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ELECTRONIC COMMUNICATIONS AND EMPLOYEE WORKPLACE PRIVACY RIGHTS

Employees' personal use of on-line social networking, text messaging and email is a fact of life in many workplaces. Two recent cases illustrate the importance of having policies clearly addressing permissible and non-permissible use of employers' electronic systems.

City of Ontario v. Quon, 560 U.S. ____ (2010). On June 17, 2010, the U.S. Supreme Court ruled that a city police department's audit of inappropriate text messages sent by its officers on department issued pagers was reasonable and did not violate the Fourth Amendment. The Court rejected the Ninth Circuit's ruling that the employees had a reasonable expectation of privacy regarding the text messages and that the messages could

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FACT BOX

Notable Cases Slated

The United States Supreme Court issued orders framing important cases for consideration next Term, including:

- *U.S. Chamber of Commerce v. Candelaria* (09-115). Are Arizona statutes imposing immigration-related burdens on employers preempted by federal law?
- *Janus Capital Group v. First Derivative Traders* (09-525). Can a person who drafts a false prospectus be civilly liable under federal law even though the person did not issue the security?
- *CIGNA Corp. v. Amara, et al.* (09-804). Showing required to entitle ERISA beneficiaries to recover benefits for alleged variance between plan and description of plan.

LAND USE COMMENTARY

By Lane Shetterly

Oregon's statewide land use planning system has been in a constant state of change since its inception in 1973. Measures to repeal or curtail governments' authority reached the ballot in 1976, 1982 and 1998. In 2000, Measure 7 was passed, requiring compensation be paid when a land use regulation restricted the use of property and decreased its value.

Measure 7 was declared unconstitutional, but it spawned Measure 37 (2004). Measure 37 allowed government to avoid paying compensation by "waiving" the offending regulation. Claims flooded in but few yielded on-the-ground development.

In 2007 voters approved Measure 49, substantially replacing Measure 37 and limiting the scope of development for retroactive claims to residential uses. Measure 49 did much to restore stability to the land use planning program. It permits Measure 37 claimants to elect to construct a limited number of residences on the claim property. DLCD received 4,652 Measure 49 "elections" in the initial round, almost all of which sought three or fewer homesite approvals. Less than one percent of claim decisions have been appealed.

Measure 49 resolved many of the issues that Measures 37 exposed, but challenges and changes will continue. In February 2010, the legislature enacted SB 1049 to grant limited development rights for about 800 Measure 37 claimants who had filed claims only with a county, and another 85 or so who had tried but failed to gain approval for up to 10 homesites under Measure 49. SB 1049 also clarified the relief available to about 700 claimants who acquired their property after adoption of the statewide land use goals in 1975, but before their county's comprehensive plan had been acknowledged.

Whether it be transfer of development rights, urban reserves and rural preserves, or climate change, practitioners and policy makers need to stay engaged in the always-evolving issues around land use planning in Oregon.

RECENT STATE AGENCY RULEMAKING

State agencies usually have the power to enact administrative rules. Some are required to engage in rulemaking. Except in emergencies, agencies must conduct a public hearing and set a final date for public comment before enforcing a proposed rule. For further information about any of the following, please contact Jane Leonhardt (jane.leonhardt@harrang.com). The public comment period recently closed for all of the following:

Adopt-A-Highway/Noxious Weeds. Implements HB 2424 (2009), expanding the Adopt-A-Highway program described in ORS 366.158 to include removal of noxious weeds. Oregon Department of Transportation.

Conforming State Health Insurance Continuation To Federal Subsidy Qualifications. Implements HB 2433 (2009), extending the period of eligibility for state health insurance continuation coverage from six to nine months. Department of Consumer and Business Services. Federal economic stimulus funds provide subsidies for up to nine months of coverage. These proceedings established permanent rules in place of a series of temporary and previously-existing rules.

Biometric Data Collection. Improves reliability of facial recognition software. Department of Transportation. Under ORS 807.024 and ORS 801.163, DMV uses facial recognition technology to determine if an applicant for renewal of a license is the same person previously licensed under that identity and if the person has ever been issued a license under another identity. The system requires a clear view of the iris and pupil of each eye. The new rules require applicants to remove their glasses when photographed for a driver license, driver permit or identification card. The proposed rule also requires the applicant to remove any clothing or similar material covering the person's face, and any head covering, unless the head covering is being worn for medical or religious reasons.

Hospice Licensing. Implements SB 161 (2009), establishing licensing and operational standards for hospice programs. Department of Human Services, Public Health Division. The rules define the Public Health Division's procedures for licensing, handling complaints, investigations of complaints, surveys, and discipline for hospice programs by assessing a civil penalty.

DCBS Public Records Requests. Amends procedures and fees for public records requests. Department of Consumer and Business Services. Public bodies may "establish fees reasonably calculated to reimburse the public body for the public body's actual cost of making public records available . . . ." ORS 192.440(4)(a).

SECOND AMENDMENT RULES STATES

In 2008, the United States Supreme Court struck down a District of Columbia law banning the possession of handguns in the home. *District of Columbia v. Heller*, 554 U.S. __ (2008). On June 28, 2010, the Court extended its ruling to the states and local political subdivisions. *McDonald v. Chicago*, 561 U.S. __ (2010). The majority of a divided court held that the Second Amendment limits state legislatures and municipalities with the same force it applies to Congress. Although the Court's opinion will trigger litigation nationwide, previously established law likely will mute *McDonald's* impact in Oregon.

In relevant part, the Second Amendment provides "the right of the people to keep and bear Arms, shall not be infringed." Two cities in Illinois (Chicago and Oak Park) effectively banned handgun possession by local ordinance. The plaintiffs alleged that they had a federal constitutional right to "possess a functional, personal firearm, including a handgun, within the home." They argued that Chicago and Oak Park had

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Computer Use Sparks Cases

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not be viewed without the employees' consent. The search was motivated by a legitimate work-related purpose and was reasonable in scope. The Court declined to make a broad holding concerning employees' privacy expectations while using employers' electronic systems, noting that such a ruling "might have implications for future cases that cannot be predicted."

Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 990 A.2d 650 (2010). On March 30, 2010, the New Jersey Supreme Court ruled that an employee had a reasonable expectation of privacy in e-mail communications she had with her attorney through her personal, password-protected, web-based e-mail account using her employer's computer. The ambiguous language of the employer's personnel policy regarding electronic communications was insufficient to put the employee on notice that she did not have a reasonable expectation of privacy in the e-mails.

Readers should consult with their legal counsel before implementing an electronic communications policy.

FACT BOX

Reset Cabinet Issues Final Report

Selected highlights from Governor Kulongoski's "Reset Cabinet."

Crime and Public Safety:
- Modify sentencing guideline system.
- Adopt the federal earned time system.
- Adjust Ballot Measure 11 mandatory minimum sentences.

K - 12 Education:
- Create shared services models for school districts for functions such as technology and business services.
- Reorganize Education Service Districts.
- Expand online learning options.

Post-secondary Education:
- Improve retention and graduation rates.
- Expand need-based aid.

Labor Costs:
- Create statewide collective bargaining for schools.
- Reduce employer contributions to employee IAPs.
- Increase state and local employee contributions to the cost of their health insurance.

Revenue Stability:
- Create an emergency reserve fund, funded by modifications to Oregon's "kicker law."

The full report may be viewed at:

http://governor.oregon.gov/Gov/docs/rc_fullreport.pdf

Opinions

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infringed their right to keep and bear arms in violation of the Second Amendment.

Although the Court agreed with the plaintiffs, it did so on terms that leave the door open for continued regulation of firearms. For example, it wrote that the Second Amendment "*limits* (but by no means eliminates) [the States'] ability to devise solutions to social problems that suit local needs and values." The Court placed the term "limits" in italics.

The clearest implications of the Court's opinion are consistent with Oregon law. The Court clearly ruled out of bounds state laws or local ordinances purporting to ban the possession of handguns "in the home." Twenty-eight years ago the Oregon Supreme Court construed Oregon's constitutional "right to bear arms for the defence (sic) of themselves, and the State" (Article I, Section 27) to similarly bar a "total proscription of the mere possession of certain weapons." At the other end of the spectrum, the Court ruled clearly in bounds prohibitions on the possession of firearms by felons and the mentally ill, in "sensitive places such as schools and government buildings, or laws imposing conditions on the commercial sale of arms." Likewise, the Oregon courts have upheld against state constitutional attacks numerous regulations on the possession of firearms.

For *McDonald* to have effect in Oregon, the challenged regulation would have to be consistent with the Oregon Constitution but inconsistent with the Second Amendment as construed in *McDonald*. For this reason, *McDonald* is unlikely to provide the rule of law in most Oregon cases.

RECREATIONAL IMMUNITY CHANGES PROTECT LANDOWNERS

Recent changes to Oregon law modify the result of a 2009 Oregon Supreme Court opinion to allow landowners to charge a fee for recreational use of a portion of their land, while retaining immunity for the remainder of their land if they comply with certain requirements.

Before the change, ORS 105.682(1) appeared to immunize landowners from certain civil liabilities when they permitted recreational users to enter their land. That immunity was available only if the owner "makes no charge for permission to use the land[.]" ORS 105.688(2)(a).

On September 24, 2009 the Oregon Supreme Court decided *Coleman v. Oregon Parks and Recreation Department*, which held that under ORS 105.688 and related statutes, the state lost immunity from suit by a plaintiff who was injured while riding a bicycle at Tugman State Park. Because the plaintiff had paid a fee to camp on a portion of the park, the Court found that the state had lost immunity for all other recreational use on all of the land.

The Legislature passed HB 3673 in response. The bill amended ORS 105.688 in three significant ways. HB 3673 became effective on March 10, 2010.

First, landowners may charge a fee for certain recreational activities on part of their property, without waiving immunity for the remainder, provided they comply with certain notice requirements. Landowners are required to give notice either by posting, or as part of a receipt, of the portion of land that is subject to a charge, and the immunities provided for the remainder of the land. ORS 105.688(4) and (8)(b).

Second, a landowner may also charge for a limited recreational use of the land, and still retain immunity for all other recreational uses of the land, if the landowner provides the required notice. ORS 105.688(4) and (8)(a).

Finally, a landowner may charge a parking fee of $15 or less per day without losing recreational immunity. ORS 105.672(c).

Thus, the changes to Oregon's recreational immunity statutes provide a way for landowners to charge for certain uses, charge for use of certain lands, or charge a small parking fee, without waiving immunity from other civil liabilities.

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Harrang Long Gary Rudnick is pleased to publish this edition of the firm's Capitol Mall Dispatch. We hope you enjoy learning about developments at the intersection of law and public policy.

This issue includes articles from Harrang Long Gary Rudnick attorneys Ben Miller (recreational immunity), Andrea Nagles (labor law) and Aaron Landau, who contributed to our article on the Second Amendment.