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# High Court's GPS ruling breaks new ground on privacy rights

By Kimberly Atkins
Staff writer

WASHINGTON – After punting on the issue in the past, the U.S. Supreme Court has again waded into the choppy waters of privacy protection in the digital age in a case involving the warrantless use of a GPS device on a suspect's car.

But while still not ruling on the privacy issue directly, this time five justices gave a strong indication that individuals' privacy interests may be entitled to constitutional protection.

That's very important in the criminal context "because of the increasing use of GPS technology by law enforcement," said Boston attorney Michelle Peirce, a partner at Donoghue Barrett & Singal.

In *U.S. v. Jones*, a unanimous Court held that the installation and use of a GPS device by police to track a car's movements constituted a search under the Fourth Amendment.

The Court was split on the basis for that conclusion. A five-member majority held that the GPS use constituted a physical trespass under centuries-old common law principles.

"It is important to be clear about what occurred in this case: The government physically occupied private property for the purpose of obtaining information," Justice Antonin Scalia wrote in the opinion of the Court. "We have no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted."

But in a strongly worded concurrence joined by three other justices, Justice Samuel Alito argued that the court should have reached its conclusion by examining "whether respondent's reasonable expectations of privacy were violated."

"Ironically, the Court has chosen to decide this case based on 18th-century tort law. ...

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AP Photo/Jeff T. Green

Justice Antonin Scalia wrote the majority opinion in the U.S Supreme Court ruling holding that the use of a Global Positioning System device to track a suspect's car was a search under the Fourth Amendment.

This holding, in my judgment, is unwise," Alito wrote. "It strains the language of the Fourth Amendment; it has little if any support in current Fourth Amendment case law; and it is highly artificial."

In what may prove to be the key opinion in the case, Justice Sonia Sotomayor – who also joined in Scalia's trespass analysis – wrote a separate concurrence stating that privacy interests were also implicated and suggesting a willingness to engage in a privacy analysis in future cases involving advancing technologies.

"I would ask whether people reasonably expect that their movements will be recorded and aggregated in a manner that enables the Government to ascertain, more or less at

**GPS:** Ruling is fact-based.
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# Whistleblower claims fueled by unemployed

By Sylvia Hsieh
Staff writer

With more attention being given to corporate rule-breaking and stronger laws supporting those who report it, employment lawyers are seeing more workers claiming that they lost their jobs because they complained about wrongdoing in the workplace.

While special federal laws like Sarbanes-Oxley and Dodd-Frank protect whistleblowers in specific industries, employment lawyers say workers in all types of jobs are claiming whistleblower status – from hospital employees complaining about patient safety to hourly workers blowing the whistle on employers who aren't paying overtime to both public and private employees who complain rule-bending is hurting the public.

"It's white hot – this is as hot of an area as you can get right now," said Steven J. Pearlman, a partner at Seyfarth Shaw in Chicago who co-chairs his firm's whistleblower team.

In late January, a firefighter in New Jersey won a $3.5 million verdict after arguing to a jury that the reason he was passed over for promotion to lieutenant was because he complained about safety concerns when he was ordered to enter a building with low air levels and ordered to clean up hazardous material at a hospital.

The longer length of time people are now out of work between jobs has been helping to push employment litigation in general, and retaliation claims have been leading the trend in the past several years.

"As retaliation claims become more and more prevalent, whistle-

**Whistleblower:** Key issues hinge on state law.
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# Plaintiffs' lawyers skeptical of litigation funding

By Sylvia Hsieh
Staff writer

Whether it's because of the credit crunch or because defendants are pushing more cases to trial, litigation funding companies are increasingly marketing their services to cash-strapped plaintiffs who have large medical bills but possibly an even larger legal recovery on the horizon.

Plaintiffs' attorneys say they have seen an uptick in marketing from funding companies, who offer cash up front in return for a piece of any recovery in the lawsuit. Like a contingent fee attorney, the litigation company makes no money if the plaintiff loses – and the amount the company charges reflects that risk.

The practice has been adopted most recently in big-ticket commercial litigation, but most activity is directed at individuals with personal injury and employment cases.

As a sign of the popularity of litigation funding, some personal injury attorneys have themselves gotten into the business.

The companies say they are throwing a life preserver to injured plaintiffs, who aren't forced into quick settlements by financial constraints and can try to maximize the value of their lawsuits.

"It can be an exceptionally valuable tool and really help out plaintiffs who do not have the same economic advantage as a tortfeasor who has the money to suspend [a case] 'til the ninth inning," said John M. Willis, a personal injury plaintiffs' attorney in Philadelphia.

Willis, who also owns a litigation funding

**Funding:** Clients must be advised carefully.
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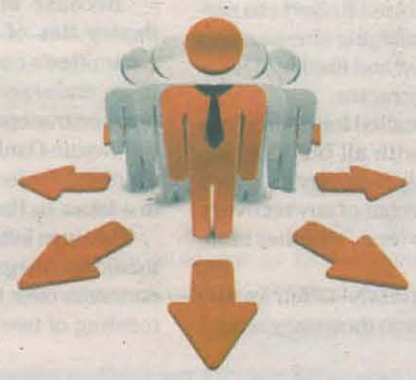

# If you don't have a plan, you don't have a chance

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rolling period of 12 months into the future, and ideally should be revised weekly (and no less often than monthly) to enable the firm to spot developing problems and take remedial action.

The disaster recovery plan aims at business survival. It should encompass a risk assessment that reviews readiness and looks for weakness, including everything from insurance coverage to a comprehensive internal emergency communication system for lawyers, staff, clients and vendors.

Other elements include planning for temporary office space, arranging lawyer referral support and securing offsite back-up and storage of electronic and paper records. A comprehensive recovery team should oversee who does what in a disaster situation.

A succession plan is essential to clarifying how clients will be taken care of as any lawyer approaches retirement. Failure to have such a plan puts clients at risk.

In large firms, succession planning means training younger lawyers not only to service clients but to begin marketing and bringing in clients of their own. Client transitioning is just as important in small firms and solo practices, where planning options can range from closing or selling the practice to grooming a successor or hiring a lateral who will assume the practice over a period of years.

These specific plans should not end up being rarely consulted binders or PowerPoint presentations. Plans are meaningless if people are not held accountable for maintaining them. One forceful approach would be to determine compensation on the basis of plan development (a realistic and aggressive plan merits more compensation) and achievement of plan goals.

Ultimately, every law firm is a business, and a business that lacks overall goals and specific benchmarks to measure them lacks any realistic chance of long-term survival.

# Whistleblower claims fueled by the unemployed

**Whistleblower** – Continued from page 1

blower type claims are expanding," said David Scher, a principal of the Employment Law Group in Washington, D.C., a national employment litigation firm that represents employees.

Some defense lawyers say the trend has become so popular that plaintiffs' attorneys latch onto a theme of the justice-seeking workplace crusader whenever possible to make plaintiffs more palatable to juries.

"Everybody is a whistleblower now," lamented management attorney Portia R. Moore, a partner at Davis Wright Tremaine in Seattle. "That's how plaintiffs' [counsel] are getting sympathy for an otherwise unlikeable plaintiff."

**"As retaliation claims become more and more prevalent, whistleblower type claims are expanding."**

**– David Scher**

### New awareness

With the airwaves full of stories of everything from the accountant who noticed the company was cooking the books to the officer who stood up to misconduct in the military, attorneys say a big reason there are more whistleblowers is a new awareness of whistleblowers and the rights they have.

"People's consciousness has been raised about whistleblowing. Employers should be very worried about these cases and take them more seriously," said plaintiffs' attorney Susan Ritz of Ritz, Clark & Ben-Asher in New York.

The economic and regulatory environment post-bailout and mortgage crisis has made people less tolerant of corruption and more willing to come forward, said Jean Hyams, an employment attorney who represents plaintiffs.

A whistleblower generally doesn't have to prove he or she was right, or that the company actually violated a law; a whistleblower only has to prove a reasonable belief that the conduct was a violation of the law.

"A lay person doesn't have to say, 'I think what you're doing is a violation of this health and safety code' but can say, 'You're not providing masks and you're asking us to work with toxic materials,'" said Hyams, a partner at Dickson Levy Vinick Burrell Hyams in Oakland, Calif.

The whistleblower's lawyer, however, does have to point to a statute covering the conduct complained about.

Defense lawyers say this is not difficult to do.

"There are a tremendous number of whistleblower statutes. Forty-six states have their own whistleblower statutes and there's a federal False Claims Act, Sarbanes-Oxley, [and] also scores of other types covering environmental, trucking, transportation and other activities," said Pearlman.

How easy or difficult it is to sue an employer for whistleblower retaliation often hinges on state law.

In Virginia, for example, "you have to have an express statute. It's very, very difficult," said Scher.

Seattle plaintiffs' employment attorney D. Jill Pugh has turned away more than one potential whistleblower client thanks to a state supreme court ruling last September that threw out a lawsuit by a worker fired after complaining that a co-worker was driving drunk in a company car.

"My office is not taking much unless there is a statutory basis" for a whistleblower claim, Pugh said.

But in more employee-friendly California, if there is no statute on point attorneys can rely on two sources: a state labor statute and common law claims.

"As a plaintiffs' lawyer it's nice to have options. We either have a claim under a catch-all retaliation statute or a common law claim for wrongful termination in violation of public policy. We'll bring both together," said Mark Venardi, a plaintiffs' side employment attorney in Walnut Creek, Calif., who noted that punitive damages are also available.

In New York, lawyers look to other sources.

"Public policy in New York isn't going to get you anywhere, but some courts have looked to promissory estoppel based on an employee handbook ... and implied breach of contract arising out of a written policy," said Ritz.

The handbook or policy must say that employees are encourage to complain if they see something wrong and that the employer will not retaliate based on complaints.

### Jurors can relate

Whistleblower claims may have also gained in popularity because they present a story that juries can relate to.

"These cases can really get a jury incensed and pose a very substantial risk," said Pearlman.

Retaliation claims have fewer legal restrictions than other types of claims, such as age discrimination, which only covers workers over 40, and sex harassment, which requires severe or pervasive conduct.

Aside from portraying a sympathetic plaintiff who is looking out for the public good, the story of an employee punished for complaining about a work policy is a more universal experience than, say, gender or race discrimination.

"Retaliation and retribution is a concept that isn't that foreign to many people in their daily lives," said Pearlman.

Plaintiffs' lawyers say they have an easier time picking jurors if they're telling a story that everyone can understand.

"When bringing a harassment or discrimination claim, you want people who have a more empathetic approach to the world. With a whistleblower claim, you can do very well with a bunch of authoritarian people on a jury, because those people expect rules to be followed. They're offended by anyone who is a rule-breaker," said Hyams.

Unlike discrimination claims, where jurors may not have had a personal experience to draw from, almost everyone has experienced some form of retaliation.

"What's great about whistleblower claims is that just about everybody relates to it. Intuitively, everybody understands 'If I did that or if someone in my family did that, I would get terminated' or 'Yep, I've seen things go wrong at my place of work but I kept my mouth shut,'" said Venardi.

Questions or comments can be directed to the writer at: sylvia.hsieh@lawyersusaonline.com

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