Hawaiian Airlines, Inc. v. Norris,* 512 U.S. 246, 252-53, 256, 114 S.Ct. 2239, 129 L.Ed.2d 203 (1994) (internal alterations omitted). Such disputes, labeled "minor" disputes under the RLA, are subject to mandatory arbitration. *Id.* at 253, 114 S.Ct. 2239. Hawaiian argues, and the district court agreed, that Konop's

RLA claims are grounded in the collective bargaining agreement ("CBA") and, therefore, subject to mandatory arbitration. We disagree.

In *Fennessy v. Southwest Airlines,* 91 F.3d 1359 (9th Cir.1996), we addressed whether the district court had jurisdiction over the plaintiff's statutory claim under the RLA. The plaintiff in *Fennessy* alleged ***1049** that the carrier violated 45 U.S.C. § 152 (Fourth) by terminating his employment in retaliation for his efforts to replace the existing union. *Id.* at 1360-61. We held that "because his claim is based on a statutory provision rather than on the collective bargaining contract, it is not a minor dispute that must be brought to [arbitration]; it is a statutory claim that he may bring directly in district court." *Id.* at 1362. The plaintiff's unsuccessful arbitration of a related contractual claim under the CBA did not alter this conclusion. Because the statutory claims were not "grounded in the collective-bargaining agreement," and the statutory rights were "independent of the CBA," we found the district court had jurisdiction. *Id.*

Hawaiian argues that, unlike the statutory claim in *Fennessy,* Konop's statutory claims are grounded in and dependent on the CBA. To support this position, Hawaiian focuses on conduct which Konop alleged as violating the CBA. Specifically, in the RLA section of Konop's complaint, Konop alleges that Hawaiian violated the CBA by suspending him from work, reducing his employee benefits, requiring him to submit to physical and psychological testing, and giving certain pilots paid opportunities to campaign in favor of the concessionary contract.

On appeal, however, Konop does not argue that the above RLA claims fall within this court's jurisdiction. Instead, the RLA claims Konop presses on appeal involve allegations that Hawaiian violated the RLA by (1) accessing his website under false pretenses, (2) disclosing the website's contents to the rival union faction, and (3) threatening to sue Konop for defamation based on statements on the website. Hawaiian never explains how these RLA claims are grounded in the CBA, except to say that Konop merely presents them as a precursor to the alleged CBA violations. Nothing, however, requires this cramped reading of Konop's allegations. Konop, like the plaintiff in *Fennessy,* presents his statutory claims as independent violations of the RLA. The RLA statutory claims Konop presses on appeal in no way depend upon a finding that Hawaiian, at some later time, violated Konop's contractual rights under the CBA.

Accordingly, we hold that the RLA claims which Konop presses on appeal are not grounded in the CBA, are not subject to mandatory arbitration and, therefore, fall within the court's jurisdiction.

B. Protected Activity.

Hawaiian contends that even if Hawaiian managers accessed Konop's website under false pretenses, conveyed this information to a rival union leader, and threatened to sue Konop for defamation, such conduct would not violate the RLA because it would not interfere with any protected organizing activity. The organizing activity in which Konop engaged principally involved the publication of articles on a secure website. As discussed above, only employees who agreed to the confidentiality terms were allowed access; managers and union representatives were categorically excluded. Konop's website publication vigorously criticized managers of Hawaiian and their proposal for wage concessions to the existing collective bargaining agreement. Because the incumbent union, Air Line Pilots Association, supported the concessionary contract, Konop sought to encourage consideration of alternative union representation.

There is no dispute that Konop's website publication would ordinarily constitute protected union organizing activity under the RLA. Hawaiian argues, however, that Konop forfeited any protection he would otherwise enjoy because his articles contained malicious, defamatory and insulting material known to be false. In *Linn v. United Plant Guard Workers of Amer., Local 114,* 383 U.S. 53, 61, 86

S.Ct. 657, 15 L.Ed.2d 582 (1966) (" *Linn* "), the Supreme Court held that a party forfeits his protection under the National Labor Relations Act ("NLRA") by "circulating defamatory or insulting material known to be false." *See also* ***1050***Old Dominion Branch No. 496, Nat'l Ass'n of Letter Carriers v. Austin,* 418 U.S. 264, 286, 94 S.Ct. 2770, 41 L.Ed.2d 745 (1974) (" *Letter Carriers* "); *San Antonio Comm. Hosp. v. Southern Cal. Dist. Council of Carpenters,* 125 F.3d 1230, 1237 (9th Cir.1997). [FN4]

> FN4. While employers covered under the RLA are not subject to the provisions of the NLRA, courts look to the NLRA and the cases interpreting it for guidance in interpreting the RLA. *Brotherhood of Railroad Trainmen v. Jacksonville Terminal Co.,* 394 U.S. 369, 383, 89 S.Ct. 1109, 22 L.Ed.2d 344 (1969). We see no reason why the rule announced in *Linn,* 383 U.S. at 61, 86 S.Ct. 657, regarding protected activities, should not apply in the context of the RLA.

While Hawaiian claims that many of the statements on Konop's website were defamatory and known to be false, it fails to identify the challenged statements in the "Discussion" section of its brief. Presumably, Hawaiian is referring to the alleged false statements contained in the "Facts" section. There, Hawaiian indicates that Konop published the following false statements: (1) Nobles does his "dirty work ... like the Nazis during World War II"; (2) "Soviet Negotiating Style Essential to Nobles Plan!"; (3) Nobles is "one incompetent at the top"; (4) Nobles "has little skill and little ability with people.... In fact, with as few skills as Nobles possesses, it is difficult to imagine how he got this far"; and (5) "Nobles Suspected in Fraud!" and "Hawaiian Air president, Bruce Nobles, is the prime suspect in an alleged fraud which took place in 1991."

The first two statements, referencing the Nazis and Soviets, are simply "rhetorical hyperbole" protected by federal labor laws. *See Letter Carriers,* 418 U.S. at 286, 94 S.Ct. 2770 ("rhetorical hyperbole" protected). The second two statements, commenting on Nobles' competence and people skills, are opinion also protected by federal labor laws. *See id.* at 284, 94 S.Ct. 2770 (opinion protected); *San Antonio Comm. Hosp.,* 125 F.3d at 1237 (same). Konop did not forfeit his protection under the Railway Labor Act, as Hawaiian suggests, simply by publishing statements that were critical of and insulting to Nobles. " '[F]ederal law gives a union license to use intemperate, abusive, or *insulting* language without fear of restraint or penalty....' " *San Antonio Comm. Hosp.,* 125 F.3d at 1235 (quoting *Letter Carriers,* 418 U.S. at 283, 94 S.Ct. 2770) (emphasis added); *see also Linn,* 383 U.S. at 58, 86 S.Ct. 657 ("representation campaigns are frequently characterized by bitter and extreme charges, countercharges, unfounded rumors, vituperations, personal accusations, misrepresentations and distortions"). [FN5]

> FN5. We recognize that some organizing activity may be "so flagrant, violent or extreme" or so "egregious," "opprobrious," "offensive," "obscene" or "wholly unjustified" that it loses the protection of the RLA. *See Reef Indust., Inc. v. NLRB,* 952 F.2d 830, 837 (5th Cir.1991); *Timekeeping Sys., Inc. and Lawrence Leinweber,* 323 N.L.R.B. 244, 248-50 (1997). It is not clear whether Hawaiian is contending that Konop's conduct falls within one of these more amorphous standards. Assuming Hawaiian does so contend, we nevertheless find Hawaiian has failed to demonstrate that, as a matter of law, Konop's activities were so intolerable as to lose their protection under the RLA.

With respect to the final challenged statement, indicating that Nobles was suspected of fraud, Hawaiian fails to argue or present any evidence that Konop published the statement with knowledge of its falsity or with reckless disregard for the truth.

Federal labor law protects even false and defamatory statements unless such statements are made with actual malice-*i.e.,* knowledge of falsity or with reckless disregard for the truth. *See Letter Carriers,* 418 U.S. at 281, 94 S.Ct. 2770; *Linn,* 383 U.S. at 61, 86 S.Ct. 657 (protection under labor law maintained "even though the statements are erroneous and defame one of the parties to the dispute"). With no evidence or argument that Konop acted with actual malice, Hawaiian cannot demonstrate as a matter of law that Konop forfeited his protection under the RLA.

NLRB v. Pincus Brothers, Inc., 620 F.2d 367 (3rd Cir.1980), upon which Hawaiian principally relies, provides little ***1051** support for Hawaiian's position. In *Pincus Brothers,* the Third Circuit merely concluded that, under the particular facts of that case, it was "at least arguable" that the employee published a defamatory statement known to be false. *Id.* at 376. For Hawaiian to prevail on summary judgment, however, it must do more than show it is "at least arguable" that Konop knew the challenged statement was false. It must demonstrate this as a matter of law. As Hawaiian presents no evidence or argument that Konop acted with the requisite malice, Hawaiian falls short of demonstrating that Konop's activity was unprotected as a matter of law.

Accordingly, we find that Konop has raised a material triable issue of fact with respect to whether the development and maintenance of his website constituted protected activity under the Railway Labor Act.

C. Specific Violations.

Konop argues that Hawaiian managers: (1) interfered with Konop's organizing efforts by viewing the website under false pretenses, (2) wrongfully supported one labor group in favor of another by informing the opposing labor faction of the website's contents, and (3) engaged in coercion and intimidation by threatening to sue Konop for defamation, all in violation of the Railway Labor Act. Hawaiian argues, and the district court agreed, that Konop failed to present sufficient evidence to withstand summary judgment on these claims. We disagree.

1. Access of Website.

Konop argues that Davis interfered with Konop's organizing efforts by viewing the website under false pretenses. Absent a legitimate justification, employers are generally prohibited from engaging in surveillance of union organizing activities. *California Acrylic Indus., Inc. v. NLRB,* 150 F.3d 1095, 1100 (9th Cir.1998). The reason for this general proscription is that employer surveillance "tends to create fear among employees of future reprisal" and, thus, "chills an employee's freedom to exercise" his rights under federal labor law. *Id.* at 1099.

In *NLRB v. Unbelievable, Inc.,* 71 F.3d 1434 (9th Cir.1995), we upheld the Board's finding that the employer "engaged in unfair labor practices by eavesdropping on private conversations between employees and [a] Union representative," which occurred in the employee break room. *Id.* at 1438-39. We see no principled distinction between the employer's eavesdropping in *Unbelievable* and Hawaiian's access of Konop's secure website. This conclusion is supported by our determination that Hawaiian's access of Konop's website raises a triable issue with respect to Konop's claims under the Wire Tap Act (as amended by the Electronic Communications Privacy Act) and the Stored Communications Act.

Hawaiian suggests that it had a legitimate reason to access Konop's website; namely, to identify and correct any false or misleading statements contained on the website. However, concern for the accuracy of Konop's publications, even if it was the primary motivator of Davis' conduct, cannot justify a violation of the Wire Tap Act and the Stored Communications Act. As we have found a triable issue with respect to these claims, we must also find a triable issue with respect to Konop's RLA

claim based on the same conduct.

Hawaiian also argues that Davis' access did not violate the RLA because it did not appreciably limit Konop's organizing activities. Hawaiian emphasizes that, after learning about Davis' access to the website, Konop restricted access for a mere half-day and declined to temper the language in his articles. Hawaiian, however, presents no authority indicating that employees subject to surveillance or eavesdropping must also demonstrate that they consequently limited their organizing activity. It is the *tendency* to chill protected activities, not the actual chilling of protected activities, ***1052** that renders eavesdropping and surveillance generally objectionable under federal labor law. *See, e. g., California Acrylic,* 150 F.3d at 1099. That a hardy individual might continue his organizing activities undeterred, despite an employer's surveillance, does not render the employer's conduct any less of a violation.[FN6]

> FN6. Hawaiian also presents this argument to defeat the other two alleged RLA claims discussed in the following sections. We find it is no more persuasive in the context of those claims.

Accordingly, we find that Konop has raised a material triable issue of fact whether Hawaiian interfered with Konop's union organizing activity in violation of the RLA by accessing Konop's website.

2. Disclosure to Opposing Union.

Konop argues that Nobles unlawfully assisted Reno Morella, the union leader who supported the concessionary contract, by disclosing the contents of Konop's website. Generally, the RLA prohibits employers from providing assistance to a union or labor faction. *See Barthelemy v. Air Lines Pilots Ass'n,* 897 F.2d 999, 1009 (9th Cir.1990); *see also NLRB v. Finishline Indus., Inc.,* 451 F.2d 1280, 1281-82 (9th Cir.1971) (NLRA prohibits employer from telling workers to withdraw from one union and join another); *NLRB v. L. Ronney & Sons Furniture Mfg. Co.,* 206 F.2d 730, 734-35 (9th Cir.1953) (NLRA prohibits employer from initiating membership drive among his employees for employer-favored union).

Konop argues that Nobles disclosed useful intelligence to a rival union faction in an effort to ensure that Konop's faction, which opposed the concessionary contract, would not prevail. Hawaiian does not seriously dispute that disclosure of the contents of Konop's website to Morella would constitute improper assistance. Instead, Hawaiian argues that Konop failed to present sufficient evidence that Nobles made any such disclosure or that Nobles was even familiar with the contents of Konop's website when he spoke to Morella.

Morella, however, states in his declaration that Nobles contacted him on December 14, 1995 and informed him "that he had just reviewed information which was posted on an internet communications system operated by Hawaiian Airlines Pilot Robert Konop." In addition, Morella states that Nobles also "disclosed to me that Konop's internet communications system contained a third written article concerning Konop's efforts to obtain union representation by a labor organization other than the Air Line Pilots Association." This evidence creates a genuine issue of fact with respect to whether Nobles was familiar with the contents of Konop's website and whether Nobles disclosed the contents of the website to Morella.

Moreover, Nobles confirmed in his declaration that he contacted Morella because he "felt that Reno Morella, the Chairman of the ALPA Master Executive Council, should be aware of the newsletter because of its inaccurate attack on the proposed labor agreements and the unfair effect it could have on the ratification process." Nobles thus effectively concedes that he interceded to help ensure that Morella's faction-which favored ratification of the concessionary contract-would prevail over Konop's faction, which opposed the agreement.

Accordingly, we find that Konop has raised a material triable issue of fact with respect to whether Nobles improperly assisted one union faction over another in violation of the RLA.

3. Threat of Defamation Suit.

Konop argues that Nobles engaged in unlawful coercion and intimidation by threatening to file a defamation suit against Konop based on statements on Konop's website. An employer's filing or threatened filing of a lawsuit against an employee concerning union organizing activities may, under certain circumstances, ***1053** violate the RLA. *See, e.g., Diamond Walnut Growers, Inc. v. NLRB,* 53 F.3d 1085, 1089-90 (9th Cir.1995) (finding employer's defamation lawsuit against union violated NLRA); *GHR Energy Corp.,* 294 N.L.R.B. 1011, 1014 (1989), *enforced,* 924 F.2d 1055 (5th Cir.1991) (analyzing whether employer's threat to sue employee for defamation violated NLRA).

Hawaiian does not argue that Nobles would be justified in threatening to sue Konop for defamation. Instead, Hawaiian contends that Konop failed to present sufficient evidence that Nobles ever made such a threat. Nobles stated in his declaration that he "did mention to Morella that the gross inaccuracies and lies in the newsletter made by Konop amounted to defamation," but that he "never said that [he] intended to file a lawsuit against Konop."

Morella, however, indicates otherwise. Morella states in his declaration, "Nobles advised me that Konop should be cautioned, or informed, of the possibility of a defamation lawsuit by Nobles." Morella also testified, "[I]t was my impression and conclusion that Nobles intended for me to contact Konop, or take other action, for the purpose of opposing Konop's efforts to seek alternative union representation." Morella then "informed Konop of Mr. Nobles' statements ... regarding caution with respect to a possible lawsuit against Konop for defamation." Konop confirms the same in his declaration. This evidence is sufficient to raise a material triable issue of fact that Nobles threatened to sue Konop for defamation.

Accordingly, we find that Konop has raised a material triable issue of fact that Nobles engaged in coercion and intimidation in violation of the RLA by threatening to sue Konop for defamation.

D. Conclusion.

We hold that this court has jurisdiction over the RLA claims Konop presses on appeal, that Konop raised a triable issue of fact that he engaged in activity protected under the RLA, and that Konop raised a triable issue whether Hawaiian violated the RLA by accessing his website, disclosing the website's content to a union leader, and threatening to sue Konop for defamation. Accordingly, we hold the district court erred in granting summary judgment against Konop on these RLA claims.

III. Bench Trial on Retaliation Claim.

After trial, the district court entered judgment against Konop on his retaliatory suspension claim. That claim involved Konop's allegation that Hawaiian violated the RLA when it placed him on sick leave in retaliation for protected labor activities. Konop challenges the district court's judgment against him on this claim on the ground that his subpoenas for corroborating witnesses were improperly quashed. We review a district court's order quashing subpoenas for an abuse of discretion. *See United States v. Berberian,* 767 F.2d 1324, 1324 (9th Cir.1985). A litigant whose subpoenas have been improperly quashed must also show prejudice. *See Casino Foods Corp. v. Kraftco Corp.,* 546 F.2d 301, 302 (9th Cir.1976).

Though there is some dispute regarding whether the district court's remarks in a pretrial hearing constituted an order to quash subpoenas at all, Konop has not suggested what relevant evidence the subpoenaed witnesses might have introduced had they been compelled to testify. Konop therefore has not

shown that he was prejudiced as a result of any order by the district court quashing subpoenas.

CONCLUSION

The district court erred in granting summary judgment to Hawaiian on Konop's Wiretap Act and Stored Communications Act claims, and Konop's Railway Labor Act statutory claims. The district court did not abuse its discretion by quashing Konop's subpoenas of witnesses in connection with the bench trial on Konop's retaliatory suspension claim under the ***1054** RLA and, therefore, judgment against Konop on that claim was proper.

REVERSED IN PART, AFFIRMED IN PART, and REMANDED.

C.A.9 (Cal.),2001.
Konop v. Hawaiian Airlines, Inc.
236 F.3d 1035, 166 L.R.R.M. (BNA) 2195, 142 Lab.Cas. P 10,872, 01 Cal. Daily Op. Serv. 199, 2001 Daily Journal D.A.R. 311

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Not Reported in F.Supp.2d, 2004 WL 2066746 (D.Or.), 34 Employee Benefits Cas. 2097
(Cite as: 2004 WL 2066746 (D.Or.))

United States District Court,
D. Oregon.
Phil THYGESON, Plaintiff,
v.
U.S. BANCORP, a Delaware corporation, d.b.a. "U.S. Bank" in Oregon, U.S. Bancorp Equipment Financing, Inc., an Oregon Corporation, and U.S. Bancorp Comprehensive Welfare Benefit Plan, Defendants.
No. CV-03-467-ST.

Sept. 15, 2004.

David H. Griggs, Martin Christopher Dolan, Dolan Griggs & McCulloch LLP, Portland, OR, for Plaintiff.

Janine Catherine Blatt, Jeffrey Julius Druckman, Druckman & Associates, P.C., Portland, OR, for Defendants.

FINDINGS AND RECOMMENDATION

STEWART, Magistrate J.

INTRODUCTION

***1** Plaintiff, Phil Thygeson ("Thygeson"), originally filed this action against defendant, U.S. Bancorp, on or about March 5, 2003, in the Circuit Court of the State of Oregon for Multnomah County, *Thygeson v. U.S. Bancorp,* Case No. 0303-02384. U.S. Bancorp removed the case to this court on April 10, 2003. Thygeson's Second Amended Complaint (docket # 68) added defendants U.S. Bancorp Equipment Finance ("USBEF") and U.S. Bancorp Comprehensive Welfare Benefit Plan.

Thygeson was employed by defendants U.S. Bancorp and USBEF for over 18 years. His employment was terminated after the discovery of inappropriate materials he was allegedly accessing on his work computer. He was not provided with severance benefits.

Thygeson's Second Amended Complaint alleges that defendants violated The Employee Retirement Income Security Act ("ERISA"), 29 USC §§ 1001-1461, by wrongfully interfering with his severance benefits in violation of 29 USC § 1140 (First Claim); breaching their fiduciary duties under 29 USC § 1104 by failing to notify him of how to apply for severance benefits and failing to respond to his inquiries (Second Claim); and wrongfully denying him benefits to which he was entitled in violation of 29 USC § 1132(a)(1)(B) (Third Claim). Thygeson also alleges a state law claim of invasion of privacy (Fourth Claim). This court has original jurisdiction over the federal ERISA claims under 28 USC § 1331 and supplemental jurisdiction over the state law claim under 28 USC § 1367.

Defendants' Answer to Plaintiff's First Amended Complaint (docket # 18) alleges three affirmative defenses: (1) Thygeson's ERISA claims are not ripe because he failed to exhaust his administrative remedies; (2) Thygeson's ERISA claims are barred because he failed to file a claim in the proper manner and within the proper timeframe; and (3) Thygeson consented to a search of his workplace computer. Defendants also seek their attorneys fees pursuant to 29 USC § 1132(g)(1).

Defendants' Motion for Summary Judgment (docket # 43) is now before this court. For the reasons stated below, defendants' motion should be granted as to the Second, Third, and Fourth Claims, and denied as to the First Claim.

LEGAL STANDARDS

FRCP 56(c) authorizes summary judgment if "no genuine issue" exists regarding any material fact and "the moving party is entitled to judgment as a

matter of law." The moving party must show an absence of an issue of material fact. *Celotex Corp. v. Catrett,* 477 U.S. 317, 323, 106 S.Ct. 2548, 91 L.Ed.2d 265 (1986). Once the moving party does so, the nonmoving party must "go beyond the pleadings" and designate specific facts showing a "genuine issue for trial." *Id* at 324, citing FRCP 56(e). The court must "not weigh the evidence or determine the truth of the matter, but only determines whether there is a genuine issue for trial." *Balint v. Carson City,* 180 F.3d 1047, 1054 (9th Cir1999) (citation omitted). A " *'scintilla* of evidence,' or evidence that is 'merely colorable' or 'not significantly probative," ' does not present a genuine issue of material fact. *United Steelworkers of Am. v. Phelps Dodge Corp.,* 865 F.2d 1539, 1542 (9th Cir), *cert denied,* 493 U.S. 809, 110 S.Ct. 51, 107 L.Ed.2d 20 (1989) (emphasis in original) (citation omitted).

***2** The substantive law governing a claim or defense determines whether a fact is material. *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 631 (9th Cir1987). The court must view the inferences drawn from the facts "in the light most favorable to the nonmoving party." *Id* (citation omitted). Thus, reasonable doubts about the existence of a factual issue should be resolved against the moving party. *Id* at 631.

FACTS

Because all material facts must be viewed in the light most favorable to the non-movant, this court will view the evidence in the light most favorable to Thygeson. A review of the parties' facts, as well as the other materials submitted by the parties, including affidavits and deposition excerpts, [FN1] reveal the following facts.

> FN1. Both parties have submitted documents with various attachments. Citations to affidavits and depositions are identified by the last name of the affiant or deponent, and citations are to the paragraph(s) of the affidavit or page(s) of the deposition transcript. Where witnesses executed more than one affidavit, the cited affidavit is identified by the date on which it was signed. Exhibits attached to affidavits or depositions are identified by the name of the affidavit or deposition to which they were attached, together with their exhibit number. All other citations are to the exhibit number of the parties' submissions.

I. *Thygeson's Employment and Termination*

USBEF employed Thygeson as a Regional Manager. Affidavit of Regis Timothy Evans ("Evans Aff"), ¶ 2. USBEF is a wholly owned subsidiary of U.S. Bank, National Association ("U.S.Bank"). U.S. Bank is a wholly owned subsidiary of USB Holdings, Inc., which in turn is a wholly owned subsidiary of U.S. Bancorp. Affidavit of Brenda Harvey ("Harvey Aff") (June 18, 2004), ¶ 2. USBEF provides equipment leasing and financing services to businesses. Deposition of Phil Thygeson ("Thygeson Depo"), p. 11.

For approximately two and one-half years, Thygeson reported directly to Tim Evans ("Evans"), the National Sales Manager. *Id* at 18. As Regional Manager, Thygeson supervised approximately 14-20 sales representatives or area managers located across the United States. *Id* at 17. Thygeson's job was to provide support and direction to these sales representatives, which included assisting them with marketing and structuring transactions. *Id* at 17-18.

In his performance evaluation for 2001, Evans rated Thygeson as "Needs Improvement" in the following categories: "High Energy Level and Ability to Motivate People; Flexibility; Business Management; People Management; Decision Making; and Teamwork and Cooperation." Evans Aff, ¶ 4. Thygeson received this evaluation in January 2002. Thygeson Depo, p. 70.

In early 2002, Evans began receiving complaints from sales representatives that Thygeson was not providing adequate assistance and management. Evans Aff, ¶ 5, Affidavit of Jennifer Winters ("Winters Aff"), ¶ 2; Affidavit of Scott Gault ("Gault Aff"), ¶ 2. At USBEF's annual sales meeting in February 2002, a sales representative who reported to Thygeson approached Evans and asked to be reassigned to another Regional Manager because Thygeson was not providing him with anything of value as a manager. Evans Aff, ¶ 5; Gault Aff, ¶ 2. In March 2002, Evans' supervisor informed him that he had observed Thygeson sleeping on the job. Evans Aff, ¶ 6. In April 2002, Evans observed Thygeson sleeping on the job. *Id.* When confronted, Thygeson told Evans that he suffered from "non-debilitating intermittent narcolepsy." Thygeson Depo, pp. 65-67. When Thygeson failed to produce medical documentation for his alleged narcolepsy, Evans informed Thygeson in writing that his behavior was unacceptable. *Id* at 68-69; Evans Aff, ¶ 6.

***3** After receiving the complaints about Thygeson and observing him sleeping on the job, Evans began to more closely monitor Thygeson's work. Evans Aff, ¶ 7. When Evans walked past Thygeson's office or came into his office to talk to him, Thygeson typically was viewing his computer screen. *Id.* Around July 2002, Evans also received reports from some of Thygeson's subordinates that he was sending e-mails to them with inappropriate attachments. *Id* at ¶ 10.

On June 26, 2002, Evans asked Jo Russo ("Russo"), USBEF's Systems Analyst, to provide him with a report showing Thygeson's internet activity over an extended period of time. Evans Aff, ¶ 8. Evans wanted to determine if Thygeson was using his office computer for business purposes. *Id.* Evans also asked Russo to search USBEF's network drive to determine if Thygeson had saved any pictures on USBEF's computer equipment. *Id* at ¶ 10.

On July 8, 2002, Russo provided Evans with a report approximately an inch thick listing the internet sites Thygeson had visited in the 12-day period from June 26 through the morning of July 8, 2002. *Id* at ¶ 9. Russo created the report by copying all the internet addresses accessed by Thygeson on each particular day. Deposition of Jo Anne Russo ("Russo Depo"), pp. 9-10, 12. She did not copy the actual content of the websites he visited. *Id* at 9. Additionally, she did not enter Thygeson's office to generate the report, but used computer systems assigned to her to access information stored on USBEF's network drive. *Id.*

Evans reviewed the report, made some estimated calculations, and concluded that Thygeson was spending an average of four hours per day visiting internet sites on his work computer. Evans Aff, ¶ 9. Thygeson's job did not require him to view internet sites several hours each day. *Id.*

Russo also searched USBEF's network drive for any pictures saved by Thygeson. Russo Depo, pp. 19-21. She found inappropriate e-mails containing pictures of nudity and sexually offensive jokes that Thygeson had saved on USBEF's network drive. *Id* at 22, 27-28. Russo forwarded the material directly to Brenda Harvey ("Harvey"), U.S. Bank's Senior Human Resources Generalist. *Id* at 27. Russo also forwarded the internet usage report to Harvey. Deposition of Brenda Harvey ("Harvey Depo"), pp. 23-25.

On July 8, 2002, Evans contacted Harvey to seek advice with respect to Thygeson's excessive internet usage and the pictures and jokes found on the company's network drive. Evans Aff, ¶ 11. Harvey reviewed the pictures and jokes and consulted with Judi Nevonen ("Nevonen"), Manager of Employee Relations, regarding the appropriate response. Harvey Depo, pp. 16-18. After consulting Nevonen, Harvey advised Evans that the material Thygeson had saved on USBEF's Local Area Network was a violation of U.S. Bancorp's employment policies. *Id* at 18, 47. Harvey also advised Evans that because Thygeson was a manager, he should be terminated for his conduct. Evans Aff, ¶ 11.

*4 According to Evans, he terminated Thygeson's employment on July 9, 2002, based on evidence that Thygeson was spending an inordinate amount of time on the internet during work hours, which was detracting from his effectiveness as a manager, and on Harvey's conclusion that the sexually inappropriate material Thygeson had downloaded onto his work computer warranted discharge. Evans Aff, ¶ 12. Harvey provided a written "Notice of Termination" to Thygeson on July 10, 2004, which stated:

> This is your written confirmation that U.S. Bancorp or its affiliate is terminating your employment. The termination is deemed a termination for cause as defined in the Middle Management Change in Control Severance Program. Under the terms of that program, you will not receive severance pay because your employment is being terminated for cause. The termination is effective as of July 9, 2002. The basis for the termination is violation of U.S. Bancorp's Code of Ethics and Conduct on the Job. You have engaged in gross and willful misconduct by accessing internet sites on your work computer which may be perceived as offensive or of an inappropriate nature in the work environment.

Harvey Depo, Exhibit. 1.

II. *Thygeson's Communications with U.S. Bancorp*

On July 16, 2002 Thygeson sent an e-mail to Harvey in which he claimed that he did not engage in the alleged misconduct and that his termination was not in accordance with the "normal disciplinary ladder." Harvey Aff (June 18, 2004), ¶ 6; Plaintiff's Exhibit 6. He "vigorously dispute[d] the allegation therein [-] gross and willful misconduct and intentional violation of the company's internet policy[.]" He asked if U.S. Bancorp had a grievance procedure to contest his termination. *Id.* Thygeson's e-mail did not directly discuss severance benefits. *Id.*

On July 24, 2002, U.S. Bancorp received correspondence from Martin Dolan ("Dolan"), Thygeson's attorney. Affidavit of Katherine Jones ("Jones Aff"), ¶ 3; [FN2] Plaintiff's Exhibit 7. Dolan requested numerous documents, including a copy of U.S. Bancorp's Middle Management Change in Control Severance Program ("Severance Pay Program"). *Id.* Dolan also asserted that Thygeson did not engage in the conduct for which he was terminated and requested that Harvey or U.S. Bancorp's attorney contact him to discuss the reasons for Thygeson's termination and the potential for an informal resolution. *Id.*

> FN2. Katherine Jones' Affidavit (docket # 38) was submitted in support of Defendants' Memorandum in Opposition to Thygeson's Motion to Amend his First Amended Complaint. However, defendants filed their materials opposing Thygeson's Motion to Amend at approximately the same time they filed their Motion for Summary Judgment, and the Memorandum in Support of their Motion for Summary Judgment references Jones' Affidavit. Therefore, this court will also treat Jones' Affidavit as filed in support of their Motion for Summary Judgment.

On August 6, 2002, U.S. Bancorp's in-house counsel, Katherine Jones ("Jones"), responded to Dolan's request for documents and provided him with the reasons for Thygeson's termination. Plaintiff's Exhibit 8. Although referenced in her August 6, 2002 letter to Dolan, Jones enclosed the Middle Management Change in Control Severance Plan Summary Plan Description ("Summary Plan Description") in a follow-up letter sent to Dolan on August 7, 2002. Plaintiff's Exhibit 9.

On August 13, 2002, Dolan sent a letter to Harvey acknowledging that he had received the letters dated August 6 and 7, 2002, along with the accompanying documents. Plaintiff's Exhibit 10. Dolan asserted that Thygeson had claims under Title I of the Electronic Privacy Communications Act of 1986, state tort theories for invasion of privacy, and age discrimination law. *Id.* He offered to settle

these claims in exchange for reinstatement with back pay and benefits or, in the alternative, for severance pay. *Id.*

***5** Jones wrote to Dolan on August 14, 2002, requesting that he direct all future correspondence to her attention rather than to employees of her client. Plaintiff's Exhibit 11. On August 20, 2002, Jones responded to the claims Dolan asserted in his August 13, 2004 letter. Plaintiff's Exhibit 12. The parties continued to discuss options for settlement of the dispute through October 18, 2002. Plaintiff's Exhibits 13, 14, and 15.

III. *U.S. Bancorp's Policies Concerning the Use of Computer Equipment at Work*

U.S. Bancorp's Employee Handbook states: "Our ... personal computers, ... including e-mail, ... are intended for Company business only." Harvey Aff (June 18, 2004), Exhibit 1, p. 7. The Handbook also states: "Do not use U.S. Bancorp computer resources for personal business" and "Do not access inappropriate internet sites and do not send e-mails which may be perceived as offensive, intimidating, or hostile or that are in violation of Company policy." *Id* at 8. Furthermore, it adds: "Like voice mail, computer systems or other office equipment, e-mail is the exclusive property of U.S. Bancorp and is not intended for personal use." *Id.* With respect to monitoring, the Handbook states:

> U.S. Bancorp reserves the right to monitor any employee's e-mail and computer files for any legitimate business reason, including when there is a reasonable suspicion that employee use of these systems violates ... a company policy, or may have an adverse effect on the Company or its employees. Examples include but are not limited to e-mails containing sexual innuendo or off-color jokes; ... [or] excessive or unauthorized use that violates Company policy.

Id at 9.

In a section entitled "Privacy in the Workplace," the Handbook states:

> U.S. Bancorp may assign workspace, equipment, or other company property for use in performing your job accountabilities. Company property is not intended for personal use. U.S. Bancorp reserves the right to access and/or search workspace and equipment that has been assigned to you.... U.S. Bancorp reserves the right to monitor employee accounts and electronic forms of communication, including e-mail, telephones, computer systems, and other electronic records for any legitimate business reasons.

Id at 10.

Thygeson acknowledged in writing that he received copies of these policies. Harvey Aff (June 18, 2004), Exhibit 2. Thygeson understood that the policies in the Employee Handbook applied to him and he was expected to comply with them. Thygeson Depo, p. 34.

IV. *U.S. Bancorp's Severance Pay Program*

U.S. Bancorp's Severance Pay Program was designed to assist employees whose employment was terminated as a result of a change in control of U.S. Bancorp. Harvey Depo, p. 12. The Severance Pay Program is a part of the Comprehensive Welfare Benefit Plan Statement. Defendants' Exhibit 1. Several benefit programs are appendices to the Plan Statement. Defendants' Exhibit 2. Benefit Appendix A-6 is the full written plan for the Severance Pay Program (the "Plan"). *Id; see also* Affidavit of Dee Ann Neri ("Neri Aff"), ¶ 3. The Comprehensive Welfare Benefit Plan Statement gives the Severance Committee the authority to administer the Severance Pay Program. Defendants' Exhibit 1, §§ 6.3-6.5.

***6** To qualify for a severance payment, a Covered Employee must have a "Termination of Employment" that occurs within 24 months following a Change in Control. *See* Exhibit 2, § 4.1. A Change in Control can be a Full Change in Control or a Par-

tial Change in Control. *Id* at § 1.8. An Agreement and Plan of Merger entered into between U.S. Bancorp and Firstar Corporation on October 3, 2000, was deemed by the U.S. Bancorp Board of Directors to be a Partial Change in Control. Neri Aff, ¶ 5; Defendants' Exhibit 3, p. 4. The Partial Change in Control was announced on October 4, 2000, and became effective February 27, 2001. Neri Aff, ¶ 5.

The Severance Pay Program defines "Termination of Employment" as a "termination (a) by [U.S. Bancorp] for any reason other than Cause or (b) by a Covered Employee for Good Reason[.]" Defendant's Exhibit 2, § 1.26. The Severance Pay Program defines "cause," in the case of a Partial Change in Control, as follows:

> (i) the continued ... failure by a Covered Employee to substantially perform the Covered Employee's duties with the Employer ... after a written demand for substantial performance is delivered to the Covered Employee that specifically identifies the manner in which the Employer believes that the Covered Employee has not substantially performed the Covered Employee's duties, and the Covered Employee has failed to resume substantial performance of the covered employee's duties on a continuous basis, (ii) ... gross and willful misconduct during the course of employment ... including, but not limited to, theft, assault, battery, malicious destruction of property, arson, sabotage, embezzlement, harassment, acts or omissions which violate the Employer's rules or policies (such as breaches of confidentiality) or other conduct which demonstrates a willful or reckless disregard of the interests of the Employer or its Affiliates[.]

Id at § 1.7.

The Severance Pay Program's definition of "cause" also states: "Circumstances constituting Cause shall be determined in the sole discretion of the Principal Sponsor." *Id.* "Principal Sponsor" is defined as "U.S. Bancorp, a Delaware corporation, or any successor thereto[.]" *Id* at § 1.22.

The Severance Pay Program requires the employer to provide a "Notice of Termination" in conjunction with any termination (except due to death) of a Covered Employee. *Id* at § 3.1. A "Notice of Termination" is defined, in relevant part, as "a written notice which sets forth the Date of Termination and, in reasonable detail, the facts and circumstances claimed to provide a basis, if any, for termination of the Covered Employee's employment." *Id* at § 1.19.

DISCUSSION

I. *Whether U.S. Bancorp Terminated Thygeson to Deprive Him of Severance Benefits (First Claim)*

Defendants argue that Thygeson's First Claim for interference with his severance benefits in violation of 29 USC § 1140 [FN3] is barred because he failed to exhaust his administrative remedies under the Severance Pay Program. Alternatively, defendants contend he cannot prove the merits of this claim.

> FN3. 29 USC § 1140 provides, in relevant part:
>
> > It shall be unlawful for any person to discharge, fine, suspend, expel, discipline, or discriminate against a participant or beneficiary for exercising any right to which he is entitled under the provisions of an employee benefit plan, this subchapter, section 1201 of this title, or the Welfare and Pension Plans Disclosure Act [29 USCA § 301 *et seq.*], or for the purpose of interfering with the attainment of any right to which such participant may become entitled under the plan, this subchapter, or the Welfare and Pension Plans Disclosure Act.... The provisions of section 1132 of this title shall be applicable in the enforcement of this section.

A. *Failure to Exhaust Administrative Remedies*

*7 This court rejects defendants' argument that Thygeson's 29 USC § 1140 claim is invalid because he failed to exhaust the administrative remedies available to him under the Severance Pay Program. Defendants fail to recognize that for certain claims brought under ERISA itself, such as those made under 29 USC § 1140, exhaustion is not required.

In cases involving claims under 29 USC § 1132 (a)(1)(B),[FN4] or other ERISA provisions *besides* 29 USC § 1140, the Ninth Circuit has indicated that exhaustion is required. *See, e.g. Chappel v. Laboratory Corp. of America,* 232 F.3d 719, 723 (9th Cir2000) (claim brought under 29 USC § 1132 (a)(1)); *Diaz v. United Agr. Employee Welfare Ben. Plan and Trust,* 50 F.3d 1478, 1483 (9th Cir1995) (claim brought under 29 USC § 1166); *Graphic Communications Union v. GCIU-Employer Retirement Benefit Plan,* 917 F.2d 1184, 1185 (9th Cir1990) (court not discussing type of claim, but presumably brought under 29 USC § 1132(a)(1) because plaintiff sought a declaration that the plan's arbitration provision violated ERISA and a resolution of a vesting-rights issue); *Amato v. Bernard,* 618 F.2d 559, 561 (9th Cir1980) (claim brought under 29 USC § 1132(a)); *see also Watts v. Pacific Gas and Elec.,* 1995 WL 481750, *3 (ND Cal Aug 9, 1995) (requiring exhaustion for plaintiff's second claim brought under 29 USC § 1132(a)). However, in cases involving claims brought under 29 USC § 1140 for interference and discharge in retaliation for seeking some right under an ERISA-regulated plan, courts have not required exhaustion. *Amaro v. Cont'l Can Co.,* 724 F.2d 747, 748, 752 (9th Cir1984); *Zipf v. Am. Tel. & Teleg.,* 799 F.2d 889, 891-94 (3rd Cir1986); *Watts,* 1995 WL 481750 at *3.

FN4. 29 USC 1132(a)(1)(B) provides:

> (a) Persons empowered to bring a civil action
>
> A civil action may be brought-
>
> (1) by a participant or beneficiary-
>
> (B) to recover benefits due to him under the terms of his plan, to enforce his rights under the terms of the plan, or to clarify his rights to future benefits under the terms of the plan[.]

This distinction exists because ERISA actions other than those under 29 USC § 1140 involve subsections that mandate internal appeal procedures. Therefore courts can be assisted by exhaustion in order to obtain the plan trustees' interpretation of their own plan. In contrast, claims brought under 29 USC § 1140 "solely" involve an "alleged violation of a protection afforded by ERISA." *Amaro,* 724 F.2d at 751. For a claim under this section, "[t]here is no internal appeal procedure either mandated or recommended by ERISA to hear these claims. Furthermore, there is only a statute to interpret. That is a task for the judiciary[.]" *Id; see also Diaz,* 50 F.3d at 1483-84 (discussing the difference between 29 USC § 1140 precedents, like *Amaro,* and cases involving other ERISA claims).

Defendants argue that Thygeson's 29 USC § 1140 claim is really a claim for severance benefits under a particularized set of facts, which he has attempted to disguise as a statutory claim. In the context of a claim brought under 29 USC § 1166, the Ninth Circuit has warned against efforts to disguise a claim for plan benefits as one for statutory violation:

> To be sure, many employee claims for plan benefits may implicate statutory requirements imposed by ERISA or COBRA (or perhaps other statutes, for that matter). And when the administrative resolution of those claims is then presented for judicial review, courts may then be called upon to determine whether the plan administrators have construed or dealt with those statutes in an appropriate manner. But that prospect does not give a claimant the license to attach a "statutory violation" sticker to his or her claim and then to use that label as an asserted justification for a total failure to pursue the congressionally mandated internal appeal procedures.

***8** *Diaz,* 50 F.3d at 1484.

On the other hand, *Diaz* recognized that "[n]either [*Amaro* nor *Zipf*] involved an individual's claim for plan benefits under a particularized set of facts-the kind of scenario that is presented here and that has led this and other Circuits to establish the claimant's need to go the administrative route first rather than turning directly to the courts." *Id.* As both *Diaz* and *Amaro* made clear, no congressionally mandated internal appeal procedure exists in ERISA-regulated plans to judge statutory claims for interference made in retaliation for an individual seeking to enforce rights under a plan. *Id; Amaro,* 724 F.2d at 751. Such a retaliation claim is not a claim for benefits under a particularized set of facts, but rather a claim for interference under a particularized set of facts. Therefore, whether the protection offered by a plan is one for arbitration, as in *Amaro,* or internal review by various appeal boards, as here, "[j]udicial procedures are more capable of safeguarding individual statutory rights" to be free from retaliation "than are arbitral procedures" or internal appeal processes. *Amaro,* 724 F.2d at 752. Indeed, on a fundamental level, it makes no sense to require exhaustion of remedies from the very entity that wrongfully interfered.

Accordingly, Thygeson was not required to exhaust his administrative remedies in order to seek relief under 29 USC § 1140. Therefore, it is unnecessary to reach Thygeson's argument that appealing his denial of benefits through U.S. Bancorp's internal procedures would have been futile.

B. *Merits of 29 USC § 1140 Claim*

1. *Legal Standard*

Congress enacted 29 USC 1140 "primarily to prevent 'unscrupulous employers from discharging or harassing their employees in order to keep them from obtaining vested pension rights." ' *Gavalik v. Cont'l Can Co.,* 812 F.2d 834, 851 (3rd Cir1987), quoting *West v. Butler,* 621 F.2d 240, 245 (6th Cir1980). To recover under 29 USC § 1140, a plaintiff need not prove that "the *sole* reason for his termination was to interfere with pension rights." *Id,* citing *Titsch v. Reliance Group, Inc.,* 548 F.Supp. 983, 985 (S.D.N.Y.1982), *aff'd,* 742 F.2d 1441 (2nd Cir1983) (emphasis in original). "A plaintiff must, however, demonstrate that the defendant had the " 'specific intent' to violate ERISA." *Id,* quoting *Watkinson v. Great Atl. & Pac. Tea Co., Inc.,* 585 F.Supp. 879, 883 (E.D.Pa.1984) (quoting *Titsch, supra*). Proof of a mere incidental loss of benefits is not sufficient to recover under 29 USC § 1140. *Id,* citing *Titsch,* 548 F.Supp. at 985 (A plaintiff cannot recover under 29 USC § 1140 where "the loss of ... benefits [i]s a mere consequence of, but not a motivating factor behind, a termination of employment").

Absent direct evidence of specific intent, the Ninth Circuit has adopted the *McDonnell Douglas* burden-shifting framework for assessing an employer's liability under 29 USC § 1140. *Ritter v. Hughes Aircraft Co.,* 58 F.3d 454, 457 (9th Cir1995); *see also McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 802, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). Thygeson must first establish a *prima facie* case of discrimination. *Lessard v. Applied Risk Mgmt.,* 307 F.3d 1020, 1029 n. 3 (9th Cir2002). "To establish a *prima facie* case under ERISA § 510 [29 USC § 1140], an employee must demonstrate (1) prohibited employer conduct (2) taken for the purpose of interfering (3) with the attainment of any right to which the employee may become entitled." *Gavalik,* 812 F.2d at 852.

***9** If Thygeson demonstrates a *prima facie* case of discrimination, the burden then shifts to U.S. Bancorp to set forth the reasons for his ineligibility for benefits. *Lessard,* 307 F.3d at 1029 n. 3. If U.S. Bancorp satisfies this burden of production, Thygeson must then provide "specific and substantial evidence" demonstrating that U.S. Bancorp's proffered reasons are a pretext for discrimination. *Id; Aragon v. Republic Silver State Disposal Inc.,* 292 F.3d 654, 659 (9th Cir2002). Judgment in favor

of U.S. Bancorp is appropriate if Thygeson fails to establish pretext. *Ritter,* 58 F.3d at 459.

2. *Analysis*

Thygeson argues he has demonstrated a *prima facie* case of U.S. Bancorp's intent to fire him in order to interfere with his acquisition of severance benefits because (1) other individuals who engaged in similar conduct were not fired; and (2) Evans was looking for a reason to terminate him that might constitute misconduct for which he could be fired for "cause."

Courts have found that disparate treatment is sufficient to prove liability under 29 USC § 1140. In *Ursic v. Bethlehem Mines,* 556 F.Supp. 571, 574-75 (W.D.Pa.1983), an employee was terminated for allegedly taking a small quantity of hand tools shortly before he completed the 30 years of service necessary to qualify for a pension. The plaintiff was found with the tools only after undergoing extensive surveillance to which other employees were not subjected. The court held the termination was pretextual and designed to deprive the plaintiff of his impending pension rights:

> Whatever importance the cost-conscious superintendent attached to his pet program of cutting tool expenditures, there is an atmosphere of "invidious discrimination" when only one employee, and the one who is within hailing distance of his hard-earned pension, is subjected to strict enforcement of [the superintendent's] unwritten edict, to secret surveillance by expensive private investigators, and to discharge for taking from the mine a trifling quantity of hand tools, while other employees roam in and out of the mine without a single dinner bucket being searched for contraband.
>
> The inescapable inference is that an ulterior motive lay behind defendants' maneuvers, and that a speedy discharge, before Ursic's thirty year pension vested, was aimed at.

Id at 574-575.

A disparate treatment analysis was also applied in *Watkins v. Shared Hosp. Serv.,* 852 F.Supp. 640, 643 (M.D.Tenn.1994), where the employer fired the plaintiff for reporting time spent traveling from his home to his first pickup as time on the clock. The court held that the plaintiff met his *prima facie* burden under 29 USC § 1140 by showing that the employer had sanctioned the practice in all other cases but his, and also showed pretext by demonstrating the employer's reason was unworthy of credence. *Id* at 643-44.

As in *Ursic* and *Watkins,* Thygeson submits evidence of defendants' disparate treatment that he claims is sufficient to give rise to an inference of discriminatory motive. According to Thygeson, Evans never told him that he was spending too much time on the internet or accessing inappropriate materials, nor did he give him a chance to explain his actions before being terminated. Thygeson Declaration, ¶ 10. On the other hand, U.S. Bancorp gave notice and discipline to other employees who engaged in excessive use of the internet; used an office computer for personal use; sent e-mails containing sexual innuendo or other inappropriate content; or viewed or accessed inappropriate, sexual, or offensive images on the computer. Plaintiff's Exhibits 20-24 (warnings given to several employees for excessive use of office computer and downloading inappropriate and/or sexual materials). Only one of these employees was terminated, and only after she failed to adhere to an Action Plan for improvement and had other specific performance issues besides e-mail infractions. Plaintiff's Exhibit 25. Three of the individuals given warnings were managers. Plaintiff's Exhibits 20-22 (warnings) and 26 (discovery interrogatory responses indicating the three employees were managers). Thygeson notes that one of the managers was given two warnings for the same behavior within a three month period. Plaintiff's Exhibit 22. The second warning informed him that the termination may be cause as defined in the Severance Pay Program, and that he would not

receive severance if terminated for such reasons. *Id* at 1.

***10** Thygeson also argues that Evans was looking for a reason to fire him, presumably because of his recent poor performance, but wanted to do so in a way that would prevent him from collecting severance benefits. Thygeson claims that Evans sent some of the inappropriate e-mails for which he was terminated (Thygeson Declaration, ¶ 9) and sought to uncover these same e-mails in order to find "cause" for terminating him, thereby avoiding payment of severance benefits.[FN5]

> FN5. Thygeson also challenges Evans' credibility because no evidence supports Evans' claim that he began investigating Thygeson because of complaints from employees under Thygeson's supervision. Defendants responded to this argument by submitting affidavits from several employees previously under Thygeson's supervision swearing that they approached Evans and complained about Thygeson's work. Winters Aff, ¶ 2; Gault Aff, ¶ 2.

Defendants respond by arguing that Evans had no input into Harvey's conclusion that Thygeson's misconduct rendered him ineligible for severance benefits. As a result, Evans' reasons for investigating Thygeson and firing him for misconduct are inconsequential. Additionally, defendants seek to narrow the question to whether Harvey determined that Thygeson was fired for misconduct (and hence ineligible for benefits) in order to prevent him from collecting severance benefits.

Defendants' approach is overly restrictive because it ignores the fact that before Harvey made the severance benefits decision, she advised Evans that Thygeson's conduct warranted dismissal. If sufficient circumstantial evidence supports a finding that Harvey gave this advice in order to prevent Thygeson from collecting severance benefits, then Thygeson would demonstrate a *prima facie* case under 29 USC § 1140. Additionally, Evans' intentions leading up to Thygeson's termination are also relevant. If Thygeson can show that Evans investigated him and reported his conduct to Harvey in order to ensure termination without payment of severance benefits, he would establish a *prima* facie case. Once Evans and Harvey discovered Thygeson's conduct and came to the conclusion that it was sufficient misconduct to require or justify termination for cause, the later determination that Thygeson was ineligible for severance benefits became far more likely. Therefore, solely focusing on Harvey's intentions when deciding the severance benefits issue is inapposite.

Defendants also attack Thygeson's evidence of disparate treatment offered to show Evans' discriminatory intent. Defendants argue that the comparative evidence offered by Thygeson is unhelpful because a proper comparison is not whether other employees were fired for similar conduct, but whether employees who were fired for similar misconduct received severance benefits. Defendants also maintain that Thygeson has not demonstrated that any of the managing employees who were warned (but not fired) about improper computer use had viewed, saved, or forwarded pictures involving nudity, and has not rebutted the testimony that termination is appropriate for managers who access nude pictures on their computer. Nevonen Depo, pp. 21-22.

Despite defendants' argument, Thygeson's evidence of disparate treatment is relevant even if it only concerns employees who were not fired for engaging in similar misconduct, rather than evidence of employees who were fired for similar misconduct but received severance benefits. The question of whether a person was terminated for "cause," as defined by the Severance Pay Program, and therefore not eligible for severance benefits, is only raised when a person is terminated in the first place. If Thygeson was terminated for cause for conduct for which others were not terminated, that may evidence an intent to deny him severance benefits since it is the termination for cause that placed him at risk of losing benefits.

***11** Moreover, Thygeson's evidence of disparate treatment is not insufficient merely because U.S. Bancorp failed to use the word "nudity" in its disciplinary notices if other employees were warned (but not fired) about materials that may have contained nudity or something similar. There is such evidence here. For example, the warning given one other manager mentioned computer use that could involve nudity, such as "downloading cartoons, pictures, videos, or similar material of a sexual nature." Plaintiff's Exhibit 22, p. 1.

Defendants next argue that Thygeson has failed to offer direct evidence demonstrating that Evans fired him in order to prevent him from obtaining severance benefits, or that Harvey had an improper intention when finding him ineligible for severance benefits. Thygeson responds that the extensive steps Evans took to survey his computer use, combined with the disparate treatment he received in comparison to his co-workers, raises a *prima face* case of interference under 29 USC § 1140.

Both parties agree that because Thygeson was an at-will employee, Evans could have terminated him at any time for any reason. As a result, it is difficult to explain why Evans ordered the extensive surveillance into Thygeson's computer activities. Evans' conduct might be explained by the Severance Pay Program's different treatment of immediate termination versus termination for cause.

An immediate termination would have required U.S. Bancorp to pay severance benefits to Thygeson because § 1.7(i) of the Severance Pay Program requires certain warnings before a person terminated for reasons other than cause can be denied severance benefits. In contrast, § 1.7(ii) of the Severance Pay Program permits denial of severance benefits to an employee who is terminated for cause. Considering that other employees were not terminated for engaging in similar conduct, and the lack of evidence rebutting Thygeson's testimony that Evans sent him some of the inappropriate e-mails later found in his personal folder,[FN6] Thygeson has raised at least a *prima facie* case that Evans' investigation and termination of Thygeson were motivated by a desire to deny him severance benefits. Indeed, in many ways, Evans' surveillance and disparate treatment of Thygeson appears very similar to the conduct in which the employer engaged in *Ursic.*

> FN6. Defendants did submit a sworn statement from Harvey indicating that U.S. Bancorp searched all the e-mail messages on its network by either Evans or Thygeson, but was unable to locate any evidence that Evans sent Thygeson any of the inappropriate pictures or jokes supporting his discharge. Harvey Aff (August 11, 2004), ¶ 4. At best, this statement merely creates an issue of fact as to whether Evans sent the e-mail. It does not rebut Thygeson's *prima facie* case.

This same evidence also rebuts defendants' final argument that Thygeson's inappropriate computer use provided a legitimate reason for his termination. Here, as in a Title VII context, which also uses the *McDonnell Douglas* burden shifting system, "where a defendant's intent and state of mind are placed in issue, summary judgment is ordinarily inappropriate." *Rosen v. Thornburgh,* 928 F.2d 528, 533 (2nd Cir1991) (citations omitted). Many open questions surround Evans' intent that are best left to decision by the fact-finder. It may be that Evans sought to acquire the evidence surrounding Thygeson's computer use to justify to a superior the termination of a manager-however unnecessary in the case of an at-will employee. More malevolently, perhaps Evans conducted the surveillance in order to have an excuse to fire an older manager that would avoid an Age Discrimination in Employment Act ("ADEA") claim.[FN7] But the evidence also raises a substantial possibility that Evans engaged in this conduct in order to deny Thygeson severance benefits. Although evidence of Evans' hostility towards Thygeson is slim, it is sufficient to create a fact issue rendering summary judgment inappropriate against Thygeson's 29 USC § 1140 claim for inter-

ference.

FN7. There is some evidence that Evans wanted to get rid of Thygeson because he was part of the "old regime." Declaration of Steve Calaway ("Calaway Declaration"), ¶ 4.

II. *Whether U.S. Bancorp Breached its Fiduciary Duties (Second Claim)*

***12** An administrator of an ERISA-regulated employee plan has a fiduciary duty to act solely in the interest of plan participants and beneficiaries. 29 USC § 1104.[FN8] The Second Claim alleges that U.S. Bancorp, acting through its Human Resources officer, Harvey, and its in-house counsel, Jones, breached this fiduciary duty by notifying Thygeson that he was terminated for cause and ineligible for benefits without setting forth: (1) the specific provision of the Plan relied on to deny benefits; (2) what materials or information were necessary to perfect a claim; and (3) the Plan's applicable appeal procedures. Thygeson also alleges U.S. Bancorp failed to respond to his inquiries for more information about his rights under the Plan. Thygeson alleges these errors failed to meet requirements set out in 29 USC § 1133 [FN9] and 29 CFR § 2560.503-1(g)(1), [FN10] and therefore breached U.S. Bancorp's fiduciary duty under 29 USC § 1104.

FN8. 29 USC 1104, in relevant part, provides:

(a) Prudent man standard of care

(1) Subject to sections 1103(c) and (d), 1342, and 1344 of this title, a fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and-

(A) for the exclusive purpose of:

(i) providing benefits to participants and their beneficiaries; and

(ii) defraying reasonable expenses of administering the plan;

(B) with the care, skill, prudence, and diligence under the circumstances then prevailing that a prudent man acting in a like capacity and familiar with such matters would use in the conduct of an enterprise of a like character and with like aims[.]

FN9. 29 USC § 1133 provides:

In accordance with regulations of the Secretary, every employee benefit plan shall-

(1) provide adequate notice in writing to any participant or beneficiary whose claim for benefits under the plan has been denied, setting forth the specific reasons for such denial, written in a manner calculated to be understood by the participant, and

(2) afford a reasonable opportunity to any participant whose claim for benefits has been denied for a full and fair review by the appropriate named fiduciary of the decision denying the claim.

FN10. 20 CFR § 2560.503-1(g)(1), in relevant part, provides:

(g) Manner and content of notification of benefit determination.

(1) Except as provided in paragraph (g)(2) of this section, the plan administrator shall provide a claimant with written or electronic notification of any adverse benefit determination. Any electronic notification shall comply with the standards imposed by 29 CFR 2520.104b-1(c)(1)(i), (iii), and (iv). The notification shall set forth, in a manner calculated to be understood by the

> claimant-
>
> (i) The specific reason or reasons for the adverse determination;
>
> (ii) Reference to the specific plan provisions on which the determination is based;
>
> (iii) A description of any additional material or information necessary for the claimant to perfect the claim and an explanation of why such material or information is necessary;
>
> (iv) A description of the plan's review procedures and the time limits applicable to such procedures, including a statement of the claimant's right to bring a civil action under section 502(a) of the Act following an adverse benefit determination on review[.]

Defendants respond that Harvey and Jones were not acting as fiduciaries and, alternatively, that the Second Claim fails on the merits.[FN11]

> FN11. Defendants do not argue that Thygeson's claim under 29 USC § 1104 is barred by his failure to exhaust administrative remedies.

A. *Presence of a Fiduciary*

The Severance Committee and U.S. Bancorp are the named fiduciaries of the Severance Pay Program. Defendants' Exhibit 1, § 6 .3. Neither Harvey nor Jones are members of the Severance Committee. Harvey Aff (August 11, 2004), ¶ 6; Jones Aff, ¶ 2; Neri Depo, p. 6. However, other individuals who have "discretionary authority" under the Severance Pay Program are also fiduciaries. 29 USC § 1002(21)(A).[FN12]

> FN12. 29 USC § 1002(21)(A) states:
>
> Except as otherwise provided in subparagraph (B), a person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan. Such term includes any person designated under section 1105(c)(1)(B) of this title.

1. *Jones as a Fiduciary*

An attorney rendering professional services to an ERISA-regulated plan is not a fiduciary so long as he or she does not exercise any authority over the plan "in a manner other than by usual professional functions." *Nieto v. Ecker,* 845 F.2d 868, 870 (9th Cir1988), quoting *Yeseta v. Baima,* 837 F.2d 380, 385 (9th Cir1988). Thus, Jones acted as a fiduciary only if she acted in more than her usual professional function as in-house counsel.

The record contains six communications from Jones to Dolan, Thygeson's attorney. On August 6 and 7, 2002, Jones provided certain materials Dolan requested in his prior letters and explained the basic reasons why Thygeson was fired. Plaintiff's Exhibits 8 and 9. On August 14, 2002, she asked Thygeson to stop contacting her client's employees directly and informed Dolan she was considering his settlement proposals. Plaintiff's Exhibit 11. On August 20, 2002, she provided her analysis of why U.S. Bancorp was not liable to Thygeson under certain legal theories Dolan advanced in a previous letter. Plaintiff's Exhibit 12. On September 3, 2002, she again asked Thygeson to stop contacting U.S. Bancorp's employees. Plaintiff's Exhibit 13. Finally, on October 18, 2002, she asked for a re-

sponse to U.S. Bancorp's offers to settle Thygeson's claims. Plaintiff's Exhibit 15.

None of these communications is anything more than what an attorney would typically do when attempting to resolve a dispute with a client's former employee. Moreover, because the Severance Pay Program required that a claim be filed with the Severance Committee, of which Jones was not a member, she had no authority to determine that any of Dolan's letters served as a claim for severance benefits under the Program. *See* Jones Aff, Exhibit 4, p. 12 (Summary Plan Description indicating that original claims should be filed with the Severance Committee); Defendant's Exhibit 2, § 8.3 (a copy of the Plan stating that "[n]o inquiry or question shall be deemed to be a claim or request for a review of a denied claim unless made in accordance with the claims procedures"). Accordingly, Thygeson has failed to demonstrate that Jones was a fiduciary exercising any authority over the Severance Pay Program "in a manner other than by usual professional functions." *Nieto,* 845 F.2d at 870, quoting *Yeseta,* 837 F.2d at 385.

2. *Harvey as a Fiduciary*

***13** Harvey did exercise some discretion when deciding whether Thygeson was eligible for severance benefits, rather than just applying rules. In order to decide whether Thygeson was terminated for "cause" under § 1.7(ii) of the Severance Pay Program, Harvey had to decide whether Thygeson's inappropriate computer use rose to the level of "gross and willful misconduct," including "harassment" or "acts or omissions which violate [U.S. Bancorp's] rules or policies," or was "other conduct which demonstrate[d] a willful or reckless disregard of the interests of [U.S. Bancorp]. Even so, the terms of the Severance Pay Program gave her no actual discretionary authority over its management or assets. Harvey's lack of authority contrasts with the facts in *Yeseta,* 837 F.2d at 386, where an office manager was held to be a fiduciary because even though his actual authority was in dispute, he exercised control over an ERISA-regulated plan's assets by withdrawing funds.

Nonetheless, it is conceivable that Harvey was acting as U.S. Bancorp's agent when she determined that Thygeson was not entitled to severance benefits. Rather than decide this murky issue, this court will assume, for purposes of this motion, that Harvey was acting as U.S. Bancorp's agent. Despite that assumption, as discussed next, Thygeson's claim premised on Harvey's conduct as a fiduciary fails.

B. *Adequacy of Harvey's Notice to Thygeson*

Defendants argue the notice requirements of 29 USC § 1133 and 29 CFR § 2560.503-1(g)(1) were not triggered because Thygeson never filed a claim for severance benefits. Defendants characterize the communications between Thygeson, Dolan and Harvey as nothing more than statements of Thygeson's belief that his termination was wrongful, his intent to institute legal action under specific theories (not including a violation of the Severance Pay Program), and an offer to settle the dispute over termination.

Thygeson counters that the termination notice he received from Harvey, which also stated that he was ineligible for severance pay because he was terminated for cause, was a "notification of any severance benefit determination." 20 CFR § 2560.503-1(g)(1). Thygeson contends that Harvey, as a fiduciary, violated 29 USC § 1133 and 20 CFR § 2650.503-1(g)(1) because her notice did not specify which provision defendants used to determine that Thygeson was ineligible for severance benefits and did not describe the procedures Thygeson could use for appealing the determination or for making an independent claim for benefits.

Two cases decided by the Seventh Circuit support defendants' position that a claim must be filed before the statutory and regulatory notice requirements are triggered. In *Kleinhans v. Lisle Sav.*

Profit Sharing Trust, 810 F.2d 618 (7 th Cir1987), the plaintiff sent letters to his employer demanding severance benefits that were due him. The plaintiff asserted these letters requested information that the administrator was required to provide under 29 USC § 1133. The plaintiff sued under 29 USC § 1132(c),[FN13] which imposes a civil penalty (up to $100 per a day) for an administrator's refusal to respond to a request for information that ERISA requires the administrator to provide. The court rejected the plaintiff's claim, holding that he "failed to fulfill one of the prerequisites for triggering the defendants' liability for the [29 USC § 1132(c)] statutory penalty-requesting 'information' concerning the Trust or his rights under the Trust that the defendants were required to make available to him[.]" *Id* at 622. It concluded that a demand for benefits or payment does not constitute a "request for information" for the purposes of 29 USC § 1132(c) because 29 USC § 1133 does not require an administrator to provide an explanation of a denial of benefits or to respond to requests for information " *until* such time as the claim is denied." *Id* at 623 (emphasis in original).

> FN13. 29 USC § 1132(c) provides, in relevant part:
>
> > (c) Administrator's refusal to supply requested information; penalty for failure to provide annual report in complete form
> >
> > (1) Any administrator (A) who fails to meet the requirements of paragraph (1) or (4) of section 1166 of this title or section 1021(e)(1) of this title with respect to a participant or beneficiary, or (B) who fails or refuses to comply with a request for any information which such administrator is required by this subchapter to furnish to a participant or beneficiary (unless such failure or refusal results from matters reasonably beyond the control of the administrator) by mailing the material requested to the last known address of the requesting participant or beneficiary within 30 days after such request may in the court's discretion be personally liable to such participant or beneficiary in the amount of up to $100 a day from the date of such failure or refusal, and the court may in its discretion order such other relief as it deems prop- er.

***14** Although *Kleinhans* did not address whether defendants complied with the notification requirements of 29 USC § 1133, but instead decided the question of whether defendants adequately responded to the plaintiff's request for information, it did hold that a claim must be filed and rejected in order to trigger a duty to respond to inquiries for more information under 29 USC § 1133. Similarly, a notification requirement would be triggered only by a claim denial since a claimant cannot request information as to why he was denied benefits until he is first notified that his claim is denied.

Later in *Tolle v. Carroll Touch, Inc.,* 23 F.3d 174, 180-81 (7th Cir1994), the Seventh Circuit held that the notification procedures in 29 USC § 1133 did not apply. There was no denial of benefits because the employee never properly submitted a claim.

Additionally, the express language of 29 USC § 1133 requires the denial of a claim. A plan administrator must only "provide adequate notice in writing to any participant or beneficiary whose *claim for benefits* under the plan has been *denied"* and "afford a reasonable opportunity to any participant whose *claim for benefits* has been *denied* for a full and fair review[.]" 29 USC § 1133 (emphasis added).

Similarly, a careful examination of 29 CFR § 2560.503-1(g)(1) reveals that despite its broad reference to "any adverse benefit determination," it also only applies when an individual has filed a claim for benefits. The purpose of the overall regulation is described as: "set[ting] forth minimum requirements for employee benefit plan procedures

pertaining to *claims for benefits* by participants and beneficiaries." 29 CFR § 2560.503-1(a) (emphasis added). A "claim for benefits" is defined as "a request for a plan benefit or benefits made by a claimant in accordance with a plan's reasonable procedure for filing benefit claims." 29 CFR § 2560.503-1(e). Additionally, the notice requirements themselves only apply to a "claimant," which implies that a claim must first be filed. 29 CFR § 2560.503-1(g)(1). Finally, the timing requirements for a notification of benefit determination only apply if a claim is first filed and denied:

> [I]f a claim is wholly or partially denied, the plan administrator shall notify the claimant, in accordance with paragraph (g) of this section, of the plan's adverse benefit determination within a reasonable period of time, but not later than 90 days after receipt of the claim by the plan, unless the plan administrator determines that special circumstances require an extension of time for processing the claim.

29 CFR § 2560.503-1(f)(1)

Accordingly, both 29 USC § 1133 and its implementing regulation, as well as supporting case law, require a participant or beneficiary to file a claim before the notice requirements are triggered. Thygeson does not contend that he complied with the requirements for filing a claim for severance benefits under U.S. Bancorp's Severance Pay Program. Therefore, he cannot prevail on a claim for a failure to provide adequate notice of benefit ineligibility under 29 USC § 1133.

C. *Response to Thygeson's Inquiries*

***15** Thygeson argues that his July 16, 2002 e-mail to Harvey, which he sent after receiving his notice of termination, as well as Dolan's later communications to Harvey and Jones, were requests for more information on appeal procedures to which defendants failed to respond in violation of 29 USC § 1133, which breached their fiduciary duties under 29 USC § 1104. [FN14]

> FN14. Although Thygeson pleads this claim based on a violation of 29 USC § 1133, that statute requires written notice of denial with reasons and does not address requests for information. Instead, a failure to respond to requests for information violates 29 USC § 1132(c). Since 29 USC § 1132(c) provides its own civil remedy, its violation may not constitute a breach of 29 USC § 1104.

As *Kleinhans* made clear, the requirement to respond to a claimant's inquiries only applies when a claim for benefits has been rejected. 810 F.2d at 623-24. Thygeson and his attorney's letters were, at best, demands for benefits, but did not constitute claims for benefits filed pursuant to the terms of the Severance Pay Program. Therefore, the manner in which Harvey and Jones responded to these communications did not breach their fiduciary duties under 29 USC § 1104.

D. *General Fiduciary Duty Principles*

Thygeson's final argument is that even if the manner in which defendants notified him of his ineligibility for benefits and responded to his inquiries did not violate 29 USC § 1133, defendants still breached the general principles of fiduciary duty set out in 29 USC § 1104. In effect, Thygeson argues that the general duty of an administrator of an ERISA-regulated plan under 29 USC § 1104 to act solely on behalf of the plan's participants and beneficiaries required defendants to do more than explain why he was terminated and mail him a Summary Plan Description.

The general fiduciary duties embodied in 29 USC § 1104 require less from a fiduciary than 29 USC § 1133 and 29 USC § 1132(c) require from an employer who is notifying a claimant of ineligibility or responding to inquiries. Instead, 29 USC § 1104 only requires that the fiduciary act on behalf of par-

ticipants and beneficiaries according to a prudent person standard. Without being able to demonstrate that defendants violated 29 USC § 1133 when providing him with information, Thygeson cannot demonstrate they otherwise acted in violation of this standard. Harvey's notification to Thygeson that he was ineligible for severance benefits was brief, but this court cannot conclude that a prudent person in like circumstances would have provided more details. This is especially the case considering that prior to his termination, Thygeson received materials outlining his rights under the Severance Pay Program, including a copy of the Summary Plan Description. Affidavit of Sheri L. McGrath, ("McGrath Aff"), ¶ 2; Thygeson Depo, pp. 108-09. If Thygeson contested his eligibility for benefits, he could have referred to the Summary Plan Description to determine how to file a claim for benefits.

Because defendants did not breach their fiduciary duties to Thygeson, summary judgment should be granted against Thygeson's claim for relief under 29 USC § 1104.[FN15]

> FN15. It is unnecessary to determine whether Jones' responses to Dolan adequately fulfilled general fiduciary duty principles because Jones was not a fiduciary.

III. *Whether U.S. Bancorp Abused its Discretion in Denying Benefits (Third Claim)*

The Third Claim alleges that Thygeson should be awarded benefits pursuant to 29 USC § 1132 (a)(1)(B) because his termination was not for "cause" as defined in the terms of the Severance Pay Program. Defendants respond by first arguing Thygeson's 29 USC § 1132(a)(1)(B) claim for benefits is barred because he failed to exhaust his administrative remedies. Alternatively, defendants argue that Thygeson fails to raise a material issue of fact as to whether he was fired for some other reason than his misconduct.

***16** As discussed previously, in cases involving claims for relief under 29 USC § 1132(a), exhaustion is required. *See, e.g. Chappel,* 232 F.3d at 723; *Graphic Communications,* 917 F.2d at 1185; *Amato,* 618 F.2d at 561; *Watts,* 1995 WL 481750 at *3. Thygeson does not contend that he exhausted his administrative remedies. However, exhaustion can be excused when it would be futile or remedies are inadequate.[FN16] *Diaz,* 50 F.3d at 1483. Thygeson argues that it would have been futile for him to apply for severance benefits for several reasons.

> FN16. Thygeson also argues that exhaustion can be excused if a breach of fiduciary duty occurred. However, exhaustion cannot be excused under that theory since no breach of fiduciary duty occurred here.

First, Thygeson asserts that he could not have filed a proper claim without a copy of the Severance Pay Program's full written Plan and that he was refused a copy of the Plan without a subpoena and only provided a copy after he filed this lawsuit. This argument fails. Thygeson's attorney was provided with a Summary Plan Description as early as August 7, 2002. That Summary Plan Description provides the following information:

Filing a Claim for Severance Pay

If you think you're eligible for payment under the Programs and/or the Excess Plan, but you're not contacted, you can file a claim for benefits. You can also file a claim if you think you're entitled to a different amount of severance pay. If you have a dispute about the amount of severance pay, you should file the claim for severance benefits before signing the release.

All claims for severance benefits must be sent in writing to:

Severance Administration Committee

U.S. Bancorp

[the Committee's address]

Appealing a Denied Claim

> If your claim is denied, you have the right to appeal. You must file a written request for appeal with the Severance Administration Committee within 60 days of the day you're notified that your claim has been denied.

Jones Aff, Exhibit 4, p. 12.

Thus, to determine eligibility for severance pay without first being contacted, to dispute the amount of severance pay, or to appeal a denied claim, a former employee must contact the Severance Committee. In effect, Thygeson fit at least two of these categories since he disputed the amount of severance pay he was given ($0) and wanted to appeal what he may have viewed as Harvey's denial of his claim. Therefore, based on the information in the Summary Plan Description, Thygeson should have known to file a claim with the Severance Committee.

Moreover, to the extent Thygeson needed to see the Plan, filing a claim would not have been futile since he had adequate access to the Plan. Thygeson could have obtained the Plan by following the procedures set out in the Summary Plan Description (*id* at 16), which Jones provided Dolan in August 2002. Additionally, Jones' August 6, 2002 letter specifically informed Dolan that the Summary Plan Description explained how to obtain a copy of the Plan.[FN17] Plaintiff's Exhibit 8.

> FN17. Thygeson argues Jones' August 6, 2002 letter indicates the Plan can only be obtained by subpoena. He is incorrect. Early in her letter, Jones mentions the Summary Plan Description and how Thygeson can obtain a full copy of the Plan. It is only later in the letter that Jones states, "with respect to the remaining items you have requested, it is the bank's policy to require a subpoena before disclosing such documents." *Id.* This reference is certainly not to the Plan, since that is previously discussed in Jones' letter, but is instead presumably to materials requested by Dolan in his July 24, 2002 letter, such as complaints made against Thygeson that formed a basis for his termination.

Second, Thygeson argues that filing a claim would have been futile since the Severance Committee had no power to overrule the Human Resources Department's determination that he was terminated for cause and therefore ineligible for benefits. It is apparent from the terms of the Severance Pay Program that the Severance Committee is the entity which determines whether a claim for severance benefits should be granted or denied. The Plan indicates that both an original claim and an appeal of a denied claim must be filed with the Severance Committee. Defendants' Exhibit 2, §§ 8.1 and 8.2. Therefore, whatever may have been the actual purpose of Harvey's apparently gratuitous decision to inform Thygeson that he was ineligible for benefits, only the Severance Committee had the authority to accept or deny his claim.

***17** Additionally, the terms of the Severance Pay Program and the testimony of Severance Committee members establish that the Severance Committee could have found that Thygeson's termination did not constitute "cause" under the Severance Pay Program, regardless of any determination made by Harvey or other U.S. Bancorp employees. As discussed previously, when a Partial Change of Control occurs and no written demand for performance is made, as here, the test for whether an employee was terminated for "cause" for the purposes of the Severance Pay Program is set forth in § 1.7(ii). That section requires "gross and willful misconduct during the course of employment ... including but not limited to [certain crimes], harassment, acts or omissions which violate the Employer's rules or policies ... or other conduct which demonstrates a willful or reckless disregard of the interests of the Employer[.]" Defendants' Exhibit 2. Therefore, if Thygeson had filed a claim, the Severance Committee would have determined whether his conduct

was "gross and willful misconduct" or demonstrated a "willful or reckless disregard" of U.S. Bancorp's interests. In doing so, the Severance Committee could have decided that "cause" for termination did not rise to the high level of "gross and willful" or "willful and reckless disregard" necessary to constitute the "cause" for denying severance benefits. Two members of the Severance Committee so testified. *See* Nevonen Depo, pp. 24-26; Neri Depo, pp. 16-18.

Moreover, the terms of the Severance Pay Program explicitly state that: "Circumstances constituting Cause shall be determined in the sole discretion of the Principal Sponsor." Defendants' Exhibit 2, § 1.7. "Principal Sponsor" is defined as "U.S. Bancorp, a Delaware corporation, or any successor thereto [.]" *Id* at § 1.22. The Comprehensive Welfare Benefit Plan Statement clarifies that U.S. Bancorp delegates its authority to determine severance benefits to the Severance Committee, which in turn has the authority to perform whatever acts are necessary to administer the Severance Pay Program. *See* Defendants' Exhibit 1, §§ 6.3-6.3.1. Therefore, to the extent some interpretation is required of the "Circumstances constituting Cause," such as whether conduct was "gross and willful misconduct," the Severance Committee has the authority to make that determination.

Accordingly, the Severance Committee had the authority to make an independent determination of Thygeson's eligibility for severance benefits, such that it would not have been futile for him to file a claim for benefits. Accordingly, Thygeson has no excuse for his failure to exhaust the administrative remedies available to him and his claim under 29 USC § 1132(a)(1)(B) is barred.

IV. *Invasion of Privacy (Fourth Claim)*

The Fourth Claim seeks to hold defendants liable for invading Thygeson's privacy by accessing the files he stored in his "personal" folder of U.S. Bancorp's computer network and remotely determining the address of the websites he visited while at work. Defendants seek summary judgment because Thygeson had no reasonable expectation of privacy in his use of U.S. Bancorp's computers and computer network.

A. *Legal Standards*

***18** Invasion of privacy is a tort designed to protect a plaintiff's right " 'to be let alone." ' *Mauri v. Smith,* 324 Or. 476, 482, 929 P.2d 307, 310 (1996), quoting *Humphers v. First Interstate Bank,* 298 Or. 706, 714, 696 P.2d 527, 531 (1985) (quoting W. Page Keeton *et al., Prosser and Keeton on the Law of Torts* § 117, at 851 (5th ed 1984)). Four different theories support a claim for invasion of privacy: (1) intrusion upon seclusion; (2) appropriation of another's name or likeness; (3) false light; and (4) publication of private facts. *Id,* citing *French v. Safeway Stores,* 247 Or. 554, 556, 430 P.2d 1021, 1022 (1967) (citing Note, *Right to Privacy: Social Interest and Legal Right,* 51 Minn L Rev 531, 539-40 (1967) and RESTATEMENT (SECOND) OF TORTS § 652A (1977)). The only theory at issue here is intrusion upon seclusion.

In order to establish a claim for intrusion upon seclusion, a plaintiff must prove: "(1) an intentional intrusion, physical or otherwise, (2) upon the plaintiff's solitude or seclusion or private affairs or concerns, (3) which would be highly offensive to a reasonable person." *Id* at 483, 430 P.2d 1021, 929 P.2d at 310.

B. *Analysis*

The parties do not dispute that an intrusion occurred, but argue over whether it was an intrusion on Thygeson's solitude in a manner that would be highly offensive to a reasonable person. Thygeson argues that he had a reasonable expectation of privacy in those materials saved in his "personal" folder on his work computer, especially those materials he saved there after accessing them through his personal e-mail account.

Thygeson also argues that he had a "reasonable expectation that his personal e [-]mail account was private." Complaint, ¶ 47. Thygeson accessed two e-mail accounts from his work computer to send personal e-mails: (1) the e-mail account on U.S. Bancorp's system; and (2) his personal internet e-mail account accessed through an internet webpage (his "Netscape account").[FN18] Defendants never accessed the actual content of either of these accounts. Russo Depo, pp. 9, 20-21. Instead, Russo, USBEF's Systems Analyst, remotely determined the address of the websites that Thygeson visited using his work computer and U.S. Bancorp's internet access. One of these websites was Thygeson's Netscape account. Therefore, Thygeson's allegation of an intrusion based on an expectation of privacy in his personal e-mail account is presumably a reference to this search by Russo. This intrusion is separately addressed from Thygeson's allegation concerning his "personal" folder on U.S. Bancorp's network.

> FN18. The record contains copies of e-mails found in Thygeson's folder on U.S. Bancorp's computer network that Thygeson sent from his Netscape account, which had an e-mail address of "pthygeson@netscape.net." In addition to this private internet e-mail account, testimony indicated that Thygeson may have had another personal internet e-mail account accessed while at work through American On-Line ("AOL"). *See* Thygeson Depo, p. 80. Indeed, Russo's report on Thygeson's internet usage demonstrated that Thygeson accessed a webpage associated with AOL numerous times. Harvey Aff (June 18, 2004), Exhibit 6. However, no copies of any e-mails sent to or from an AOL account are in the record. Therefore, for purposes of clarity, when referring to Thygeson's e-mails sent or received from his personal internet e-mail, this court will refer only to Thygeson's Netscape account.

1. *Accessing Files in Thygeson's Personal Folder*

The Ninth Circuit has not directly addressed an invasion of privacy claim similar to the one alleged here. However, decisions by other courts provide some guidance.

In *McClaren v. Microsoft Corp.,* 1999 WL 339015, *1 (Tex Ct App 1999), the plaintiff alleged an invasion of privacy claim against his employer, Microsoft, which accessed personal folders on a network that allowed storage of e-mail messages. Access was obtained through a network password as well as a personal password created by the plaintiff and allowed by Microsoft. The court focused its analysis on differentiating *K-Mart Corp. Store No. 7441 v. Trotti,* 677 S.W.2d 632 (Tex.App.1984), *writ ref'd N.R.E.,* 686 S.W.2d 593 (1985), which found a reasonable expectation of privacy when an employer provided a locker but allowed employees to buy and use their own lock for the locker. *McClaren* distinguished the locker in *Trotti* from the personal e-mail folders because the locker was provided to the employee for the specific purpose of storing personal belongings, whereas the plaintiff's computer and the e-mail application were provided to him for the purposes of his employment. Additionally, the locker in *Trotti* was a "discrete, physical place where the employee, separate and apart from other employees, could store her tangible, personal belongings." *McClaren,* 1999 WL 339015 at *4. In contrast, the e-mail storage system involved messages that were transmitted to the server-based inbox and stored there until the plaintiff moved them to his personal folders. Holding the plaintiff had no reasonable expectation of privacy in his e-mail saved in personal folders, the court reasoned:

> ***19** Even [if the plaintiff's practice was to move e-mail messages to personal folders], any e-mail messages stored in McLaren's personal folders were first transmitted over the network and were at some point accessible by a third-party [because they were temporarily stored in the central routing computer accessible to the employer]. Given

> these circumstances, we cannot conclude that McLaren, even by creating a personal password, manifested-and [his employer] recognized-a reasonable expectation of privacy in the contents of the e-mail messages such that [the employer] was precluded from reviewing the messages.

Id (footnote omitted).

As in *McLaren,* Thygeson used his employer's e-mail system to send and receive personal messages, some of which he saved in personal folders on U.S. Bancorp's computer network. If the plaintiff in *McLaren* did not have a reasonable expectation of privacy when his employer accessed the files on its network that the plaintiff saved using a personal password, then Thygeson could not have had a reasonable expectation of privacy in the e-mails he sent and received using his U.S. Bancorp office e-mail and then saved in a folder on U.S. Bancorp's network that he merely labeled "personal" without even creating a password.

Although Thygeson also saved some e-mails in his personal folder that he accessed using his Netscape account, this activity is still similar to *McClaren.* Thygeson used his employer's computer and network for personal use and saved personal information in a location that could be accessed by his employer, despite warnings in the Employee Handbook that personal use was prohibited and monitored. Indeed, the situation is very similar to a hypothetical given in *Trotti,* where the court found that if the employer provided the locker and the lock and retained the master key, the employee could have no expectation of privacy. *Id,* citing *Trotti,* 677 S.W.2d at 637. Here, U.S. Bancorp provided the computer, internet access, and computer network, and retained the key such that Russo was able to remotely search Thygeson's personal files on the network. Thygeson could not have a reasonable expectation of privacy in anything he chose to put in a network folder to which U.S. Bancorp retained the key.

The use of password-protection and personal folders on the company intranet system to save e-mails sent using an office e-mail system, including sexually explicit e-mails from internet joke sites, also was found insufficient to create a reasonable expectation of privacy in *Garrity v. John Hancock Mut. Life Ins. Co.,* 2002 WL 974676, *2 (D.Mass.2002), citing *McLaren,* 1999 WL 339015 at *4.

Other courts also found that employees have no expectation of privacy in e-mail that an employer can access. In *Smyth v. Pillsbury Co.,* 914 F.Supp. 97 (E.D.Pa.1996), the court found no reasonable expectation of privacy in e-mail an employee sent to his supervisor over the company e-mail system, even though the employer made assurances that such communications would not be intercepted by management or used as grounds for reprimand. "Once plaintiff communicated the alleged unprofessional comments to a second person ... over an e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost." *Id* at 101. As in *Smyth,* Thygeson had no reasonable expectation of privacy in e-mails he saved on a network U.S. Bancorp created and could access. Moreover, if statements that e-mail was private were insufficient to create an expectation of privacy in *Smyth,* then Thygeson also had no expectation of privacy when he was specifically warned that office computers were for personal use and activity on them could be monitored.

***20** One court has even held that an individual who is not an employee had no right to privacy in information a defendant accessed on its own computer system. *Wilkinson v. Methodist, Richard Young Hosp.,* 259 Neb. 745, 612 N.W.2d 213, 216 (Neb 2000) (holding there was no invasion of privacy where a hospital accessed its own computer records in order to find out the plaintiff's private insurance record for purposes of paying a hospital bill).

In addition, Thygeson may not have had a reasonable expectation of privacy in his personal folders simply because of the explicit policies set out in

U.S. Bancorp's Employee Handbook. In a criminal case involving a Fourth Amendment defense to information seized from a computer during a government employer's search and seizure, the Fourth Circuit found no reasonable expectation of privacy, given an explicit computer monitoring policy:

> Simons did not have a legitimate expectation of privacy with regard to the record or fruits of his Internet use in light of [his employer's] Internet policy. The policy clearly stated that [the employer] would "audit, inspect, and/or monitor" employees' use of the Internet, including all file transfers, all websites visited, and all e-mail messages, "as deemed appropriate." This policy placed employees on notice that they could not reasonably expect that their Internet activity would be private. Therefore, regardless of whether Simons subjectively believed that the files he transferred from the Internet were private, such a belief was not objectively reasonable after [his employer] notified him that it would be overseeing his Internet use.

U.S. v. Simons, 206 F.3d 392, 398-99 (4th Cir2000) (footnote and internal citations omitted).

As in *Simons,* U.S. Bancorp had no reasonable expectation of privacy against a remote search of his computer files because of the explicit warnings in U.S. Bancorp's Employee Handbook. The Handbook specifically states: "Our ... personal computers, ... including e-mail, ... are intended for Company business only." Harvey Aff (June 18, 2004), Exhibit 1, p. 7. It also states that "U.S. Bancorp reserves the right to monitor any employee's e-mail and computer files for any legitimate business reason, including when there is a reasonable suspicion that employee use of these systems violates ... a company policy [.]" *Id* at 9. These warnings are just as clear as those found to nullify an expectation of privacy in *Simons.* Thygeson acknowledges that he was provided with a copy of these policies. Harvey Aff (June 18, 2004), Exhibit 2.

Thygeson cites several cases to support his alleged right to privacy. However, all these cases can be differentiated from Thygeson's situation. The first case, *Leventhal v. Knapek,* 266 F.3d 64 (2nd Cir2001), involved a claim under 42 USC § 1983 by an employee of a state agency, alleging that his Fourth Amendment right to be free from unreasonable searches and seizures was violated by the agency's search of the hard drive of his office computer. Although the court later found no Fourth Amendment violation because the search was justified and of appropriate scope, it first held the plaintiff had a reasonable expectation of privacy in the contents of his computer. This expectation arose because the computer was in a private office to which the plaintiff had exclusive use; the plaintiff did not share his computer with other employees; the public and visitors did not have access to his computers; the technical support staff normally announced its maintenance of computers in advance; and other employees searched unattended computers infrequently and only for selected documents. The court specifically noted that the agency did not have a "general practice of routinely conducting searches of office computers or had placed [the plaintiff] on notice that he should have no expectation of privacy in the contents of his office computer." *Id* at 74. In contrast, U.S. Bancorp's Employee Handbook directly placed Thygeson on notice that his computer was not for personal use and that his activity could be monitored. Therefore, *Leventhal* does not provide support for Thygeson's argument that he had a reasonable expectation of privacy in his personal e-mail folder.

***21** In the other case, *Restuccia v. Burk Tech.,* 1996 WL 1329386, *1 (Mass Super Ct 1996), the court denied summary judgment against an invasion of privacy claim where the employer used its supervisory password to read employee e-mail sent and received using an office e-mail system. The court found a material issue of fact as to whether the plaintiffs had a reasonable expectation of privacy in their e-mail messages and whether the employer's reading of the e-mail messages constituted a substantial interference. However, the employer in *Re-*

stuccia had no policy against using the office's e-mail system for personal messages; employees were not told supervisors had access to their e-mail using supervisory passwords; and employees were not specifically told that their computer files, including e-mail messages, were automatically saved onto back-up files to which supervisors had access. In contrast, U.S. Bancorp's Employee Handbook made it clear that computers were for business purposes only and that employee activity on them could be monitored. Therefore, *Restuccia* is easily distinguished from this case.

No precedents support Thygeson's argument that he had a reasonable expectation of privacy in the e-mails saved in his personal folder. On the contrary, other courts are clear that when, as here, an employer accesses its own computer network and has an explicit policy banning personal use of office computers and permitting monitoring, an employee has no reasonable expectation of privacy. Therefore, Thygeson's invasion of privacy claim fails to the extent it relies on U.S. Bancorp's intrusion into his personal folder.

2. *Monitoring Website Addresses*

The monitoring of addresses of the websites Thygeson visited, including the website he used to access his Netscape account, raises slightly different issues. In contrast to an e-mail system provided by an employer, most employees have a higher expectation of privacy when accessing personal internet e-mail accounts, such as Netscape or Hotmail accounts, even when doing so while at work. However, it is an entirely different issue whether this expectation is reasonable when the employer has an explicit computer policy.

Thygeson relies on *Fischer v. Mt. Olive Lutheran Church,* 207 F Supp2d 914 (W.D.Wis.2002), where the court denied a motion for summary judgment against an invasion of privacy claim. In *Fischer,* a church accessed its employee's personal internet e-mail account (a Hotmail account) as part of an investigation into whether the employee had used the church's internet access for sexual conversations. After finding the elements of the state's invasion of privacy claim should be interpreted in conformity with the RESTATEMENT (SECOND) OF TORTS § 625B, the court denied summary judgment, explaining:

> Because it is disputed whether accessing plaintiff's email account is highly offensive to a reasonable person and whether plaintiff's email account is a place that a reasonable person would consider private, I will deny defendants' motion for summary judgment as to this claim.

***22** *Id* at 928.

This cursory examination of the law and facts is not persuasive. Moreover, one key fact in *Fischer* differentiates it from this case: the church accessed the content of e-mails on the plaintiff's Hotmail account by guessing at his password. *Id* at 920. Here, defendants never accessed the content of the e-mails in Thygeson's Netscape account. Instead, defendants only accessed the record of the addresses of the webpages Thygeson visited. Furthermore, this information was available on defendants' own network. This situation is wholly unlike the invasive sort of search involved in *Fischer.* Additionally, *Fischer* did not discuss whether the church had a policy on personal computer use and monitoring. Here U.S. Bancorp had an explicit policy on these matters.

Absent any persuasive precedent favoring Thygeson, this court is unwilling to conclude that Thygeson had a reasonable expectation of privacy when using his computer and U.S. Bancorp's internet access. Any subjective expectation of privacy Thygeson had was unreasonable given the Employee Handbook, which explicitly states that U.S. Bancorp's computers are not for personal use and employee activity can be monitored. This is especially true when the information defendants collected was only the website addresses, rather than the actual content of the websites Thygeson visited, and de-

fendants conducted this surveillance remotely. This type of search is analogous to a pen registry search, where in the Fourth Amendment context, courts have held that defendants have no reasonable expectation of privacy in the telephone numbers they dial because the numbers are conveyed to the telephone company. *Smith v. Maryland,* 442 U.S. 735, 741-744, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). Similarly, Thygeson could have no reasonable expectation of privacy in the website addresses he accessed using U.S. Bancorp's network and internet access. [FN19]

> FN19. This analysis might differ if defendants had accessed the content of the websites Thyesson visited, especially his e-mails sent using his Netscape account. In the Fourth Amendment context, the Supreme Court has recognized a greater expectation of privacy in the content of telephone conversations. *See Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967). Similarly, an employee might have a reasonable expectation of privacy in the content of the actual e-mails he accesses and sends using a private internet e-mail account. On the other hand, this expectation of privacy might be nullified by explicit employer policies on computer use and monitoring.

Accordingly, because both of Thygeson's allegations of an intrusion on his seclusion lack merit, his invasion of privacy claim should be dismissed.

RECOMMENDATION

For the reasons stated above, defendants' Motion for Summary Judgment (docket # 43) should be GRANTED IN PART AND DENIED IN PART. Summary judgment should be denied as to the First Claim (29 USC § 1140), but granted as to the Second, Third and Fourth Claims.

SCHEDULING ORDER

Objections to this Findings and Recommendation, if any, are due October 4, 2004. If no objections are filed, then the Findings and Recommendation will be referred to a district court judge and go under advisement on that date.

If objections are filed, then the response is due within 10 days after being served with a copy of the objections. When the response is due or filed, whichever date is earlier, the Findings and Recommendation will be referred to a district court judge and go under advisement.

D.Or.,2004.
Thygeson v. U.S. Bancorp
Not Reported in F.Supp.2d, 2004 WL 2066746 (D.Or.), 34 Employee Benefits Cas. 2097

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529 F.3d 892, 91 Empl. Prac. Dec. P 43,233, 155 Lab.Cas. P 60,628, 27 IER Cases 1377, 08 Cal. Daily Op. Serv. 7472, 2008 Daily Journal D.A.R. 9051, 47 Communications Reg. (P&F) 164
(Cite as: 529 F.3d 892)

United States Court of Appeals,
Ninth Circuit.
Jerilyn QUON; April Florio; Jeff Quon; Steve Trujillo, Plaintiffs-Appellants,
v.
ARCH WIRELESS OPERATING COMPANY, INCORPORATED, a Delaware corporation; City of Ontario, a municipal corporation; Lloyd Scharf, individually and as Chief of Ontario Police Department; Ontario Police Department; Debbie Glenn, individually and as a Sergeant of Ontario Police Department, Defendants-Appellees.
No. 07-55282.

Argued and Submitted Feb. 6, 2008.
Filed June 18, 2008.

Background: City police department employees, and one employee's wife, brought § 1983 Fourth Amendment action against department, city, chief of police, and internal affairs officer, in connection with department's review of employees' text messages, and asserted claim against wireless communications provider under Stored Communications Act (SCA). The United States District Court for the Central District of California, 445 F.Supp.2d 1116, Stephen G. Larson, J., granted summary judgment for wireless provider on SCA claim, and, following jury determination as to chief's intent in ordering review of text messages, entered judgment in favor of remaining defendants on Fourth Amendment and related state-law claims. Plaintiffs appealed.

Holdings: The Court of Appeals, Wardlaw, Circuit Judge, held that:
(1) wireless provider was "electronic communication service" (ECS) under SCA, and had violated SCA by releasing archived transcripts to city;
(2) employees had expectation of privacy in content of their text messages;
(3) police officer had reasonable expectation of privacy in text messages, given informal policy of no auditing of messages upon payment for usage overages;
(4) scope of department's search of text messages was unreasonable and violative of Fourth Amendment, given less intrusive alternatives;
(5) police chief enjoyed qualified immunity as to Fourth Amendment claim; and
(6) city and department were not protected by statutory immunity against invasion of privacy claim under California Constitution.

Affirmed in part and reversed and remanded in part.

West Headnotes

[1] Telecommunications 372 ⚿1438

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1438 k. Wireless or Mobile Communications. Most Cited Cases
Wireless communications provider that contracted with city to provide text messaging services for city's employees was "electronic communication service" (ECS) under Stored Communications Act (SCA), rather than a remote computing service (RCS), and thus violated SCA when it knowingly released archived transcripts of police officers' text messages to city at city's request, since city was subscriber but not addressee or intended recipient; provider gave city "ability to send or receive wire or electronic communications," rather than "provi[ding] to the public ... computer storage or processing services." 18 U.S.C.A. §§ 2510(15), 2702(a)(1, 2), 2711(2).

[2] Searches and Seizures 349 ⚿23

349 Searches and Seizures
349I In General
349k23 k. Fourth Amendment and Reason-

ableness in General. Most Cited Cases

Searches and Seizures 349 ⚿26

349 Searches and Seizures
349I In General
349k25 Persons, Places and Things Protected
349k26 k. Expectation of Privacy. Most Cited Cases
Reasonableness of search under Fourth Amendment is determined by assessing, on one hand, degree to which it intrudes upon individual's privacy and, on the other, degree to which it is needed for promotion of legitimate governmental interests. U.S.C.A. Const.Amend. 4.

[3] Searches and Seizures 349 ⚿31.1

349 Searches and Seizures
349I In General
349k31 Persons Subject to Limitations; Governmental Involvement
349k31.1 k. In General. Most Cited Cases
Searches and seizures by government employers or supervisors of private property of their employees are subject to restraints of Fourth Amendment. U.S.C.A. Const.Amend. 4.

[4] Searches and Seizures 349 ⚿36.1

349 Searches and Seizures
349I In General
349k36 Circumstances Affecting Validity of Warrantless Search, in General
349k36.1 k. In General. Most Cited Cases
Public employer's intrusions on constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, are judged by standard of reasonableness under all circumstances; under that standard, court evaluates whether search was justified at its inception, and whether it was reasonably related in scope to circumstances which justified interference in the first place. U.S.C.A. Const.Amend. 4.

[5] Telecommunications 372 ⚿1438

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1438 k. Wireless or Mobile Communications. Most Cited Cases
Employees of city police department had expectation of privacy, under Fourth Amendment, in content of text messages that they sent and received using city-owned pagers, and that were archived by wireless service provider that contracted with city; fact that provider had capability to access content for its own purposes did not remove that expectation. U.S.C.A. Const.Amend. 4.

[6] Telecommunications 372 ⚿1438

372 Telecommunications
372X Interception or Disclosure of Electronic Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1438 k. Wireless or Mobile Communications. Most Cited Cases
Police officer had reasonable expectation of privacy, under Fourth Amendment, in text messages sent to and from his city-owned pager, even though department's written computer and e-mail policy decreed that no expectation of privacy should attach to use of those resources, and even assuming that messages constituted public records under California Public Records Act (CPRA); police lieutenant in charge of pagers had established informal policy under which officer's messages would not be audited if he paid for usage overages, and CPRA did not diminish officer's reasonable expectation. U.S.C.A. Const.Amend. 4; West's Ann.Cal.Gov.Code § 6253.

[7] Telecommunications 372 ⚿1438

372 Telecommunications
372X Interception or Disclosure of Electronic

Communications; Electronic Surveillance
372X(A) In General
372k1435 Acts Constituting Interception or Disclosure
372k1438 k. Wireless or Mobile Communications. Most Cited Cases
Police department's search of content of officers' text messages sent and received via city-owned pagers, which was reasonable at its inception based on noninvestigatory work-related purpose of ensuring that officers were not being required to pay for work-related expenses when they reimbursed city for usage overages, was nevertheless unreasonable in scope and thus violative of Fourth Amendment; less intrusive means existed to achieve same end, including warning officers that content of messages would be reviewed in future to ensure work-related uses. U.S.C.A. Const.Amend. 4.

[8] Civil Rights 78 ⚿1376(10)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(10) k. Employment Practices. Most Cited Cases
Police chief enjoyed qualified immunity in police department employees' § 1983 Fourth Amendment action alleging undue invasion of privacy from department's review of employees' text messages, which were archived by wireless service provider; at time of review, there was no clearly established law regarding whether public-employee users of text messages that are archived by service provider have reasonable expectation of privacy in their content. U.S.C.A. Const.Amend. 4; 42 U.S.C.A. § 1983 .

[9] Civil Rights 78 ⚿1376(1)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(1) k. In General. Most Cited Cases

Civil Rights 78 ⚿1376(2)

78 Civil Rights
78III Federal Remedies in General
78k1372 Privilege or Immunity; Good Faith and Probable Cause
78k1376 Government Agencies and Officers
78k1376(2) k. Good Faith and Reasonableness; Knowledge and Clarity of Law; Motive and Intent, in General. Most Cited Cases
On claim of qualified immunity, court: (1) asks whether, taken in light most favorable to party asserting injury, facts alleged show that officer's conduct violated constitutional right, and (2) if so, proceeds to determine whether right was clearly established, i.e. whether it would be clear to reasonable officer that his conduct was unlawful in situation confronted.

[10] Municipal Corporations 268 ⚿747(3)

268 Municipal Corporations
268XII Torts
268XII(B) Acts or Omissions of Officers or Agents
268k747 Particular Officers and Official Acts
268k747(3) k. Police and Fire. Most Cited Cases
City and its police department were not protected by statutory "judicial or administrative proceeding" immunity against department employees' California Constitution claim of violation of privacy, arising from department's review of content of employees' text messages; review of messages never could have led to judicial or administrative proceeding, since department had informal policy permitting officers to use pagers for personal purposes and to exceed usage limit, if they reimbursed department for

overage. West's Ann.Cal. Const. Art. 1, § 1; West's Ann.Cal.Gov.Code § 821.6.
***895** Dieter C. Dammeier, Zahra Khoury, Lackie & Dammeier APC, Upland, CA, for the plaintiffs-appellants.

Dimitrios C. Rinos, Rinos & Martin, LLP, Tustin, CA; Kent L. Richland, Kent J. Bullard, Greines, Martin, Stein & Richland LLP, Los Angeles, CA, for defendants-appellees City of Ontario, Ontario Police Department, and Lloyd Scharf.

Bruce E. Disenhouse, Kinkle, Rodiger and Spriggs, Riverside, CA, for defendant-appellee Debbie Glenn.

John H. Horwitz, Schaffer, Lax, McNaughton & Chen, Los Angeles, CA, for defendant-appellee Arch Wireless, Inc.

Appeal from the United States District Court for the Central District of California; Stephen G. Larson, District Judge, Presiding. D.C. No. CV-03-00199-SGL.

Before: HARRY PREGERSON and KIM McLANE WARDLAW, Circuit Judges, and RONALD B. LEIGHTON,[FN*] District Judge.

FN* The Honorable Ronald B. Leighton, United States District Judge for the Western District of Washington, sitting by designation.

WARDLAW, Circuit Judge:

This case arises from the Ontario Police Department's review of text messages sent and received by Jeff Quon, a Sergeant and member of the City of Ontario's SWAT team. We must decide whether (1) Arch Wireless Operating Company Inc., the company with whom the City contracted for text messaging services, violated the Stored Communications Act, 18 U.S.C. §§ 2701-2711 (1986); and (2) whether the City, the Police Department, and Ontario Police Chief Lloyd Scharf violated Quon's rights and the rights of those with whom he "texted"-Sergeant Steve Trujillo, Dispatcher April Florio, and his wife Jerilyn Quon [FN1]-under the Fourth Amendment to the United States Constitution and Article I, Section 1 of the California Constitution.

FN1. Doreen Klein, a plaintiff below, has not filed an appeal.

I. FACTUAL BACKGROUND

On October 24, 2001, Arch Wireless ("Arch Wireless") contracted to provide wireless text-messaging services for the City of Ontario. The City received twenty two-way alphanumeric pagers, which it distributed to its employees, including Ontario Police Department ("OPD" or "Department") Sergeants Quon and Trujillo, in late 2001 or early 2002.

According to Steven Niekamp, Director of Information Technology for Arch Wireless:

> A text message originating from an Arch Wireless two-way alphanumeric text-messaging pager is sent to another two-way text-messaging pager as follows: The message leaves the originating pager via a radio frequency transmission. That transmission is received by any one of many receiving stations, which are owned by Arch Wireless. Depending on the location of the receiving station, the message is then entered into the Arch Wireless computer network either by wire transmission or via satellite by another radio frequency transmission.***896** Once in the Arch Wireless computer network, the message is sent to the Arch Wireless computer server. Once in the server, a copy of the message is archived. The message is also stored in the server system, for a period of up to 72 hours, until the recipient pager is ready to receive delivery of the text message. The recipient pager is ready to receive delivery of a message when it is both activated and located in an Arch Wireless service area. Once the recipient

pager is able to receive delivery of the text message, the Arch Wireless server retrieves the stored message and sends it, via wire or radio frequency transmission, to the transmitting station closest to the recipient pager. The transmitting stations are owed [sic] by Arch Wireless. The message is then sent from the transmitting station, via a radio frequency transmission, to the recipient pager where it can be read by the user of the recipient pager.

The City had no official policy directed to text-messaging by use of the pagers. However, the City did have a general "Computer Usage, Internet and E-mail Policy" (the "Policy") applicable to all employees. The Policy stated that "[t]he use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy." The Policy also provided:

C. Access to all sites on the Internet is recorded and will be periodically reviewed by the City. The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources.

D. Access to the Internet and the e-mail system is **not** confidential; and information produced either in hard copy or in electronic form is considered City property. As such, these systems should not be used for personal or confidential communications. Deletion of e-mail or other electronic information may not fully delete the information from the system.

E. The use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system will not be tolerated.

In 2000, before the City acquired the pagers, both Quon and Trujillo had signed an "Employee Acknowledgment," which borrowed language from the general Policy, indicating that they had "read and fully understand the City of Ontario's Computer Usage, Internet and E-mail policy." The Employee Acknowledgment, among other things, states that "[t]he City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice," and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Two years later, on April 18, 2002, Quon attended a meeting during which Lieutenant Steve Duke, a Commander with the Ontario Police Department's Administration Bureau, informed all present that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." Quon "vaguely recalled attending" this meeting, but did not recall Lieutenant Duke stating at the meeting that use of the pagers was governed by the City's Policy.

***897** Although the City had no official policy expressly governing use of the pagers, the City did have an informal policy governing their use. Under the City's contract with Arch Wireless, each pager was allotted 25,000 characters, after which the City was required to pay overage charges. Lieutenant Duke "was in charge of the purchasing contract" and responsible for procuring payment for overages. He stated that "[t]he practice was, if there was overage, that the employee would pay for the overage that the City had.... [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]' "

The informal policy governing use of the pagers came to light during the Internal Affairs investigation, which took place after Lieutenant Duke grew weary of his role as bill collector. In a July 2, 2003 memorandum entitled "Internal Affairs Investigation of Jeffery Quon," (the "McMahon Memor-

andum") OPD Sergeant Patrick McMahon wrote that upon interviewing Lieutenant Duke, he learned that early on

> Lieutenant Duke went to Sergeant Quon and told him the City issued two-way pagers were considered e-mail and could be audited. He told Sergeant Quon it was not his intent to audit employee's [sic] text messages to see if the overage is due to work related transmissions. He advised Sergeant Quon he could reimburse the City for the overage so he would not have to audit the transmission and see how many messages were non-work related. Lieutenant Duke told Sergeant Quon he is doing this because if anybody wished to challenge their overage, he could audit the text transmissions to verify how many were non-work related. Lieutenant Duke added the text messages were considered public records and could be audited at any time.

For the most part, Lieutenant Duke agreed with McMahon's characterization of what he said during his interview. Later, however, during his deposition, Lieutenant Duke recalled the interaction as follows:

> I think what I told Quon was that he had to pay for his overage, that I did not want to determine if the overage was personal or business unless they wanted me to, because if they said, "It's all business, I'm not paying for it," then I would do an audit to confirm that. And I didn't want to get into the bill collecting thing, so he needed to pay for his personal messages so we didn't-pay for the overage so we didn't do the audit. And he needed to cut down on his transmissions.

According to the McMahon Memorandum, Quon remembered the interaction differently. When asked "if he ever recalled a discussion with Lieutenant Duke that if his text-pager went over, his messages would be audited ... Sergeant Quon said, 'No. In fact he [Lieutenant Duke] said the other, if you don't want us to read it, pay the overage fee.' "

Quon went over the monthly character limit "three or four times" and paid the City for the overages. Each time, "Lieutenant Duke would come and tell [him] that[he] owed X amount of dollars because [he] went over [his] allotted characters." Each of those times, Quon paid the City for the overages.

In August 2002, Quon and another officer again exceeded the 25,000 character limit. Lieutenant Duke then let it be known at a meeting that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers." In response, Chief Scharf ordered Lieutenant Duke to "request the transcripts of those pagers for auditing ***898** purposes." Chief Scharf asked Lieutenant Duke "to determine if the messages were exclusively work related, thereby requiring an increase in the number of characters officers were permitted, which had occurred in the past, or if they were using the pagers for personal matters. One of the officers whose transcripts [he] requested was plaintiff Jeff Quon."

City officials were not able to access the text messages themselves. Instead, the City e-mailed Jackie Deavers, a major account support specialist for Arch Wireless, requesting the transcripts. According to Deavers,

> I checked the phone numbers on the transcripts against the e-mail that I had gotten, and I looked into the system to make sure they were actually pagers that belonged to the City of Ontario, and they were. So I took the transcripts and put them in a manila envelope [and brought them to the City].

Deavers stated that she did not determine whether private messages were being released, though she acknowledged that, upon reviewing approximately four lines of the transcript, she had realized that the messages were sexually explicit. She also stated that she would only deliver messages to the "contact" on the account, and that she would not deliver messages to the "user" unless he was also the contact on the account. In this case, the "contact" was the City.

After receiving the transcripts, Lieutenant Duke conducted an initial audit and reported the results to Chief Scharf. Subsequently, Chief Scharf and Quon's supervisor, Lieutenant Tony Del Rio, reviewed the transcripts themselves. Then, in October 2002, Chief Scharf referred the matter to internal affairs "to determine if someone was wasting ... City time not doing work when they should be." Sergeant McMahon, who conducted this investigation on behalf of Internal Affairs, enlisted the help of Sergeant Glenn, also a member of Internal Affairs. Sergeant McMahon released the McMahon Memorandum on July 2, 2003. According to the Memorandum, the transcripts revealed that Quon "had exceeded his monthly allotted characters by 15,158 characters," and that many of these messages were personal in nature and were often sexually explicit. These messages were directed to and received from, among others, the other Appellants.

II. PROCEDURAL BACKGROUND

On May 6, 2003, Appellants filed a Second Amended Complaint in the District Court for the Central District of California alleging, *inter alia,* violations of the Stored Communications Act ("SCA") and the Fourth Amendment. After the district court dismissed one of Appellants' claims against Arch Wireless pursuant to Federal Rule of Civil Procedure 12(b)(6), all parties filed numerous rounds of summary judgment motions. On August 15, 2006, the district court denied Appellants' summary judgment motion in full, and granted in part and denied in part Appellees' summary judgment motions.

Appellants appeal the district court's holding that Arch Wireless did not violate the SCA, 18 U.S.C. §§ 2701-2711.[FN2] The district court found that Arch Wireless was a "remote computing service" under § 2702(a), and that it therefore committed no harm when it released the text-message transcripts to its "subscriber," the City.

FN2. Appellants fail to raise on appeal their claims against Arch Wireless for violations of California Penal Code section 629.86 and their state-law invasion of privacy claim under Article I, Section 1 of the California Constitution. Therefore, they have waived those claims. *See Blanford v. Sacramento County,* 406 F.3d 1110, 1114 n. 8 (9th Cir.2005).

***899** Appellants also appeal the district court's resolution of their claims against the City, the Department, Scharf, and Glenn.[FN3] Appellants argue that the City, the Department, and Scharf violated Appellants' Fourth Amendment rights to be free from unreasonable search and seizure pursuant to 42 U.S.C. § 1983, and that the City, Department, Scharf, and Glenn violated Article I, Section 1 of the California Constitution, which protects a citizen's right to privacy.[FN4] The district court addressed only the Fourth Amendment claim. [FN5] Relying on *O'Connor v. Ortega,* 480 U.S. 709, 715, 725-26, 107 S.Ct. 1492, 94 L.Ed.2d 714 (1987), the district court determined that to prove a Fourth Amendment violation, the plaintiff must show that he had a reasonable expectation of privacy in his text messages, and that the government's search or seizure was unreasonable under the circumstances. The district court held that, in light of Lieutenant Duke's informal policy that he would not audit a pager if the user paid the overage charges, Appellants had a reasonable expectation of privacy in their text messages as a matter of law. Regarding the reasonableness of the search, the district court found that whether Chief Scharf's intent was to uncover misconduct or to determine the efficacy of the 25,000 character limit was a genuine issue of material fact. If it was the former, the search was unreasonable; if it was the latter, the search was reasonable. Concluding that Chief Scharf was not entitled to qualified immunity on the Fourth Amendment claim, and that the City and the Department were not entitled to statutory immunity on the California constitutional privacy claim, the district court held a jury trial on the single issue of Chief Scharf's intent. The jury found that Chief

Scharf's intent was to determine the efficacy of the character limit. Therefore, all defendants were absolved of liability for the search.

> FN3. Appellants fail to raise on appeal their claims against the City, the Department, Scharf, and Glenn for violations of the Stored Communications Act and California Penal Code section 629.86. Jerilyn Quon fails to address on appeal her claim for defamation and interference with prospective business advantage; nor does Florio address her claim that seizure of her personal pager and cell phone violated the Fourth Amendment. Therefore, Appellants have waived those claims. *See Blanford,* 406 F.3d at 1114.
>
> FN4. "All people are by nature free and independent and have inalienable rights. Among these are enjoying and defending life and liberty, acquiring, possessing, and protecting property, and pursuing and obtaining safety, happiness, and privacy." CAL. CONST. art. I, § 1.
>
> FN5. The district court limited its discussion to the Fourth Amendment because "the arguments lodged by the governmental defendants against plaintiffs' invasion of privacy claim and state constitutional claim are the same as those pressed against plaintiffs' Fourth Amendment claim...."

On December 7, 2006, Appellants filed a motion to amend or alter the judgment pursuant to Federal Rule of Civil Procedure 59(e), and a motion for new trial pursuant to Rule 59(a). The district court denied each of these motions. Appellants timely appeal.

III. JURISDICTION AND STANDARD OF REVIEW

The district court had jurisdiction pursuant to 28 U.S.C. §§ 1331 and 1343. We have jurisdiction over final judgments of the district courts pursuant to 28 U.S.C. § 1291.

We review a district court's grant of summary judgment de novo. *Bagdadi v. Nazar,* 84 F.3d 1194, 1197 (9th Cir.1996). In reviewing the grant of summary judgment, we "must determine, viewing the ***900** evidence in the light most favorable to the nonmoving party, whether genuine issues of material fact exist and whether the district court correctly applied the relevant substantive law." *Id.*

IV. DISCUSSION

A. Stored Communications Act

[1] Congress passed the Stored Communications Act in 1986 as part of the Electronic Communications Privacy Act. The SCA was enacted because the advent of the Internet presented a host of potential privacy breaches that the Fourth Amendment does not address. *See* Orin S. Kerr, *A User's Guide to the Stored Communications Act, and a Legislator's Guide to Amending It,* 72 GEO. WASH. L. REV.. 1208, 1209-13 (2004). Generally, the SCA prevents "providers" of communication services from divulging private communications to certain entities and/or individuals. *Id.* at 1213. Appellants challenge the district court's finding that Arch Wireless is a "remote computing service" ("RCS") as opposed to an "electronic communication service" ("ECS") under the SCA, §§ 2701-2711. The district court correctly concluded that if Arch Wireless is an ECS, it is liable as a matter of law, and that if it is an RCS, it is not liable. However, we disagree with the district court that Arch Wireless acted as an RCS for the City. Therefore, summary judgment in favor of Arch Wireless was error.

Section 2702 of the SCA governs liability for both ECS and RCS providers. 18 U.S.C. § 2702(a)(1)-(2). The nature of the services Arch Wireless offered to the City determines whether Arch Wireless is an ECS or an RCS. As the Niekamp Declaration makes clear, Arch Wireless provided to the

City a service whereby it would facilitate communication between two pagers-"text messaging" over radio frequencies. As part of that service, Arch Wireless archived a copy of the message on its server. When Arch Wireless released to the City the transcripts of Appellants' messages, Arch Wireless potentially ran afoul of the SCA. This is because both an ECS and RCS can release private information to, or with the lawful consent of, "an addressee or intended recipient of such communication," *id.* § 2702(b)(1), (b)(3), whereas only an RCS can release such information "with the lawful consent of ... the subscriber." *Id.* § 2702(b)(3). It is undisputed that the City was not an "addressee or intended recipient," and that the City was a "subscriber."

The SCA defines an ECS as "any service which provides to users thereof the ability to send or receive wire or electronic communications." *Id.* § 2510(15). The SCA prohibits an ECS from "knowingly divulg[ing] to any person or entity the contents of a communication while in electronic storage by that service," unless, among other exceptions not relevant to this appeal, that person or entity is "an addressee or intended recipient of such communication." *Id.* § 2702(a)(1), (b)(1), (b)(3). "Electronic storage" is defined as "(A) any temporary, intermediate storage of a wire or electronic communication incidental to the electronic transmission thereof; and (B) any storage of such communication by an electronic communication service for purposes of backup protection of such communication." *Id.* § 2510(17).

An RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system." *Id.* § 2711(2). Electronic communication system-which is simply the means by which an RCS provides computer storage or processing services and has no bearing on how we interpret the meaning of "RCS"-is defined as "any wire, radio, electromagnetic, photooptical or photoelectronic facilities ***901** for the transmission of wire or electronic communications, and any computer facilities or related electronic equipment for the electronic storage of such communications." *Id.* § 2510(14). The SCA prohibits an RCS from "knowingly divulg[ing] to any person or entity the contents of any communication which is carried or maintained on that service." Unlike an ECS, an RCS may release the contents of a communication with the lawful consent of a "subscriber." *Id.* § 2702(a)(2), (b)(3).

We turn to the plain language of the SCA, including its common-sense definitions, to properly categorize Arch Wireless. An ECS is defined as "any service which provides to users thereof the ability to send or receive wire or electronic communications." 18 U.S.C. § 2510(15). On its face, this describes the text-messaging pager services that Arch Wireless provided. Arch Wireless provided a "service" that enabled Quon and the other Appellants to "send or receive ... electronic communications," i.e., text messages. Contrast that definition with that for an RCS, which "means the provision to the public of computer storage or processing services by means of an electronic communications system." *Id.* § 2711(2). Arch Wireless did not provide to the City "computer storage"; nor did it provide "processing services." By archiving the text messages on its server, Arch Wireless certainly was "storing" the messages. However, Congress contemplated this exact function could be performed by an ECS as well, stating that an ECS would provide (A) temporary storage incidental to the communication; and (B) storage for backup protection. *Id.* § 2510(17).

This reading of the SCA is supported by its legislative history. The Senate Report identifies two main services that providers performed in 1986:(1) data communication; and (2) data storage and processing. First, the report describes the means of communication of information:

> [W]e have large-scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing.... [M]any different companies, not just common carriers, offer a wide

> variety of telephone and other communications services.

S. REP. NO. 99-541, at 2-3 (1986), U.S.Code Cong. & Admin.News 1986, pp. 3555, 3556-3557. Second,

> [t]he Committee also recognizes that computers are used extensively today for the storage and processing of information. With the advent of computerized recordkeeping systems, Americans have lost the ability to lock away a great deal of personal and business information. For example, physicians and hospitals maintain medical files in offsite data banks, businesses of all sizes transmit their records to remote computers to obtain sophisticated data processing services. These services as well as the providers of electronic mail create electronic copies of private correspondence for later reference. This information is processed for the benefit of the user but often it is maintained for approximately 3 months to ensure system integrity.

Id. at 3. Under the heading "Remote Computer Services," the Report further clarifies that term refers to the processing or storage of data by an off-site third party:

> In the age of rapid computerization, a basic choice has faced the users of computer technology. That is, whether to process data inhouse on the user's own computer or on someone else's equipment. Over the years, remote computer service companies have developed to provide sophisticated and convenient computing services to subscribers and customers from remote facilities. Today ***902** businesses of all sizes-hospitals, banks and many others-use remote computing services for computer processing. This processing can be done with the customer or subscriber using the facilities of the remote computing service in essentially a time-sharing arrangement, or it can be accomplished by the service provider on the basis of information supplied by the subscriber or customer. Data is most often transmitted between these services and their customers by means of electronic communications.

Id. at 10-11.

In the Senate Report, Congress made clear what it meant by "storage and processing of information." It provided the following example of storage: "physicians and hospitals maintain medical files in offsite data banks." Congress appeared to view "storage" as a virtual filing cabinet, which is not the function Arch Wireless contracted to provide here. The Senate Report also provided an example of "processing of information": "businesses of all sizes transmit their records to remote computers to obtain sophisticated data processing services." In light of the Report's elaboration upon what Congress intended by the term "Remote Computer Services," it is clear that, before the advent of advanced computer processing programs such as Microsoft Excel, businesses had to farm out sophisticated processing to a service that would process the information. *See* Kerr, 72 GEO. WASH. L. REV.. at 1213-14. Neither of these examples describes the service that Arch Wireless provided to the City.

Any lingering doubt that Arch Wireless is an ECS that retained messages in electronic storage is disposed of by *Theofel v. Farey-Jones,* 359 F.3d 1066, 1070 (9th Cir.2004). In *Theofel,* we held that a provider of e-mail services, undisputedly an ECS, stored e-mails on its servers for backup protection. *Id.* at 1075. NetGate was the plaintiffs' Internet Service Provider ("ISP"). Pursuant to a subpoena, NetGate turned over plaintiffs' e-mail messages to the defendants. We concluded that plaintiffs' e-mail messages-which were stored on NetGate's server after delivery to the recipient-were "stored 'for purposes of backup protection' .... within the ordinary meaning of those terms." *Id.* (citation omitted).

The service provided by NetGate is closely analogous to Arch Wireless's storage of Appellants' messages. Much like Arch Wireless, NetGate served as a conduit for the transmission of electronic communications from one user to another, and stored those communications "as a 'backup' for the user." *Id.*

Although it is not clear for whom Arch Wireless "archived" the text messages-presumably for the user or Arch Wireless itself-it is clear that the messages were archived for "backup protection," just as they were in *Theofel.* Accordingly, Arch Wireless is more appropriately categorized as an ECS than an RCS.

Arch Wireless contends that our analysis in *Theofel* of the definition of "backup protection" supports its position. There, we noted that "[w]here the underlying message has expired in the normal course, any copy is no longer performing any backup function. An ISP that kept permanent copies of temporary messages could not fairly be described as 'backing up' those messages." *Id.* at 1070. Thus, the argument goes, Arch Wireless's permanent retention of the Appellants' text messages could not have been for backup purposes; instead, it must have been for storage purposes, which would require us to classify Arch Wireless as an RCS. This reading is not persuasive. First, there is no indication in the record that Arch Wireless retained a permanent copy of the text-***903** messages or stored them for the benefit of the City; instead, the Niekamp Declaration simply states that copies of the messages are "archived" on Arch Wireless's server. More importantly, *Theofel*'s holding-that the e-mail messages stored on NetGate's server after delivery were for "backup protection," and that NetGate was undisputedly an ECS-forecloses Arch Wireless's posi- tion.

We hold that Arch Wireless provided an "electronic communication service" to the City. The parties do not dispute that Arch Wireless acted "knowingly" when it released the transcripts to the City. When Arch Wireless knowingly turned over the text-messaging transcripts to the City, which was a "subscriber," not "an addressee or intended recipient of such communication," it violated the SCA, 18 U.S.C. § 2702(a)(1). Accordingly, judgment in Appellants' favor on their claims against Arch Wireless is appropriate as a matter of law, and we remand to the district court for proceedings consistent with this holding.

B. Fourth Amendment

Appellants assert that they are entitled to summary judgment on their Fourth Amendment claim against the City, the Department, and Scharf, and on their California constitutional privacy claim against the City, the Department, Scharf, and Glenn. Specifically, Appellants agree with the district court's conclusion that they had a reasonable expectation of privacy in the text messages. However, they argue that the issue regarding Chief Scharf's intent in authorizing the search never should have gone to trial because the search was unreasonable as a matter of law. We agree.

[2] "The 'privacy' protected by[Article I, Section 1 of the California Constitution] is no broader in the area of search and seizure than the 'privacy' protected by the Fourth Amendment...." *Hill v. Nat'l Collegiate Ath. Ass'n,* 7 Cal.4th 1, 30 n. 9, 26 Cal.Rptr.2d 834, 865 P.2d 633 (1994). Accordingly, our analysis proceeds under the Fourth Amendment to the United States Constitution. The Fourth Amendment protects the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures." U.S. CONST. amend. IV. "[T]he touchstone of the Fourth Amendment is reasonableness." *United States v. Kriesel,* 508 F.3d 941, 947 (9th Cir.2007) (citing *Samson v. California,* 547 U.S. 843, 126 S.Ct. 2193, 2201 n. 4, 165 L.Ed.2d 250 (2006)). Under the "general Fourth Amendment approach," we examine "the totality of the circumstances to determine whether a search is reasonable." *Id.* "The reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual's privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests." *United States v. Knights,* 534 U.S. 112, 118-19, 122 S.Ct. 587, 151 L.Ed.2d 497 (2001) (internal quotation marks omitted).

[3] "Searches and seizures by government employers or supervisors of the private property of their employees ... are subject to the restraints of the Fourth Amendment." *O'Connor,* 480 U.S. at 715, 107 S.Ct. 1492. In *O'Connor,* the Supreme Court reasoned that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *Id.* at 717, 107 S.Ct. 1492. However, the Court also noted that "[t]he operational realities of the workplace ... may make *some* employees' expectations of privacy unreasonable." *Id.* For example, "[p]ublic employees' expectations of privacy in their offices, desks, and file cabinets ... may be reduced***904** by virtue of actual office practices and procedures, or by legitimate regulation." *Id.* The Court recognized that, "[g]iven the great variety of work environments in the public sector, the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis." *Id.* at 718, 107 S.Ct. 1492.

[4] Even assuming an employee has a reasonable expectation of privacy in the item seized or the area searched, he must also demonstrate that the search was unreasonable to prove a Fourth Amendment violation: "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *Id.* at 725-26, 107 S.Ct. 1492. Under this standard, we must evaluate whether the search was "justified at its inception," and whether it "was reasonably related in scope to the circumstances which justified the interference in the first place." *Id.* at 726, 107 S.Ct. 1492 (internal quotation marks omitted).

1. Reasonable Expectation of Privacy

The extent to which the Fourth Amendment provides protection for the contents of electronic communications in the Internet age is an open question. The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored. Here, we must first answer the threshold question: Do users of text messaging services such as those provided by Arch Wireless have a reasonable expectation of privacy in their text messages stored on the service provider's network? We hold that they do.

In *Katz v. United States,* 389 U.S. 347, 88 S.Ct. 507, 19 L.Ed.2d 576 (1967), the government placed an electronic listening device on a public telephone booth, which allowed the government to listen to the telephone user's conversation. *Id.* at 348, 88 S.Ct. 507. The Supreme Court held that listening to the conversation through the electronic device violated the user's reasonable expectation of privacy. *Id.* at 353, 88 S.Ct. 507. In so holding, the Court reasoned, "One who occupies [a phone booth], shuts the door behind him, and pays the toll that permits him to place a call is surely entitled to assume that the words he utters into the mouthpiece will not be broadcast to the world. To read the Constitution more narrowly is to ignore the vital role that the public telephone has come to play in private communication." *Id.* at 352, 88 S.Ct. 507. Therefore, "[t]he Government's activities in electronically listening to and recording the petitioner's words violated the privacy upon which he justifiably relied while using the telephone booth and thus constituted a 'search and seizure' within the meaning of the Fourth Amendment." *Id.* at 353, 88 S.Ct. 507.

On the other hand, the Court has also held that the government's use of a pen register-a device that records the phone numbers one dials-does not violate the Fourth Amendment. This is because people "realize that they must 'convey' phone numbers to the telephone company, since it is through telephone company switching equipment that their calls are completed." *Smith v. Maryland,* 442 U.S. 735, 742, 99 S.Ct. 2577, 61 L.Ed.2d 220 (1979). The Court distinguished *Katz* by noting that "a pen re-

gister differs significantly from the listening device employed in *Katz,* for pen registers do not acquire the *contents* of communications." *Id.* at 741, 99 S.Ct. 2577.

***905** This distinction also applies to written communications, such as letters. It is well-settled that, "since 1878, ... the Fourth Amendment's protection against 'unreasonable searches and seizures' protects a citizen against the warrantless opening of sealed letters and packages addressed to him in order to examine the contents." *United States v. Choate,* 576 F.2d 165, 174 (9th Cir.1978) (citing *Ex parte Jackson,* 96 U.S. 727, 24 L.Ed. 877 (1877)); *see also United States v. Jacobsen,* 466 U.S. 109, 114, 104 S.Ct. 1652, 80 L.Ed.2d 85 (1984) ("Letters and other sealed packages are in the general class of effects in which the public at large has a legitimate expectation of privacy."). However, as with the phone numbers they dial, individuals do not enjoy a reasonable expectation of privacy in what they write on the outside of an envelope. *See United States v. Hernandez,* 313 F.3d 1206, 1209-10 (9th Cir.2002) ("Although a person has a legitimate interest that a mailed package will not be opened and searched en route, there can be no reasonable expectation that postal service employees will not handle the package or that they will not view its exterior" (citations omitted)).

Our Internet jurisprudence is instructive. In *United States v. Forrester,* we held that "e-mail ... users have no expectation of privacy in the to/from addresses of their messages ... because they should know that this information is provided to and used by Internet service providers for the specific purpose of directing the routing of information." *United States v. Forrester,* 512 F.3d 500, 510 (9th Cir.2008). Thus, we have extended the pen register and outside-of-envelope rationales to the "to/from" line of e-mails. But we have not ruled on whether persons have a reasonable expectation of privacy in the content of e-mails. Like the Supreme Court in *Smith,* in *Forrester* we explicitly noted that "e-mail to/from addresses ... constitute addressing information and do not necessarily reveal any more about the underlying contents of communication than do phone numbers." *Id.* Thus, we concluded that "[t]he privacy interests in these two forms of communication [letters and e-mails] are identical," and that, while "[t]he contents may deserve Fourth Amendment protection ... the address and size of the package do not." *Id.* at 511.

[5] We see no meaningful difference between the e-mails at issue in *Forrester* and the text messages at issue here.[FN6] Both are sent from user to user via a service provider that stores the messages on its servers. Similarly, as in *Forrester,* we also see no meaningful distinction between text messages and letters. As with letters and e-mails, it is not reasonable to expect privacy in the information used to "address" a text message, such as the dialing of a phone number to send a message. However, users do have a reasonable expectation of privacy in the content of their text messages vis-a-vis the service provider. *Cf. United States v. Finley,* 477 F.3d 250, 259 (5th Cir.2007) (holding that defendant had a reasonable expectation of privacy in the text messages on his cell phone, and that he consequently had standing to challenge the search). That Arch Wireless may have been able to access the contents of the messages for its own purposes is irrelevant. *See United States v. Heckenkamp,* 482 F.3d 1142, 1146-47 (9th Cir.2007) (holding that a student did not lose his reasonable expectation of privacy in information stored on his computer, despite a university policy that it could access***906** his computer in limited circumstances while connected to the university's network); *United States v. Ziegler,* 474 F.3d 1184, 1189-90 (9th Cir.2007) (holding that an employee had a reasonable expectation of privacy in a computer in a locked office despite a company policy that computer usage would be monitored). For, just as in *Heckenkamp,* where we found persuasive that there was "no policy allowing the university actively to monitor or audit [the student's] computer usage," 482 F.3d at 1147, Appellants did not expect that Arch Wireless would monitor their text messages, much less turn over the messages to

third parties without Appellants' consent.

> FN6. Because Jeff Quon's reasonable expectation of privacy hinges on the OPD's informal policy regarding his use of the OPD-issued pagers, *see infra* pages 909-10, this conclusion affects only the rights of Trujillo, Florio, and Jerilyn Quon.

We do not endorse a monolithic view of text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry. Absent an agreement to the contrary, Trujillo, Florio, and Jerilyn Quon had no reasonable expectation that Jeff Quon would maintain the private nature of their text messages, or vice versa. *See United States v. Maxwell,* 45 M.J. 406, 418 (C.A.A.F.1996) ("[T]he maker of a telephone call has a reasonable expectation that police officials will not intercept and listen to the conversation; however, the conversation itself is held with the risk that one of the participants may reveal what is said to others." (citing *Hoffa v. United States,* 385 U.S. 293, 302, 87 S.Ct. 408, 17 L.Ed.2d 374 (1966))). Had Jeff Quon voluntarily permitted the Department to review his text messages, the remaining Appellants would have no claims. Nevertheless, the OPD surreptitiously reviewed messages that all parties reasonably believed were free from third-party review. As a matter of law, Trujillo, Florio, and Jerilyn Quon had a reasonable expectation that the Department would not review their messages absent consent from either a sender or recipient of the text messages.

[6] We now turn to Jeff Quon's reasonable expectation of privacy, which turns on the Department's policies regarding privacy in his text messages. We agree with the district court that the Department's informal policy that the text messages would not be audited if he paid the overages rendered Quon's expectation of privacy in those messages reasonable.

The Department's general "Computer Usage, Internet and E-mail Policy" stated both that the use of computers "for personal benefit is a significant violation of City of Ontario Policy" and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Quon signed this Policy and attended a meeting in which it was made clear that the Policy also applied to use of the pagers. If that were all, this case would be analogous to the cases relied upon by the Appellees. *See, e.g., Muick v. Glenayre Elecs.,* 280 F.3d 741, 743 (7th Cir.2002) ("[Employer] had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that [employee] might have had and so scotches his claim."); *Bohach v. City of Reno,* 932 F.Supp. 1232, 1234-35 (D.Nev.1996) (finding a diminished expectation of privacy under the Fourth Amendment where police department had issued a memorandum informing employees that messages sent on city-issued pagers would be "logged on the [department's] network" and that certain types of messages were "banned from the system," and because any employee "with access to, and a working knowledge of, the Department's computer system" could see the messages); *see also O'Connor,* 480 U.S. at 719, 107 S.Ct. 1492 (noting that expectation of privacy would not be reasonable if the employer "had established any reasonable regulation or policy discouraging employees***907** ... from storing personal papers and effects in their desks or file cabinets"); *Schowengerdt v. General Dynamics Corp.,* 823 F.2d 1328, 1335 (9th Cir.1987) ("We conclude that [the employee] would enjoy a reasonable expectation of privacy in areas given over to his exclusive use, unless he was on notice from his employer that searches of the type to which he was subjected might occur from time to time for work-related purposes.").

As the district court made clear, however, such was not the "operational reality" at the Department. The district court reasoned:

> Lieutenant Duke made it clear to the staff, and to Quon in particular, that he would *not* audit their pagers so long as they agreed to pay for any overages. Given that Lieutenant Duke was the one in charge of administering the use of the city-owned

> pagers, his statements carry a great deal of weight. Indeed, before the events that transpired in this case the department did not audit any employee's use of the pager for the eight months the pagers had been in use.

Even more telling, Quon had exceeded the 25,000 character limit "three or four times," and had paid for the overages every time without anyone reviewing the text of the messages. This demonstrated that the OPD followed its "informal policy" and that Quon reasonably relied on it. Nevertheless, without warning, his text messages were audited by the Department. Under these circumstances, Quon had a reasonable expectation of privacy in the text messages archived on Arch Wireless's server.

Appellees argue that, because Lieutenant Duke was not a policymaker, his informal policy could not create an objectively reasonable expectation of privacy. Moreover, Lieutenant Duke's statements "were specific to his own bill-collecting practices" and were "limited to ... an accounting audit. He did not address privacy rights." However, as the district court pointed out, "Lieutenant Duke was the one in charge of administering the use of the city-owned pagers, [and] his statements carry a great deal of weight." That Lieutenant Duke was not the official policymaker, or even the final policymaker, does not diminish the chain of command. He was in charge of the pagers, and it was reasonable for Quon to rely on the policy-formal or informal-that Lieutenant Duke established and enforced.

Appellees also point to the California Public Records Act ("CPRA") to argue that Quon had no reasonable expectation of privacy because, under that Act, "public records are open to inspection at all times ... and every person has a right to inspect any public record." CAL GOV'T CODE § 6253. Assuming for purposes of this appeal that the text messages archived on Arch Wireless's server were public records as defined by the CPRA,[FN7] we are not persuaded by Appellees' argument. The CPRA does not diminish an employee's reasonable expectation of privacy. As the district court reasoned, "There is no evidence before the [c]ourt suggesting that CPRA requests to the department are so widespread or frequent as to constitute 'an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable.' " (quoting *Leventhal v. Knapek,* 266 F.3d 64, 74 (2d Cir.2001) (internal quotation marks omitted)).

> FN7. The Act defines "public records" as "any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics." CAL GOV'T CODE § 6252(e).

The Fourth Amendment utilizes a reasonableness standard. Although the fact ***908** that a hypothetical member of the public may request Quon's text messages might slightly diminish his expectation of privacy in the messages, it does not make his belief in the privacy of the text messages objectively unreasonable. *See Zaffuto v. City of Hammond,* 308 F.3d 485, 489 (5th Cir.2002) ("[Defendant] also argues that the existence of Louisiana's public records law and a department policy that calls would be taped suggests that it would not be objectively reasonable for [plaintiff] to expect privacy in making a personal phone call from work....[The officers testified that] they understood the policy to mean that only calls coming into the communications room (where outside citizens would call) were being recorded, not calls from private offices. A reasonable juror could conclude, on this evidence, that [plaintiff] expected that his call to his wife would be private, and that that expectation was objectively reasonable."). Therefore, Appellees' CPRA argument is without merit.

2. Reasonableness of the Search

Given that Appellants had a reasonable expectation of privacy in their text messages, we now consider whether the search was reasonable. We hold that it was not.

The district court found a material dispute concerning the "actual *purpose* or *objective* Chief Scharf sought to achieve in having Lieutenant Duke perform the audit of Quon's pager." It reasoned that if Chief Scharf's purpose was to uncover misconduct, the search was unreasonable at its inception because "the officers' pagers were audited for the period when Lieutenant Duke's informal, but express policy of *not* auditing pagers unless overages went unpaid was in effect." The district court further reasoned, however, that if the purpose was to determine "the utility or efficacy of the existing monthly character limits," the search was reasonable because "the audit was done for the benefit of (not as a punishment against) the officers who had gone over the monthly character limits." Concluding that a genuine issue of material fact existed on this point, the district judge determined that this was a question for the jury. The jury found that Chief Scharf's purpose was to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses," rendering a verdict in favor of the City, the Department, Scharf, and Glenn.

Given that a jury has already found that Chief Scharf's purpose in auditing the text messages was to determine the efficacy of the 25,000 character limit, we must determine-keeping that purpose in mind-whether the search was nevertheless unconstitutional.

A search is reasonable "at its inception" if there are "reasonable grounds for suspecting ... that the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file." *O'Connor,* 480 U.S. at 726, 107 S.Ct. 1492. Here, the purpose was to ensure that officers were not being required to pay for work-related expenses. This is a legitimate work-related rationale, as the district court acknowledged.

[7] However, the search was not reasonable in scope. As *O'Connor* makes clear, a search is reasonable in scope "when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct]." *Id.* (internal quotation marks omitted). Thus, "if less intrusive methods were feasible, or if the depth of the inquiry or extent of the seizure exceeded that necessary for the government's legitimate purposes ... the search would be unreasonable...." *Schowengerdt,* 823 F.2d at 1336. The district court determined that there were no ***909** less-intrusive means, reasoning that talking to the officers beforehand or looking only at the numbers dialed would not have allowed Chief Scharf to determine whether 25,000 characters were sufficient for work-related text messaging because that required examining the content of all the messages. Therefore, "the only way to accurately and definitively determine whether such hidden costs were being imposed by the monthly character limits that were in place was by looking at the actual text-messages used by the officers who exceeded the character limits."

We disagree. There were a host of simple ways to verify the efficacy of the 25,000 character limit (if that, indeed, was the intended purpose) without intruding on Appellants' Fourth Amendment rights. For example, the Department could have warned Quon that for the month of September he was forbidden from using his pager for personal communications, and that the contents of all of his messages would be reviewed to ensure the pager was used only for work-related purposes during that time frame. Alternatively, if the Department wanted to review past usage, it could have asked Quon to count the characters himself, or asked him to redact personal messages and grant permission to the Department to review the redacted transcript. Under this process, Quon would have an incentive to be truthful because he may have previously paid for work-related overages and presumably would want the limit increased to avoid paying for such overages in the future. These are just a few of the ways in which the Department could have conducted a search that was reasonable in scope. Instead, the Department opted to review the contents of all the messages, work-related and personal, without the

consent of Quon or the remaining Appellants. This was excessively intrusive in light of the noninvestigatory object of the search, and because Appellants had a reasonable expectation of privacy in those messages, the search violated their Fourth Amendment rights.

3. Qualified Immunity for Chief Scharf

[8] Chief Scharf asserts that, even if we conclude that he violated Appellants' Fourth Amendment and California constitutional privacy rights, he is entitled to qualified immunity. We agree.

[9] When determining whether qualified immunity applies, we engage in the following two-step inquiry. First, we ask, "[t]aken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz,* 533 U.S. 194, 201, 121 S.Ct. 2151, 150 L.Ed.2d 272 (2001). If we answer this question in the affirmative, as we do here, we then proceed to determine "whether the right was clearly established." *Id.* "This inquiry ... must be undertaken in light of the specific context of the case, not as a broad general proposition." *Id.* Specifically, "[t]he relevant, dispositive inquiry in determining whether a right is clearly established is whether it would be clear to a reasonable officer that his conduct was unlawful in the situation he confronted." *Id.* at 202, 121 S.Ct. 2151.

Chief Scharf argues that, "[i]n 2002, there was no clearly established law from the Supreme Court or our Circuit governing the right of a government employer to review text messages on government-issued pagers in order to determine whether employees are engaging in excessive personal use of the pagers while on duty." Chief Scharf misconstrues *Saucier.* While there may be no case with a holding that aligns perfectly with the factual scenario presented here, it was clear at the time of ***910** the search that an employee is free from unreasonable search and seizure in the workplace. *See, e.g., O'Connor,* 480 U.S. at 715, 107 S.Ct. 1492 (1987); *Schowengerdt,* 823 F.2d at 1335 (1987); *Ortega v. O'Connor,* 146 F.3d 1149, 1157 (9th Cir.1998) ("[I]t was clearly established in 1981 that, in the absence of an accepted practice or regulation to the contrary, government employees ... had a reasonable expectation of privacy in their private offices, desks, and file cabinets, thereby triggering the protections of the Fourth Amendment with regard to searches and seizures.").

Nevertheless, we ultimately agree with Chief Scharf because, at the time of the search, there was no clearly established law regarding whether users of text-messages that are archived, however temporarily, by the service provider have a reasonable expectation of privacy in those messages. There fore, Chief Scharf is entitled to qualified immunity.

4. Statutory Immunity on the California Constitutional Claim

[10] The City and the Department contend that they are shielded from liability on the California constitutional claim. We conclude that the district court correctly determined that the City and the Department are not protected by statutory immunity. California Government Code section 821.6 provides that "[a] public employee is not liable for injury caused by his instituting or prosecuting any judicial or administrative proceeding within the scope of his employment, even if he acts maliciously and without probable cause." "The policy behind section 821.6 is to encourage fearless performance of official duties. State officers and employees are encouraged to investigate and prosecute matters within their purview without fear of reprisal from the person or entity harmed thereby." *Shoemaker v. Myers,* 2 Cal.App.4th 1407, 1424, 4 Cal.Rptr.2d 203 (1992) (citations omitted). Immunity "also extends to actions taken in preparation for formal proceedings. Because investigation is an essential step toward the institution of formal proceedings, it is also cloaked with immunity." *Amylou R. v. County of Riverside,* 28 Cal.App.4th 1205, 1209-10, 34 Cal.Rptr.2d 319 (1994) (internal quotation marks

omitted).

Although Chief Scharf ordered an "investigation" in the ordinary sense of the word, the investigation never could have led to a "judicial or administrative proceeding" because Lieutenant Duke's informal policy permitted officers to use the pagers for personal purposes and to exceed the 25,000 character limit. Thus, Quon could have committed no misconduct, a prerequisite for a formal proceeding against him. As such, the City's and Department's conduct does not fall within California Government Code section 821.6, and they are not entitled to statutory immunity.

V. CONCLUSION

As a matter of law, Arch Wireless is an "electronic communication service" that provided text messaging service via pagers to the Ontario Police Department. The search of Appellants' text messages violated their Fourth Amendment and California constitutional privacy rights because they had a reasonable expectation of privacy in the content of the text messages, and the search was unreasonable in scope. While Chief Scharf is shielded by qualified immunity, the City and the Department are not shielded by statutory immunity. In light of our conclusions of law, we affirm in part, reverse in part, and remand to the district court for further proceedings on Appellants' Stored Communications Act claim against Arch Wireless, and their claims against the City, the Department,***911** and Glenn under the Fourth Amendment and California Constitution.

Because we hold that Appellants prevail as a matter of law on their claims against Arch Wireless, the City, the Department, and Glenn, we need not reach their appeal from the denial of their motions to alter or amend the judgment and for a new trial under Federal Rule of Civil Procedure 59. The parties shall bear their own costs of appeal.

AFFIRMED in part, REVERSED in part, and REMANDED for Further Proceedings.

C.A.9 (Cal.),2008.
Quon v. Arch Wireless Operating Co., Inc.
529 F.3d 892, 91 Empl. Prac. Dec. P 43,233, 155 Lab.Cas. P 60,628, 27 IER Cases 1377, 08 Cal. Daily Op. Serv. 7472, 2008 Daily Journal D.A.R. 9051, 47 Communications Reg. (P&F) 164

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Discrimination and Harassment

659A.030 Discrimination because of race, color, religion, sex, sexual orientation, national origin, marital status or age prohibited. (1) It is an unlawful employment practice:

(a) For an employer, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to refuse to hire or employ the individual or to bar or discharge the individual from employment. However, discrimination is not an unlawful employment practice if the discrimination results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.

(b) For an employer, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to discriminate against the individual in compensation or in terms, conditions or privileges of employment.

(c) For a labor organization, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to exclude or to expel from its membership the individual or to discriminate in any way against the individual or any other person.

(d) For any employer or employment agency to print or circulate or cause to be printed or circulated any statement, advertisement or publication, or to use any form of application for employment or to make any inquiry in connection with prospective employment that expresses directly or indirectly any limitation, specification or discrimination as to an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or on the basis of an expunged juvenile record, or any intent to make any such limitation, specification or discrimination, unless based upon a bona fide occupational qualification. Identification of prospective employees according to race, color, religion, sex, sexual orientation, national origin, marital status or age does not violate this section unless the Commissioner of the Bureau of Labor and Industries, after a hearing conducted pursuant to ORS 659A.805, determines that the designation expresses an intent to limit, specify or discriminate on the basis of race, color, religion, sex, sexual orientation, national origin, marital status or age.

(e) For an employment agency, because of an individual's race, color, religion, sex, sexual orientation, national origin, marital status or age if the individual is 18 years of age or older, or because of the race, color, religion, sex, sexual orientation, national origin, marital status or age of any other person with whom the individual associates, or because of an individual's juvenile record that has been expunged pursuant to ORS 419A.260 and 419A.262, to classify or refer for employment, or to fail or refuse to refer for employment, or otherwise to discriminate against the individual. However, it is not an unlawful employment practice for an employment agency to classify or refer for employment an individual when the classification or referral results from a bona fide occupational qualification reasonably necessary to the normal operation of the employer's business.

(f) For any person to discharge, expel or otherwise discriminate against any other person because that other person has opposed any unlawful practice, or because that other person has filed a complaint, testified or assisted in any proceeding under this chapter or has attempted to do so.

(g) For any person, whether an employer or an employee, to aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter or to attempt to do so.

(2) The provisions of this section apply to an apprentice under ORS 660.002 to 660.210, but the selection of an apprentice on the basis of the ability to complete the required apprenticeship training before attaining the age of 70 years is not an unlawful employment practice. The commissioner shall administer this section with respect to apprentices under ORS 660.002 to 660.210 equally with regard to

all employees and labor organizations.

(3) The compulsory retirement of employees required by law at any age is not an unlawful employment practice if lawful under federal law.

(4)(a) It is not an unlawful employment practice for an employer or labor organization to provide or make financial provision for child care services of a custodial or other nature to its employees or members who are responsible for a minor child.

(b) As used in this subsection, "responsible for a minor child" means having custody or legal guardianship of a minor child or acting in loco parentis to the child.

(5) This section does not prohibit an employer from enforcing an otherwise valid dress code or policy, as long as the employer provides, on a case-by-case basis, for reasonable accommodation of an individual based on the health and safety needs of the individual. [Formerly 659.030; 2007 c.100 §4]

659A.033 Violation of ORS 659A.030 by denying religious leave or prohibiting certain religious observances or practices; determination of reasonable accommodation. (1) An employer violates ORS 659A.030 if:

(a) The employer does not allow an employee to use vacation leave, or other leave available to the employee, for the purpose of allowing the employee to engage in the religious observance or practices of the employee; and

(b) Reasonably accommodating use of the leave by the employee will not impose an undue hardship on the operation of the business of the employer as described in subsection (4) of this section.

(2) Subsection (1) of this section applies only to leave that is not restricted as to the manner in which the leave may be used and that the employer allows the employee to take by adjusting or altering the work schedule or assignment of the employee.

(3) An employer violates ORS 659A.030 if:

(a) The employer imposes an occupational requirement that restricts the ability of an employee to wear religious clothing, to take time off for a holy day or to take time off to participate in a religious observance or practice;

(b) Reasonably accommodating those activities does not impose an undue hardship on the operation of the business of the employer as described in subsection (4) of this section; and

(c) The activities have only a temporary or tangential impact on the employee's ability to perform the essential functions of the employee's job.

(4) A reasonable accommodation imposes an undue hardship on the operation of the business of the employer for the purposes of this section if the accommodation requires significant difficulty or expense. For the purpose of determining whether an accommodation requires significant difficulty or expense, the following factors shall be considered:

(a) The nature and the cost of the accommodation needed.

(b) The overall financial resources of the facility or facilities involved in the provision of the accommodation, the number of persons employed at the facility and the effect on expenses and resources or other impacts on the operation of the facility caused by the accommodation.

(c) The overall financial resources of the employer, the overall size of the business of the employer with respect to the number of persons employed by the employer and the number, type and location of the employer's facilities.

(d) The type of business operations conducted by the employer, including the composition, structure and functions of the workforce of the employer and the geographic separateness and administrative or fiscal relationship of the facility or facilities of the employer.

(e) The safety and health requirements in a facility, including requirements for the safety of other employees and any other person whose safety may be adversely impacted by the requested accommodation. [2009 c.744 §2]

839-005-0030

Sexual Harassment

(1) Sexual harassment is unlawful discrimination on the basis of sex and includes the following types of conduct:

(a) Unwelcome sexual advances, requests for sexual favors, or other conduct of a sexual nature when such conduct is directed toward an individual because of that individual's sex and:

(A) Submission to such conduct is made either explicitly or implicitly a term or condition of employment; or

(B) Submission to or rejection of such conduct is used as the basis for employment decisions affecting that individual.

(b) Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating a hostile, intimidating or offensive working environment.

(2) The standard for determining whether harassment based on an individual's sex is sufficiently severe or pervasive to create a hostile, intimidating or offensive working environment is whether a reasonable person in the circumstances of the complaining individual would so perceive it.

(3) Employer proxy: An employer is liable for harassment when the harasser's rank is sufficiently high that the harasser is the employer's proxy, for example, the respondent's president, owner, partner or corporate officer.

(4) Harassment by Supervisor plus Tangible Employment Action: An employer is liable for sexual harassment by a supervisor with immediate or successively higher authority over an individual when the harassment results in a tangible employment action that the supervisor takes or causes to be taken against that individual. A tangible employment action includes but is not limited to the following:

(a) Terminating employment, including constructive discharge;

(b) Failing to hire;

(c) Failing to promote; or

(d) Changing a term or condition of employment, such as work assignment, work schedule, compensation or benefits or making a decision that causes a significant change in an employment benefit.

(5) Harassment by Supervisor, No Tangible Employment Action: When sexual harassment by a supervisor with immediate or successively higher authority over an individual is found to have occurred, but no tangible employment action was taken, the employer is liable if:

(a) The employer knew of the harassment, unless the employer took immediate and appropriate corrective action.

(b) The employer should have known of the harassment. The division will find that the employer should have known of the harassment unless the employer can demonstrate:

(A) That the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior; and

(B) That the complaining individual unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm.

(6) Harassment by Co-Workers or Agents: An employer is liable for sexual harassment by the employer's employees or agents who do not have immediate or successively higher authority over the complaining individual when the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action.

(7) Harassment by Non-Employees: An employer is liable for sexual harassment by non-employees in the workplace when the employer or the employer's agents knew or should have known of the conduct unless the employer took immediate and appropriate corrective action. In reviewing such cases the division will consider the extent of the employer's control and any legal responsibility the employer may have with respect to the conduct of such non-employees.

(8) Withdrawn Consent: An employer is liable for sexual harassment of an individual by the employer's supervisory or non-supervisory employees, agents or non-employees, even if the acts complained of were of a kind previously consented to by the

complaining individual, if the employer knew or should have known that the complaining individual had withdrawn consent to the offensive conduct.

(9) When employment opportunities or benefits are granted because of an individual's submission to an employer's sexual advances, requests for sexual favors, or other sexual harassment, the employer is liable for unlawful sex discrimination against other individuals who were qualified for but denied that opportunity or benefit.

Stat. Auth.: ORS 659A.805
Stats. Implemented: ORS 659A.029 & 659A.030
Hist.: BLI 19-2000, f. & cert. ef. 9-15-00; BLI 10-2002, f. & cert. ef. 5-17-02; BLI 46-2006, f. 12-29-06, cert. ef. 1-3-07; BLI 35-2007, f. 12-27-07 cert. ef. 1-1-08

Sexual Harassment: Questions & Answers

Technical Assistance: FAQs

Q. What is sexual harassment?
A. Sexual harassment is defined as unwelcome sexual advances, requests for sexual favors, or conduct of a sexual nature (verbal, physical, or visual), that is directed toward an individual because of gender. It can also include conduct that is not sexual in nature but is gender-related. Sexual harassment includes the harassment of the same or of the opposite sex.

Q. What are some other examples of conduct that could be considered sexual harassment?
A. Sexual harassment can take many forms, including repeated sexual flirtations, advances or propositions, continued or repeated language of a sexual nature, graphic or degrading comments about an individual or his or her appearance, the display of sexually suggestive objects or pictures, or any unwelcome or abusive physical contact of a sexual nature. Sexual harassment also includes situations in which employment benefits are conditioned upon sexual favors (quid pro quo); or in which the conduct has the effect or purpose of creating a hostile, intimidating, or offensive working environment (must be sufficiently pervasive or severe to create a hostile environment)

Q. What does "quid pro quo" mean?
A. Quid pro quo means "this for that" in Latin. This terminology describes harassment that typically involves a supervisor giving or withholding employment benefits based upon an employee's willingness to grant sexual favors.

> **Example:** Donald tells Ivana she'll get the promotion if she sleeps with him.
> **Example:** Demi tells Michael his workload will double if he doesn't join her for dinner.
>
> **Example:** Geraldo implies Sally must continue dating him if she wishes to keep her job.

Q. How would you describe a "hostile environment"?
A. A "hostile environment" is a work atmosphere in which a pattern of offensive sexual conduct is involved. The administrative rules describe it as "Any unwelcome verbal or physical conduct that is sufficiently severe or pervasive to have the purpose or effect of unreasonably interfering with work performance or creating an intimidating, hostile, or offensive working environment." *OAR 839-005-0010(3)(A)*

> **Example:** Tom, Nicole's supervisor, regularly compliments her figure and clothing. He frequently walks up behind her and massages her shoulders, despite her objections. On Monday mornings, Tom tells the crew the "dirty joke of the week" from his Saturday night poker game. Other employees laugh, but Nicole usually walks away. Tom also keeps a calendar of semi-nude women posted in his office, despite Nicole's comments that she finds the calendar demeaning. Based on all of the foregoing conduct by Tom, Nicole files a hostile environment sexual harassment claim.

Q. Is an employer automatically liable for sexual harassment by a supervisor?
A. An employer is automatically liable for sexual harassment by a supervisor when a "tangible employment action" occurs in connection with the harassment. A tangible employment action is very broadly defined and need not be negative. Examples include changes in work assignment or schedule, terminations or failure to promote. *OAR 839-005-0030(4)*

Q. What about harassment by a supervisor when there is no tangible employment action?
A. The employer is still liable if the employer knew about the harassment, unless the

employer took immediate and appropriate corrective action. Furthermore, the employer is liable if it should have known of the harassment. The Civil Rights Division will find that the employer should have known of the harassment unless the employer can show:

- That it exercised reasonable care to prevent harassment, and
- That the complaining employee unreasonably failed to take advantage of preventive opportunities, such as the employer´s complaint process. *OAR 839-005-0030(5)*

Q. May an employer also be liable for harassment by co-workers?
A. Yes, if the employer knew or should have known of the conduct but failed to take immediate and appropriate corrective action. *OAR 839-005-0030(6)*

Q. What is an employer´s responsibility for sexual harassment by a non-employee?
A. An employer is liable for harassment by a non-employee if the employer knew or should have known of the conduct, unless the employer took immediate and appropriate corrective action. When evaluating a complaint, the Civil Rights Division considers how much control the employer has over the non-employee. For example, an employer is considered to have a great deal of control over an individual who is on the premises to fill a vending machine. An employer can call the vending company and request a different service person, can hire an alternate company, or can even have the machines removed. *OAR 839-005-0030(7)*

Q. Should an employer have a written policy prohibiting sexual harassment?
A. Yes. The policy should define sexual harassment and emphatically state that it is not tolerated. Employers should allow verbal or written complaints, and should provide a grievance procedure that bypasses the immediate supervisor if he or she is the alleged harasser. The policy should also describe the disciplinary actions that may be taken, up to and including termination.

Q. What is the best way to prevent sexual harassment?
A. Equal Employment Opportunity Commission (EEOC) Guidelines recommend that employers discuss sexual harassment with employees and express strong disapproval. The employer should develop appropriate sanctions, inform employees of the right to raise complaints and how to raise them, and develop methods to sensitize all concerned.

The employer should emphasize the importance of its sexual harassment policy through communication and training. Training for staff is essential. Employers should have departmental or unit meetings to explain policies and grievance procedures, so that all employees understand what is prohibited conduct and how to complain about it.

Q. What should an employer do if an employee complains of sexual harassment?
A. The employer must make a prompt, thorough investigation to determine whether harassment has occurred. The employer should take detailed statements from the complaining person, the alleged harasser, and witnesses, and determine if the allegations are supported by the investigation. All steps of the investigation should be thoroughly documented. Employers may wish to consult an attorney for assistance with harassment investigations.

Q. What if the investigation shows that harassment has occurred?
A. The employer must take "immediate and appropriate corrective action," which means doing whatever is necessary to put a stop to the harassment. Depending on the severity of the harassment, appropriate corrective action could include any of the following: verbal or written warning; counseling; suspension; sensitivity training or education on harassment laws and appropriate workplace conduct; reassignment of workers to different locations or shifts; or dismissal of the harasser.

Q. Roseanne, an employee of mine, used to delight in telling off-color and sexually explicit jokes, but has now joined a new church and is strongly objecting when other employees tell such jokes. Is the company obligated to take any action?
A. Yes. Even though Roseanne previously consented to and even actively participated in the conduct, the company must act if she communicates that she now finds it offensive. Sexual jokes or conversations in the workplace can form the basis of a hostile

environment claim, and an employer is liable if he or she knew or should have known that the offended employee withdrew consent to such conduct.

Q. Must an employee complain to the harasser or to the company before taking legal action?
A. No. An employee alleging sexual harassment can file a lawsuit or a complaint with an administrative agency, without first exhausting intra-company remedies.

Q. What types of damages can be awarded to an employee who has a successful sexual harassment lawsuit?
A. A court or administrative law judge may award damages including: back pay, counseling or medical costs; attorney fees, pain and suffering, and punitive damages.

The Technical Assistance for Employers unit offers employer seminars, handbooks, and other materials covering a number of topics. For additional information, visit our website at www.oregon.gov/boli/ta or call our Employer Assistance line.

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These materials were prepared as a general summary and teaching guide. The mission of the Technical Assistance for Employers Program is to promote compliance with civil rights and wage and hour laws through education. Technical Assistance does not provide legal advice. In order to determine the legality of any matter or to protect your legal rights, you should contact an attorney. Check the yellow pages of your telephone directory or contact the Oregon State Bar Lawyer Referral Service at 1-503-620-0222 or 1-800-452-7636. THIS INFORMATION IS AVAILABLE IN AN ALTERNATE FORMAT.

Ethical Issues

WHISTLEBLOWING

(Disclosures by Employee of Violation of State or Federal Law)

659A.199 Prohibited conduct by employer. (1) It is an unlawful employment practice for an employer to discharge, demote, suspend or in any manner discriminate or retaliate against an employee with regard to promotion, compensation or other terms, conditions or privileges of employment for the reason that the employee has in good faith reported information that the employee believes is evidence of a violation of a state or federal law, rule or regulation.

(2) The remedies provided by this chapter are in addition to any common law remedy or other remedy that may be available to an employee for the conduct constituting a violation of this section. [2009 c.524 §2]

652.610 Itemized statement of amounts and purposes of deductions; timely payment to recipient of amounts deducted. (1) All persons, firms, partnerships, associations, cooperative associations, corporations, municipal corporations, the state and its political subdivisions, except the federal government and its agencies, employing, in this state, during any calendar month one or more persons, and withholding for any purpose any sum of money from the wages, salary or commission earned by an employee, shall provide the employee on regular paydays with a statement sufficiently itemized to show the amount and purpose of the deductions made during the respective period of service that the payment covers.

(2) The itemized statement shall be furnished to the employee at the time payment of wages, salary or commission is made, and may be attached to or be a part of the check, draft, voucher or other instrument by which payment is made, or may be delivered separately from the instrument.

(3) An employer may not withhold, deduct or divert any portion of an employee's wages unless:

(a) The employer is required to do so by law;

(b) The deductions are authorized in writing by the employee, are for the employee's benefit and are recorded in the employer's books;

(c) The employee has voluntarily signed an authorization for a deduction for any other item, provided that the ultimate recipient of the money withheld is not the employer and that the deduction is recorded in the employer's books;

(d) The deduction is authorized by a collective bargaining agreement to which the employer is a party;

(e) The deduction is authorized under ORS 18.736; or

(f) The deduction is made from the payment of wages upon termination of employment and is authorized pursuant to a written agreement between the employee and employer for the repayment of a loan made to the employee by the employer, if all of the following conditions are met:

(A) The employee has voluntarily signed the agreement;

(B) The loan was paid to the employee in cash or other medium permitted by ORS 652.110;

(C) The loan was made solely for the employee's benefit and was not used, either directly or indirectly, for any purpose required by the employer or connected with the employee's employment with the employer;

(D) The amount of the deduction at termination of employment does not exceed the amount permitted to be garnished under ORS 18.385; and

(E) The deduction is recorded in the employer's books.

(4) When an employer deducts an amount from an employee's wages as required or authorized by law or agreement, the employer shall pay the amount deducted to the appropriate recipient as required by the law or agreement. The employer shall pay the amount deducted within the time required by the law or the agreement or, if the time for payment is not specified by the law or agreement, within seven days after the date the wages from which the deductions are made are due. Failure to pay the amount as required constitutes an unlawful deduction.

(5) This section does not:

(a) Prohibit the withholding of amounts authorized in writing by the employee to be contributed by the employee to charitable organizations, including contributions made pursuant to ORS 243.666 and 663.110;

(b) Prohibit deductions by check-off dues to labor organizations or service fees when the deductions are not otherwise prohibited by law; or

(c) Diminish or enlarge the right of any person to assert and enforce a lawful setoff or counterclaim or to attach, take, reach or apply an employee's compensation on due legal process. [Amended by 1977 c.618 §1; 1980 s.s. c.1 §2; 1981 c.594 §5; 1995 c.753 §2; 2001 c.249 §78; 2003 c.779 §5; 2007 c.676 §1]

Drug Testing

659A.124 Illegal use of drugs. (1) Subject to the provisions of subsection (2) of this section, the protections of ORS 659A.112 do not apply to any job applicant or employee who is currently engaging in the illegal use of drugs if the employer takes action based on that conduct.

(2) The protections of ORS 659A.112 apply to the following individuals:

(a) An individual who has successfully completed a supervised drug rehabilitation program and is no longer engaging in the illegal use of drugs or has otherwise been rehabilitated successfully and is no longer engaging in the illegal use of drugs.

(b) An individual who is participating in a supervised rehabilitation program and is no longer engaging in the illegal use of drugs.

(c) An individual who is erroneously regarded as engaging in the illegal use of drugs.

(3) An employer may adopt or administer reasonable policies or procedures, including but not limited to drug testing, designed to ensure that an individual described in subsection (2)(a) or (b) of this section is no longer engaging in the illegal use of drugs. [Formerly 659.442; 2009 c.508 §9]

Drug Testing Of Employees

Technical Assistance: FAQs

Q. Andrew is a member of my office staff whose job performance recently has not been up to par. Based on rumors I've heard from my other employees, I suspect that Andrew may be using illegal drugs. Can I require him to submit to a drug screen? What are the rules for drug testing employees?

A. The Oregon civil rights laws don't specifically address drug testing of employees. But the absence of specific statutes in this area doesn't mean that employers have carte blanche to conduct drug tests in every situation. In fact, while it's generally legal for employers to conduct drug tests, you should proceed very carefully, because this type of testing can infringe on an employee's constitutional privacy rights.

So how can you conduct drug tests without landing your company on the wrong end of a lawsuit? Here are a few tips:

Have a clear policy. Your first step is to implement a clear written policy on drug testing and to fully explain the policy to all your employees. Work with your employment law attorney and a qualified laboratory testing service to draft a legal policy that advises employees they could be subject to testing.

Articulate your standard for testing. Advise employees how they can be selected for testing. Although some employers may choose to test randomly, many employment attorneys suggest that you limit testing to situations where there is "cause" (when the employer has reasonable suspicion of drug use), or when an employee is involved in a workplace incident or accident.

Apply your policy consistently. To avoid charges of discrimination or wrongful discharge, enforce your drug testing policy in a fair and consistent manner. If you test employees randomly, be certain you can document that your selection methods are truly random. If you test employees "for cause," be certain you can articulate the facts (not merely rumors or gossip) which gave you reasonable suspicion of an employee's drug use.

You can set different drug testing standards for different classifications of workers, as long as your standards are based on business reasons. For example, you might decide to set higher drug testing standards for your delivery drivers than for your clerical staff.

Obviously, it would be discriminatory to drug test only your Asian employees, or only your female employees, or only your employees over 40 years old. Likewise, you should realize that employees who suffer on-the-job injuries fall into a protected class, and thus it would be discriminatory to drug test only employees who get hurt at work. So if you test employees based on their involvement in a work-related accident, you ought to test all employees involved, regardless of whether they were injured.

Provide advance notice. It's typically recommended that you provide your current employees with at least 30 days advance notice before starting a new drug-testing program. Without such notice, your employees have a "reasonable expectation of privacy," an expectation that they'll be free from drug testing in the workplace. Spring a surprise drug test on an employee without a drug testing policy in place, and you may get a surprise of your own -- in the form of a lawsuit.

If you do drug test employees in a proper manner, you can discipline or

terminate employees who screen positive for current use of illegal drugs, because such individuals are not protected by the ADA or Oregon disability laws.

In your situation with Andrew, ask yourself the following questions: Did we previously advise Andrew that our company has a drug testing policy? Did we explain in the policy that employees can be tested "for cause?" Did we give sufficient advance notice of the policy? Do we really have reasonable suspicion to believe that Andrew is using illegal drugs?

If you answered "no" to any of these questions, watch out! Instead of requiring a drug test, you'll be much safer addressing Andrew's specific performance deficiencies by following your regular disciplinary policies. If Andrew is arriving late for work, acting in a bizarre or inappropriate manner, or simply not completing his job duties on time, focus on those issues and apply your existing discipline rules as you would with other employees.

The Technical Assistance for Employers unit offers employer seminars, handbooks, and other materials covering a number of topics. For additional information, visit our website at www.oregon.gov/boli/ta or call our Employer Assistance line.

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