Legal Update

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The New York State Court of Appeals recently issued two decisions concerning public employers and their employees that have implications for school districts statewide. One involves the duty of school districts to defend employees in a civil suit, even where their actions violate state regulation *[Matter of Deborah Sagal-Cotler v. Board of Education of the City School District of the City of New York, et al, 20 N.Y. 3d 671 (2013)]*. The other discusses the lengths to which a public employer may legally go to gather surveillance evidence to be used to discipline an employee *[Matter of Cunningham v. NYS Department of Labor*, 2013 N.Y. LEXIS 1729 (June 27, 2013)].

In the *Sagal-Cotler* case, two paraprofessionals employed by the New York City School District asked the district to defend them in two separate civil lawsuits that were brought against them by students who alleged that the employees had hit them. The first employee admitted that she had slapped a student in the face after he refused three times to go with her to the cafeteria. The second employee was accused of hitting a student on the head when the student did not complete his work, but she denied the allegation. Her principal, however, found that the charge was substantiated. The district denied both requests for defense because the employees' behavior violated state regulation at 8 NYCRR § 19.5(a), which prohibits the use of corporal punishment in schools. The district reasoned that the employees were not entitled to a defense because, in hitting students, they were not "discharging [their] duties". Rather, they were actually *violating* a duty, *i.e.*, to refrain from using corporal punishment.

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A school district's duty to defend an employee is based on Education Law § 3028, which says: "Notwithstanding any inconsistent provision of any general, special or local law, or the limitations contained in the provisions of any city charter, each board of education, trustee or trustees in the state shall provide an attorney or attorneys for, and pay such attorney's fees and expenses necessarily incurred in the defense of a teacher, member of a supervisory or administrative staff or employee...in any civil or criminal action or proceeding arising out of a disciplinary action taken against any pupil of the district *while in the discharge of his duties within the scope of his employment...*" Thus the key question in this case was whether the employees acted "while in the discharge of [their] duties within the

scope of [their] employment." The district did not dispute that the employees were acting "within the scope of [their] employment." It argued, however, that an employee cannot be "discharging her duties" when she is in fact violating the employer's regulations (or state law, for that matter).

The Court, however, rejected the district's argument. The Court *did* recognize that the employees violated the law by using physical force against students. But the Court also said that by insisting that an employee cannot possibly be discharging her duties if, in the process, she violates a regulation, the district was interpreting the "discharge of duties" language too restrictively. The Court instead held that "discharge of duties" really means the same thing as "within the scope of [their] employment." In other words, the Court said that the legislature intended employees to be entitled to defense as long as the actions at issue were taken within the scope of employment, *i.e.*, "while the servant was doing his master's work, no matter how irregularly, or with what disregard of instructions." The Court supported its reasoning by noting that Education Law § 3028 *also requires* defense in *criminal cases*, meaning that the legislature "wanted even employees who engaged in highly questionable conduct to be defended at public expense."

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In the *Cunningham* case, the Court issued a decision that was only minimally more favorable to school districts. The issue was joined in *Cunningham* when the NYS Department of Labor secretly attached a global positioning system (GPS) device to an employee's personal car in an effort to determine whether the employee was submitting false time reports, *i.e.*, representing that he was in certain locations when, in fact, he was not. When the employee was disciplined based upon the evidence gathered by the GPS, he sued the state (his employer). The employee argued that the placement of the GPS on his personal car violated his fourth amendment constitutional right to be free from unreasonable searches and seizures.

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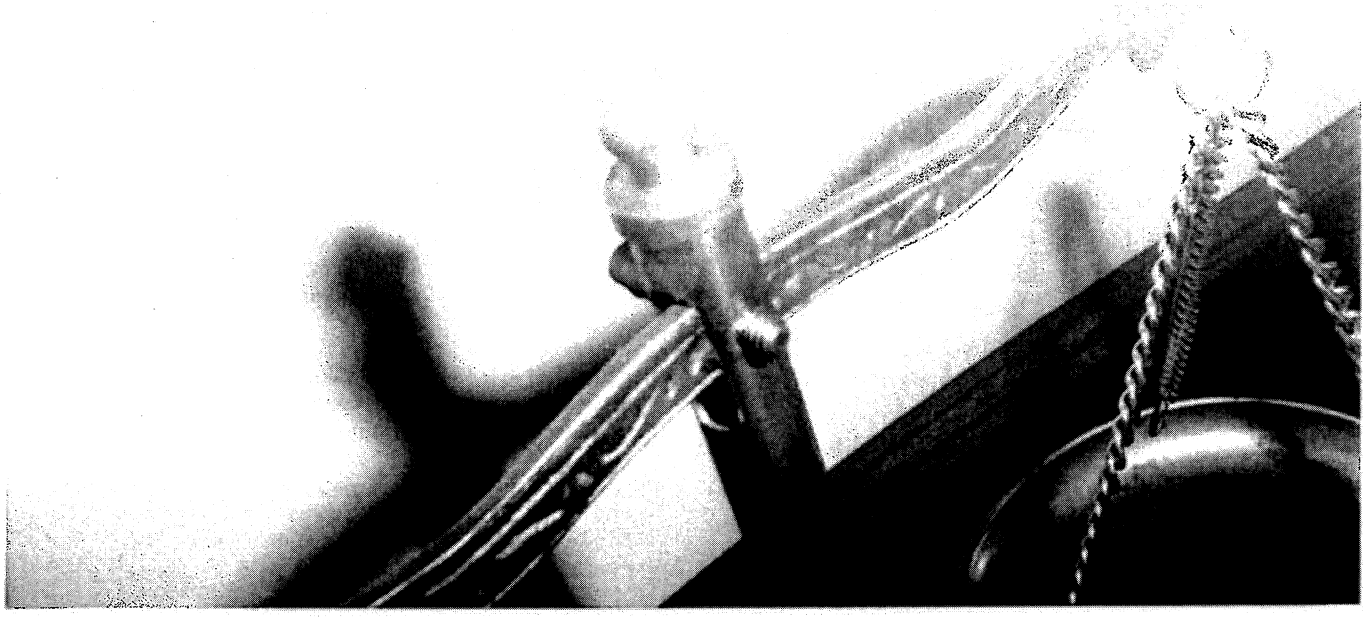

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As a threshold matter, the Court found—and the state did not dispute—that the placement of the GPS device constituted a "search" within the meaning of the Fourth Amendment. The question thus became whether the state needed to obtain a warrant in order to place the device on the car (in other words, to conduct such a "search"). The Court found that it did not, because the search was for the purpose of investigating violations of workplace rules. The "search" thus fell within the "workplace" exception explained by the plurality opinion in the Supreme Court decision of *O'Connor v. Ortega*, 480 U.S. 709 (1987): "In our view, requiring an employer to obtain a warrant whenever the employer wished to enter an employee's office, desk, or file cabinets for a work-related purpose would seriously disrupt the routine conduct of business and would be unduly burdensome. Imposing unwieldy warrant procedures in such cases upon supervisors, who would otherwise have no reason to be familiar with such procedures, is simply unreasonable." The Court of Appeals consequently concluded that the employer could place the GPS on the car without a warrant.

The remainder of the Court's decision, however, proves a cautionary tale, lest public employers become too enthusiastic about conducting warrantless searches under the "workplace" exception. The Court found that, while the search did not require a warrant, it did not comply with either the state or Federal constitutions because it was nevertheless an "unreasonable" search under the facts of the case. In determining "reasonableness", the Court followed the two-prong test articulated by the Supreme Court: first, whether the search was justified at its inception; and, second, whether the search, as actually conducted, was reasonably related in scope to the circumstances that justified the interference in the first place. Applying the two-prong test to the facts, the search failed the test of "reasonableness". The Court acknowledged that the state had satisfied the first prong of the test, because the search was based on a reasonable suspicion of employee misconduct, of which the state employer had ample evidence. The state failed, however, on the second prong of the test regarding "scope". The Court noted that the GPS was excessively intrusive, given that it was intended to capture workplace misconduct during work hours, but in addition tracked the employee in the evenings, on weekends, on his family vacation to Massachusetts—24/7 for an entire month. Accordingly, the Court found that the search was not reasonable in scope. Consequently, the Court suppressed the evidence that was gathered via the GPS, finding that the search as a whole was unreasonable. The employer was thus left with only those findings of guilt that were adequately supported by evidence *independent* of the unreasonable GPS search.

Taken together, these decisions deliver a one-two punch to districts, first by limiting the methods districts can use to gather evidence in a case of suspected employee misconduct, and then by requiring districts to defend employees who are sued civilly or prosecuted criminally based on actions taken within the scope of their employment and in the discharge of their duties, *even if* those actions may amount to misconduct. ◄

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