

MANCHESTER AREA HUMAN RESOURCES ASSOCIATION

MARCH 6, 2012

Legal Update

by

Attorney Jim Reidy



Sheehan Phinney Bass + Green, PA
1000 Elm Street
Manchester, NH 03105-3701
(603) 627-8217
jreidy@sheehan.com
www.sheehan.com

It's 10 a.m., do you know where your employees are? **US Supreme Court Rules on Employer Use of GPS Tracking Devices**

More and more, with advances in technology, employers can now track the whereabouts of employees by using global positioning systems (GPS) and related devices. In what could be an indication of how courts view this form of surveillance, the U.S. Supreme Court recently ruled on a case involving the legality of such tracking practices. On January 23, 2012, the U.S. Supreme Court ruled, in a case involving law enforcement use of GPS devices in a criminal investigation, that the use of these tracking devices was a warrantless search in violation of the Fourth Amendment (*United States v. Jones*, No. 10-1259). While that wasn't an employment case, the High Court, in this decision gave employers some sense of how they might view tracking in a workplace context.

In that case, police had targeted a suspected drug dealer and obtained a warrant to put a GPS device on his car in the District of Columbia within 10 days. However, the device wasn't attached until the 11th day, and while the car was in Maryland. In the majority opinion Justice Antonin Scalia wrote that the police's

search went beyond the parameters of a warrant, and so the individual's conviction on drug charges was overturned.

In Justice Sonia Sotomayor's concurrence, she wrote that "the trespassory test applied in the majority's opinion reflects an irreducible constitutional minimum: when the government physically invades personal property to gather information, a search occurs." Other justices also noted that "physical intrusion is now unnecessary to many forms of surveillance. With increasing regularity, the government will be capable of duplicating the monitoring undertaken in this case by enlisting factory- or owner-installed vehicle tracking devices or GPS-enabled smartphones." This technology, as many legal commentators have noted, is already available to and used by employers.

Again, because the court's ruling is a criminal case, it does not have direct applicability to the workplace and especially private sector workplaces where Fourth Amendment searches aren't relevant. However, in the concurring justices' opinions in this case, they hint at how the Supreme Court might rule in the context of private employers that use GPS devices to track employees.

While private sector employees won't have constitutional claims as in this case, they may still assert claims under common law privacy rights. Therefore, private sector employers will be on safer ground using GPS devices to track employees if they have a policy that notifies employees that it may use tracking devices to monitor employees' whereabouts during work hours and will not monitor them outside work hours.

Individual and workers' rights groups, such as the American Civil Liberties Union, have already seized on the Supreme Court's opinion to push for privacy legislation that would address employers' use of GPS technology. Currently there are a few electronic monitoring bills in Congress and they include H.R. 2168, the Geolocation Privacy and Surveillance Act; S. 1212, the GPS Act; and S. 1223, the Location Privacy Protection Act of 2011.

Courts and legislatures (state and federal) are still playing catch up as they try to address the advances in monitoring technologies and their applications, and potential abuses, in the workplace.

Stay tuned (you may be monitored as we speak so sit up straight and mind your manners.)!