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New York Court of Appeals Approves Warrantless GPS Tracking of Government Employees

July 10, 2013

On June 27, 2013, a divided New York Court of Appeals held in *Cunningham v. New York State Dept. of Labor*, that the state can use GPS tracking to monitor its employees during working hours without a warrant.

Background

Michael Cunningham was the Director of Staff and Organizational Development for the State Department of Labor ("DOL"). In 2008, the DOL began investigating Cunningham for unauthorized absences and falsifying time sheets. This led to Cunningham's two-month suspension and the DOL hiring an investigator to follow Cunningham's car. The Office of the State Inspector General ("OSIG") was enlisted to conduct a second investigation after Cunningham eluded the investigator following his car. As part of its investigation, the OSIG attached a GPS device to Cunningham's car, without his knowledge, while the car was parked in a lot near the DOL offices. The device and two replacements recorded all of the car's movements for a month, including evenings, weekends, and days when Cunningham was on vacation. Based on the subsequent report from the OSIG, the DOL brought charges against Cunningham, four of which were dependent on evidence obtained from the GPS device, and initiated disciplinary proceedings which resulted in Cunningham's termination.

Cunningham appealed and the decision was confirmed by the Third Judicial Department of the Appellate Division. *Cunningham v. New York State Dept. of Labor*, 89 AD3d 1347 (3d Dept. 2011). Cunningham argued that the GPS devices, placed on his car without a warrant, constituted an illegal search and seizure and, therefore, all data extracted from the device should have been excluded from his disciplinary hearing.

In a 3-2 decision, the Appellate Division held that the state only needed to show that its use of GPS devices to investigate Cunningham's alleged workplace misconduct was reasonable. Emphasizing Cunningham's prior disciplinary history and that traditional investigation tactics had failed, the court concluded that GPS tracking of Cunningham's car for a month, which he used during alleged unauthorized absences, was not unreasonable.

New York Court of Appeals Decision

On appeal, the state argued that its search was within the workplace exemption to the warrant requirement articulated in *O'Connor v. Ortega*, 480 U.S. 709 (1987). *O'Connor* involved the warrantless search by a public employer of an employee's office who was suspected of misconduct. The *O'Connor* court held that warrantless searches to investigate violations of workplace rules do not violate the Fourth Amendment. Cunningham contended that the exception did not apply because the object of the search was his personal car as opposed to a vehicle issued by his employer that could be seen as an extension of the workplace.

Emphasizing the burden that would be imposed on supervisors, who "are hardly in the business of investigating the violation of criminal laws," to obta in a warrant and Cunningham's diminished expectation of privacy in the location of his vehicle, the court rejected Cunningham's suggestion and held that when an employee chooses to use his car during the business day, GPS tracking of the vehicle may be considered a workplace search. Therefore, a public employer is not required to get a warrant for a search designed to find out the location of the vehicle an employee is using when that employee is, or claims to be, working for the employer.

Citing the *O'Connor* plurality, the court reasoned that the location of a personal car used by an employee during working hours is no different than a personal photograph on an employee's desk or personal letter posted on an employee's bulletin board and, therefore, is equally part of an employee's workplace. The court also said that Cunningham's expectation of privacy in the location of his car, during the hours he claimed to be at work, was diminished by his obligation to report his arrival and departure times to his employer. Rejecting the concurring opinion's suggestion that, on its reasoning, a GPS device could be attached to an employee's purse or shoe without a warrant, the majority noted that people have a greater expectation of privacy in the location of their bodies, and the clothing and accessories that accompany their bodies, than in the location of their cars.

While the court ruled that the state's warrantless search fell within the workplace exemption, it nevertheless reversed the Appellate Division's decision and unanimously held that the search did not meet the reasonableness standard articulated by the *O'Connor* plurality. In *O'Connor*, the court explained that the reasonableness of a search depends upon a two-fold inquiry: (1) whether the search was justified at its inception; and (2) whether the search as actually conducted was reasonably related in scope to the circumstances which justified the search in the first place. The court, citing *O'Connor*, held that the state's search was justified at its inception because it was based on a reasonable suspicion of employee misconduct. However, the court held that the state's search was not reasonable in scope because it failed to make reasonable efforts to avoid tracking Cunningham outside of business hours.

According to the court, the state's examination of activity with which it had no legitimate concern, including tracking Cunningham on all evenings, all weekends and vacation, was excessively intrusive. While the court acknowledged that it might be unreasonably difficult to limit a GPS search of an employee's car to eliminate all surveillance of private activity, it found it troubling that the state was able to remove a GPS device from Cunningham's vehicle on three separate occasions over the course of its month-long investigation, yet it did not remove the device when Cunningham went on his annual vacation. Because the court concluded that the entire GPS search was unreasonable, the evidence obtained from the search was suppressed and the four charges against Cunningham that were dependent on the GPS evidence were dismissed.

Implications

Under the *Cunningham* decision, public employers can continue to utilize GPS tracking for investigating alleged employee misconduct without securing a warrant. However, it is imperative that employers who choose to utilize GPS monitoring devices take necessary precautions to ensure that the tracking is reasonably related in scope to the circumstances which justified the search in the first place.

If you have any questions about this client alert, please contact your Proskauer relationship lawyer or any co-chair of the Employment Law Counseling & Training Group.

For more information on current privacy issues, read Proskauer's Privacy Law Blog.

Special thanks to Latoya Moore, Associate, for her assistance in drafting this alert.