Crisis in the Public Workplace:
Cutting Edge Issues in Personnel and Labor Relations
Employee Speech, Privacy, and the Internet

Raw Materials for Discussion

Demers v. Austin, Case No. 11-35558 (9th Cir. Jan. 29, 2014). College professor claimed retaliation for distributing a pamphlet about restructuring his college's academic departments. The Ninth Circuit held that his free speech claim was governed by the standards of *Pickering v. Board of Education*, 391 U.S. 563 (1968), instead of *Garcetti v. Ceballos*, 547 U.S. 410 (2006).

City of San Diego v. Roe, 543 U.S. 77 (2004). Police officer was discharged for selling pornographic tapes of himself on eBay. His "speech" was not of concern to the community, and was detrimental to the mission and functions of his employer.

California Labor Code sections 96 and 98.6. Bars employers from acting against employees "for lawful conduct occurring during nonworking hours away from the employer's premises," and authorizes lawsuits for violations.

Doe v. Green, Case No. 0704-04734 (Ore. Cir. Ct. Apr. 26, 2007). Complaint alleges that ambulance company is liable for EMT's posting of information about rape victim on the EMT's personal MySpace account.

Holmes v. Petrovich Development Co., 191 Cal.App.4th 1047 (2011). Emails that employee sent to her attorney from her employer's computer were not confidential communications between a client and her attorney. Therefore, there were not protected by the attorney-client privilege.

Sitton v. Print Direction, Inc., 718 S.E.2d 532 (2011). Employee discharged for engaging in a business that competed with his employer did not have a privacy claim for his employer's retrieval of information from a personal laptop that the employee used at work.

Trapp v. Department of Homeland Security, FMCS Case No. 12-56290-A (Jul. 11, 2013). Border Patrol officer was discharged based on material that his supervisor had retrieved from the officer's Facebook page by "friending" him under an alias. In refusing to sustain the discharge, the arbitrator found that the collection of material from the officer's Facebook page was illegal.

AB 1844. An employer may not require employees or applicants for employment to provide the employer with access to personal social media.

Connecticut State Police Social Media Policy.

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DAVID K. DEMERS, *Plaintiff-Appellant*, v. ERICA AUSTIN; ERICH LEAR; WARWICK M. BAYLY; FRANCES MCSWEENEY, *Defendants-Appellees*.	No. 11-35558 D.C. No. 2:09-cv-00334-RHW ORDER AND OPINION

Appeal from the United States District Court
for the Eastern District of Washington
Robert H. Whaley, Senior District Judge, Presiding

Argued and Submitted
November 7, 2012—Seattle, Washington

Filed January 29, 2014

Before: William A. Fletcher and Raymond C. Fisher, Circuit Judges, and Gordon J. Quist, Senior District Judge.[*]

Order;
Opinion by Judge W. Fletcher

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[*] The Honorable Gordon J. Quist, Senior United States District Judge for the Western District of Michigan, sitting by designation.

SUMMARY[**]

Civil Rights

The panel replaced its prior opinion, filed on September 4, 2013, and published at 729 F.3d 1011, with a new opinion, denied a petition for panel rehearing, and denied a petition for rehearing en banc on behalf of the court, in an action brought pursuant to 42 U.S.C. § 1983 by a tenured associate university professor who alleged that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet and drafts from an in-progress book.

The panel held that *Garcetti v. Ceballos*, 547 U.S. 410 (2006), does not apply to speech related to scholarship or teaching. Rather, such speech is governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968). The panel concluded that the short pamphlet was related to scholarship or teaching and that it addressed a matter of public concern under *Pickering*. The panel concluded, further, that there was insufficient evidence in the record to show that the in-progress book triggered retaliation against plaintiff. Finally, the panel concluded that defendants were entitled to qualified immunity from damages, given the uncertain state of the law in the wake of *Garcetti*.

[**] This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

COUNSEL

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John Joshua Wheeler, Thomas Jefferson Center, Charlottesville, Virginia, for Amici Curiae American Association of University Professors and the Thomas Jefferson Center for the Protection of Free Expression.

ORDER

The opinion filed on September 4, 2013, and published at 729 F.3d 1011, is withdrawn and replaced by the attached opinion.

With the filing of this new opinion, the panel has voted to deny the petition for rehearing. Judge W. Fletcher has voted to deny the petition for rehearing en banc; and Judges Fisher and Quist so recommend.

The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on whether to rehear the matter en banc. Fed. R. App. P. 35.

The petition for rehearing and the petition for rehearing en banc, filed October 3, 2013, are **DENIED**.

OPINION

W. FLETCHER, Circuit Judge:

David Demers is a tenured associate professor at Washington State University. He brought suit alleging that university administrators retaliated against him in violation of the First Amendment for distributing a short pamphlet and drafts from an in-progress book. The district court granted summary judgment for the defendants, finding that the pamphlet and draft were distributed pursuant to Demers's employment duties under *Garcetti v. Ceballos*, 547 U.S. 410 (2006). Alternatively, the court held that the pamphlet was not protected under the First Amendment because its content did not address a matter of public concern.

We hold that *Garcetti* does not apply to "speech related to scholarship or teaching." *Id.* at 425. Rather, such speech is governed by *Pickering v. Board of Education*, 391 U.S. 563 (1968). In Demers's case, we conclude that the short pamphlet was related to scholarship or teaching, and that it addressed a matter of public concern under *Pickering.* We remand for further proceedings. We conclude, further, that there is insufficient evidence in the record to show that the in-progress book triggered retaliation against Demers. Finally, we conclude that defendants are entitled to qualified immunity, given the uncertain state of the law in the wake of *Garcetti*.

I. Background

David Demers is a member of the faculty in the Edward R. Murrow College of Communication ("Murrow School" or "Murrow College") at Washington State University

("WSU"). He joined the faculty in 1996. He was granted tenure as an associate professor in 1999. Demers also owns and operates Marquette Books, an independent publishing company.

Demers brought suit alleging First Amendment violations by WSU Interim Director of the Murrow School Erica Austin, Vice Provost for Faculty Affairs Frances McSweeney, Dean of the College of Liberal Arts Erich Lear, and Interim WSU Provost and Executive Vice President Warwick Bayly. Demers contends that defendants retaliated against him, in violation of his First Amendment rights, for distributing a pamphlet called "The 7-Step Plan" ("the Plan") and for distributing a draft introduction and draft chapters of an in-progress book titled "*The Ivory Tower of Babel*" ("*Ivory Tower*"). Demers contends that defendants retaliated by giving him negative annual performance reviews that contained falsehoods, by conducting two internal audits, and by entering a formal notice of discipline. Demers contends in his brief that over a three-year period he "went from being a popular teacher and scholar with high evaluations to a target for termination" due to the actions of defendants.

The Plan is a two-page pamphlet Demers wrote in late 2006 and distributed in early 2007. Demers distributed the Plan while he was serving on the Murrow School's "Structure Committee," which was actively debating some of the issues addressed by the Plan. At that time, the Murrow School was part of the College of Liberal Arts at WSU, but the faculty had voted unanimously in favor of becoming a free-standing College. (It became a College in July 2008.) The Murrow School had two faculties. One faculty was Mass Communications, which had a professional and practical orientation. The other was Communications Studies, which

had a more traditional academic orientation. Faculty members held appointments in either Mass Communications or Communications Studies. The Structure Committee was considering whether to recommend, as part of the restructuring of the Murrow School, that the two faculties of the School be separated. There was serious disagreement at the Murrow School on that question.

Demers is a member of the Mass Communications faculty. Demers's Plan proposed separating the two faculties. It proposed strengthening the Mass Communications faculty by appointing a director with a strong professional background and giving more prominent roles to faculty members with professional backgrounds. For four years, early in his career, Demers had himself been a professional reporter.

On January 16, 2007, Demers sent the Plan to the Provost of WSU. In his cover letter, he stated that the purpose of the Plan is to show how WSU "can turn the Edward R. Murrow School of Communication into a revenue-generating center for the university and, at the same time, improve the quality of the program itself." Demers's letter also stated, "To initiate a fund-raising campaign to achieve this goal, my company and I would like to donate $50,000 in unrestricted funds to the university." Demers signed the letter "Dr. David Demers, Publisher/ Marquette Books LLC." A footnote appended to the signature line specified, "Demers also is associate professor of communications at Washington State University. Marquette Books LLC is a book/journal publishing company that he operates in his spare time. It has no ties with nor does it use any of the resources at Washington State University." The cover of the Plan states that it was "prepared by Marquette Books LLC." The Provost did not respond to

Demers's letter and Plan. On March 29, 2007, Demers sent the Plan to the President of WSU. The cover letter was identical to the letter he had sent to the Provost, except that he increased the offered donation to $100,000.

In his declaration, Demers states that he sent the Plan "to members of the print and broadcast media in Washington state, to administrators at WSU, to some of my colleagues, to the Murrow Professional Advisory Board, and others." Demers also posted the Plan on the Marquette Books website. In his deposition, Demers stated that he could not remember the names of the individuals to whom he had sent the Plan. Demers did not submit the Plan to the Structure Committee or to Interim Director Austin. In her deposition, Austin stated that alumni and members of the professional community contacted faculty members to ask about the Plan.

During the period relevant to his suit, Demers had completed drafts of parts of what would eventually become "*Ivory Tower*." The book was not published until after the actions about which Demers complains took place. In his self-prepared 2006 "Faculty Annual Report," submitted in early 2007, Demers described the in-progress book as "partly autobiographical and partly empirical. It will involve national probability surveys of social scientists, governmental officials and journalists." Demers attached a copy of the draft introduction and the first chapter to his November 2007 application for a sabbatical. In his application, he described the planned book as follows:

> [T]he book examines the role and function of social science research in society. . . . Today most social scientists believe very strongly that the research they conduct is important for

> solving social problems, or at least has some impact on public policy. However, empirical research in political science and public policy shows just the opposite. Social scientific research generally has little impact on public policy decisions and almost never has a direct impact on solving social problems. Instead, social movements play a much more important role . . . .

Demers also wrote in the application, "The book contains information that is critical of the academy, including some events at Washington State University." In his self-prepared 2008 Annual Activity Report, Demers reported that he had completed 250 of a planned 380 pages of the book.

Demers did not put any of the drafts of the book in the record. Interim Director Austin recalled in her deposition that she had seen parts of the book in connection with Demers's application for sabbatical. Vice Provost McSweeney stated in her deposition that she read some draft chapters that had been posted online, in particular chapters written about her and about "anything that [she] was directly involved in."

Demers contends that defendants retaliated against him for circulating the Plan and drafts of *Ivory Tower*. He claims that Austin and others knowingly used incorrect information to lower his performance review scores for 2006, 2007, and 2008. He contends that some defendants falsely stated that he had improperly canceled classes and that he had not gone through the proper university approval process before starting Marquette Books. He contends that specific acts of retaliation included spying on his classes, preventing him

from serving on certain committees, preventing him from teaching basic Communications courses, instigating two internal audits, sending him an official disciplinary warning, and excluding him from heading the journalism sequence at the Murrow School. Demers claims that these acts affected his compensation and his reputation as an academic. Demers argues on appeal that the Plan is protected, despite *Garcetti*, because it was not written and distributed as part of his employment. He contends further that the Plan and *Ivory Tower* are protected because *Garcetti* does not apply to academic speech.

Defendants respond that changes in Demers's evaluations and the investigations by the university were warranted, and were not retaliation for the Plan or *Ivory Tower*. Defendants contend that Demers reoriented his priorities away from academia after receiving tenure, that Demers's attendance at faculty committee meetings was sporadic, and that Demers gave online quizzes instead of appearing in person to teach his Friday classes despite repeated requests to comply with university policies that required him to appear in person. Defendants contend that the legitimate reasons for Demers's critical annual reviews include his post-tenure failure to publish scholarship in refereed journals, his failure to perform his appropriate share of university service, and his failure to report properly his activities at Marquette Books. Defendants contend, further, that Demers's lower marks under Interim Director Austin were partly attributable to an overall adjustment of the annual review scale for the faculty as a whole.

Defendants contend that the Plan was written and circulated pursuant to Demers's official duties and so is not protected under *Garcetti*, and that, in any event, the Plan does

not address a matter of public concern. They contend that because Demers failed to place any of the drafts of *Ivory Tower* in the record, there is insufficient evidence upon which to sustain Demers's retaliation claim based on those drafts. Finally, defendants contend that they are entitled to qualified immunity from any damages based on the uncertain status of teaching and academic writing after *Garcetti*.

The district court granted summary judgment to defendants. It held that the Plan and *Ivory Tower* were written and distributed in the performance of Demers's official duties as a faculty member of WSU, and were therefore not protected under the First Amendment. The district court held, alternatively, with respect to the Plan, that it did not address a matter of public concern. Demers timely appealed.

II. Standard of Review

We review a district court's grant of summary judgment *de novo*. *Suzuki Motor Corp. v. Consumers Union of U.S., Inc.*, 330 F.3d 1110, 1131 (9th Cir. 2003). Summary judgment is appropriate when "there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). Because this appeal is taken from an order of summary judgment in favor of defendants, "'[t]he evidence of [Demers] is to be believed, and all justifiable inferences are to be drawn in his favor.'" *Garcetti v. Ceballos*, 547 U.S. 410, 442 n.13 (2006) (first alteration in original) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986)).

III. Discussion

Demers makes two arguments. First, he argues that writing and distributing the Plan were not done pursuant to his official duties, and thus do not come within the Court's holding in *Garcetti*. Second, he argues that even if he wrote and distributed the Plan (as well as *Ivory Tower*) pursuant to his official duties, *Garcetti*'s holding does not extend to speech and academic writing by a publicly employed teacher. We disagree with his first argument but agree with his second.

A. Speech Pursuant to Official Duties

The district court found that Demers wrote and distributed the Plan and *Ivory Tower* pursuant to his duties as a professor at WSU. We agree with the district court. "[A]fter *Garcetti*, . . . the question of the scope and content of a plaintiff's job responsibilities is a question of fact." *Dahlia v. Rodriguez*, 735 F.3d 1060, 1072 (9th Cir. 2013) (en banc) (citation and internal quotation marks omitted).

While he was preparing the Plan, Demers sent an email to his fellow faculty members at the Murrow School, soliciting ideas and comments. He wrote:

> As you know, I'm preparing a proposal for splitting the School back into two separate units, a Communications Studies department and a professional/mass communication school.

In his self-prepared 2007 Annual Activity Report, Demers listed under the heading "Murrow School of Communication Service Activities":

> Developed a 7-Step Plan for reorganizing the Murrow School to improve the quality of the professional programs and attract more development funds. The plan recommends that the communications studies program be separated from the four professional programs (print journalism, broadcasting, public relations, and advertising), the School hire more professionals and give them more authority, seek accreditation for the professional programs, and develop stronger partnerships with the business community.

Demers prepared and sent the Plan to the Provost and President while he was serving as a member of the Murrow School "Structure Committee," which was deciding, among other things, whether to recommend separating the Mass Communications and Communications Studies faculties.

Demers points out that the cover of the Plan indicates that it was prepared by Marquette Books, that he did not sign his cover letters to the Provost and the President as a professor, and that he included a footnote in the letter stating that he was not acting as a professor. He contends that this, along with his private donation offer, shows that he was not acting pursuant to his duties as a professor when he wrote and distributed the Plan. However, it is impossible, as a real-world practical matter, to separate Demers's position as a member of the Mass Communications faculty, and as a member of the Structure Committee, from his preparation and

distribution of his Plan. Further, we note that when it was to his advantage to do so, Demers characterized his development of the Plan as part of his official duties in his 2007 Annual Activities Report. Demers may not have been acting as a team player in sending his Plan directly to the top administrators at WSU, rather than working with and through his fellow committee members. But we conclude that in preparing the Plan, in sending the Plan to the Provost and President, in posting the Plan on the Internet, and in distributing the Plan to news media, to selected faculty members and to alumni, Demers was acting sufficiently in his capacity as a professor at WSU that he was acting "pursuant to [his] official duties" within the meaning of *Garcetti*. 547 U.S. at 421. We thus turn to the question whether *Garcetti* applies to academic speech.

B. Academic Speech Under the First Amendment

Until the Supreme Court's 2006 decision in *Garcetti*, public employees' First Amendment claims were governed by the public concern analysis and balancing test set out in *Pickering v. Board of Education*, 391 U.S. 563 (1968), and *Connick v. Myers*, 461 U.S. 138 (1983). *Garcetti*, however, changed the law. The plaintiff in *Garcetti* was a deputy district attorney who had written a memorandum concluding that a police affidavit supporting a search warrant application contained serious misrepresentations. *Garcetti*, 547 U.S. at 413–14. The plaintiff contended that his employer retaliated against him in violation of the First Amendment for having written and then defended the memorandum. *Id*. at 415. The Court held in *Garcetti* that "when public employees make statements pursuant to their official duties, the employees are not speaking as citizens for First Amendment purposes, and

the Constitution does not insulate their communications from employer discipline." *Id*. at 421.

However, *Garcetti* left open the possibility of an exception. In response to a concern expressed by Justice Souter in dissent, the Court reserved the question whether its holding applied to "speech related to scholarship or teaching." *Id.* at 425. Justice Souter had expressed concern about the potential breadth of the Court's rationale, writing, "I have to hope that today's majority does not mean to imperil First Amendment protection of academic freedom in public colleges and universities, whose teachers necessarily speak and write 'pursuant to . . . official duties.'" *Id.* at 438 (Souter, J., dissenting) (alteration in original).

Demers presents the kind of case that worried Justice Souter. Under *Garcetti*, statements made by public employees "pursuant to their official duties" are not protected by the First Amendment. 547 U.S. at 421. But teaching and academic writing are at the core of the official duties of teachers and professors. Such teaching and writing are "a special concern of the First Amendment." *Keyishian v. Bd. of Regents of the Univ. of the State of N.Y.*, 385 U.S. 589, 603 (1967). We conclude that if applied to teaching and academic writing, *Garcetti* would directly conflict with the important First Amendment values previously articulated by the Supreme Court. One of our sister circuits agrees. *See Adams v. Trs. of the Univ. of N.C.-Wilmington*, 640 F.3d 550, 562 (4th Cir. 2011) ("We are . . . persuaded that *Garcetti* would not apply in the academic context of a public university as represented by the facts of this case.").

The Supreme Court has repeatedly stressed the importance of protecting academic freedom under the First Amendment. It wrote in *Keyishian*:

> Our Nation is deeply committed to safeguarding academic freedom, which is of transcendent value to all of us and not merely to the teachers concerned. That freedom is therefore a special concern of the First Amendment, which does not tolerate laws that cast a pall of orthodoxy over the classroom. "The vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools."

Id. at 603 (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)). It had previously written to the same effect in *Sweezy v. New Hampshire*:

> The essentiality of freedom in the community of American universities is almost self-evident. . . . To impose any strait jacket upon the intellectual leaders in our colleges and universities would imperil the future of our Nation. . . . Scholarship cannot flourish in an atmosphere of suspicion and distrust. Teachers and students must always remain free to inquire, to study and to evaluate, to gain new maturity and understanding; otherwise our civilization will stagnate and die.

354 U.S. 234, 250 (1957). More recently, the Court wrote in *Grutter v. Bollinger*, "We have long recognized that, given

the important purpose of public education and the expansive freedoms of speech and thought associated with the university environment, universities occupy a special niche in our constitutional tradition." 539 U.S. 306, 329 (2003); *see also Rust v. Sullivan*, 500 U.S. 173, 200 (1991) ("[T]he university is . . . so fundamental to the functioning of our society that the Government's ability to control speech within that sphere by means of conditions attached to the expenditure of Government funds is restricted by the vagueness and overbreadth doctrines of the First Amendment.").

We conclude that *Garcetti* does not — indeed, consistent with the First Amendment, cannot — apply to teaching and academic writing that are performed "pursuant to the official duties" of a teacher and professor. We hold that academic employee speech not covered by *Garcetti* is protected under the First Amendment, using the analysis established in *Pickering*. The *Pickering* test has two parts. First, the employee must show that his or her speech addressed "matters of public concern." *Pickering*, 391 U.S. at 568; *see Connick*, 461 U.S. at 146. Second, the employee's interest "in commenting upon matters of public concern" must outweigh "the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." *Pickering*, 391 U.S. at 568; *see Cockrel v. Shelby Cnty. Sch. Dist.*, 270 F.3d 1036, 1048 (6th Cir. 2001); *Leary v. Daeschner*, 228 F.3d 729, 737 (6th Cir. 2000).

In *Pickering*, a public high school teacher wrote a letter to a local newspaper complaining about budgetary decisions made by the school district. *Pickering*, 391 U.S. at 564. The Court wrote that teachers have a First Amendment right "to comment on matters of public interest in connection with the

operation of the public schools in which they work," but that, at the same time, the rights of public school teachers are not independent of the interest of their employing school district. *Id*. at 568. The task of a court is "to arrive at a balance between the interests of the teacher, as a citizen, . . . and the interest of the State, as an employer." *Id*. The Court held in *Pickering* that "the question whether a school system requires additional funds is a matter of legitimate public concern," *id.* at 571, and that the school district did not have a sufficient interest in preventing the teacher from speaking out on this question to deprive him of his First Amendment rights. *Id.* at 572–74.

In *Connick v. Myers*, the Court returned to the question whether an employee's speech addressed a matter of public concern. The employee in *Connick* was an assistant district attorney who objected to being transferred to prosecute cases in a different section of the criminal court. 461 U.S. at 140. She circulated a questionnaire within the district attorney's office raising questions about "office transfer policy, office morale, the need for a grievance committee, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns." *Id.* at 141. The Court held that all but one of the topics in the questionnaire were not matters of public concern. With the exception of the question about pressure to work on political campaigns, the "questions reflect[ed] one employee's dissatisfaction with a transfer and an attempt to turn that displeasure into a cause célèbre." *Id.* at 148. The Court held that the question about political campaigns, however, addressed "a matter of interest to the community upon which it is essential that public employees be able to speak out freely without fear of retaliatory dismissal." *Id.* at 149.

The Court in *Connick* refined the *Pickering* analysis in two ways. First, perhaps recognizing the artificiality of characterizing an employee's speech about matters relating to his employment as merely speech "as a citizen," the Court did not insist on characterizing the *Connick* plaintiff's protected question about political campaigns as speech "as a citizen." While her question may in some sense have been speech as a citizen, it was much more directly and obviously speech as an employee. Not only did the employee circulate her questionnaire exclusively within her workplace. In addition, the clear implication from the record is that she was herself subject to pressure to work on campaigns, and that her fellow employees, to whom she sent the questionnaire, were subject to that same pressure. Second, the Court emphasized the subtlety of the balancing process, writing that "the State's burden in justifying a particular [discipline] varies depending upon the nature of the employee's expression. Although such particularized balancing is difficult, the courts must reach the most appropriate possible balance of the competing interests." *Id.* at 150.

The *Pickering* balancing process in cases involving academic speech is likely to be particularly subtle and "difficult." *Id.* The nature and strength of the public interest in academic speech will often be difficult to assess. For example, a long-running debate in university English departments concerns the literary "canon" that should have pride of place in the department's curriculum. This debate may seem trivial to some. But those who conclude that the composition of the canon is a relatively trivial matter do not take into account the importance to our culture not only of the study of literature, but also of the choice of the literature to be studied. Analogous examples could readily be drawn from philosophy, history, biology, physics, or other disciplines.

Recognizing our limitations as judges, we should hesitate before concluding that academic disagreements about what may appear to be esoteric topics are mere squabbles over jobs, turf, or ego.

The nature and strength of the interest of an employing academic institution will also be difficult to assess. Possible variations are almost infinite. For example, the nature of classroom discipline, and the part played by the teacher or professor in maintaining discipline, will be different depending on whether the school in question is a public high school or a university, or on whether the school in question does or does not have a history of discipline problems. Further, the degree of freedom an instructor should have in choosing what and how to teach will vary depending on whether the instructor is a high school teacher or a university professor. Still further, the evaluation of a professor's writing for purposes of tenure or promotion involves a judgment by the employing university about the quality of what he or she has written. Ordinarily, such a content-based judgment is anathema to the First Amendment. But in the academic world, such a judgment is both necessary and appropriate. Here too, recognizing our limitations, we should hesitate before concluding that we know better than the institution itself the nature and strength of its legitimate interests.

With the foregoing in mind, we turn to what Demers wrote.

C. *Ivory Tower*

We put to one side Demers's *Ivory Tower*. For reasons best known to himself, Demers did not put the draft introduction or any of the draft chapters of *Ivory Tower* into

the record. The only information we have about those drafts are the brief descriptions Demers provided when he applied for sabbatical and when he described his academic activities for purposes of his annual reviews, and the acknowledgments by Austin and McSweeney that they saw or read parts of those drafts. There is only one sentence in Demers's descriptions of his drafts that could conceivably have prompted any adverse reaction from defendants. In his application for sabbatical, Demers wrote, "The book contains information that is critical of the academy, including some events at Washington State University." However, Demers described no specific "events" at WSU. This is pretty thin gruel. Even assuming for the moment that defendants retaliated against Demers, he has provided insufficient information about the drafts of *Ivory Tower* to support a claim that any such retaliation resulted from those drafts. We therefore conclude that Demers has failed to establish a First Amendment violation with respect to *Ivory Tower*.

D. The Plan

1. "Speech Related to Scholarship or Teaching" Under *Garcetti*

We conclude that The 7-Step Plan prepared by Demers in connection with his official duties as a faculty member of the Murrow School was "related to scholarship or teaching" within the meaning of *Garcetti*. *See* 547 U.S. at 425. The basic thrust of the Plan may be understood from its first paragraphs:

> The relationship between mass communication programs (e.g., journalism, broadcasting, public relations, advertising)

and the academy in general has always been a rocky one. The first print journalism programs emerged in the early 1900s, mostly at Midwestern universities and colleges, and were staffed largely with teachers who had professional backgrounds (former journalists and editors). As the years passed, increasing pressure was placed on journalism and other related programs (broadcasting, public relations, advertising) to "scholarize" their faculty — that is, to hire faculty who had earned Ph.D. degrees in the social sciences and conduct research. At the same time, the programs began hiring fewer teachers with professional experience.

As the number of Ph.D.s increased, so did the tension within these departments. Some historians have referred to this as the era of the "green eyeshades" versus the "chi-squares." Not unexpectedly, at larger research-oriented universities, the Ph.D.s won the battle and today most of the faculty teaching in mass communication programs at research-oriented universities have the Ph.D.

Needless to say, this turn of events alienated many professionals and media-related businesses. Students were required to take more theory and conceptual courses and fewer skills-based courses, such as writing and reporting. Professionals complained more and more that the writing skills of university graduates were declining. The close

> relationship universities once had with the professional community was disappearing.

The Plan proposed seven steps that would increase the influence of professionals and reduce the influence of Ph.Ds within the Murrow School. Those steps were:

> 1. Separate the mass communication program from the communication studies program at WSU — i.e., create two separate units. . . .
>
> 2. Hire a director of the Edward R. Murrow School of Communication who has a strong professional background. . . .
>
> 3. Create an Edward R. Murrow Center for Media Research that conducts joint research projects with the professional community. . . .
>
> 4. Give professionals an active (rather than the current passive) role in the development of the curriculum in the School. . . .
>
> 5. Give professional faculty a more active role in the development of the undergraduate curriculum for mass communication students. . . .
>
> 6. Seek national accreditation for the "new" mass communication program. . . .
>
> 7. Hire more professional faculty with substantial work experience. . . .

In Demers's view, the teaching of mass communications had lost a critical connection to the real world of professional communicators. His Plan, if implemented, would restore that connection and would, in his view, greatly improve the education of mass communications students at the Murrow School. It may in some cases be difficult to distinguish between what qualifies as speech "related to scholarship or teaching" within the meaning of *Garcetti*. But this is not such a case. The 7-Step Plan was not a proposal to allocate one additional teaching credit for teaching a large class instead of a seminar, to adopt a dress code that would require male teachers to wear neckties, or to provide a wider range of choices in the student cafeteria. Instead, it was a proposal to implement a change at the Murrow School that, if implemented, would have substantially altered the nature of what was taught at the school, as well as the composition of the faculty that would teach it.

2. Matter of Public Concern Under *Pickering*

The first step in determining whether the Plan is protected under the First Amendment is to determine whether it addressed a matter of public concern. Whether speech is a matter of public concern under *Pickering* is a matter of law that we review de novo. *Berry v. Dep't of Soc. Servs.*, 447 F.3d 642, 648 (9th Cir. 2006). The plaintiff bears the burden of showing that his or her speech addresses an issue of public concern. *Eng v. Cooley*, 552 F.3d 1062, 1071 (9th Cir. 2009).

"Speech involves a matter of public concern when it can fairly be considered to relate to 'any matter of political, social, or other concern to the community.'" *Johnson v. Multnomah Cnty.*, 48 F.3d 420, 422 (9th Cir. 1995) (quoting

Connick, 461 U.S. at 146). The "essential question is whether the speech addressed matters of public as opposed to personal interest." *Desrochers v. City of San Bernardino*, 572 F.3d 703, 709 (9th Cir. 2009) (internal quotation marks and citation omitted). Public interest is "defined broadly." *Ulrich v. City & Cnty. of S.F.*, 308 F.3d 968, 978 (9th Cir. 2002). We have adopted a "liberal construction of what an issue of public concern is under the First Amendment." *Roe v. City & Cnty. of S.F.*, 109 F.3d 578, 586 (9th Cir. 1997) (internal quotation marks omitted). We consider "the content, form, and context of a given statement, as revealed by the whole record." *Connick*, 461 U.S. at 147–48. Of these, content is the most important factor. *Desrochers*, 572 F.3d at 710.

We begin by noting two obvious points. First, not all speech by a teacher or professor addresses a matter of public concern. Teachers and professors, like other public employees, speak and write on purely private matters. If a publicly employed professor speaks or writes about what is "properly viewed as essentially a private grievance," *Roe*, 109 F.3d at 585, the First Amendment does not protect him or her from any adverse reaction. Second, protected academic writing is not confined to scholarship. Much academic writing is, of course, scholarship. But academics, in the course of their academic duties, also write memoranda, reports, and other documents addressed to such things as a budget, curriculum, departmental structure, and faculty hiring. Depending on its scope and character, such writing may well address matters of public concern under *Pickering*. Indeed, in *Pickering* itself the teacher's protected letter to the newspaper addressed operational and budgetary concerns of the school district. The Court in *Pickering* noted that the letter addressed "the preferable manner of operating the school system," which "clearly concerns an issue of general

public interest." 391 U.S. at 571. Further, the Court wrote that "the question whether a school system requires additional funds is a matter of legitimate public concern." *Id*.

Demers described his Plan on its cover as a "7-Step Plan for Making the Edward R. Murrow School of Communication Financially Independent." The first page of the Plan gave an abbreviated history of "mass communications programs . . . and the academy in general," and placed the communications program at WSU in the broader context of similar programs at other universities. The second page recommended seven steps for improving the communications program at WSU. Demers's Plan did not focus on a personnel issue or internal dispute of no interest to anyone outside a narrow "bureaucratic niche." *Tucker v. Cal. Dep't of Educ.*, 97 F.3d 1204, 1210 (9th Cir. 1996) (citation omitted); *see Desrochers*, 572 F.3d at 713. Nor did the Plan address the role of particular individuals in the Murrow School, or voice personal complaints. Rather, the Plan made broad proposals to change the direction and focus of the School. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1263 (10th Cir. 2005) (holding that a professor's critiques of a plan to move the medical school "addressing the use of public funds and regarding the objectives, purposes and mission of the University of Colorado and its medical school fall well within the rubric of 'matters of public concern'"). The importance of the proposed steps in Demers's Plan is suggested by the fact that the Murrow School had appointed a "Structure Committee," of which Demers was a member, to address some of the very issues addressed in Demers's Plan.

The manner in which the Plan was distributed reinforces the conclusion that it addressed matters of public concern. If an employee expresses a grievance to a limited audience,

such circulation can suggest a lack of public concern. *See Desrochers*, 572 F.3d at 713–14. But limited circulation is not, in itself, determinative, as may be seen in *Connick* where the questionnaire was distributed only within the employee's office. *See* 461 U.S. at 141. Here, Demers sent the Plan to the President and Provost of WSU, to members of the Murrow School's Professional Advisory Board, to other faculty members, to alumni, to friends, and to newspapers. He posted the Plan on his website, making it available to the public.

There may be some instances in which speech about academic organization and governance does not address matters of public concern. *See, e.g.*, *Brooks v. Univ. of Wis. Bd. of Regents*, 406 F.3d 476, 480 (7th Cir. 2005) (objections by professors against the closing of their laboratories and study programs represented "a classic personnel struggle — infighting for control of a department — which is not a matter of public concern"); *Clinger v. N.M. Highlands Univ., Bd. of Regents*, 215 F.3d 1162, 1166 (10th Cir. 2000) (no matter of public concern where professor publicly disagreed with the Board of Trustees "on the internal process they followed in selecting a president and reorganizing the University"). But this is not such a case. Demers's Plan contained serious suggestions about the future course of an important department of WSU, at a time when the Murrow School itself was debating some of those very suggestions. We therefore conclude that the Plan addressed a matter of public concern within the meaning of *Pickering*.

E. Remaining Issues on the Merits

Based on its holding that Demers's Plan did not address a matter of public concern, the district court granted summary

judgment to defendants. As to the three questions it would have had to reach had it held otherwise, the district court wrote that there were questions of material fact. Those questions were whether defendants had a sufficient interest in controlling or sanctioning Demers's circulation of the Plan to deprive it of First Amendment protection; whether, if the Plan was protected speech under the First Amendment, its circulation was a substantial or motivating factor in any adverse employment action defendants might have taken; and whether defendants would have taken such employment action absent the protected speech. *See Anthoine v. N. Cent. Cntys. Consortium*, 605 F.3d 740, 748 (9th Cir. 2010). The district court may address those questions, as appropriate, on remand.

F. Qualified Immunity and Prospective Relief

Defendants are entitled to qualified immunity, even if they violated Demers's First Amendment rights, if they reasonably could have believed that their conduct was lawful "in light of clearly established law and the information [that they] possessed." *Cohen v. San Bernardino Valley Coll.*, 92 F.3d 968, 973 (9th Cir. 1996) (alteration in original) (quoting *Baker v. Racansky*, 887 F.2d 183, 187 (9th Cir. 1989)). A right is clearly established when the contours of the right are "'sufficiently clear' that every 'reasonable official would have understood that what he is doing violates that right.'" *Karl v. City of Mountlake Terrace*, 678 F.3d 1062, 1073 (9th Cir. 2012) (quoting *Ashcroft v. al-Kidd*, 131 S. Ct. 2074, 2083 (2011)).

Until the decision in this case, our circuit has not addressed the application of *Garcetti* to teaching and academic writing. In *Adams*, after the Fourth Circuit held

that *Garcetti* did not apply, it considered whether defendants had qualified immunity in light of "the uncertain state of the law in the area of what protection should be afforded to public university teacher's speech following *Garcetti*." *Adams*, 640 F.3d at 565. The court held that the professor's First Amendment rights were clearly established in the Fourth Circuit, and it denied qualified immunity. *Id*. at 565–66; *see also Karl*, 678 F.3d at 1074 (denying qualified immunity in a *Garcetti* case in light of clear in-circuit precedent). However, because there is no Ninth Circuit law on point to inform defendants about whether or how *Garcetti* might apply to a professor's academic speech, we cannot say that the contours of the right in this circuit were "sufficiently clear that every reasonable official would have understood" that this conduct violated that right. *Id.* at 1073 (internal quotation marks omitted). We therefore hold that defendants are entitled to qualified immunity.

Qualified immunity of course does not preclude injunctive relief. Should the district court determine that Demers's First Amendment rights were violated, it may still grant injunctive relief to the degree it is appropriate. *Presbyterian Church (U.S.A.) v. United States*, 870 F.2d 518, 527 (9th Cir. 1989) ("Qualified immunity is an affirmative defense to damage liability; it does not bar actions for declaratory or injunctive relief." (citing *Harlow v. Fitzgerald*, 457 U.S. 800, 815 (1982))).

Conclusion

We hold that there is an exception to *Garcetti* for teaching and academic writing. We affirm the district court's determination that Demers prepared and circulated his Plan pursuant to official duties, but we reverse its determination

that the Plan does not address matters of public concern. We hold that defendants are entitled to qualified immunity. We remand for further proceedings consistent with this opinion.

The parties shall bear their own costs.

AFFIRMED in part, REVERSED in part, and REMANDED.

543 U.S. 77 (2004)

CITY OF SAN DIEGO ET AL.
v.
ROE

No. 03-1669.

Supreme Court of United States.

Decided December 6, 2004.

ON PETITION FOR CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

78 *78 PER CURIAM.

The city of San Diego (City), a petitioner here, terminated a police officer, respondent, for selling videotapes he made and for related activity. The tapes showed the respondent engaging in sexually explicit acts. Respondent brought suit alleging, among other things, that the termination violated his First and Fourteenth Amendment rights to freedom of speech. The United States District Court for the Southern District of California granted the City's motion to dismiss. The Court of Appeals for the Ninth Circuit reversed.

The petition for a writ of certiorari is granted, and the judgment of the Court of Appeals is reversed.

I

Respondent John Roe, a San Diego police officer, made a video showing himself stripping off a police uniform and masturbating. He sold the video on the adults-only section of eBay, the popular online auction site. His user name was "Code3stud@aol.com," a word play on a high priority police radio call. 356 F.3d 1108, 1110 (CA9 2004). The uniform apparently was not the specific uniform worn by the San Diego police, but it was clearly identifiable as a police uniform. Roe also sold custom videos, as well as police equipment, including official uniforms of the San Diego Police Department (SDPD), and various other items such as men's underwear. Roe's eBay user profile identified him as employed in the field of law enforcement.

Roe's supervisor, a police sergeant, discovered Roe's activities when, while on eBay, he came across an official SDPD police uniform for sale offered by an individual with the user-name "Code3stud@aol.com." He searched for other items Code3stud offered and discovered listings for Roe's videos depicting the objectionable material. Recognizing Roe's picture, the sergeant printed images of certain of Roe's offerings and shared them with others in Roe's chain of
79 command, including a police captain. The captain notified the SDPD's *79 internal affairs department, which began an investigation. In response to a request by an undercover officer, Roe produced a custom video. It showed Roe, again in police uniform, issuing a traffic citation but revoking it after undoing the uniform and masturbating.

The investigation revealed that Roe's conduct violated specific SDPD policies, including conduct unbecoming of an officer, outside employment, and immoral conduct. When confronted, Roe admitted to selling the videos and police paraphernalia. The SDPD ordered Roe to "cease displaying, manufacturing, distributing or selling any sexually explicit materials or engaging in any similar behaviors, via the internet, U. S. Mail, commercial vendors or distributors, or any other medium available to the public." *Id.,* at 1111 (internal quotation marks omitted). Although Roe removed some of the items he had offered for sale, he did not change his seller's profile, which described the first two videos he had produced and listed their prices as well as the prices for custom videos. After discovering Roe's failure to follow its orders, the SDPD—citing Roe for the added violation of disobedience of lawful orders—began termination proceedings. The proceedings resulted in Roe's dismissal from the police force.

Roe brought suit in the District Court pursuant to Rev. Stat. § 1979, 42 U. S. C. § 1983, alleging that the employment termination violated his First Amendment right to free speech. In granting the City's motion to dismiss, the District Court decided that Roe had not demonstrated that selling official police uniforms and producing, marketing, and selling sexually explicit videos for profit qualified as expression relating to a matter of "public concern" under this Court's decision in *Connick* v. *Myers,* 461 U. S. 138 (1983).

In reversing, the Court of Appeals held Roe's conduct fell within the protected category of citizen commentary on matters of public concern. Central to the Court of Appeals' conclusion was that Roe's expression was not an internal workplace
80 *80 grievance, took place while he was off duty and away from his employer's premises, and was unrelated to his employment. 356 F.3d, at 1110, 1113-1114.

II

A government employee does not relinquish all First Amendment rights otherwise enjoyed by citizens just by reason of his or her employment. See, *e. g., Keyishian* v. *Board of Regents of Univ. of State of N. Y.*, 385 U. S. 589, 605-606 (1967). On the other hand, a governmental employer may impose certain restraints on the speech of its employees, restraints that would be unconstitutional if applied to the general public. The Court has recognized the right of employees to speak on matters of public concern, typically matters concerning government policies that are of interest to the public at large, a subject on which public employees are uniquely qualified to comment. See *Connick, supra; Pickering* v. *Board of Ed. of Township High School Dist. 205, Will Cty.*, 391 U. S. 563 (1968). Outside of this category, the Court has held that when government employees speak or write on their own time on topics unrelated to their employment, the speech can have First Amendment protection, absent some governmental justification "far stronger than mere speculation" in regulating it. *United States* v. *Treasury Employees,* 513 U. S. 454, 465, 475 (1995) (*NTEU*). We have little difficulty in concluding that the City was not barred from terminating Roe under either line of cases.

A

In concluding that Roe's activities qualified as a matter of public concern, the Court of Appeals relied heavily on the Court's decision in *NTEU.* 356 F.3d, at 1117. In *NTEU* it was established that the speech was unrelated to the employment and had no effect on the mission and purpose of the employer. The question was whether the Federal
81 Government could impose certain monetary limitations on outside *81 earnings from speaking or writing on a class of federal employees. The Court held that, within the particular classification of employment, the Government had shown no justification for the outside salary limitations. The First Amendment right of the employees sufficed to invalidate the restrictions on the outside earnings for such activities. The Court noted that throughout history public employees who undertook to write or to speak in their spare time had made substantial contributions to literature and art, 513 U. S., at 465, and observed that none of the speech at issue "even arguably [had] any adverse impact" on the employer, *ibid.*

The Court of Appeals' reliance on *NTEU* was seriously misplaced. Although Roe's activities took place outside the workplace and purported to be about subjects not related to his employment, the SDPD demonstrated legitimate and substantial interests of its own that were compromised by his speech. Far from confining his activities to speech unrelated to his employment, Roe took deliberate steps to link his videos and other wares to his police work, all in a way injurious to his employer. The use of the uniform, the law enforcement reference in the Web site, the listing of the speaker as "in the field of law enforcement," and the debased parody of an officer performing indecent acts while in the course of official duties brought the mission of the employer and the professionalism of its officers into serious disrepute. 356 F. 3d, at 1111 (internal quotation marks omitted).

The Court of Appeals noted the City conceded Roe's activities were "unrelated" to his employment. *Id.,* at 1112, n. 4. In the context of the pleadings and arguments, the proper interpretation of the City's statement is simply to underscore the obvious proposition that Roe's speech was not a comment on the workings or functioning of the SDPD. It is quite a different question whether the speech was detrimental to the SDPD. On that score the City's consistent position has

been that the speech is contrary to its regulations and harmful to the proper functioning of the police force. The present
82 *82 case falls outside the protection afforded in *NTEU.* The authorities that instead control, and which are considered below, are this Court's decisions in *Pickering, supra*, *Connick, supra*, and the decisions which follow them.

B

To reconcile the employee's right to engage in speech and the government employer's right to protect its own legitimate interests in performing its mission, the *Pickering* Court adopted a balancing test. It requires a court evaluating restraints on a public employee's speech to balance "the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees." 391 U. S., at 568; see also *Connick, supra*, at 142.

Underlying the decision in *Pickering* is the recognition that public employees are often the members of the community who are likely to have informed opinions as to the operations of their public employers, operations which are of substantial concern to the public. Were they not able to speak on these matters, the community would be deprived of informed opinions on important public issues. See 391 U. S., at 572. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it.

Pickering did not hold that any and all statements by a public employee are entitled to balancing. To require *Pickering* balancing in every case where speech by a public employee is at issue, no matter the content of the speech, could compromise the proper functioning of government offices. See *Connick*, 461 U. S., at 143. This concern prompted the Court in *Connick* to explain a threshold inquiry (implicit in *Pickering* itself) that in order to merit *Pickering* balancing, a
83 public employee's speech must touch on a matter of "public *83 concern." 461 U. S., at 143 (internal quotation marks omitted).

In *Connick,* an assistant district attorney, unhappy with her supervisor's decision to transfer her to another division, circulated an intraoffice questionnaire. The document solicited her co-workers' views on, *inter alia,* office transfer policy, office morale, the need for grievance committees, the level of confidence in supervisors, and whether employees felt pressured to work in political campaigns. See *id.,* at 141.

Finding that—with the exception of the final question—the questionnaire touched not on matters of public concern but on internal workplace grievances, the Court held no *Pickering* balancing was required. 461 U. S., at 141. To conclude otherwise would ignore the "common-sense realization that government offices could not function if every employment decision became a constitutional matter." *Id.,* at 143. *Connick* held that a public employee's speech is entitled to *Pickering* balancing only when the employee speaks "as a citizen upon matters of public concern" rather than "as an employee upon matters only of personal interest." 461 U. S., at 147.

Although the boundaries of the public concern test are not well defined, *Connick* provides some guidance. It directs courts to examine the "content, form, and context of a given statement, as revealed by the whole record" in assessing whether an employee's speech addresses a matter of public concern. *Id.,* at 146-147. In addition, it notes that the standard for determining whether expression is of public concern is the same standard used to determine whether a common-law action for invasion of privacy is present. *Id.,* at 143, n. 5. That standard is established by our decisions in *Cox Broadcasting Corp.* v. *Cohn,* 420 U. S. 469 (1975), and *Time, Inc.* v. *Hill,* 385 U. S. 374, 387-388 (1967). These
84 cases make clear that public concern is something that is a *84 subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public at the time of publication. The Court has also recognized that certain private remarks, such as negative comments about the President of the United States, touch on matters of public concern and should thus be subject to *Pickering* balancing. See *Rankin* v. *McPherson,* 483 U. S. 378 (1987).

Applying these principles to the instant case, there is no difficulty in concluding that Roe's expression does not qualify as a matter of public concern under any view of the public concern test. He fails the threshold test and *Pickering* balancing does not come into play.

Connick is controlling precedent, but to show why this is not a close case it is instructive to note that even under the view expressed by the dissent in *Connick* from four Members of the Court, the speech here would not come within the definition of a matter of public concern. The dissent in *Connick* would have held that the entirety of the questionnaire circulated by the employee "discussed subjects that could reasonably be expected to be of interest to persons seeking to develop informed opinions about the manner in which . . . an elected official charged with managing a vital governmental agency, discharges his responsibilities." 461 U. S., at 163 (opinion of Brennan, J.). No similar purpose could be attributed to the employee's speech in the present case. Roe's activities did nothing to inform the public about any aspect of the SDPD's functioning or operation. Nor were Roe's activities anything like the private remarks at issue in *Rankin,* where one co-worker commented to another co-worker on an item of political news. Roe's expression was widely broadcast, linked to his official status as a police officer, and designed to exploit his employer's image.

The speech in question was detrimental to the mission and functions of the employer. There is no basis for finding that
85 it was of concern to the community as the Court's cases have *85 understood that term in the context of restrictions by governmental entities on the speech of their employees.

The judgment of the Court of Appeals is

Reversed.

LABOR CODE - LAB

DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS [50 - 176] *(Division 1 enacted by Stats. 1937, Ch. 90.)*

CHAPTER 4. Division of Labor Standards Enforcement [79 - 107] *(Heading of Chapter 4 amended by Stats. 1976, Ch. 746.)*

96. The Labor Commissioner and his or her deputies and representatives authorized by him or her in writing shall, upon the filing of a claim therefor by an employee, or an employee representative authorized in writing by an employee, with the Labor Commissioner, take assignments of:

(a) Wage claims and incidental expense accounts and advances.

(b) Mechanics' and other liens of employees.

(c) Claims based on "stop orders" for wages and on bonds for labor.

(d) Claims for damages for misrepresentations of conditions of employment.

(e) Claims for unreturned bond money of employees.

(f) Claims for penalties for nonpayment of wages.

(g) Claims for the return of workers' tools in the illegal possession of another person.

(h) Claims for vacation pay, severance pay, or other compensation supplemental to a wage agreement.

(i) Awards for workers' compensation benefits in which the Workers' Compensation Appeals Board has found that the employer has failed to secure payment of compensation and where the award remains unpaid more than 10 days after having become final.

(j) Claims for loss of wages as the result of discharge from employment for the garnishment of wages.

(k) Claims for loss of wages as the result of demotion, suspension, or discharge from employment for lawful conduct occurring during nonworking hours away from the employer's premises.

(Amended by Stats. 1999, Ch. 692, Sec. 2. Effective January 1, 2000.)

LABOR CODE - LAB

DIVISION 1. DEPARTMENT OF INDUSTRIAL RELATIONS [50 - 176] *(Division 1 enacted by Stats. 1937, Ch. 90.)*

CHAPTER 4. Division of Labor Standards Enforcement [79 - 107] *(Heading of Chapter 4 amended by Stats. 1976, Ch. 746.)*

98.6. (a) A person shall not discharge an employee or in any manner discriminate, retaliate, or take any adverse action against any employee or applicant for employment because the employee or applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee or applicant for employment has filed a bona fide complaint or claim or instituted or caused to be instituted any proceeding under or relating to his or her rights that are under the jurisdiction of the Labor Commissioner, made a written or oral complaint that he or she is owed unpaid wages, or because the employee has initiated any action or notice pursuant to Section 2699, or has testified or is about to testify in a proceeding pursuant to that section, or because of the exercise by the employee or applicant for employment on behalf of himself, herself, or others of any rights afforded him or her.

(b) (1) Any employee who is discharged, threatened with discharge, demoted, suspended, retaliated against, subjected to an adverse action, or in any other manner discriminated against in the terms and conditions of his or her employment because the employee engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the employee has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to reinstatement and reimbursement for lost wages and work benefits caused by those acts of the employer.

(2) An employer who willfully refuses to hire, promote, or otherwise restore an employee or former employee who has been determined to be eligible for rehiring or promotion by a grievance procedure, arbitration, or hearing authorized by law, is guilty of a misdemeanor.

(3) In addition to other remedies available, an employer who violates this section is liable for a civil penalty not exceeding ten thousand dollars ($10,000) per employee for each violation of this section.

(c) (1) Any applicant for employment who is refused employment, who is not selected for a training program leading to employment, or who in any other manner is discriminated against in the terms and conditions of any offer of employment because the applicant engaged in any conduct delineated in this chapter, including the conduct described in subdivision (k) of Section 96, and Chapter 5 (commencing with Section 1101) of Part 3 of Division 2, or because the applicant has made a bona fide complaint or claim to the division pursuant to this part, or because the employee has initiated any action or notice pursuant to Section 2699 shall be entitled to employment and reimbursement for lost wages and work benefits caused by the acts of the prospective employer.

(2) This subdivision shall not be construed to invalidate any collective bargaining agreement that requires an applicant for a position that is subject to the collective bargaining agreement to sign a contract that protects either or both of the following as specified in subparagraphs (A) and (B), nor shall this subdivision be construed to

invalidate any employer requirement of an applicant for a position that is not subject to a collective bargaining agreement to sign an employment contract that protects either or both of the following:

(A) An employer against any conduct that is actually in direct conflict with the essential enterprise-related interests of the employer and where breach of that contract would actually constitute a material and substantial disruption of the employer's operation.

(B) A firefighter against any disease that is presumed to arise in the course and scope of employment, by limiting his or her consumption of tobacco products on and off the job.

(d) The provisions of this section creating new actions or remedies that are effective on January 1, 2002, to employees or applicants for employment do not apply to any state or local law enforcement agency, any religious association or corporation specified in subdivision (d) of Section 12926 of the Government Code, except as provided in Section 12926.2 of the Government Code, or any person described in Section 1070 of the Evidence Code.

(Amended by Stats. 2013, Ch. 732, Sec. 2. Effective January 1, 2014.)

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IN THE CIRCUIT COURT OF THE STATE OF OREGON

FOR THE COUNTY OF MULTNOMAH

04734

JANE DOE,

Plaintiff,

vs.

Simon P. Green and American Medical Response Northwest, Inc., doing business as American Medical Response (AMR),

Defendants.

Case No.: **0704-04734**

COMPLAINT AND DEMAND FOR JURY TRIAL

NEGLIGENCE (breach of duty) and BREACH OF CONFIDENTIALITY (breach of duty)

Not subject to mandatory arbitration

Plaintiff alleges:

PRELIMINARY STATEMENT

1.

This is a claim brought by the plaintiff for negligence (breach of duty) and breach of confidentiality (breach of duty) against both defendants. The plaintiff's claims arise from the defendants' failure to protect the privacy of her protected health information and their breach of her confidences. The defendants' conduct has caused the plaintiff non-economic damages in the form of emotional distress, physical illness, and loss of sleep, memory and concentration, and economic damages in the form of expenses incurred because she missed work, had to obtain counseling and had to move due, in part, to the defendants' conduct.

PARTIES

2.

The plaintiff Jane Doe resides in Portland, Multnomah County, Oregon.

3.

The defendant Simon P. Green, hereafter Green, resides in Portland, Multnomah County, Oregon.

4.

The defendant American Medical Response Northwest, Inc., doing business as American Medical Response (AMR), hereafter "AMR," is a corporation whose principal place of business is in Portland, Multnomah County, Oregon.

JURISDICTION AND VENUE

5.

All of the claims giving rise to this action accrued in Portland, Multnomah County, Oregon. AMR engages in regular, sustained business in Portland, Multnomah County, Oregon. Green and the plaintiff both reside in Portland, Multnomah County, Oregon.

6.

The plaintiff's claims are based on state law. The plaintiff makes no federal claims.

JOINDER OF DEFENDANTS

7.

The plaintiff's right to relief arises out of the same occurrence and involves at least one common question of fact or law.

ALLEGATIONS OF FACT

8.

A right to medical patient privacy existed at common law at all times relevant to this complaint.

9.

A federal rule that requires covered entities and their employees to restrict disclosure of protected health information also was in effect at all times relevant to this complaint. This rule is known as the "HIPAA Privacy Rule." (45 CFR Section 164.502).

10.

An Oregon law (hereafter, "the Oregon law") that generally exempts "information of a personal nature" – such as that kept in a medical file – from disclosure as a public record if public disclosure would constitute "an unreasonable invasion of privacy" also was in effect at all times relevant to this complaint." (ORS 192.502.)

11.

"The Oregon law" states that "it is the policy of the State of Oregon that an individual has the right to have protected health information of the individual safeguarded from unlawful use or disclosure." (ORS 192.518(1)).

12.

"The Oregon law" incorporated "the HIPAA Privacy Rule" into Oregon law. (ORS 192.518(2).)

13.

The defendant AMR and its employees were covered by "the HIPAA Privacy Rule."

14.

The defendant Green was employed by AMR at all times relevant to this complaint as an Emergency Medical Technician (EMT) paramedic.

15.

Green was acting within the scope of his agency or employment with AMR at all times relevant to this complaint.

16.

The defendants' job duties included providing for the plaintiff's needs, safety and comfort; obtaining medical and other personal and confidential information from her for these purposes; and respecting her dignity.

17.

Under "the HIPAA Privacy Rule," protected health information includes individually identifiable information that is received by a covered entity and its employees and that relates to the past or present physical or mental health or condition of an individual and/or the provision of health care to an individual.

18.

Under "the HIPAA Privacy Rule," information need not be labeled with an individual's name to be identifiable.

19.

One of the purposes of "the HIPAA Privacy Rule" is to protect patients from emotional distress caused by unauthorized disclosure of their protected health information.

20.

On Feb. 15, 2007, the plaintiff was raped and beaten by a stranger at her apartment in Southeast Portland.

21.

AMR, which has an exclusive contract with Multnomah County to provide emergency ambulance services throughout the county, and Green were dispatched from their location in Southeast Portland to aid the plaintiff.

22.

It was reasonably foreseeable that the defendants would come into contact with the plaintiff.

23.

The defendants used their positions to gain the trust and confidence of the plaintiff and of the Portland Police Bureau officers who also had been dispatched to aid her.

24.

The defendants obtained protected health information and other personal and confidential information from the plaintiff as a result of the trust and confidence that she and the police officers had in the defendants.

25.

As the defendants drove the plaintiff from her residence to the hospital, Green kept telling the plaintiff how horrible the assault on her was and how he had "never seen anything like this." As the defendants delivered the plaintiff to the hospital, Green told the plaintiff that she was at a private entrance and that "No media will see you coming in; no one will ever know that you came in."

26.

The Portland Police Bureau, which is investigating the assault on the plaintiff, did not release the facts pertaining to the assault or the plaintiff's protected health information or other personal and confidential information to the media prior to March 4, 2007.

27.

On or about March 4, 2007, Green posted the following information on "MySpace," which is an internet site for online conversations: "Three weeks ago I took a lady our age to the hospital after being raped at knife point, by a caucasion [sic] male of average build. The eerie thing here is that we took a female cop with us to the hospital and the victim could only keep stating on [sic] how green her assailant's eyes were when asked to describe him. This took place at approximately 30th and stark [sic] at about 1 am. Additionally her description was very detailed considering the horrible event. Black ski mask, two pairs of gloves, very yellow teeth.

whispered all commands, smelled of bourbon and cigarettes. He followed her in her apartment while she was outside smoking a cig, raped her and forced her to shower in front of her [sic]. All told he was in her apartment about an hour, and this very pretty, otherwise normal woman's life is irrepprably [sic] changed. My advice: fight. It's only a knife, and any rapist is a coward who will probably turn tail at any resistance. Also, I know you are all total firearms enthusiasts, but the glock 26 is an absolutely reliable, tough, subcompact 10 round 9 mm which would look great in your purse, for around 300 bones."

28.

Green's posting was preceded by a posting identifying him as a "paramedic."

29.

Green posted the information from his residence in Southeast Portland.

30.

All of the information posted by Green was obtained while he was doing acts that AMR had hired him to do.

31.

As a result of reading Green's posting on MySpace, other people began doing "personal recon [recognizance]" of the plaintiff's neighborhood to look for someone who matched his posted description of the assailant.

32.

Green told Det. Susan Fachini of the Portland Police Bureau, who is investigating the assault, that he knew the information he posted on MySpace concerning the plaintiff was confidential but that he did not think it was a violation of confidentiality law because he didn't use the plaintiff's name. Det. Fachini told Green that the information he posted on MySpace about the suspect being armed and wearing two pairs of gloves; having green eyes and very yellow teeth and whispering commands was information that she did not want released and

and whose release could compromise the investigation. Det. Fachini explained to Green that if a suspect could be identified, these would be crucial pieces of evidence and would link the suspect to the crime. Det. Fachini explained to Green that she could have prepared an affidavit for a warrant to search a potential suspect's residence to look for the physical items. Det. Fachini explained to Green that if the plaintiff's assailant saw Green's MySpace posting or was alerted by the neighborhood reconnaissance, he could destroy the evidentiary items. Green told Det. Fachini he was sorry and explained that he was only trying to "get the word out" so other women would have an opportunity to protect themselves. Det. Fachini told Green the plaintiff had an expectation of privacy while she was riding in the ambulance. Green again apologized and said, "Great. I guess I'm going to get fired and sued."

33.

The Portland Police Bureau was relying on the assailant's retention of physical evidence related to his assault on the plaintiff, including but not limited to the ski mask, latex and cloth gloves, possible green contact lenses and pistol and the assailant's remaining or returning to the area of the assault to solve this crime.

34.

As a result of Green's posting on MySpace, the Portland Police Bureau detectives assigned to the plaintiff's case fear that the assailant may have destroyed physical evidence related to his assault on the plaintiff and fled the area.

35.

As a result of Green's posting on MySpace and the subsequent neighborhood reconnaissance, Det. Fachini told the plaintiff that the investigation has been severely compromised and that her assailant may never be identified or prosecuted.

36.

As a result of Green's posting on MySpace, the media contacted the plaintiff to question her about the assault.

37.

As a result of Green's posting on MySpace, the subsequent media contacts and the assault itself, the plaintiff was forced to move from her residence.

38.

AMR's stated "mission" is to "...make a difference by caring for people in need."

39.

AMR's stated values include "...treat[ing] our patients like members of our own families" and "...respect[ing] the dignity of each patient."

40.

AMR's stated values include "...be[ing] empowered to make a difference in the world."

41.

Green's act of posting the plaintiff's protected health information and other personal and confidential information on MySpace was committed substantially within the time and space limits authorized by his employment as a paramedic for AMR; was motivated, at least partially, by a purpose to serve his employer AMR; and was of a kind that he was hired to perform as a paramedic for AMR.

42.

The plaintiff did not consent to Green's posting of her protected health information and other personal and confidential information.

43.

As a result of the defendants' conduct, the plaintiff has suffered non-economic damages in the form of emotional distress, physical illness, and loss of sleep, memory and concentration.

She has suffered economic damages in the form of expenses incurred because she missed work, had to obtain counseling and had to move.

FIRST CLAIM: NEGLIGENCE

(Common Law Negligence, Breach of Duty)

44.

The plaintiff incorporates paragraphs 1-43.

45.

The defendants had the duty to provide the plaintiffs with reasonable care.

46.

The defendants further had a duty to protect the plaintiff from the unauthorized disclosure of her protected health information and other personal and confidential information and the emotional distress resulting from such disclosure.

47.

Green breached this duty by posting the plaintiff's protected health information and other personal and confidential information on the MySpace internet site.

48.

AMR breached this duty by:

1) negligently hiring Green;

2) negligently failing to train Green on the requirements of HIPAA and of maintaining the confidentiality of a patient's protected health information and other personal and confidential information;

2) negligently supervising Green.

49.

The defendants' negligence is the sole proximate cause of the plaintiff's non-economic and economic injuries.

50.

The plaintiff's injuries were foreseeable to the defendants.

SECOND CLAIM: BREACH OF CONFIDENTIALITY

(Breach of Duty)

51.

The plaintiff incorporates paragraphs 1-50.

52.

The defendants had a duty to protect the plaintiff from the unconsented, unprivileged disclosure, to a third party, of non-public information concerning the plaintiff that the defendants learned within their confidential relationship with the plaintiff.

53.

Green breached this duty by posting the plaintiff's nonpublic information on the MySpace internet site.

54.

AMR breached this duty by:

1) negligently hiring Green;

2) negligently failing to train Green on the necessity of not disclosing a patient's nonpublic information to a third party without the patient's consent;

2) negligently supervising Green.

WHEREFORE, the plaintiff seeks relief against the defendants as follows:

a) On her claim of negligence (breach of duty), compensation for her non-economic damages in the amount of $500,000;

b) On her claim of negligence (breach of duty) compensation for her economic damages in an amount to be proven at trial;

c) On her claim of breach of confidentiality (breach of duty), compensation for her non-economic damages in the amount of $500,000;

d) On her claim for breach of confidentiality (breach of duty), compensation for her economic damages in an amount to be proven at trial;

e) On all of her claims, compensation for her attorney's fees, filing fees and other costs incurred as a result of this action, in amounts to be proven at trial;

f) Judgment in her favor; and

g) Any other compensation or relief that the court deems just.

The plaintiff demands a jury trial.

Dated April 26, 2007.

Respectfully submitted,

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191 Cal.App.4th 1047 (2011)

GINA M. HOLMES, Plaintiff and Appellant,

v.

PETROVICH DEVELOPMENT COMPANY, LLC, et al., Defendants and Respondents.

No. C059133.

Court of Appeals of California, Third District.

January 13, 2011.

1050 *1050 Law Offices of Joanna R. Mendoza and Joanna R. Mendoza, for Plaintiff and Appellant.

Perkins & Associates and Robin K. Perkins, for Defendants and Respondents.

1051 *1051 # OPINION

SCOTLAND, J.[*]

Plaintiff Gina M. Holmes appeals from the judgment entered in favor of defendants Petrovich Development Company, LLC, and Paul Petrovich in her lawsuit for sexual harassment, retaliation, wrongful termination, violation of the right to privacy, and intentional infliction of emotional distress.[1] She contends that the trial court erred in granting defendants' motion for summary adjudication with respect to the causes of action for discrimination, retaliation, and wrongful termination, and that the jury's verdict as to the remaining causes of action must be reversed due to evidentiary and instructional errors. We disagree and shall affirm the judgment.

Among other things, we conclude that e-mails sent by Holmes to her attorney regarding possible legal action against defendants did not constitute "`confidential communication between client and lawyer'" within the meaning of Evidence Code section 952. This is so because Holmes used a computer of defendant company to send the e-mails even though (1) she had been told of the company's policy that its computers were to be used only for company business and that employees were prohibited from using them to send or receive personal e-mail, (2) she had been warned that the company would monitor its computers for compliance with this company policy and thus might "inspect all files and messages . . . at any time," and (3) she had been explicitly advised that employees using company computers to create or maintain personal information or messages "have no right of privacy with respect to that information or message."

As we will explain, an attorney-client communication "does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication." (Evid. Code, § 917, subd. (b).) However, the e-mails sent via company computer under the circumstances of this case were akin to consulting her lawyer in her employer's conference room, in a loud voice, with the door open, so that any reasonable person would expect that their discussion of her complaints about her employer would be overheard by him. By using the company's computer to communicate with her lawyer, knowing the communications violated company computer policy and could be discovered by her employer due to company monitoring of e-mail usage, Holmes did not communicate "in confidence by a means
1052 which, so far as the client is aware, *1052 discloses the information to no third persons other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted." (Evid. Code, § 952.) Consequently, the communications were not privileged.

FACTS

Holmes began working for Petrovich as his executive assistant in early June 2004.

The employee handbook, which Holmes admitted reading and signing, contained provisions clearly spelling out the policy concerning use of the company's technology resources, such as computers and e-mail accounts. The handbook directs employees that the company's technology resources should be used only for company business and that employees are prohibited from sending or receiving personal e-mails. Moreover, the handbook warns that "[e]mployees who use the Company's Technology Resources to create or maintain personal information or messages have no right of privacy with respect to that information or message." The "Internet and Intranet Usage" policy in the handbook specifically states, "E-mail is not private communication, because others may be able to read or access the message. E-mail may best be regarded as a postcard rather than as a sealed letter. . . ." The handbook spells out further that the company may "inspect all files or messages . . . at any time for any reason at its discretion" and that it would periodically monitor its technology resources for compliance with the company's policy.

The handbook also set forth the company's policy regarding harassment and discrimination. It directs an employee who thinks that he or she has been subjected to harassment or discrimination to immediately report it to Petrovich or Cheryl Petrovich, who was the company's secretary and handled some human resources functions. If the complaining party is not comfortable reporting the conduct to them, the report should be made to the company's controller. The policy promises that the complaint will be taken seriously, it will be investigated thoroughly, and there will be no retaliation. The policy also urges the employee, when possible, to confront the person who is engaging in the unwanted conduct and ask the person to stop it.

The next month, July of 2004, Holmes told Petrovich that she was pregnant and that her due date was December 7, 2004. Petrovich recalled that Holmes told him she planned to work up until her due date and then would be out on maternity leave for six weeks.

1053 *1053 Holmes did not like it when coworkers asked her questions about maternity leave; she thought such comments were inappropriate. She asked "[t]hat little group of hens" to stop, and they complied. Holmes recalled having about six conversations with Petrovich about her pregnancy, during which they discussed her belly getting big and baby names. She thought "belly-monitoring" comments were inappropriate, but never told Petrovich that he was being offensive.

On Friday morning, August 6, 2004, Petrovich sent Holmes an e-mail discussing various topics, including that they needed to determine how they were going to handle getting a qualified person to help in the office who would be up to speed while Holmes was on maternity leave. He explained that, given his schedule and pace, this would not be a simple task. Thus, they needed to coordinate the transition so neither he nor Holmes would be stressed about it before or after Holmes left on maternity leave. Petrovich stated: "My recollection from the email you sent me when you told me you were pregnant and in our subsequent conversations, you are due around December 7th and will be out six weeks. We are usually swamped between now and the third week of December. The good news is between the third week of December to the second week of January, it slows down a little."

Holmes e-mailed Petrovich a few hours later and advised him that she estimated starting her maternity leave around November 15, and that the time estimate of six weeks might not be accurate as she could be out for the maximum time allowed by the employee handbook and California law, which is four months. She did not expect to be gone for the full four months but thought she should mention it as a possibility. Holmes believed that "Leslie" was "capable of picking up most of the slack" while Holmes was gone, and that the company could hire a "temp just to cover some of the receptionist duties so that Leslie could be more available . . . ."

A short time later, Petrovich responded, "I need some honesty. How pregnant were you when you interviewed with me and what happened to six weeks? Leslie is not and cannot cover your position, nor can a temp. That is an extreme hardship on me, my business and everybody else in the company. You have rights for sure and I am not going to do anything to violate any laws, but I feel taken advantage of and deceived for sure."

Holmes replied that she thought the subject was better handled in person, "but here it goes anyway. [¶] I find it offensive that you feel I was dishonest or deceitful. I wrote a very detailed email explaining my pregnancy as soon as the tests

from my amniocentesis came back that everything was `normal' with the baby. An amnio cannot be performed until you
1054 are nearly 4 months pregnant, hence the delay in knowing the results. I am 39 years old, and *1054 therefore, there was a chance that there could be something `wrong' or `abnormal' with the baby. If there had been, I had decided not to carry the baby to term. That is a very personal choice, and not something that I wanted to have to share with people at work; so in order to avoid that, I waited until I knew that everything was o.k. before telling anyone I was pregnant. [¶] I've also had 2 miscarriages at 3 months into my pregnancy, and could not bear having to share that with co-workers again, as I have in the past. [¶] These are very important and personal decisions that I made. I feel that I have the right to make these decisions, and there is no deceipt [*sic*] or dishonesty involved with this. On a more professional level; there is no requirement in a job interview or application to divulge if you are pregnant or not; in fact, I believe it's considered unethical to even inquire as to such. [¶] At this point, I feel that your words have put us in a bad position where our working relationship is concerned, and I don't know if we can get past it. [¶] As long as we're being straightforward with each other, please just tell me if what you are wanting at this time, is for me to not be here anymore, because that is how it feels. [¶] I need to go home and gather my thoughts."

Because he was concerned that Holmes might be quitting, Petrovich forwarded their e-mail exchange to Cheryl Petrovich; Lisa Montagnino, who handled some human resources functions; in-house counsel Bruce Stewart; and Jennifer Myers, who handled payroll and maintained employee files.

Petrovich also e-mailed Holmes as follows: "All I ever want is for people to be honest with me. The decision is all yours as to whether you stay here. I am NOT asking for your resignation. I do have the right to express my feelings, so I can't help it if you feel offended if the dates and amount of time you told me you would be out on maternity leave no longer apply. I also never asked you about you [being] pregnant in our interview, so you mentioning unethical behavior is out of place. I think you are missing the whole point here. I am trying to keep my business organized and I was working off information you told me. When you disclosed, only upon me asking, that what you told me is incorrect and that you had already decided on a maternity leave date without ever informing me, I [have] the right to question [the] information and not be subject to being quoted California law or my own handbook. You obviously are well versed on all of this which speaks volumes. No, you are not fired. Yes, you are required to be straight with your employer. If you do not wish to remain employed here, I need to know immediately."

On Monday morning, August 9, 2004, Holmes sent an e-mail to Petrovich, who was vacationing in Montana. She explained that she had thought about things a lot over the weekend and felt that what occurred on Friday could have
1055 been avoided if they had communicated in person. She enjoyed her *1055 employment and took it as a compliment that Petrovich was worried about filling her shoes in her absence. Holmes stated, "I may only be gone 6 weeks, but I don't want to commit to that, because unforeseen circumstances can happen making my absence continue slightly longer. The max is 4 months, and that is only if there are disability issues; which I don't anticipate in my case, but I wanted to give you the `outside' number, so you wouldn't be left with any surprises. [¶] I am happy about my pregnancy and happy about my job; I'd like to feel good about continuing to work here, in a positive and supportive environment up until my maternity leave in November, and I would like to return shortly thereafter. [¶] If we are on the same page, please let me know. I will do whatever I can to accommodate you while I'm gone; I can work from home, or come in a few hours a day; I am very flexible and hope that we will be able to work out the bumps along the way."

Petrovich replied that he agreed with Holmes's e-mail and saw things the way that she did. He stated, "I agree we do need to communicate. I need [to] admit I was in shock when you told me you were pregnant so soon after you started work. Right or wrong, I felt entrapped. It's a `no win' for an employer. Yes, I am happy for you, but it was building in me and I decide[d] to approach it by asking if your plans were still as represented. When everything got moved up, I felt even worse. I know I have no right to feel this way by law or as an employer, but I am human in a tough business where people are constantly trying to take advantage of me. Remember what I said about loyalty in our interview? The person closest to me in the office has been the person in your position. When this happened, it greatly upset me since I was hoping for the very best foundation for us since I have been pleased with your efforts and because it had been a while since I have found someone committed to do what is a tough job. It will take some time for me to `get over it' but I will and I want you to stay. It will work."

Early the next morning, August 10, 2004, Holmes replied, "Thank you Paul. I understand your feelings, you understand mine; let's move forward in a positive direction, and remember, `this too shall pass'." She then discussed some business matters, said that everyone was thinking of Petrovich and his family, and stated that "Norman and Oliver say meow and woof!"

At some point after she e-mailed Petrovich, Holmes learned that Petrovich had forwarded their e-mails regarding her pregnancy to Cheryl Petrovich, Bruce Stewart, Lisa Montagnino, and Jennifer Myers. Although she never asked Petrovich not to forward the e-mails to others, and she conceded the e-mails did not contain any language communicating that the information was to be kept private, Holmes was very upset because she "thought that it went without saying" the e-mails should not be disseminated to others.

1056 *1056 On August 10, 2004, Holmes saw her doctor for routine obstetric care and complained about being harassed at work regarding her upcoming pregnancy disability. According to the doctor, Holmes was "moderately upset" and "somewhat tearful." He advised her that the best course of action would be to discuss the matter directly with her boss about how she feels and remedy the situation. If the harassment continued, then she might benefit from the assistance of a lawyer.

At 3:30 p.m. on the same day that Holmes saw her doctor and had e-mailed Petrovich that they could move forward in a positive direction, Holmes used the company computer to e-mail an attorney, Joanna Mendoza. Holmes asked for a referral to an attorney specializing in labor law, specifically relating to pregnancy discrimination. When Mendoza asked what was going on, Holmes replied that her boss was making it unbearable for her. He said things that were upsetting and hurtful, and had forwarded personal e-mail about her pregnancy to others in the office. Holmes stated, "I know that there are laws that protect pregnant women from being treated differently due to their pregnancy, and now that I am officially working in a hostile environment, I feel I need to find out what rights, if any, and what options I have. I don't want to quit my job; but how do I make the situation better." Holmes explained that her boss had accused her of being dishonest because she underestimated her maternity leave, that he had forwarded a personal e-mail and made it "common reading material for employees," and that he had made her feel like an "outcast." Holmes forwarded to Mendoza a few of Petrovich's e-mails.

At 4:42 p.m. on the same day, Mendoza e-mailed Holmes that she should delete their attorney-client communications from her work computer because her employer might claim a right to access it. Mendoza suggested they needed to talk and, while they could talk on the phone, she "would love an excuse to see [Holmes] and catch up on everything." Mendoza stated they could meet for lunch the next day. Holmes agreed and said she would come to Mendoza's law office, at which time Mendoza could see her "big belly."

On the evening of August 11, 2004, after her lunch with Mendoza, Holmes e-mailed Petrovich saying that Holmes had been upset since his first e-mail on Friday. She had been in tears, her stomach was in knots, and she realized that they would be unable "to put this issue behind us." She stated, "I think you will understand that your feelings about my pregnancy; which you have made more than clear, leave me no alternative but to end my employment here." Holmes advised Petrovich that she had cleared her things from her desk and would not be returning to work. Holmes also e-mailed Jennifer Myers stating that she was quitting and advising her where to send the final paycheck.

1057 *1057 In September of 2005, Holmes filed a lawsuit against defendants, asserting causes of action for sexual harassment, retaliation, wrongful termination in violation of public policy, violation of the right to privacy, and intentional infliction of emotional distress. She alleged that the negative comments in Petrovich's e-mails and his dissemination of her e-mails, which contained highly personal information, invaded her privacy, were intended to cause her great emotional distress, and caused her to quit her job to avoid the abusive and hostile work environment created by her employer. According to Holmes, Petrovich disseminated the e-mails to retaliate against her for inconveniencing him with her pregnancy and to cause her to quit. Holmes claimed she was constructively terminated in that continuing her employment with Petrovich "became untenable, as it would have been for any reasonable pregnant woman."

On November 17, 2006, defendants filed a motion for summary judgment or summary adjudication on the ground that, as a matter of law, Holmes could not establish any of her causes of action. Defendants argued Holmes could not

establish (1) that there was an objectively or subjectively hostile work environment; (2) that she suffered an adverse employment action in retaliation for her pregnancy; (3) that she suffered an adverse employment action that would cause a reasonable person to quit; (4) that Holmes had a reasonable expectation of privacy in her e-mails; or (5) that Petrovich's conduct was extreme and outrageous.

The trial court granted the motion for summary adjudication as to three of the causes of action. The court ruled that, although there was evidence that Holmes subjectively perceived her workplace as hostile or abusive, there must also be evidence that the work environment was objectively offensive. "The undisputed brief, isolated, work-related exchanges between her and Mr. Petrovich, and others in the office, could not be objectively found to have been severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment based upon her pregnancy." As for Holmes's claims for retaliation and constructive discharge, there was no evidence she experienced an adverse employment action, and no evidence from which a reasonable trier of fact could find that Petrovich "intentionally created or knowingly permitted working conditions that were so intolerable or aggravated at the time of [Holmes's] resignation that a reasonable employer would realize that a reasonable person in [her] position would be compelled to resign."

The trial court denied the motion for summary adjudication as to the causes of action for invasion of privacy and intentional infliction of emotional distress. The court ruled that, despite Holmes's use of e-mail to communicate private
1058 information to Petrovich, and despite the company's policy regarding *1058 the nonprivate nature of electronic communications, triable issues of fact remained regarding whether Petrovich's dissemination of the information to other people in the office breached Holmes's right to privacy or whether the disclosure was privileged; and that issues of fact remained concerning whether the disclosure was egregious and outrageous.

The trial of those two causes of action resulted in a defense verdict.

DISCUSSION

I

Holmes contends the trial court erred in granting defendants' motion for summary adjudication on her causes of action for sexual harassment, retaliation, and constructive discharge.

A motion for summary judgment "shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." (Code Civ. Proc., § 437c, subd. (c).) Legal questions are considered de novo on appeal. (*Unisys Corp. v. California Life & Health Ins. Guarantee Assn.* (1998) 63 Cal.App.4th 634, 637 [74 Cal.Rptr.2d 106].) However, we must presume the judgment is correct, and the appellant bears the burden of demonstrating error. (*Howard v. Thrifty Drug & Discount Stores* (1995) 10 Cal.4th 424, 443 [41 Cal.Rptr.2d 362, 895 P.2d 469].)

Viewing Holmes's specific contentions within the context of the appropriate legal framework, we find no error.

A

First, Holmes contends the trial court erred in granting summary adjudication with respect to her cause of action for sexual harassment.

(1) The California Fair Employment and Housing Act (FEHA) (Gov. Code, § 12900 et seq.) makes it an unlawful employment practice for an employer, "because of . . . sex, . . . to harass an employee." (Gov. Code, § 12940, subd. (j)(1).) Under FEHA, "`harassment' because of sex includes sexual harassment, gender harassment, and harassment based on pregnancy, childbirth, or related medical conditions." (Gov. Code, § 12940, subd. (j)(4)(C).)

There are two theories upon which sexual harassment may be alleged: quid pro quo harassment, where a term of
1059 employment is conditioned upon *1059 submission to unwelcome sexual advances; and hostile work environment, where the harassment is sufficiently pervasive so as to alter the conditions of employment and create an abusive work environment. (*Mogilefsky v. Superior Court* (1993) 20 Cal.App.4th 1409, 1414 [26 Cal.Rptr.2d 116].) Holmes pursued the latter.

(2) To prevail on a claim of hostile work environment sexual harassment, an employee must demonstrate that he or she was subjected to sexual advances, conduct, or comments that were (1) unwelcome, (2) because of sex, and (3) sufficiently severe or pervasive to alter the conditions of his or her employment and create an abusive work environment. (*Lyle v. Warner Brothers Television Productions* (2006) 38 Cal.4th 264, 279 [42 Cal.Rptr.3d 2, 132 P.3d 211] (hereafter *Lyle*).)

"`"[W]hether an environment is `hostile' or `abusive' can be determined only by looking at all the circumstances [including] the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance." [Citation.]' [Citation.] Therefore, to establish liability in a FEHA hostile work environment sexual harassment case, a plaintiff employee must show she was subjected to sexual advances, conduct, or comments that were *severe enough or sufficiently pervasive to alter the conditions of her employment and create a hostile or abusive work environment.*" (*Lyle, supra*, 38 Cal.4th at p. 283, original italics.) "With respect to the pervasiveness of harassment, courts have held an employee generally cannot recover for harassment that is occasional, isolated, sporadic, or trivial; rather, the employee must show a concerted pattern of harassment of a repeated, routine, or a generalized nature." (*Ibid.*)

(3) "To be actionable, `a sexually objectionable environment must be both objectively and subjectively offensive, one that a reasonable person would find hostile or abusive, and one that the victim in fact did perceive to be so.' [Citations.] *That means a plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail under the FEHA, if a reasonable person in the plaintiff's position, considering all the circumstances, would not share the same perception.* Likewise, a plaintiff who does not perceive the workplace as hostile or abusive will not prevail, even if it objectively is so." (*Lyle, supra*, 38 Cal.4th at p. 284, italics added.)

Relying on *Lyle,* the trial court found that, although Holmes subjectively perceived her workplace as hostile, it was not an abusive environment from an objective standpoint as a matter of law. Holmes claims the trial court erred in relying on *Lyle* because the facts in that case are distinguishable. But the trial court did not grant Petrovich's motion based on a
1060 factual comparison to *1060 *Lyle;* it simply used the standard of review established therein as it was required to do, and as are we, under principles of stare decisis. (*Auto Equity Sales, Inc. v. Superior Court* (1962) 57 Cal.2d 450, 455 [20 Cal.Rptr. 321, 369 P.2d 937].)

Holmes contends the proper standard in sexual harassment cases is whether a reasonable woman would consider the work environment a hostile one and, hence, the standard in pregnancy discrimination cases should be whether a reasonable pregnant woman would consider her work environment hostile. Thus, Holmes asserts, "Unless there was undisputed evidence that [she] was an *unreasonable* pregnant woman, it is oxymoronic that the lower court found the conduct at issue subjectively offensive but not `objectively' offensive to a reasonable pregnant woman in [her] position. . . . Quite frankly, the issue of `objectively offensive conduct' should have been left to the trier of fact and not been a question of law for the judge to have decided, especially if it was clear that there was subjective offense and highly questionable conduct at issue." (Original italics.)

Holmes's argument is not persuasive. An evaluation of all the circumstances surrounding Holmes's employment discloses an absence of evidence from which a reasonable jury could objectively find that Petrovich created a hostile work environment for a reasonable pregnant woman. During the two months Holmes worked for Petrovich, there was no severe misconduct or pervasive pattern of harassment. Holmes claims that her coworkers treated her differently based upon her pregnancy by asking about her maternity leave, but she admits that, when she asked them to stop, they complied.

Holmes points to the e-mails she exchanged with Petrovich on August 6 and 9, 2004, in which he implied she had

deceived him about her pregnancy, stated he was offended that she had changed the period of time she would be absent for maternity leave, and asserted that her pregnancy was an extreme hardship on his business. She also complains that Petrovich unnecessarily forwarded to others her e-mail containing personal information about her age, prior miscarriages, and the possibility she would have terminated her pregnancy if the amniocentesis results had revealed problems with the fetus. Holmes asserts that Petrovich did this to humiliate her. Petrovich said he sent the e-mails to in-house counsel and employees involved in human relations because he thought that Holmes was about to quit.

When viewed in context, the e-mails (set forth at length, *ante*) show nothing more than that Petrovich made some critical comments due to the stress of being a small business owner who must accommodate a pregnant woman's right to maternity leave. He recognized Holmes's legal rights, stated he would honor them, said he was not asking for her
1061 resignation, noted he *1061 had been pleased with her work, and simply expressed his feelings as a "human in a tough business where people are constantly trying to take advantage of me." He assured Holmes that "it will work." Rather than giving him a chance to honor his promise, Holmes quit.

It appears Holmes expects FEHA to be a civility code. It is not. (*Lyle, supra*, 38 Cal.4th at p. 295.) As we stated above, there is no recovery for harassment that is occasional, isolated, sporadic, or trivial. (*Id.* at p. 283.) Rather, a plaintiff must show a concerted pattern of harassment that is repeated, routine, or generalized in nature. (*Mokler v. County of Orange* (2007) 157 Cal.App.4th 121, 142 [68 Cal.Rptr.3d 568].) Holmes failed to do so. The isolated incidents to which she points are objectively insufficient.

Holmes relies on three cases for the proposition that harassment need not be pervasive and may be established by only a few instances of conduct over a short period of time. She fails to recognize that harassment need not be pervasive *if it is sufficiently severe* enough to alter the conditions of employment. (*Lyle, supra*, 38 Cal.4th at p. 283 [the plaintiff must be subjected to conduct or comments severe enough *or* sufficiently pervasive to alter the conditions of her employment and create a hostile work environment].) The cases upon which Holmes relies are not remotely similar to her situation in that they all involve egregious and severe conduct that unquestionably was abusive. In *Hostetler v. Quality Dining, Inc.* (7th Cir. 2000) 218 F.3d 798, the plaintiff's harasser engaged in three incidents over a one-week period of time: (1) he forced his tongue into her mouth, (2) he attempted to kiss her again and to remove her bra, and (3) he told her that he could perform oral sex so effectively he could make her do cartwheels. (*Id.* at pp. 802, 807-808.) In *Erdmann v. Tranquility Inc.* (N.D.Cal. 2001) 155 F.Supp.2d 1152, a homosexual employee's boss insisted that the employee become heterosexual, convert to the employer's Mormon faith, and lead the company's prayer service. (*Id.* at pp. 1160-1161.) And in *Mayfield v. Trevors Store, Inc.* (N.D.Cal., Dec. 6, 2004, No. C-04-1483 MHP) 2004 WL 2806175, the employer not only made comments that made the plaintiff feel stigmatized due to her pregnancy, the employer also wrote negative performance evaluations, assigned the plaintiff large amounts of extra work, and denied her a sick day.

Petrovich did not engage in any similarly egregious conduct, and he provided a nondiscriminatory explanation for his conduct. Because Holmes produced no evidence from which a reasonable jury could infer the existence of a hostile work environment, the trial court correctly granted the motion for summary adjudication on this cause of action.

1062 *1062 **B**

Next, Holmes contends the court erred in granting the motion for summary adjudication on her cause of action for constructive discharge. According to Holmes, she "found the extreme stress associated with being out of work to be preferable to the treatment she was receiving at Petrovich." This claim fares no better than her last.

(4) "Constructive discharge occurs only when the employer coerces the employee's resignation, either by creating working conditions that are intolerable under an objective standard, or by failing to remedy objectively intolerable working conditions that actually are known to the employer." (*Mullins v. Rockwell Internat. Corp.* (1997) 15 Cal.4th 731, 737 [63 Cal.Rptr.2d 636, 936 P.2d 1246].) The conditions prompting resignation must be "sufficiently extraordinary and egregious to overcome the normal motivation of a competent, diligent, and reasonable employee to remain on the job." (*Turner v. Anheuser-Busch, Inc.* (1994) 7 Cal.4th 1238, 1246 [32 Cal.Rptr.2d 223, 876 P.2d 1022] (hereafter *Turner*),

disapproved on other grounds in *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479 [59 Cal.Rptr.2d 20, 926 P.2d 1114].) The resignation must be coerced, not merely a rational option chosen by the employee. (*Turner,* at p. 1247.)

From an objective standpoint, the trial court correctly granted summary adjudication. "Where a plaintiff fails to demonstrate the severe or pervasive harassment necessary to support a hostile work environment claim, it will be impossible for her to meet the higher standard of constructive discharge: conditions so intolerable that a reasonable person would leave the job." (*Brooks v. City of San Mateo* (9th Cir. 2000) 229 F.3d 917, 930.) As discussed above, Holmes failed to present sufficient evidence of a hostile work environment. Thus, her wrongful termination claim necessarily fails. (*Jones v. Department of Corrections & Rehabilitation* (2007) 152 Cal.App.4th 1367, 1381 [62 Cal.Rptr.3d 200] (hereafter *Jones*).)

C

The trial court also granted summary adjudication on Holmes's cause of action for retaliation, ruling there was no evidence of an adverse employment action by Petrovich. We agree.

Holmes argues that she was subjected to negative comments and accusations about her pregnancy, followed by Petrovich's retaliatory conduct when she told him she planned to exercise her leave rights; he retaliated by forwarding
1063 her sensitive personal information to others in the office, who had *1063 no reason to know about her prior miscarriages, amniocentesis, and potential termination of her pregnancy.

This is insufficient to establish an adverse employment action by Petrovich.

(5) An "`adverse employment action,'" which is a critical component of a retaliation claim (*Jones, supra,* 152 Cal.App.4th at p. 1380), requires a "substantial adverse change in the terms and conditions of the plaintiff's employment" (*Akers v. County of San Diego* (2002) 95 Cal.App.4th 1441, 1454, 1455 [116 Cal.Rptr.2d 602]). "[A] mere offensive utterance or . . . a pattern of social slights by either the employer or coemployees cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment for purposes of [the FEHA] . . . ." (*Yanowitz v. L'Oreal USA, Inc.* (2005) 36 Cal.4th 1028, 1054 [32 Cal.Rptr.3d 436, 116 P.3d 1123] (hereafter *Yanowitz*).) "However, a series of alleged discriminatory acts must be considered collectively rather than individually in determining whether the overall employment action is adverse [citations] and, in the end, the determination of whether there was an adverse employment action is made on a case-by-case basis, in light of the objective evidence." (*Jones, supra,* 152 Cal.App.4th at p. 1381.)

Here, Petrovich did not reduce Holmes's salary, benefits or work hours, and did not terminate her. He assured Holmes that she still had a job and that they would work things out. Holmes chose to quit because Petrovich expressed his concerns about the changes in her pregnancy leave dates and the need to replace her while she was on leave, and because he forwarded an e-mail that she wished to keep private. But she failed to demonstrate there was a triable issue of fact concerning whether he did these things to retaliate against her; she simply concluded that this was his motivation by taking out of context certain comments that he made. Holmes overlooks her own evidence, submitted in opposition to defendants' motion, which demonstrated that Petrovich forwarded the e-mail only to people he believed needed to know that Holmes had changed the anticipated date of her pregnancy leave and that she might be quitting. The fact that he forwarded her entire e-mail, rather than editing it or drafting a new one, does not demonstrate any animus toward her, given there was no clear directive in her e-mail that she did not wish others to see it.

More importantly, "[m]inor or relatively trivial adverse actions or conduct by employers or fellow employees that, from an objective perspective, are reasonably likely to do no more than anger or upset an employee cannot properly be viewed as materially affecting the terms, conditions, or privileges of employment and are not actionable . . . ." (*Yanowitz, supra,*
1064 36 Cal.4th at p. 1054.) That is what occurred here. A reasonable person would have talked *1064 to Petrovich, expressed dismay at his actions, given him an opportunity to explain or apologize, and waited to see if conditions changed after the air had cleared. Instead, Holmes chose to quit despite Petrovich's assurances that he wanted her to stay and that things would work out.

For the reasons stated above, the trial court correctly granted defendants' motion for summary adjudication.[2]

II

Holmes's remaining claims of error all arise from an alleged violation of her attorney-client privilege.

She contends the trial court abused its discretion in (1) denying her motion demanding the return of privileged documents, (2) permitting the introduction of the documents at trial, and (3) giving a limiting instruction that undermined her cause of action for invasion of privacy. She argues that the cumulative prejudicial effect of these errors requires reversal of the judgment.

Her arguments are premised on various statutes governing the attorney-client privilege as follows:

Evidence Code section 954 states in relevant part: "Subject to Section 912 and except as otherwise provided in this article, the client, whether or not a party, has a privilege to refuse to disclose, and to prevent another from disclosing, a confidential communication between client and lawyer . . . ." (Further section references are to the Evidence Code unless otherwise specified.)

Section 952 provides that a "confidential communication between client and lawyer" is "information transmitted between a client and his or her lawyer in the course of that relationship and in confidence by a means which, so far as the client
1065 is aware, discloses the information to no third persons *1065 other than those who are present to further the interest of the client in the consultation or those to whom disclosure is reasonably necessary for the transmission of the information or the accomplishment of the purpose for which the lawyer is consulted . . . ." (§ 952.)

Section 917 states in relevant part: "(a) If a privilege is claimed on the ground that the matter sought to be disclosed is a communication made in confidence in the course of the lawyer-client . . . relationship, the communication is presumed to have been made in confidence and the opponent of the claim of privilege has the burden of proof to establish that the communication was not confidential. [¶] (b) A communication . . . does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication. . . ."

Section 912, subdivision (a) provides that the right of any person to claim a lawyer-client privilege "is waived with respect to a communication protected by the privilege if any holder of the privilege, without coercion, has disclosed a significant part of the communication or has consented to disclosure made by anyone. Consent to disclosure is manifested by any statement or other conduct of the holder of the privilege indicating consent to the disclosure, including failure to claim the privilege in any proceeding in which the holder has the legal standing and opportunity to claim the privilege."

With this statutory framework in mind, we turn to Holmes's specific contentions.

A

Holmes argues the trial court erred in denying her motion for discovery sanctions, seeking return of the e-mails that she sent her attorney, Joanna Mendoza, using the company's computer. We disagree.

During a deposition, defense counsel questioned Holmes about her e-mail correspondence with her attorney. Mendoza objected on the ground of attorney-client privilege.

Mendoza then wrote to defense counsel, Kevin Iams, demanded the return of the e-mails, and said she would seek a protective order if he refused. Iams replied that Holmes made a knowing waiver of the privilege when she communicated with counsel on the company's e-mail system after being advised that her e-mails were not private. Nevertheless, Iams wrote, "I recognize that this is not an area in which the law is settled. . . . What I propose as a

1066 resolution is a stipulated protective order whereby I and my *1066 clients will agree that we will not use the emails or facsimile copies in any deposition or court proceeding, unless we provide you written notice 45 days in advance. This will allow us further time to meet and confer, obtain a further protective order, or if necessary, to seek the court's intervention."

Mendoza initially refused the proposed resolution, but then agreed. On May 15, 2006, Iams wrote a confirmation letter stating that Mendoza agreed to delay filing for a protective order pending a review of the "proposed protective order" that Iams would draft, wherein he would agree not to use the documents in any deposition or court proceeding without first giving Mendoza 45 days' written notice. The letter noted, however, that "by entering into the protective order, neither side is waiving any arguments it may have regarding the appropriate use of the [e-mails]." Stating that his schedule that week was hectic, Iams said he would strive to have a draft of the protective order to Mendoza by the end of the week for her review.

Before Iams drafted the stipulated protective order, Attorney Robin Perkins substituted in as defendants' counsel. Thereafter, Perkins used the e-mails in support of defendants' motion for summary judgment.

Holmes demanded that defendants withdraw the e-mail evidence, in accord with their agreement not to use it without prior notice. She submitted a declaration objecting to use of the attorney-client e-mails, claiming they were privileged.

Responding that the parties had never agreed not to utilize the e-mails, and that no protective order had ever been executed, defendants objected to Holmes's declaration that the e-mails were privileged. In defendants' view, the declaration was improper lay opinion, and Holmes had waived the attorney-client privilege. They pointed out that Holmes's counsel specifically permitted defendants' counsel to ask questions concerning the e-mails, stating: "If the only extent of your questions are going to be about this e-mail exchange, *and you're not going to go into a follow-up meeting that was had or any other communications with her attorney,* and it's not going to be considered a waiver of any of *those communications,* then I have no problem with it." (Italics added.)

The trial court sustained defendants' objections and did not exclude the e-mail evidence.

Thereafter, Holmes sought discovery sanctions for defendants' failure to return the e-mails and for violating the agreement not to use them without affording Holmes prior notice.

Defendants opposed the motion on the grounds that the parties never reached a written stipulation; Holmes never filed
1067 a motion to compel, which *1067 meant the court had never ordered Petrovich to return the documents; and the court had already found that the use of the e-mails did not violate the attorney-client privilege.

The court denied the motion for discovery sanctions, finding defendants had not engaged in any discovery abuse. It explained: "With respect to the e-mails that were submitted by defendants with the motion for summary judgment/adjudication, the Court found plaintiff had waived attorney-client privilege . . . ."

Holmes contests this ruling, asserting "no specific finding of waiver was made" in connection with the motion for summary judgment because defendants' objections to the claim of attorney-client privilege were made on multiple grounds, and the court merely sustained the objections without specifying the basis for its ruling. Thus, she argues, the court erred in relying on a nonexistent finding of waiver to deny the discovery sanctions motion.

Holmes overlooks that Judge Shelleyanne Chang presided over both the motion for summary judgment and/or adjudication and the motion for discovery sanctions. We presume that Judge Chang knew the basis for her own ruling sustaining defendants' objections in the first proceeding. Hence, Judge Chang did not err in relying on her prior determination that Holmes waived the attorney-client privilege. Furthermore, as we shall explain in the next part of the opinion, the e-mails were not privileged.

B

Holmes asserts the court erred in overruling her motion in limine to prevent defendants from introducing the aforementioned e-mails at trial to show Holmes did not suffer severe emotional distress, was only frustrated and annoyed, and filed the action at the urging of her attorney.

The court ruled that Holmes's e-mails using defendants' company computer were not protected by the attorney-client privilege because they were not private.

Holmes argues that the court did not understand the proper application of section 917, and thus erred in allowing introduction of the e-mail evidence. According to Holmes, "the California Legislature has already deemed [the fact that a communication was made electronically] to be irrelevant in determining whether a communication is confidential and therefore privileged." However, it is Holmes, not the trial court, who misunderstands the proper application of section 917.

1068 *1068 (6) Although a communication between persons in an attorney-client relationship "does not lose its privileged character for the sole reason that it is communicated by electronic means or because persons involved in the delivery, facilitation, or storage of electronic communication may have access to the content of the communication" (§ 917, subd. (b)), this does not mean that an electronic communication is privileged when (1) the electronic means used belongs to the defendant; (2) the defendant has advised the plaintiff that communications using electronic means are not private, may be monitored, and may be used only for business purposes; and (3) the plaintiff is aware of and agrees to these conditions. A communication under these circumstances is not a "`confidential communication between client and lawyer'" within the meaning of section 952 because it is not transmitted "by a means which, so far as the client is aware, discloses the information to no third persons other than those who are present to further the interest of the client in the consultation . . . ." (*Ibid.*)

(7) When Holmes e-mailed her attorney, she did not use her home computer to which some unknown persons involved in the delivery, facilitation, or storage may have access. Had she done so, that would have been a privileged communication unless Holmes allowed others to have access to her e-mails and disclosed their content. Instead, she used defendants' computer, after being expressly advised this was a means that was not private and was accessible by Petrovich, the very person about whom Holmes contacted her lawyer and whom Holmes sued. This is akin to consulting her attorney in one of defendants' conference rooms, in a loud voice, with the door open, yet unreasonably expecting that the conversation overheard by Petrovich would be privileged.

Holmes disagrees, but the decisions upon which she relies are of no assistance to her because they involve inapposite factual circumstances, such as Fourth Amendment searches and seizures by public or government employers (*Quon v. Arch Wireless Operating Co., Inc.* (9th Cir. 2008) 529 F.3d 892 (hereafter *Quon*), revd. *sub nom. Ontario v. Quon* (2010) 560 U.S. ___, ___ [177 L.Ed.2d 216, 231, 130 S.Ct. 2619]; *Leventhal v. Knapek* (2d Cir. 2001) 266 F.3d 64; *Convertino v. U.S. Dept. of Justice* (D.C. Cir. 2009) 674 F.Supp.2d 97, 110), or the use of a personal Web-based e-mail account accessed from an employer's computer where the use of such an account was not clearly covered by the company's policy and the e-mails contained a standard hallmark warning that the communications were personal, confidential, attorney-client communications. (*Stengart v. Loving Care Agency, Inc.* (2010) 201 N.J. 300 [990 A.2d 650, 659, 663-664].)

The present case does not involve similar scenarios. Holmes used her employer's company e-mail account after being
1069 warned that it was to be used *1069 only for company business, that e-mails were not private, and that the company would randomly and periodically monitor its technology resources to ensure compliance with the policy. (Cf. *Scott v. Beth Israel Medical Center, Inc.* (N.Y.Sub.Ct. 2007) 17 Misc.3d 934 [847 N.Y.S.2d 436, 441-443] [despite a statute similar to § 917, an attorney-client privilege did not exist when a company computer was used to send e-mails, and the company's policy prohibited the personal use of e-mails, warned that they were not private, and stated that they could be monitored].)[3]

Holmes emphasizes that she believed her personal e-mail would be private because she utilized a private password to use the company computer and she deleted the e-mails after they were sent. However, her belief was unreasonable because she was warned that the company would monitor e-mail to ensure employees were complying with office

policy not to use company computers for personal matters, and she was told that she had no expectation of privacy in any messages she sent via the company computer. Likewise, simply because she "held onto a copy of the fax," she had no expectation of privacy in documents she sent to her attorney using the company's facsimile machine, a technology resource that, she was told, would be monitored for compliance with company policy not to use it for personal matters.

According to Holmes, even though the company unequivocally informed her that employees who use the company's computers to send personal e-mail have "no right of privacy" in the information sent (because the company would periodically inspect all e-mail to ensure compliance with its policy against personal use of company computers), she nonetheless had a reasonable expectation that her personal e-mail to her attorney would be private because the "`operational reality' was that there was no access or auditing of employee's computers." (Quoting *Quon, supra,* 529 F.3d 892, revd. *sub nom. Ontario v. Quon, supra,* 560 U.S. at p. ___ [177 L.Ed.2d at p. 231].)

In support of this contention, Holmes claims she "knew that her computer was password protected and that no one had asked for or knew her password, and the only person who had the ability to inspect the computers did not ever perform that task." This misrepresents the record in two respects. It is inaccurate to say only one person had the ability to monitor e-mail sent and received on company computers. The company's controller, who had an administrative
1070 password giving her access to all e-mail sent by employees *1070 with private passwords, testified that the company's "IT person" as well as company owner Cheryl Petrovich also had such access to e-mail sent and received by company computers. And at no time during her testimony did Holmes claim she knew for a fact that, contrary to its stated policy, the company never actually monitored computer e-mail. She simply said that, to her knowledge, no one did so.

In any event, Holmes's reliance on *Quon* is misplaced. There, a police sergeant, Jeff Quon, sued his employer, the Ontario Police Department, claiming it violated his Fourth Amendment right to be free of unlawful government searches and seizures when it reviewed text messages that he sent on an employer-issued text pager. (*Quon, supra,* 529 F.3d at p. 895.) In holding that Quon had a reasonable expectation of privacy in his text messages due to the operational realities of the workplace, the Ninth Circuit relied in large part on the plurality opinion in *O'Connor v. Ortega* (1987) 480 U.S. 709 [94 L.Ed.2d 714, 107 S.Ct. 1492] (hereafter *O'Connor*). (*Quon, supra,* 529 F.3d at pp. 903-904, 907.)

O'Connor held that the fact an employee works for the government does not negate the employee's Fourth Amendment right to be free of unreasonable governmental searches and seizures at work. (*O'Connor, supra*, 480 U.S. at pp. 715, 717 [94 L.Ed.2d at pp. 721, 723].) But "[t]he operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable . . . ." (*Id.* at p. 717 [94 L.Ed.2d at p. 723].) For example, the existence of specific office policies, practices, and procedures may have an effect on public employees' expectations of privacy in their workplace. (*Ibid.*) "Given 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 p. 718 [94 L.Ed.2d at p. 723].)

Relying on *O'Connor,* the Ninth Circuit upheld the district court's determination that Quon had a reasonable expectation of privacy in his text messages because, despite a departmental policy that users of pagers had no right to privacy, the operational reality was that Quon was given an expressly conflicting message to the contrary by his supervisor. (*Quon, supra*, 529 F.3d at p. 907.) In addition to finding Quon had a reasonable expectation of privacy, the Ninth Circuit found the search was unreasonable in violation of the Fourth Amendment. (529 F.3d at pp. 908-909.)

The United States Supreme Court reversed this decision on the ground the search was not unreasonable. (*Ontario v. Quon, supra,* 560 U.S. at pp. ___ - ___ [177 L.Ed.2d at pp. 229-231].) Before turning to that issue, it noted that the parties disputed whether Quon had a reasonable expectation of privacy with respect to his pager messages. (*Id.* at p.
1071 ___ [177 L.Ed.2d at *1071 p. 226].) Opting not to resolve this issue or whether the *O'Connor* "operational reality" test was applicable, the court observed that it "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." (*Id.* at pp. ___ - ___ [177 L.Ed.2d at pp. 226-227].) "Even if the Court were certain that the *O'Connor*

plurality's approach were the right one, the Court would have difficulty predicting how employees' privacy expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable. . . . And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." (*Id.* at p. ___ [177 L.Ed.2d at p. 227], citation omitted.)

Here, we are not concerned with a potential Fourth Amendment violation because Holmes was not a government employee. And, even assuming the "operational reality" test applies, it is of no avail to Holmes because the company explicitly told employees that they did not have a right to privacy in personal e-mail sent by company computers, which e-mail the company could inspect at any time at its discretion, and the company never conveyed a conflicting policy. Absent a company communication to employees explicitly contradicting the company's warning to them that company computers are monitored to make sure employees are not using them to send personal e-mail, it is immaterial that the "operational reality" is the company does not actually do so. Just as it is unreasonable to say a person has a legitimate expectation that he or she can exceed with absolute impunity a posted speed limit on a lonely public roadway simply because the roadway is seldom patrolled, it was unreasonable for Holmes to believe that her personal e-mail sent by company computer was private simply because, to her knowledge, the company had never enforced its computer monitoring policy.

In sum, "so far as [Holmes was] aware," within the meaning of section 952, the company computer was not a means by which to communicate in confidence any information to her attorney. The company's computer use policy made this clear, and Holmes had no legitimate reason to believe otherwise, regardless of whether the company actually monitored employee e-mail. Thus, when, with knowledge of her employer's computer monitoring policy, Holmes used a company computer to e-mail her attorney about an employment action against her boss, Petrovich, Holmes in effect knowingly disclosed this information to a third party, the company and thus Petrovich, who certainly was not involved in furthering Holmes's interests in her consultation with her attorney (§ 952) because Petrovich was the party she eventually sued.

1072 *1072 Hence, the trial court correctly ruled that the attorney-client communication was not privileged. (§ 952.)

C

According to Holmes, the trial court erred when it gave the jury a protective admonishment about the attorney-client e-mails.

The court stated: "Jury, normally you may be shocked to see something like this on screen. However, I determined in proceedings prior to trial that this was not privileged information between an attorney and a client because it was communicated through company computers." When Holmes's attorney began to object, the court responded, "the jury needs to understand that we are not romping wholesale over the attorney/client privilege. And I don't want the jury to be offended by this type of correspondence."

After an unreported sidebar conference, the court stated: "I think I've made it clear to you [(the jurors)] why you're being permitted to see this kind of unusual correspondence, and the only reason you're able to see it is for the reasons I expressed earlier, namely that it was correspondence on a company computer, but that has nothing whatsoever to do with Miss Holmes' claim of privacy with respect to the pregnancy issues she communicated to Mr. Petrovich and her claims of emotional distress from that. [¶] So don't take my comments as any kind of indication how you should decide the merits of this case based upon this attorney/client communication. It's a very, very different issue. [¶] But I felt you should know why I'm permitting you to see this, because it's a very unusual kind of correspondence between a client and an attorney that normally juries would not see, but you're seeing it for that very limited purpose, but consider it only for the very limited purpose . . . and don't attach any importance to it on the main claim of Miss Holmes against [Petrovich]."

Holmes argues the above quoted comments undermined her invasion of privacy claim by more or less advising the jury

she had no right to privacy in e-mails on a company computer. Not so.

The causes of action for invasion of privacy and intentional infliction of emotional distress were not premised on Petrovich accessing Holmes's attorney-client e-mails, but on his forwarding to her coworkers her private e-mails to him about her pregnancy. She claimed that this dissemination of intimate details concerning her pregnancy violated her right to privacy, that Petrovich's conduct was outrageous, and that it caused Holmes great emotional distress.

1073 *1073 The court unambiguously advised the jury that Holmes's e-mails to her attorney were being introduced for a limited purpose, and the court's determination that they were not privileged because they were sent on a company computer had "nothing whatsoever to do with [her] claim of privacy" and her claims of emotional distress. Then, in response to jury questions during deliberations, the court advised the jury that an electronic data transmission may constitute an invasion of privacy if the elements of the tort are established by a preponderance of the evidence,[4] and that policies in an employer handbook could not supersede California law.

Holmes points to nothing indicating that the court's comments were a misstatement of the evidence or law. Unlike *Lewis v. Bill Robertson & Sons, Inc.* (1984) 162 Cal.App.3d 650 [208 Cal.Rptr. 699], upon which Holmes relies, the court did not commit misconduct and engage in partisan advocacy by expressing strong opinions on the ultimate issue at trial (*id.* at pp. 656-657), i.e., whether Petrovich invaded her right to privacy by forwarding to Holmes's coworkers the e-mails about her pregnancy. Under the circumstances, she has failed to meet her burden of establishing error. (*Badie v. Bank of America* (1998) 67 Cal.App.4th 779, 784-785 [79 Cal.Rptr.2d 273] [it is the appellants' burden to establish error with reasoned argument and citations to authority].)

Holmes also fails to meet her burden of establishing that the alleged error was prejudicial. (*In re Marriage of McLaughlin* (2000) 82 Cal.App.4th 327, 337 [98 Cal.Rptr.2d 136] [an appellant bears the burden of establishing prejudice by spelling out in his or her brief exactly how an alleged error caused a miscarriage of justice]; *American Drug Stores, Inc. v. Stroh, supra*, 10 Cal.App.4th at p. 1453 [appellants may not attempt to rectify their omissions and oversights for the first time in their reply briefs].) Holmes does not present a coherent argument explaining how the court's statement that her e-mails to her attorney were not privileged undermined her theory that Petrovich egregiously violated her privacy by forwarding e-mails about her difficult and sensitive pregnancy decisions to people she claimed had no legitimate business need to know about the matters discussed therein. Thus, Holmes fails to demonstrate that, but for the court's alleged errors, it is reasonably probable the jury would have returned a more favorable verdict. (*Cassim v. Allstate Ins. Co.* (2004) 33 Cal.4th 780, 801-802 [16 Cal.Rptr.3d 374, 94 P.3d 513].)

1074 *1074 **III**

In her reply brief, Holmes attempts to raise a new argument challenging the jury's verdict on her cause of action for invasion of privacy. The argument is entitled, "ONE DOES NOT LOSE THEIR [*sic*] CONSTITUTIONAL RIGHT TO PRIVACY SIMPLY BY WALKING THROUGH THE ENTRANCE OF THE WORKPLACE."

She asserts that an employer cannot destroy the constitutional right to privacy via a company handbook without due consideration being paid; that an employee has a reasonable expectation of privacy when an employer's technology policy is not enforced; and that an employer violates an employee's right to privacy when he discloses private information about the employee without a legitimate business reason for doing so.

We decline to address this argument because it is raised for the first time in her reply brief and is thus forfeited. (*Garcia v. McCutchen, supra*, 16 Cal.4th at p. 482, fn. 10; *Reichardt v. Hoffman, supra*, 52 Cal.App.4th at pp. 764-765; *American Drug Stores, Inc. v. Stroh, supra*, 10 Cal.App.4th at p. 1453.)

DISPOSITION

The judgment is affirmed.

Hull, Acting P. J., and Butz, J., concurred.

[*] Retired Presiding Justice of the Court of Appeal, Third Appellate District, assigned by the Chief Justice pursuant to article VI, section 6 of the California Constitution.

[1] Hereafter, we will refer to Petrovich Development Company, LLC, as the company, to Paul Petrovich as Petrovich, and to them collectively as defendants.

[2] In her reply brief, Holmes says the court should have denied the motion for summary adjudication in its entirety because it was not timely served. This argument is forfeited because it is raised for the first time in her reply brief without a showing of good cause. (*Garcia v. McCutchen* (1997) 16 Cal.4th 469, 482, fn. 10 [66 Cal.Rptr.2d 319, 940 P.2d 906]; *Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 764-765 [60 Cal.Rptr.2d 770].) "Points raised for the first time in a reply brief will ordinarily not be considered, because such consideration would deprive the respondent of an opportunity to counter the argument." (*American Drug Stores, Inc. v. Stroh* (1992) 10 Cal.App.4th 1446, 1453 [13 Cal.Rptr.2d 432]; see *Reichardt v. Hoffman, supra*, 52 Cal.App.4th at pp. 764-765.) In any event, in overruling Holmes's objection to the defect in service, the court did not err in ruling Holmes waived the defect by filing an opposition and appearing at the hearing on the motion. (*Carlton v. Quint* (2000) 77 Cal.App.4th 690, 696-698 [91 Cal.Rptr.2d 844].)

[3] Section 917, subdivision (b) is derived from the statute at issue in *Scott v. Beth Israel Medical Center, Inc., supra,* 847 N.Y.S.2d 436, New York's Civil Practice Law and Rules, section 4548, which states: "No communication privileged under this article shall lose its privileged character for the sole reason that it is communicated by electronic means or because persons necessary for the delivery or facilitation of such electronic communication may have access to the content of the communication." (See Cal. Law Revision Com. com., reprinted at 29B pt. 3A West's Ann. Evid. Code (2009 ed.) foll. § 917, p. 267.)

[4] The court instructed the jury earlier that, to establish her claim for invasion of privacy, Holmes had to prove the following five elements: (1) she had a reasonable expectation of privacy in precluding the dissemination or misuse of sensitive and confidential information under the circumstances; (2) Petrovich invaded her privacy by disseminating or misusing her sensitive or confidential information; (3) the conduct was a serious invasion of her privacy; (4) she was harmed; and (5) Petrovich's conduct was a substantial factor in causing her harm.

718 S.E.2d 532 (2011)
312 Ga. App. 365

SITTON
v.
PRINT DIRECTION, INC. et al.

No. A11A1055.

Court of Appeals of Georgia.

September 28, 2011.

534 *534 Stephen M. Katz, Marietta, Victor Severin Roberts, Atlanta, for appellant.

Fisher & Phillips, Burton F. Dodd, Atlanta, for appellees.

MIKELL, Judge.

Larry Sitton was fired from his job after his employer discovered, from e-mails on the computer Sitton used at work, that he was taking part in a competing business on the side. After his discharge, Sitton sued his former employer, Print Direction, Inc. ("PDI"), and its president and chief executive officer, William S. Stanton, Jr. (collectively "appellees"), for invasion of privacy and for computer theft and trespass in violation of OCGA § 16-9-93.[1] Appellees counterclaimed on several grounds. Following a two-day bench trial, the trial court entered judgment against Sitton and awarded appellees $39,257.71 in damages. Sitton appeals, contending that the trial court erred in rejecting his claims under OCGA § 16-9-93 and for common law invasion of privacy; in the admission of evidence; in finding for appellees on their counterclaim
535 for breach of *535 duty of loyalty; and in the calculation of damages. We affirm the judgment.

"On appeal from the entry of judgment in a bench trial, the evidence must be viewed in the light most favorable to the trial court's findings of fact,"[2] and we apply the following standard of review:

> [F]actual findings made after a bench trial shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the trial court to judge the credibility of the witnesses. OCGA § 9-11-52(a). The clearly erroneous test is the same as the any evidence rule. Thus, an appellate court will not disturb fact findings of a trial court if there is any evidence to sustain them.[3]

Properly viewed, the record reflects that PDI operated a commercial printing business and that Stanton was responsible for PDI's operations. PDI hired Sitton as an exclusive outside sales person in January 2005 and employed him as an at-will employee until he was discharged in September 2008. As an outside salesperson, Sitton sold PDI's printing services and was required to bill all sales through PDI's accounting department, in order for the commission to be shared between PDI and Sitton.

When he was first hired, Sitton received a copy of PDI's Employee Manual, which provided that "[e]mployees may not take an outside job . . . with a customer or competitor of PDI." Nonetheless, during his employment by PDI, and without informing PDI or Stanton, Sitton brokered more than $150,000 in print jobs through Superior Solutions Associates LLC ("SSA"), a print brokerage business which Sitton's wife started in October 2007 and of which Sitton served as manager. Sitton's work for SSA was in competition with PDI and continued through the date of his discharge from PDI. By brokering print jobs through SSA, Sitton was able to keep all the profit on the job rather than share the profit with his employer, PDI.

PDI provided Sitton with a laptop computer for use in connection with his work for PDI. However, Sitton chose to use his own computer, which he brought to his office at PDI, connected to PDI's system network, and used for PDI work. Sitton

also used this computer for SSA work. When Stanton "caught wind" that Sitton was competing with PDI, he entered Sitton's office, moved the computer's mouse, clicked on the e-mail listing which appeared on the screen, and printed certain e-mails from Sitton relating to a job for Apex Printing Company. These e-mails, which were on a separate e-mail address from Sitton's PDI-issued e-mail address, confirmed that Sitton was using SSA to compete with PDI. Stanton subsequently terminated Sitton as an employee of PDI.

1. Sitton contends that the trial court erred in determining that Stanton's viewing and printing the incriminating emails found on Sitton's personal computer did not constitute computer theft, computer trespass, or computer invasion of privacy under OCGA § 16-9-93. The court found that Stanton's use of Sitton's computer was not "without authority" within the meaning of the statute. We find no error.

The criminal offenses of computer theft, computer trespass, and computer invasion of privacy are set forth in OCGA § 16-9-93, which also provides for civil liability and a civil remedy.[4] Computer theft is committed by one "who uses a computer or computer network with knowledge that such use is without authority and with the intention of" taking, obtaining, or converting property of another.[5] Similarly, a person commits computer trespass when he "uses a computer or computer network with knowledge that such use is without authority and with the intention of" deleting any computer program or data; obstructing or interfering with use of a computer program or data; or altering, damaging, or causing to malfunction a computer, *536 computer network, or computer program.[6] A person commits computer invasion of privacy when he uses a computer or computer network "with the intention of examining any employment, medical, salary, credit, or any other financial or personal data relating to any other person with knowledge that such examination is without authority."[7]

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It can be seen that these three computer offenses include at least the following elements: that the proscribed actions be taken "with knowledge" that the use of the computer or the examination of the other person's data was "without authority" and that the actions be taken with the requisite intent.

We first note that the evidence fails to show that Stanton's use of Sitton's computer was "with the intention of" performing any of the acts forbidden by the statute. Stanton did not, nor did he intend to: take, obtain, or convert Sitton's property (computer theft); delete any computer program or data, obstruct or interfere with a computer program or data, or alter or damage a computer, computer network, or computer program (computer trespass); or examine Sitton's personal data (computer invasion of privacy). Thus, Stanton's actions do not fall within the scope of subsections (a), (b), or (c) of OCGA § 16-9-93.

Another element of these offenses—lack of authority—is also absent.[8] The term "without authority" is defined to include "the use of a computer or computer network in a manner that exceeds any right or permission granted by the owner of the computer or computer network."[9] In the case at bar, Stanton found the incriminating e-mails on the computer Sitton used to conduct business for PDI. This computer was located in PDI's offices but was actually owned by Sitton. The trial court found that Stanton had authority to inspect this computer pursuant to the computer usage policy contained in PDI's Employee Manual, which Sitton had agreed to abide by when he started work with PDI.

Contrary to Sitton's contention, PDI's computer usage policy was not limited to PDI-owned equipment. The policy adverted to the necessity for the company "to be able to respond to proper requests resulting from legal proceedings that call for electronically-stored evidence" and provided that for this reason, its employees should not regard "electronic mail left on or transmitted over these systems" as "private or confidential." The trial court, acting as finder of fact, found that Stanton looked at an e-mail on the screen of Sitton's computer at PDI. Whether the e-mail was stored there permanently or only temporarily, the e-mail was subject to review under the company's computer usage policy. Even if the e-mail was "stored" elsewhere, the company's policy also stated that "PDI will . . . inspect the contents of computers, voice mail or electronic mail in the course of an investigation triggered by indications of unacceptable behavior."

Sitton's reliance on *Pure Power Boot Camp v. Warrior Fitness Boot Camp*[10] is misplaced. In that case, a former employer hacked into its former employee's e-mail accounts without authorization.[11] In the case before us, the trial

court did not find evidence of hacking. Instead, the court found that, when Stanton moved the mouse, the email account appeared on the screen of Sitton's computer. Sitton challenges this finding, but because there is evidence to support it,
537 we will not disturb it on appeal.[12] Because *537 Stanton's actions were not taken "without authority," the trial court did not err in denying Sitton's claim under OCGA § 16-9-93.

2. Sitton contends that the trial court erred in ruling for appellees on his claim for common law invasion of privacy based upon an "intrusion upon [his] seclusion or solitude, or into his private affairs."[13] We disagree.

"The `unreasonable intrusion' aspect of the [tort of] invasion of privacy involves a prying or intrusion, which would be offensive or objectionable to a reasonable person, into a person's private concerns."[14] In order to show the tort of unreasonable intrusion, a plaintiff must show "a physical intrusion which is analogous to a trespass";[15] however, "this `physical' requirement can be met by showing that the defendant conducted surveillance on the plaintiff or otherwise monitored [plaintiff's] activities."[16] In the case before us, no such surveillance took place.

Even if Stanton's review of Sitton's e-mails could be seen as "surveillance," it still does not rise to the level of an unreasonable intrusion upon Sitton's seclusion or solitude, because Stanton's activity was "reasonable in light of the situation."[17] Stanton acted in order to obtain evidence in connection with an investigation of improper employee behavior.[18] In the case before us, as in *Yarbray,* "the company's interests were at stake."[19] Stanton had every reason to suspect that Sitton was conducting a competing business on the side, as in fact he was. As our Supreme Court has noted, "[T]here are some shocks, inconveniences and annoyances which members of society in the nature of things must absorb without the right of redress."[20] The trial court correctly found that Stanton's perusal of Sitton's e-mail on Sitton's computer, which Sitton used in conducting business for PDI, did not constitute such an unreasonable intrusion as to rise to the level of invasion of privacy.[21]

3. Sitton argues that the Employee Manual was actually a contract, to which the rules for construction of contracts should be applied. Sitton has failed to show this Court that he raised this argument below, that the trial court ruled on it, or that he preserved the alleged error for our consideration.[22] Therefore, this enumeration of error presents nothing for appellate review. "[An] appellate court will not consider an issue raised for the first time on appeal, because the trial court has not had the opportunity to consider it."[23]

4. Sitton asserts that the trial court erred in admitting into evidence an e-mail and the PDI Employee Manual. This enumeration of error fails.

(a) Sitton contends that the trial court erred in admitting into evidence an incriminating e-mail which he sent to Debbie
538 Burkett at Apex Printing on September 7, *538 2008,[24] and which Stanton subsequently found on Sitton's computer at PDI. Sitton contends that the e-mail was not admissible because Stanton obtained it in violation of OCGA § 16-11-62(3), a statute concerning unlawful eavesdropping or surveillance.[25]

OCGA § 16-11-62(3) makes it unlawful for anyone "to go on or about the premises of another or any private place . . . for the purpose of invading the privacy of others by eavesdropping upon their conversations or secretly observing their activities." This statute, by its plain language, is not applicable to the situation at bar. First, the evidence does not show that Stanton went "on or about the premises of another or any private place." On the contrary, Stanton went into Sitton's office at PDI. This office was owned by the business of which Stanton was the chief executive officer and was used by an employee, Sitton, who was under Stanton's authority. There is no evidence that Stanton eavesdropped on Sitton's conversations or secretly observed his activities. The trial court did not err in admitting the disputed e-mail.

(b) Sitton contends that the trial court abused its discretion in denying his motion to strike PDI's Employee Manual from evidence. Sitton argues that appellees did not admit the Employee Manual into evidence at trial and that the Manual was not in compliance with the "best evidence" rule.

This enumeration is not supported by the record. Sitton himself introduced the Employee Manual into evidence, without

objection from appellees, during the motion in limine phase of the trial.[26] Sitton did not request that the Manual be admitted for a limited purpose at that time, and it was admitted into evidence without limitation. During his case-in-chief, Sitton testified on direct, based in part on the Employee Manual. During appellees' case-in-chief, appellees' counsel asked Sitton on cross, "Have you looked at the [Employee Manual] that's been admitted into evidence in this case?" Sitton did not object at that time or during the subsequent testimony concerning the Employee Manual; in particular, Sitton did not object on "best evidence" grounds. Several months after the trial, Sitton filed a motion to strike evidence relating to the Employee Manual. The trial court denied this motion.

In light of the fact that Sitton himself introduced this evidence, relied on it in his case-in-chief, and failed to object when Stanton's counsel described it as having been admitted into evidence in the case, he has waived any purported error in the denial of his motion to strike. Sitton "cannot now complain on appeal of alleged error which [he] induced and in which [he] specifically acquiesced."[27] Self-induced error does not provide ground for reversal.[28]

5. In his fifth enumeration of error, Sitton challenges the trial court's entry of judgment against him on PDI's counterclaim for breach of duty of loyalty. We find no error.

Sitton first asserts that he was an independent contractor, not an employee, of PDI, but he has failed to support this argument by citation to the record or to authority. This claim of error is therefore deemed abandoned.[29] Even had the alleged error not been abandoned, however, it is without merit. Ample evidence in the record supports the trial court's finding that Sitton was an at-will employee of PDI, hired as an exclusive outside salesperson; that he reported to
539 Stanton, who had the authority to control the time, manner, and method of Sitton's performance *539 of his duties; that Stanton had the authority to fire him; and that, pursuant to the Employee Manual, he was subject to rules or policies which PDI might adopt in the future.[30] Moreover, there was evidence that Sitton had authority to solicit business on PDI's behalf and to bind PDI for certain obligations, which authorized the trial court to find that Sitton, as PDI's agent, owed a fiduciary obligation to his employer, PDI.[31]

Sitton next asserts that he owed no duty of loyalty to PDI, but he does not address this argument in his brief. Instead, he argues that appellees "failed to meet their burden of establishing entitlement to relief for misappropriation of a business opportunity." This argument is misplaced. Appellees did not assert, and the trial court did not rule on, this ground. Sitton's brief gives no indication whether this argument was raised below. For the reasons stated in Division 3 above, we cannot consider this argument on appeal.

As to Sitton's unsupported argument that he did not owe any duty of loyalty or fiduciary duty to his employer PDI, we conclude that it is without merit. Although an employee does not breach the fiduciary duty owed to his employer simply by making plans, while he is still employed, to enter a competing business at a future time,[32] "[h]e is not . . . entitled to solicit customers for a rival business before the end of his employment nor can he properly do other similar acts in direct competition with the employer's business."[33] Here, the trial court found that competition against PDI by its employees was specifically prohibited by the terms of PDI's Employee Manual; that Sitton agreed to abide by the Employee Manual; and that Sitton engaged in a rival business through SSA while he was employed by PDI. Thus, the trial court's finding that Sitton breached his duty of loyalty to PDI was supported by some evidence and will not be disturbed on appeal.[34]

6. Without citing authority, Sitton asserts error in the trial court's calculation of damages. This enumeration fails.

The trial court found that PDI's loss of business to SSA caused PDI damage and resulted in layoffs of employees. Evidence adduced at trial showed the total amounts Sitton billed for SSA's print services while he was still employed by PDI. The trial court treated these amounts as gross sales lost by PDI due to Sitton's breach of loyalty and fiduciary duty. The court then multiplied the 2007 and 2008 totals by PDI's profit percentage experienced during those respective years to arrive at the total net profit lost by PDI due to Sitton's diversion of this business to SSA. That the amount the court awarded exceeded the amount of commissions SSA paid to Sitton during this time period is irrelevant. The question of damages is ordinarily one for the jury.[35] The trial court, acting as finder of fact, issued an award well within the range of

540 evidence and *540 testimony presented at trial.[36]

Judgment affirmed.

SMITH, P.J., and DILLARD, J., concur.

[1] This statute is part of the Georgia Computer Systems Protection Act, OCGA § 16-9-90 et seq.

[2] (Citation omitted.) *Realty Lenders v. Levine,* 286 Ga.App. 326-327, 649 S.E.2d 333 (2007).

[3] (Citations and punctuation omitted.) *Sam's Wholesale Club v. Riley,* 241 Ga.App. 693, 527 S.E.2d 293 (1999). Accord *Lifestyle Home Rentals v. Rahman,* 290 Ga.App. 585, 660 S.E.2d 409 (2008).

[4] OCGA § 16-9-93(g)(1).

[5] OCGA § 16-9-93(a)(1)-(3).

[6] OCGA § 16-9-93(b)(1)-(3).

[7] OCGA § 16-9-93(c).

[8] See *DuCom v. State,* 288 Ga.App. 555, 562-563(4), 654 S.E.2d 670 (2007) (evidence sufficient to show computer theft where defendant employee copied employer's data without authority); *Stargate Software Intl. v. Rumph,* 224 Ga. App. 873, 879-880(6), 482 S.E.2d 498 (1997) (jury issue as to whether defendant had knowledge that its use of plaintiff's computers was without authority).

[9] OCGA § 16-9-92(18). "`Computer network' means a set of related, remotely connected computers and any communications facilities with the function and purpose of transmitting data among them through the communications facilities." OCGA § 16-9-92(2).

[10] 587 F.Supp.2d 548, 555(I)(A), 559(I)(D) (S.D.N.Y.2008) (applying the Stored Communications Act, 18 USC § 2701 et seq.).

[11] Id. at 552.

[12] *Brannon v. Perryman Cemetery,* 308 Ga.App. 832, 833, 709 S.E.2d 33 (2011) ("appellate courts will not disturb fact findings of a trial court if there is any evidence to sustain them") (citation omitted).

[13] (Footnote omitted.) *Cabaniss v. Hipsley,* 114 Ga.App. 367, 370, 151 S.E.2d 496 (1966) (listing four types of invasion of privacy, one of which is intrusion).

[14] (Citations omitted.) *Yarbray v. Southern Bell, etc. Co.,* 261 Ga. 703, 705(1), 409 S.E.2d 835 (1991).

[15] (Citations and punctuation omitted.) *Anderson v. Mergenhagen,* 283 Ga.App. 546, 550(2), 642 S.E.2d 105 (2007).

[16] Id.

[17] Id. at 551(2), 642 S.E.2d 105.

[18] See id. ("Reasonable surveillance is recognized as a common method to obtain evidence to defend a lawsuit").

[19] *Yarbray,* supra.

[20] (Citation and punctuation omitted.) Id. Accord *Udoinyion v. Re/Max of Atlanta,* 289 Ga. App. 580, 584, 657 S.E.2d 644 (2008).

[21] See discussion of "unreasonable intrusion" tort in *Benedict v. State Farm Bank,* 309 Ga.App. 133, 137(1)(a), 709 S.E.2d 314 (2011) (defendant's annoying calls to plaintiff did not amount to actionable intrusion where no surveillance, physical trespass, or physical touching was alleged).

[22] See Court of Appeals Rule 25(a)(1).

[23] (Citation and punctuation omitted.) *Thompson v. Princell,* 304 Ga.App. 256, 259(a), 696 S.E.2d 91 (2010).

[24] Sitton and the trial court both misstated the date of this e-mail as September 15, 2008.

[25] Under OCGA § 16-11-67, evidence obtained in violation of OCGA § 16-11-62 is not admissible.

[26] The trial court's ruling on the motion in limine addressed only the admissibility of the September 7, 2008, e-mail (which, as noted

above, the trial court mistakenly referred to as the September 15 e-mail).

[27] (Footnote omitted.) *Cherokee Nat. Life Ins. Co. v. Eason*, 276 Ga.App. 183, 187(2), 622 S.E.2d 883 (2005).

[28] *Harper v. Hurlock*, 281 Ga.App. 265, 266, 635 S.E.2d 874 (2006).

[29] Court of Appeals Rule 25(c)(2).

[30] See *Davis v. Beasley Timber Co.*, 241 Ga.App. 706, 707-708(1), 527 S.E.2d 221 (1999), citing *Ross v. Ninety-Two West, Ltd.*, 201 Ga.App. 887, 891-892(3), 412 S.E.2d 876 (1991) (contract describing party as "independent contractor" does not control if at the same time it provides that he shall be subject to any employer rules adopted in future).

[31] See *Hilb, Rogal & Hamilton Co. of Atlanta v. Holley*, 295 Ga.App. 54, 58(2), 670 S.E.2d 874 (2008). See also *Physician Specialists in Anesthesia v. Wildmon*, 238 Ga.App. 730, 735(3), 521 S.E.2d 358 (1999) ("a cause of action against an employee for breach of loyalty must be based upon a fiduciary duty owed by the employee and must rise and fall with any claim for breach of fiduciary duty") (footnote omitted).

[32] *Hanson Staple Co. v. Eckelberry*, 297 Ga.App. 356, 358(1), 677 S.E.2d 321 (2009).

[33] (Citation and punctuation omitted.) *Nilan's Alley, Inc. v. Ginsburg*, 208 Ga.App. 145(1), 430 S.E.2d 368 (1993). Accord *Instrument Repair Svc. v. Gunby*, 238 Ga.App. 138, 140(1), 518 S.E.2d 161 (1999). See also OCGA § 10-6-25 ("The agent shall not make a personal profit from his principal's property").

[34] Compare *Vernon Library Supplies v. Ard*, 249 Ga.App. 853, 855(3), 550 S.E.2d 108 (2001) (judgment for employee following bench trial affirmed where some evidence supported conclusion that employee did not directly compete with employer before the end of his employment).

[35] OCGA § 51-12-12(a).

[36] See *T.C. Property Mgmt. v. Tsai*, 267 Ga.App. 740, 741, 600 S.E.2d 770 (2004).

In the Matter Of the Arbitration Between:

American Federation of Government
Employees, National Border Patrol Council,
Local 2595, and Earl Trapp.

Grievants, **OPINION & AWARD**

Vs.

Department of Homeland Security,
U.S. Customs and Border Protection, U.S.
Border Patrol, Yuma Sector.

Agency.

FMCS Case No. 12-56290-A (Termination of Earl Trapp)

INTRODUCTION

The Arbitrator, Edward Scholtz, was selected by the parties from a panel of arbitrators provided by FMCS. The arbitration hearing was held in Yuma, Arizona on October 29 and 30 and December 4, 2012. The grievants were represented by Jason Aldrich, Gattey and Baranic, and the Agency, by Lauren Barefoot, Office of Assistant Counsel, U.S. Customs and Border Protection. The matter was submitted by post-hearing briefs.

ISSUE

The issue is controlled by statute. Under 5 U.S.C. Section 7513(a) the Agency must prove that the removal of Earl Trapp was only for such cause as to promote the efficiency of the service.

STATEMENT OF THE CASE AND THE FACTS

The Border Patrol is a Federal Law Enforcement Agency within the United States Department of Homeland Security, U.S. Customs and Border Protection, charged with preventing the entry of terrorists and weapons of terrorism, enforcing federal laws, interdicting smugglers, and protecting the United States from those who attempt to enter the U.S. between the ports of entry.

The Border Patrol mission is "prevent the entry of terrorists and their weapons of terrorism; to enforce the laws that protect America's homeland by detection, interdiction, and apprehension of those who attempt to illegally enter or smuggle and person or contraband across our Nation's sovereign borders."

Earl Trapp entered on duty with the U.S. Border Patrol on March 23, 2009. Trapp was assigned to the Welton Station of the U.S Border Patrol in the Yuma Border Patrol Sector. Trapp worked temporary details in the Tucson Border Patrol Sector when the opportunity presented itself. During February and March 2011, Trapp was assigned to such a temporary detail in the Tucson Sector. During this time frame, Trapp was also scheduled to attend an Army National Guard military drill in Marana, Arizona, from March 4-6, 2011.

Charge I: Time and Attendance Records

On March 4, 2011, at 8:00 in the morning, Trapp appeared at the Yuma County Sheriff's Office instead of appearing for his military drill so that he could answer questions of investigators regarding their suspicion that he had committed a felony. By appearing in Yuma for the Sheriff's investigation, Trapp did not appear for his military drill in Marana, which was quite a distance from Yuma. At the

conclusion of the hearing, the investigators requested that Trapp remain in Yuma for the weekend, which Trapp agreed to do.

Following the Sheriff's interview, Trapp called his Station. Trapp testified that he spoke with 2nd line supervisor, Robert Mead, and informed Mead that there was an investigation being conducted by the Yuma County Sheriff's Office, and that he had just answered questions of investigators in Yuma. Mead wrote an email to his superiors documenting the phone call but omitting that Trapp had told him that he was in Yuma. Trapp remained in Yuma through most of the weekend, but returned to Casa Grande, Arizona (his assigned detail station) during the evening of March 6, 2011.

The Agency's schedule for Trapp for the dates from February 27, 2011. to March 12, 2011, and Trapp's computerized record of hours worked ("COSS" records) on each of these days, show Trapp worked on these days as follows:

2/27/11: Worked from 0000-1000 hours (10 hours total)

2/28/11: Worked from 0000-1000 hours (10 hours total)

3/1/11: Worked from 0000-1000 hours (10 hours total)

3/2/11: Worked from 0000-1000 hours (10 hours total)

3/3/11: Worked from 0000-1000 hours (10 hours total)

3/4/11: Military leave (But claimed as a day off in COSS)

3/5/11: Day Off (But claimed as military leave in COSS)

3/6/11: Military leave (Claimed as military leave in COSS)

3/7/11: Day off (Claimed as day off in COSS)

3/8/11: Worked from 0000-1000 hours (10 hours total)

3/9/11: Worked from 0000-1000 hours (10 hours total)

3/10/11: Worked from 0000-1000 (10 hours total)

3/11/11: Sick Leave

3/12/11: Worked from 0000-1000 hours (but probably 12 hours total)

The Time and Attendance Sheet is what an employee completes before entering his hours in the COSS system. Trapp completed his Time and Attendance Sheet for the above dates on March 1, 201, and an email he sent that day indicates that he sent his completed Time and Attendance Sheet from a remote patrol camp (Papago Farms) to the Welton Station at 12:19 p.m. on Sunday, March 13, 2011. Trapp testified that he worked 12 hours that day.

Trapp testified that he was stressed out when he completed the Time and Attendance Sheet and that he was also fatigued having just worked 12 hours that day. Trapp testified that there were obvious inaccuracies. He should have not claimed military leave. Trapp also testified that he completely mislabeled the Administratively Uncontrollable Overtime work by entering "2's" in the AUO Excludable row, when those "2's" should have been in the AUO row immediately above the Excludable row. Trapp's Time and Attendance record show that he claimed military leave on Friday, March 4, and Sunday, March 6, while his COSS records show military leave was claimed on Saturday, March 5, and Sunday, March 6.

Chief Martin admitted that Trapp incorrectly entered his overtime (AUO) hours, and that the Time and Attendance Sheet submitted by Trapp did not request overtime for the overtime hours Trapp had worked.

Trapp testified that he believed that Charge I and its specifications should be sustained.

Charge II: Facebook Charge

Trapp had a Facebook account that included the time period from May 2010 to March 2011. Trapp testified that his Facebook postings have always been set to "private" and never to "public." An agency witness, Ms. Ashley Butler, testified that she saw Trapp's Facebook postings but her testimony lacked specifics and was not supported by any documentation. I find that Trapp's Facebook account settings were set to "private." Trapp testified that he never received a "friend request" from Michael Bodes, a Supervisory Agent at the Welton Station.

Michael Bodes has been assigned to the Welton Station for his entire career of seven years. Bodes testified that he had heard from Agent Alvarez that Trapp was posting inappropriate comments on his Facebook account. Alvarez had no recollection of telling Bodes that information but did recall another Agent, Jason Negus, complaining about Trapp's Facebook posts.

Bodes testified that he decided to create the Facebook account of "Layla Shine." Bodes then sent a "friend request" to Trapp. Trapp testified that he accepted a "friend request" from someone named "Layla Shine" with a picture of a female tagged to the request. Trapp believed that "Layla Shine" was someone that he had met in the past when he was single.

Supervisory Agent Bodes testified that when Trapp accepted the "friend request" he looked at Trapp's Facebook postings and copied them to a word

document. The Facebook postings obtained by Bodes were relied upon by the Agency to support its charge of "Poor Judgment" in Charge II. Before acquiring Trapp's Facebook posts, Bodes did not investigate to determine if his method of acquiring Trapp's Facebook pages was legal or otherwise appropriate. Bodes did not use any law enforcement authority to access Trapp's Facebook account and it was not a criminal investigation. Bodes testified that he was unaware of a requirement that he honestly and accurately identify himself to Facebook. Chief Martin admitted that none of Trapp's Facebook posts contained information that violated the Agency's Policy regarding "Improper Web Postings of Sensitive Information."

The Border Patrol Handbook Chapter 7 applies to "Reporting of Incidents." The Agency referenced Chapter 7 on February 9, 2011 to answer a question regarding reporting of off-duty incidents. An arbitration decision shows that the Arbitrator did not order the Border Patrol Handbook rescinded and the Agency withdrew a challenge to that Arbitration Award. Bodes admitted that he had read Chapter 7. The Agency introduced no evidence to show that the Border Patrol Handbook had been rescinded. Therefore, the Border Patrol Handbook was the active policy of the Agency during the relevant time period.

The Appendix to Chapter 7 of the Border Patrol Handbook classifies types of allegations. Only Class 4 allegations may be investigated by Border Patrol managers. And the Appendix 7-4 describes Class 4 allegations as low-level misconduct, such as attendance-related issues, poor or careless work performance, conducting personal business on company time, and other low-level offenses. The other Classes are all described by much more serious conduct, and must be investigated by either the

Office of the Inspector General, or, the CPB Office of Internal Affairs. Trapp's alleged Facebook misconduct was investigated as if it were a Class 4 offense, and Chief Martin regarded the Facebook Charge as much less serious than the Time and Attendance Charge.

Procedural Background

Trapp was served the Proposal for Removal on July 8, 2011. The Union provided Chief Martin several documents including Facebook's Statement of Rights and Responsibilities. This document demonstrates that Facebook requires its users to promise that the user is providing his/her real name, not provide false personal information and will not violate law in using Facebook.

On March 1, 2012, Trapp received Chief Martin's decision sustaining both Charges and all Specifications, and imposing the penalty of removal. Trapp's removal was effected on March 2, 2012. The Union timely invoked arbitration on March 21, 2012.

OPINION & AWARD

Under 5 U.S.C. Section 7513(a), the Agency must prove that the removal of Earl Trapp was only for such cause as to promote the efficiency of the service. The Agency is required to prove its case by the preponderance of the evidence standard. The Agency must also prove that the penalty selected was within the bounds of reasonableness. **(Douglas v. Veterans Administration 5 MSPR 280, 302, 306 (April 10, 1981).)**

Charge I: Submission of Inaccurate Time and Attendance Records

Trapp admitted the misconduct alleged in Charge I. The Douglas factors discussion will be discussed in order except that Factor #6 will be discussed last.

Factor #1: Nature and Seriousness of the Offense….

Chief Martin claimed that the falsification was intentional but the Proposal did not, in fact, charge intentional falsification. Patrol Agent in Charge, Justin Bristow testified that it is common for agents to make mistakes on their Time and Attendance records and that supervisors allow employees to amend their Time and Attendance records when supervisors discover inaccuracies. The evidence shows that Trapp was under stress at the time and was fatigued when he completed the Time and Attendance records, having just worked a twelve-hour shift.

Factor #2: Employees job level and type of employment….

Border Patrol Agents are law enforcement officers who are held to a high standard. (But see discussion of comparable disciplinary cases involving Border Patrol Agents regarding Factor #6.)

Factor #3: The employee's past disciplinary record.

Trapp had no prior discipline.

Factor #4: The employees past work record….

There was nothing significant regarding Trapp's work record.

Factor # 5: Effect of the offense on the employee to perform at a satisfactory level and its effect on supervisor's confidence….

The evidence shows that this is a common offense with employees routinely being given the opportunity to correct errors before disciplinary action is considered.

Factor #7: Consistency of the penalty with any applicable agency Table of Offense and Penalties.

Chief Martin admitted that he never looked at the Table in issuing his decision for removal.

Factor #8: Notoriety of Offense.

Chief Martin claimed that the matter received notoriety because the Army National Guard was involved. However, the Army National Guard had nothing to do with Trapp's Border Patrol Time and Attendance Records.

Factor #9: The clarity with which the employee was on notice of any rules that were violated… or had been warned about such conduct.

Trapp submitted "inaccurate records" which is common. This was a single incident.

Factor #10: Potential for Employee's rehabilitation.

Trapp did not commit similar misconduct either before or after the incident. Other Agents who have committed similar misconduct have not been removed from service.

Factor #11: Mitigating circumstances surrounding the offense.

The investigation by the Sheriff acted as a stressor for Trapp. Trapp was also fatigued when he completed the records having just worked a twelve-hour shift commencing at midnight. Trapp also made an error to his detriment by claiming his overtime hours in the "AUO Excludable" row that would not have provided him overtime for the hours worked.

Factor #12: The adequacy and effectiveness of alternative sanctions to deter such conduct.

The Agency has not terminated other Agents who have made similar errors.

Factor #6: Consistency of the penalty with those imposed upon other employees for the same or similar offenses.

Union Exhibit O provides the orbit of relevant comparison regarding the penalty imposed on Trapp. The first case proposed a ten-day suspension for three charges 1) Submitting inaccurate Time and Attendance Records 2) Failure to follow Leave Procedures and 3) Alleged that employee lied to his supervisor.

The remaining cases in Union Exhibit O show that four different employees of both the Yuma and El Centro Border Patrol Stations were proposed penalties ranging from five to fourteen calendar day suspensions for the act of claiming overtime pay when no overtime was worked.

After reviewing the Agency disciplinary practice in comparable cases, it is clear that removal was not justified for a single incident of errors in completing Time and Attendance Records, especially since Trapp had never received any prior discipline and other Agents have been allowed to correct their errors without penalty when supervisors caught the errors. The Agency has not applied its rules and penalties even-handedly. Therefore, the penalty of removal is reduced to a ten calendar-day suspension.

Charge II: Facebook Charge. The Electronic Stored Communications Act (ESCA) 18 U.S.C.A. Section 2707

In **Crispin v. Christian Audigier, Inc. 717 F. Supp. 2d 965 (CD Calif. 2010),**

the District Court found that Facebook postings and communications are protected by the Electronic Stored Communications Act. If the user sets the Facebook wall postings privacy settings to "private" the user is entitled to the protection of the ESCA. Judge Morrow's rulings in **Crispin** relied upon the Ninth Circuit's decision in in **Konop v. Hawaiian Airlines. Inc., 302 F. 3d 868 (2002).**

The ESCA and the **Crispin** and **Konop** cases were described to Chief Martin during the oral reply but Chief Martin chose to proceed with the Trapp removal.

Border Patrol Agent Trapp had a Facebook account with the privacy settings set to "private." Supervisory Border Patrol Agent Michael Bodes accessed Trapp's Facebook account by violating Facebook's requirements by creating a false account and acquired Trapp's wall postings after friend requesting Trapp under the false name, "Layla Shine." Bodes conduct violated the ESCA,

The defenses the Agency might rely upon appear in 18 U.S.C Sec. 2707. Paragraph (e). This provision reads as follows:

> (e) Defense—A good faith reliance on—
>
> (1) a court warrant or order, a grand jury subpoena, a legislative authorization, or a statutory authorization (including a request of a governmental entity under Section 2703(f) of this title);
> (2) a request of an investigative or law enforcement officer under Section 2518(7) of this title; or
> (3) a good faith determination that Section 2511(3) of this title permitted the conduct complained of.

Supervisory Border Patrol Agent Bodes testified that he did not conduct a criminal investigation of Trapp so he could not have obtained a warrant to search and seize Trapp's Facebook account. Therefore, the first defense is unavailable to

the Agency. The second defense requires a good faith determination by a law enforcement officer that a person's life or safety is jeopardized or national security is at risk or organized crime activities are occurring. Defense #2 does not apply since none of these facts were alleged by the Agency. The third defense is also inapplicable because the Agency is not the stored communication provider in this matter.

In summary, the courts have ruled that Facebook is an "Electronic Communication Provider," and as such, Facebook users who have their privacy settings set to "private" have an expectation of privacy. "Trickery cannot be used by law enforcement officials to obtain consent to view and potentially acquire evidence where an individual has an expectation of privacy." **Crispin.** Bodes was acting in a work-capacity when he obtained Trapp's Facebook posts but he did not follow Agency policies as set forth in Chapter 7 of the Border Patrol Handbook.

Supervisory Border Patrol Agent Michael Bodes illegally obtained Trapp's Facebook postings in violation for the ESCA. The appropriate remedy in this arbitration proceeding is to suppress Trapp's Facebook wall postings. Therefore, Charge II and its Specifications, which are based upon the illegally obtained Facebook postings, and all the evidence pertaining thereto, are excluded.

AWARD

The Union's grievance is sustained; the Agency did not prove cause for the removal of Earl Trapp. Charge I and both of its Specifications is sustained. Charge II and its Specifications are not sustained since the Agency violated the ESCA in acquiring and relying upon illegally obtained evidence. The removal penalty is

reduced to a ten calendar-day suspension, which would have commenced being served on March 2, 2012. Trapp is entitled to back pay for all lost from the date the ten calendar-day suspension would have concluded. Trapp is also entitled to seniority and all other benefits to which he would have been entitled had he been suspended for ten calendar days. The Arbitrator retains jurisdiction regarding the implementation of this Award for 60 calendar days from the date of this Award.

DATED: July 11, 2013.

Edward Scholtz, Arbitrator

California LEGISLATIVE INFORMATION

AB-1844 Employer use of social media. (2011-2012)

Assembly Bill No. 1844

CHAPTER 618

An act to add Chapter 2.5 (commencing with Section 980) to Part 3 of Division 2 of the Labor Code, relating to employment.

[Approved by Governor September 27, 2012. Filed with Secretary of State September 27, 2012.]

LEGISLATIVE COUNSEL'S DIGEST

AB 1844, Campos. Employer use of social media.

Existing law generally regulates the conduct of employers in the state.

This bill would prohibit an employer from requiring or requesting an employee or applicant for employment to disclose a username or password for the purpose of accessing personal social media, to access personal social media in the presence of the employer, or to divulge any personal social media. This bill would also prohibit an employer from discharging, disciplining, threatening to discharge or discipline, or otherwise retaliating against an employee or applicant for not complying with a request or demand by the employer that violates these provisions.

Under existing law, the Labor Commissioner, who is the Chief of the Division of Labor Standards Enforcement in the Department of Industrial Relations, is required to establish and maintain a field enforcement unit to investigate specified violations of the Labor Code and other labor laws and to enforce minimum labor standards. Existing law authorizes, and under specified circumstances requires, the Labor Commissioner to investigate employee complaints of violations of the Labor Code, provide for a hearing, and determine all matters arising under his or her jurisdiction.

This bill would provide that the Labor Commissioner is not required to investigate or determine any violation of a provision of this bill.

Vote: majority Appropriation: no Fiscal Committee: no Local Program: no

THE PEOPLE OF THE STATE OF CALIFORNIA DO ENACT AS FOLLOWS:

SECTION 1. Chapter 2.5 (commencing with Section 980) is added to Part 3 of Division 2 of the Labor Code, to read:

CHAPTER 2.5. Employer Use of Social Media

980. (a) As used in this chapter, "social media" means an electronic service or account, or electronic content, including, but not limited to, videos, still photographs, blogs, video blogs, podcasts, instant and text messages, email, online services or accounts, or Internet Web site profiles or locations.

(b) An employer shall not require or request an employee or applicant for employment to do any of the following:

(1) Disclose a username or password for the purpose of accessing personal social media.

(2) Access personal social media in the presence of the employer.

(3) Divulge any personal social media, except as provided in subdivision (c).

(c) Nothing in this section shall affect an employer's existing rights and obligations to request an employee to divulge personal social media reasonably believed to be relevant to an investigation of allegations of employee misconduct or employee violation of applicable laws and regulations, provided that the social media is used solely for purposes of that investigation or a related proceeding.

(d) Nothing in this section precludes an employer from requiring or requesting an employee to disclose a username, password, or other method for the purpose of accessing an employer-issued electronic device.

(e) An employer shall not discharge, discipline, threaten to discharge or discipline, or otherwise retaliate against an employee or applicant for not complying with a request or demand by the employer that violates this section. However, this section does not prohibit an employer from terminating or otherwise taking an adverse action against an employee or applicant if otherwise permitted by law.

SEC. 2. Notwithstanding any other provision of law, the Labor Commissioner, who is Chief of the Division of Labor Standards Enforcement, is not required to investigate or determine any violation of this act.

4.7.19 **Social Media Policy, Personal Use**

Professionalism, ethics, and integrity are of paramount importance to the public safety and law enforcement community. The effectiveness of the Department of Emergency Services and Public Protection ("DESPP") depends greatly upon the perceptions created during its day-to-day interaction with the public. To achieve credibility and obtain the public's confidence, DESPP may place reasonable restrictions on employee conduct and hold employees to these standards whether on or off duty.

DESPP has a responsibility to protect the reputation of the agency and its employees, as well as guard against liability and potential legal risk. DESPP employees, sworn and civilian as well as those personnel who are subject to the policies and procedures within the Administrative and Operations Manual ("A&O Manual") are cautioned that speech, on or off duty, made pursuant to their official duties is not protected speech and may form the basis for discipline if deemed detrimental to the agency. DESPP employees and personnel are collectively referred to hereinafter as "DESPP personnel."

DESPP personnel subject to this Personal Use of Social Media Policy are solely responsible for what they post online. DESPP personnel shall review this policy together with all applicable chapters and sections of the A&O Manual to ensure compliance.

a. **Definitions**

(1) **Blog**
A self-published diary or commentary of any type of content (from video to podcasts to traditional texts and photos) on a particular topic that may allow visitors to post responses, reactions, or comments. Items, sometimes called posts, may have keyword tags associated with them, are usually available as feeds. The term is short for "web log."

(2) **Page**
The specific portion of a social media website where content is displayed, and managed by an individual or individuals with administrator rights.

(3) **Personal social media use**
A non work-related social media activity (Examples: DESPP personnel utilizing, posting and/or communicating on social media for his/her own personal use. A Facebook page or a Twitter account for his/her own personal use).

(4) **Post**
Content an individual shares on a social media site or the act of publishing content on a site.

(5) **Profile**
Information that a user provides about himself or herself on a social networking site.

(6) **Social Media**
A category of Internet-based tools and platforms used to integrate user-generated content and participation. Such tools and platforms are used to publish, converse and share content online using media including, but not limited to, sites, blogs, videos, wikis and podcasts.

(7) **Social Networks**
Online platforms where users can create profiles, share information, and socialize with others using a range of technologies, including, but not limited to websites, blogs, video, images tagging, lists of friends, forums and messaging or any other medium or electronic communication.

(8) **Social Networking Sites**
Online places where users can create a profile for themselves and then socialize with others using a range of social media tools including websites, blogs, video, images, tagging, lists of friends, forums and messaging. This includes, but is not limited to, social networking sites (i.e.; Facebook, LinkedIn, MySpace), micro blogging sites (i.e.; Twitter, Nixle), photo and video sharing sites (i.e.; Instagram, Flickr, YouTube), Wikis (Wikipedia),blogs, and news sites (i.e.; Digg, Reddit).

(9) **Speech**
Expression or communication of thoughts or opinions in spoken words, in writing (including posts), by expressive conduct, symbolism, photographs, videotape, or related forms of communication.

(10) **Web 2.0**
The second generation of the World Wide Web focused on shareable, user-generated content, rather than static web pages. This term is sometimes used inter-changeably with social media.

(11) **Wiki**
Web page(s) that may be edited collaboratively.

NOTE: The absence or lack of explicit reference to a specific site and/or technology does not limit the extent of the application of this policy.

b. Policy

(1) **Prohibition while on duty**

(a) The utilization of social media and social networking for personal use while on duty, either on personally owned electronic equipment and/or personally owned technology devices and/or on DESPP electronic equipment, technology devices, computers and/or any other DESPP electronic resource(s), is prohibited and any proof that this has occurred on duty may result in discipline.

(b) "On duty" shall be defined as DESPP personnel's regular work hours including any hours of authorized and/or approved overtime or compensated hours, as required in the performance of official duties and/or in accordance with existing labor contracts excluding breaks, lunch, etc. All DESPP personnel are reminded of the prohibitions regarding the use of State of Connecticut electronic resources to access social media sites for non-business purposes. (Refer to A&O Manual Section 13.14 and the Department of Administrative Services, Enterprise Systems and Technology's Acceptable Use of State Systems Policy link: http://www.ct.gov/best/cwp/view.asp?a=1245&Q=3146866).

(2) **Policy Guidelines**

(a) DESPP recognizes the role that social media plays in the personal lives of some DESPP personnel. DESPP personnel are free to express themselves as private citizens on social media and networking sites to the degree that their speech is not detrimental to DESPP, does not impair the work of DESPP, damage the reputation of another, disparage, embarrass or otherwise discredit DESPP, its personnel or any of its units or functions. Barring applicable state and federal law or binding employment contracts, when using social media, DESPP personnel should be mindful that their online speech becomes part of the worldwide electronic domain. Below are guidelines outlining DESPP's expectations regarding DESPP personnel's personal use of social media:

1. DESPP personnel should exercise caution when commenting and/or communicating on social media and networking sites and should consider whether personal thoughts they publish may be misunderstood as expressing specific opinions of the agency. DESPP personnel that identify his/her employment with DESPP are prohibited from expressing any opinion or statement as the official policy or view of DESPP or of any individual therein without prior written permission from the DESPP Commissioner or his/her designee. If DESPP personnel identify his/her employment with DESPP, he/she assumes the responsibility for representing DESPP in a positive and professional manner and shall not post any material that may negatively reflect on DESPP, whether on or off duty.

2. DESPP personnel who appear in uniform or identify themselves as members of DESPP create a link between themselves and their employment within the agency. DESPP personnel that may be identified as employees may have no reasonable expectation of privacy when social networking online and shall be subject to all pertinent policies including those policies outlined by the Department of Administrative Services, DESPP and the A&O Manual as well as applicable local, state and federal laws and regulations. Individuals that may be identified as DESPP personnel shall be strictly prohibited from posting particularly offensive, unethical or unlawful content.

3. DESPP personnel are prohibited from posting information regarding DESPP business, investigations or any confidential or criminal justice information gained in the course of their employment. Photos taken while on duty at crime scenes or any police-related calls and events are DESPP property and shall not be posted on social media and networking sites unless authorized by the DESPP Commissioner or his/her designee. DESPP personnel without the prior authorization of the DESPP Commissioner or his/her designee, are prohibited from disclosing information or details concerning the following:

   [a] Criminal or traffic investigations or actions;

   [b] Administrative investigations or actions;

   [c] Official DESPP training(s), calls for service, traffic stops, vehicle crashes and other contacts with citizens;

   [d] DESPP sensitive plans, strategy, undercover assignments and/or operations;

   [e] DESPP personnel issues, including disciplinary actions, transfers, internal reports, procedures or other internal business-related communications; and

   [f] DESPP personnel matters concerning the agency.

4. DESPP personnel may not divulge nonpublic information gained by reason of their employment; make any statements, speeches, and endorsements or publish materials that could reasonably be considered to represent the views, opinions or positions of DESPP without prior written approval from the DESPP Commissioner or his/her designee.

5. DESPP personnel are prohibited from posting and/or publishing information or images of DESPP equipment using social networking web pages and/or media without prior written approval from the DESPP Commissioner or his/her designee. Examples of DESPP equipment include, but are not limited to:

   [a] Marked agency vehicles;

   [b] Unmarked agency vehicles;

   [c] Videos of training, operations or exercises;

   [d] Compilation videos of personnel, vehicles, or equipment, etc.; or

   [e] DESPP issued weapons.

   NOTE: "Equipment" as referenced above shall not include DESPP canines, see also A&O Manual Section 4.7.19b(2)(a)6 below.

6. DESPP personnel are prohibited from posting and/or publishing information or images of DESPP canines, DESPP seal, DESPP's units' or divisions' logo, badge, trademark patch, insignia or any images of intellectual property on social networking web pages and/or media in any manner that may be detrimental to, damage the reputation of, disparage, embarrass, or discredit DESPP, its personnel or any of its units or functions. Examples of such information and/or images include, but are not limited to: the Connecticut State Police badge, Connecticut State Police patch, Connecticut State Police insignia or Connecticut Fire Academy badge.

7. DESPP personnel are prohibited from speech involving themselves or other DESPP personnel reflecting behavior that would reasonably be considered reckless or irresponsible. For example, speech containing obscene or sexually explicit language, images, acts and statements or other forms of speech that ridicule, malign, disparage, or otherwise express bias against any race, any religion, or any protected class of individuals.

8. DESPP personnel are prohibited from speech involving themselves or other DESPP personnel that could be viewed as malicious, obscene, threatening or intimidating. Examples include, but are not limited to offensive posts meant to intentionally harm someone's reputation or posts that could contribute to a hostile work environment on the basis of race, sex, disability, religion or any other status protected by law or DESPP policy.

9. DESPP personnel should be aware that they may be subject to civil litigation for:

   [a] Publishing or posting false information that harms the reputation of another person, group, or organization;

[b] Publishing or posting private facts and personal information about someone without their permission that has not been previously revealed to the public, is not of legitimate public concern or would be offensive to a reasonable person;

[c] Using someone else's name, likeness or other personal attributes without that person's permission for an exploitative purpose; or

[d] Publishing the creative work of another, trademarks or certain confidential business information without the permission of the owner.

10. Social networking web pages and/or media maintained by DESPP personnel deemed inappropriate and bringing discredit to DESPP or to a DESPP member, or promoting misconduct, whether on or off-duty, may provide grounds for undermining or impeaching testimony in criminal, civil and/or administrative proceedings. DESPP personnel may be subject to discipline for such social media and/or networking activity.

11. DESPP personnel are advised that their activities on social networking web pages and/or media may impact their options for future specialized assignments. (Example: BCI assignments requiring undercover assignment or covert operations).

12. DESPP personnel should be aware that privacy settings on social networking and/or media networking sites are constantly in flux, and they should never assume that personal information posted on such sites is private.

13. DESPP personnel should expect that any information created, transmitted, downloaded, exchanged, or discussed in a public online forum may be accessed by DESPP at any time without prior notice.

c. **Policy Review**

This policy shall be reviewed by the DESPP Commissioner or his/her designee on a periodic basis to ensure that it reflects DESPP's policy, is legally sound and reasonably enforceable.

d. **Policy Notification**

All DESPP personnel including troopers, officers, administrative staff, support personnel, interns and volunteer staff, and those responsible to adhere to State Police policy and procedures in accordance with the A&O Manual shall become familiar with and adhere to the provisions of this policy. Notifications pertaining to this policy may be given by in-service training, internal mail, email and/or occasional network log-in reminders.

14.1.4 **Tattoo and Body Modification Policy**

The Connecticut State Police recognizes the personal appearance of its sworn uniform personnel, when in the public eye, has a direct impact on public confidence and thereby on the ability of individual personnel to perform their official duties. It is the policy of the Connecticut State Police that sworn uniform members maintain a professional appearance that will encourage public confidence in the members of this Department. As such, the following policy will apply to sworn members of the Connecticut State Police:

a. **Definitions**

(1) Body modification means, but is not limited to: tongue splitting or bifurcation, the complete or trans-dermal implantation of any object(s) (other than hair replacement), abnormal shaping of the ears, eyes, nose, abnormal filing of teeth, branding or scarification. Body modification shall not include those procedures medically necessitated by deformity or injury, or generally accepted cosmetic changes/ augmentations performed by a licensed medical professional.

(a) The above definition includes facial piercings to include, but not limited to tongue piercings, lip piercings, nose piercings and brow piercings.

b. **Body Modifications**

(1) Body modification to any area of the body that is visible while on-duty in any authorized uniform or attire is prohibited.

(2) The use of gold, platinum or other dental veneers or caps for the purpose of ornamentation while on-duty is prohibited. Teeth, whether natural, capped, or veneer shall not be ornamented with designs, jewels, initials, etc.

(3) Body piercing jewelry not concealed by any authorized uniform or approved attire while on-duty is prohibited with the exception of earrings worn in compliance with section 14.01.03 of the A&O manual.

(a) The wearing of any facial jewelry to include, but not limited to tongue piercings, lip piercings, nose piercings, brow piercings by any sworn member of the department while on-duty is prohibited.

c. **Tattoos**

(1) No sworn member of the department shall have any tattoo, scarification or brand that is visible while on-duty in any authorized uniform or attire.

(2) Incumbent sworn personnel shall not be required to remove or cover existing tattoos, branding, or body art that existed prior to the implementation of this policy but shall not add to or receive additional tattoos, brandings, or body art in violation of this policy, except that sworn personnel shall be permitted to re-color existing tattoos and shall be permitted to complete existing tattoos and obtain one tattoo on their arm (but not their face, neck or hands) no larger than two inches by two inches, so long as such tattoos are not extremist, indecent, sexist, or racist.

(a) Extremist tattoos or brands are those affiliated with, depicting, or symbolizing extremist philosophies, organizations, or activities. Extremist philosophies, organizations, and activities are those which advocate racial, gender or ethnic hatred or intolerance; advocate, create, or engage in illegal discrimination based on race, color, gender, ethnicity, religion, or national origin; or advocate violence or other unlawful means of depriving individual rights under the U.S. Constitution, Federal, or State law.

STATE OF CONNECTICUT
DEPARTMENT OF EMERGENCY SERVICES AND PUBLIC PROTECTION
DIVISION OF STATE POLICE

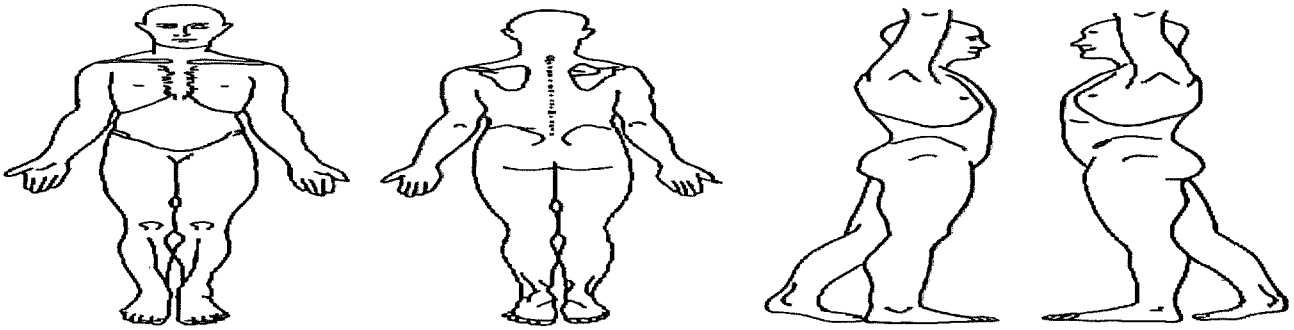
Grandfather Waiver for Visible Tattoos, Brandings, and/or Body Art Visible While in Uniform

1. Currently serving sworn personnel who have tattoos, brandings, and/or body art image, as described in A&O Manual 14.1.4, that ***are visible*** while wearing any department uniform, shall submit the following form within thirty (30) days after the adoption of the agency "Tattoo and Body Modification Policy."
2. Up to four (4) tattoos, brandings, and/or body art images may be reported per form, with additional pages used as necessary.
3. Sworn personnel ***shall not*** add to or receive additional tattoos, brandings, and/or body art images that are visible while wearing any department uniform, except as specified in A&O Manual 14.1.4c.
4. This form(s) shall be retained in the employee's Official Personnel File.
5. Employees may, in their discretion, also attach a photograph of each tattoo, branding, and/or body art image, for additional documentation purposes.

Name (Last, First, MI):	Employee Number:	Date:

A tattoo, branding, and/or body art image that is ***visible while wearing any department uniform*** shall be documented as such:

1. Utilize the body diagram below to identify the exact location on the body of each **visible** tattoo, branding, and/or body art. Identify each tattoo, branding, and/or body art image as A, B, C, and D.



2. Provide the exact size (dimension) (width, length, and circumference if around an extremity) in inches of each **visible** tattoo branding, and/or body art image.

A._____

B._____

C._____

D._____

3. Provide an accurate and complete description of each **visible** tattoo, branding, and/or body art image.

A._____

B._____

C._____

D._____

(b) Indecent tattoos or brands are those that are grossly offensive to modesty, decency, or propriety; shock the moral sense because of their vulgar, filthy, or disgusting nature or tendency to incite lustful thought; or tend reasonably to corrupt morals or incite libidinous thoughts.

(c) Sexist tattoos or brands are those that advocate a philosophy that degrades or demeans a person based on gender, but that may not meet the same definition of "indecent."

(d) Racist tattoos or brands are those that advocate a philosophy that degrades or demeans a person based on race, ethnicity, or national origin.

(3) Applicants wishing for sworn appointment to the department shall be screened during applicant processing at which time a determination shall be made as to whether an applicant is in violation of the policy. If an applicant is found to be in violation, then they will have the option of having the tattoo, branding, or body art, or visible portion thereof, removed at their own expense. If an applicant expresses a willingness to have this done, then their application will be placed on hold until the removal process is completed.

(4) Subsection 14.1.4(c) shall apply to currently sworn personnel with existing tattoos, brandings and/or body art as of the implementation date of this policy,

(5) Incumbent sworn agency employees, serving at the time of the adoption of this policy, will report any current visible tattoos, branding, or body art by completing the DESPP-1072-C within thirty (30) days after the adoption of this policy. This form will be retained in the employee's Official Personnel File for future documentation and verification purposes as may become necessary.