HEY! IS THAT THE COMPANY'S CELL PHONE OR YOUR CELL PHONE?

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In June and August, 2013, two federal district courts issued decisions involving cell phones. The decisions, taken together, provide valuable guidance to employers in writing company policies about cell phone use. One case involved an employee's personal cell phone and the other case involved a company's cell phone which was turned back to the company when the employee left employment. The rapidly changing pace of technology is leading to a growing number of court decisions concerning cell phones. Prudent employers should follow the guidance of these decisions when rewriting employment policies.

1. THE CALIFORNIA SITUATION
An employee of Wal-Mart Stores, Inc. was terminated. The employee filed an action in state court alleging discrimination (national origin, race and sex) and wrongful termination. The case was removed to federal court.

THE SUBPOENA

The employer issued a subpoena to AT&T Mobility requesting:

1. All incoming and outgoing cellular phone and text message records for the terminated employee's cell phone number for a designated period of time;

2. All records regarding any data used by the device associated with the terminated employee's cell phone number for the same period of time; and

3. Invoices for the terminated employee's cell phone number for the same period of time.

THE ARGUMENTS
The terminated employee argued that she was never counseled about cell phone use and that her employment records do not contain any documentation about her using her cell phone during work hours. She contended that she was terminated for not taking her required breaks and that the subpoenaed records are therefore not relevant.

Wal-Mart argued that since the plaintiff brought the action alleging wrongful termination, the records are necessary to defend the claim and to show that the plaintiff was terminated for stealing time. Wal-Mart argued that the plaintiff committed gross misconduct while on the job and that the misconduct is why she was terminated.

PRIVACY
The plaintiff contended that she has a right to privacy in her cell phone records under both the California State Constitution and California state law. Wal-Mart argued that the subpoena was narrowly tailored to obtain the dates and times of cell phone use but not the content.

THE CALIFORNIA DECISION
The federal magistrate judge ruled against the plaintiff and denied the motion to quash the subpoena for the cell phone records. The judge noted that the records were directly relevant to Wal-Mart's defense that the plaintiff was terminated for misrepresenting her working hours. The court also concluded that no privacy interests were violated because Wal-Mart was not seeking the content of any messages and because the records being sought were held by a third party and do not contain any content information. The magistrate judge also ruled that since Wal-Mart did not request the identity of any individuals whose telephone numbers would be shown in the records, no privacy violation concerning such individuals was present.

2. THE OHIO SITUATION
A former employee of Verizon Wireless returned her company-issued Blackberry when she left employment. When the employee was provided the company-issued phone, she was told that she could use it for personal e-mail. The employee had an account with G-Mail. The employee believed that she had deleted that account from the telephone before turning it in because she understood that Verizon would "recycle" the phone for use by another employee.

The G-Mail account was not closed and during the following 18 months, the former employee's supervisor read (without her knowledge or authorization) approximately 48,000 e-mails sent to her personal G-Mail account and disclosed the contents of some of those e-mails to others.

The former employee filed a lawsuit claiming a violation of both the federal Stored Communications Act (SCA) and a state law violation of privacy.

THE OHIO DECISION
The federal judge ruled against the numerous (and inventive) arguments of Verizon that the SCA did not apply. The judge concluded that just because the phone was a company owned Blackberry did not mean that authorization to read the personal e-mail had been granted. The court agreed that the former employee was negligent by not having deleted the G-Mail account from the Blackberry before turning it into the company. In ruling against Verizon on this point, the Court stated:

Negligence is, however, not the same as approval, much less authorization. There is a difference between someone who fails to leave the door locked when going out and one who leaves it open knowing someone will be stopping by.

The court also refused to dismiss Verizon from the lawsuit and concluded that both Verizon and the supervisor were proper defendants. With respect to the state law claim, the Court found that the e-mails were "highly personal and private" and that a reasonable jury could conclude that the actions of the supervisor in reading "tens of thousands of such private communications, if proven to have occurred," would be "highly offensive."

CONCLUSION
The first lesson from these two decisions is that company cell phone policies should apply to **both** company issued cell phones and private cell phones. In addition, if private cell phone use on personal matters (whether through a company issued cell phone or with a privately owned cell phone) are prohibited, that prohibition should be clearly stated. Moreover, if company issued cell phones are turned in by departing employees to be "recycled" to other employees, it would be prudent for the employer to ensure that **no** private information or e-mail accounts remain on the company's cell phone **before** recycling the cell phone to other employees.

Finally, in the instance of company cell phones, employers should be sure to add in-service training for supervisors to ensure that supervisors are at least as intelligent as the Smartphone. At a minimum, such in-service training should cover reasonable expectations of privacy, an admonition to all supervisors involved in the recycling of such company owned cell phones to be sensitive to privacy rights of former employees, and a reminder of Ron White's statement that "stupid never takes a day off." When Al Gore invented the Internet, he didn't explain the many opportunities for federal court litigation. Now that federal court decisions are being issued on both federal and state law claims concerning privacy about both company owned cell phones and personal cell phones, prudent employers should take these decisions into account when writing personnel policies. Prudent employers should also increase in-service training for supervisors on this topic.

LINCOLN INDEPENDENT BUSINESS ASSOCIATION

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JANUARY 2014

Luncheon Program

LIBA will host a Candidate Forum for U.S. Senate Candidates. Candidates will introduce themselves, their campaigns and answer questions submitted by LIBA.


Bart McLeay


Sid Dinsdale


Todd Watson


Shane Osborn


Ben Sasse


Jim Jenkins

Tuesday, January 21st, 11:30 am

Holiday Inn Downtown, 9th & P

As always, the monthly LIBA LUNCHEON is open to all LIBA Members and their guests with no advance reservation required. The buffet line will open at 11:30 am, the meeting begins at 12:00 noon and ends promptly at 1:00 pm. The luncheon cost is $11.00, but there is no charge to just attend the meeting. There is free parking in the Holiday Inn Garage while it lasts.

LIBA Luncheon Host: **The Waterford Communities**

At the annual membership meeting on February 17, 2014, the LIBA members in attendance will elect new members to serve on the LIBA Board of Directors. The Advisory Committee, in its role as the nominating committee, and in accordance with the LIBA Bylaws, is placing the following LIBA members in nomination for 3-year terms on the Board, to expire at the end of February 2017.

The nominees are:

John Berry – Berry Law Firm
Matthew Fox - Frank, Fox & Hoagstrom Financial Group
Ray Stevens
Corrine Sturdy – West Gate Bank