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Location Surveillance by GPS: Balancing an Employer's Business Interest with Employee Privacy

Kendra Rosenberg

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LOCATION SURVEILLANCE BY GPS: BALANCING AN
EMPLOYER'S BUSINESS INTEREST WITH EMPLOYEE PRIVACY

Kendra Rosenberg^{*}
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ABSTRACT

Employers are increasingly using GPS tracking devices as business tools to monitor employee movements. Recent judicial decisions have found an employer's interest in using location surveillance on employer-owned property generally trumps an employee's privacy interests. However, employers deciding to use GPS should be aware of the potential limitations on tracking an employee based on state constitutional, statutory, and common law rights to privacy. This Article focuses on the permissible scope of an employer's use of GPS to track employees in the workplace.

TABLE OF CONTENTS

Introduction	144
I. Location Surveillance in the Workplace.....	144
II. Violation of Privacy Claims.....	146
A. The History of GPS Litigation in the Criminal Context: State and Federal Constitutional Protections	146
B. Claimed Violations of State-Provided Rights to Privacy..	148
C. Common Law Torts of Unreasonable Intrusion and Invasion of Privacy	150

^{*} Kendra Rosenberg, University of Washington School of Law, Class of 2011. Thank you to Professor Jane Winn of the University of Washington School of Law; Peter Winn, Assistant U.S. Attorney, US Department of Justice; and student article editor Jennifer Heidt White.

III. Using GPS in the Workplace	152
Conclusion	153
Practice Pointers	154

INTRODUCTION

Employers are beginning to use Global Positioning System (“GPS”) navigation devices more frequently as a practical tool to monitor employees’ locations. This increased use of GPS has, however, also increased tensions between employers and their employees, as employers’ property rights clash with employees’ rights to privacy.¹ This tension has come to a head in the form of lawsuits, such as the New York Taxi Workers Alliance’s suit in 2007 to enjoin the city from requiring GPS installation in all licensed city cabs.²

Since no federal or state law currently restricts the use of GPS in employer-owned vehicles, many employees have sought legal recourse in constitutional and statutory privacy rights and common law protections. Although no lawsuit challenging an employer’s use of GPS has been successful, this Article provides useful guidance about how employers may avoid such litigation. First, this Article discusses the current use of GPS technology in an effort to explore how this type of litigation arises. Next, this Article explores the different causes of action pursued by employees to date, including alleged violations of state constitutional, statutory and common law rights to privacy, and claims of federal discrimination. Finally, this Article offers practice pointers to employers seeking to use GPS technology in the workplace.

I. LOCATION SURVEILLANCE IN THE WORKPLACE

GPS devices use a satellite-based electronic system that reveals the

¹ See generally National Workrights Institute, *On Your Tracks: GPS Tracking in the Workplace* 5-7 (2004), <http://epic.org/privacy/workplace/gps-tracking.pdf>.

² *Alexandre v. N.Y.C. Taxi & Limousine Comm’n*, No. 07 CV 8175(RMB), 2007 WL 2826952, at *1 (S.D.N.Y. Sept. 28, 2007) (denying plaintiff’s request for a preliminary injunction).

location of objects or individuals in real-time.³ On a vehicle, GPS technology can be used to remotely monitor vehicle movements, speed, and precise location.⁴ Location information is sent live through a receiver for real-time tracking updates or is stored in the GPS unit for later use and delivery to a server for monitoring.⁵

Many public entities have started using GPS in public employer-owned vehicles after citing the need to monitor the quality of performance and to increase employee efficiency.⁶ For example, the city of Oakland, California installed GPS trackers on vehicles in response to complaints about unsatisfactory street sweeping.⁷ Similarly, King County, Washington installed GPS equipment on solid waste trailers to maximize the efficient use of the equipment.⁸ Public schools are also using GPS to track the location of school buses, citing the need to monitor bus drivers and bus routes, speeds, and idling times.⁹

Private employers also use GPS on employer-owned delivery vehicles to increase productivity, improve customer service, reduce labor costs, and promote responsible behavior among employees.¹⁰ By using GPS, employers can receive real-time information about vehicle locations to help deal with customers' complaints and potentially lower costs by efficiently coordinating delivery fleets. Employees can use GPS to get directions and coordinate delivery routes according to the

³ William A. Herbert, *The Impact of Emerging Technologies in the Workplace: Who's Watching the Man (Who's Watching Me?)*, 25 HOFSTRA LAB. & EMP. L.J. 355, 370 (2008).

⁴ Sarah Rahter, Note, *Privacy Implications of GPS Tracking Technology*, 4 I/S: J.L. & POL'Y FOR INFO. SOC'Y 755, 756-58 (2008).

⁵ John E. Woodard, *Oops, My GPS Made Me Do It! GPS Manufacturer Liability Under a Strict Liability Paradigm When GPS Fails to Give Accurate Directions to GPS End-Users*, 34 U. DAYTON L. REV. 429, 440 (2009).

⁶ See, e.g., National Workrights Institute, *supra* note 1, at 12.

⁷ See *id.* at 11.

⁸ See, e.g., *Teamsters Local 174 v. King County*, No. 9204-PECB, 2006 WL 272493 (Wash. Pub. Emp. Rel. Comm'n Jan. 12, 2006) (regarding union opposition to GPS installation in Solid Waste Division vehicles).

⁹ Clare Jensen, *Tacoma School Buses Modernize With GPS Units*, TACOMA WEEKLY, Sept. 30, 2009, available at <http://www.tacomaweekly.com/article/3590/>.

¹⁰ *Bosses Keep Sharp Eye on Mobile Workers*, MSNBC, (Dec. 30, 2004, 12:56 PM), <http://www.msnbc.msn.com/id/6769377/>.

availability of vehicles and traffic patterns.

Employees bringing lawsuits against employers for using GPS in the workplace have sought recourse through both state and federal causes of action.¹¹ Recent judicial decisions suggest that claims by employees asserting state constitutional, statutory, and common law privacy violations are increasing. Because the use of GPS in the workplace has yet to be addressed in many jurisdictions, it is important for employers to consider potentially applicable federal and state laws that may regulate the location surveillance of individuals generally.

II. VIOLATION OF PRIVACY CLAIMS

The privacy implications of GPS use frequently arise in litigation related to law enforcement using location tracking devices to monitor suspects. Courts considering an employer's use of GPS have repeatedly referred to the scope of an individual's expectation of privacy as defined through the criminal case precedent in jurisdictions that do not regulate the tracking of an individual's movements. Thus, employers could determine what constitutes a "reasonable expectation of privacy" by looking to Fourth Amendment precedent and state law regarding constitutional and statutory employee privacy protections.

A. *The History of GPS Litigation in the Criminal Context: State and Federal Constitutional Protections*

Although the United States Supreme Court has not yet decided whether the use of GPS to track an individual implicates constitutional rights or privacy interests, the Court has addressed the issue with other tracking technologies. For example, the Supreme Court held in *United States v. Knotts*,¹² that police did not violate a suspect's Fourth Amendment rights when they monitored the signal from a tracking device installed in a chemical container being transported by the

¹¹ See, e.g., *Gerardi v. City of Bridgeport*, 985 A.2d 328, 335 (Conn. 2010); *Elgin v. St. Louis Coca-Cola Bottling Co.*, No. 4:05CV970-DJS, 2005 WL 3050633 (E.D. Mo. Nov. 14, 2005); *State v. Jackson*, 76 P.3d 217 (Wash. 2003).

¹² *United States v. Knotts*, 460 U.S. 276 (1983).

defendant. The Court held that monitoring the beeper signal, while the automobile transported the can, did not invade the individual's legitimate expectation of privacy because it revealed information that could have been obtained through visual surveillance. Therefore, it did not constitute a search or a seizure.¹³ This holding suggests GPS surveillance during criminal investigations could be lawful if the information obtained could also be gathered from visual surveillance.

In *United States v. Karo*, the Supreme Court affirmed *Knotts*, but narrowly held the monitoring of a beeper in a private residence, a location not open to visual surveillance, violates the Fourth Amendment rights to a justifiable interest in the privacy of one's residence.¹⁴ In *Karo*, Drug Enforcement Administration agents installed a beeper to monitor the location of a can of ether after an informant told agents the ether would be used to extract cocaine from clothing. The agents monitored the beeper signal as the suspects moved the can between residences and commercial storage facilities. The Court held that a private residence is a place in which the individual normally expects privacy and monitoring the electronic device revealed information that could not have been visually verified.¹⁵

State courts, relying on *Knotts* and *Karo*, have applied state constitutional privacy protections in GPS tracking cases. In *State v. Jackson*, for example, the Washington Supreme Court held that installation of the GPS on a vehicle for surveillance purposes violated the state constitutional right to be free from unreasonable search and seizure.¹⁶ The Court noted in dicta that GPS had a capacity to gather large amounts of long-term personal data:

[T]he intrusion into private affairs made possible with a GPS device is quite extensive as the information obtained can disclose a great deal about an individual's life. . . . In this age, vehicles are used to take people to a vast number of places that can reveal preferences,

¹³ *Knotts*, 460 U.S. at 284-85.

¹⁴ *United States v. Karo*, 468 U.S. 705, 714 (1984).

¹⁵ *Karo*, 468 U.S. at 715.

¹⁶ 76 P.3d 217, 264 (Wash. 2003).

alignments, associations, personal ails and foibles.¹⁷

The Supreme Judicial Court of Massachusetts also held that the installation of GPS on the defendant's vehicle by police constituted a seizure because operation of the GPS required power from the vehicle's electrical system; therefore, it was an ongoing physical intrusion.¹⁸ In New York state court, a trial judge found a search unlawful because the GPS was placed on the defendant's vehicle by police and used to track the defendant's movements over a 65-day period, noting that a ride in a motor vehicle "does not so completely deprive its occupants of any reasonable expectation of privacy."¹⁹ Despite these examples, whether or not the use of GPS technology reveals private information that invades a protected privacy interest as a matter of law is not settled in most jurisdictions.

Courts have looked to the Supreme Court precedent in *Knotts* and *Karo* when deciding the scope of an individual's expectation of privacy.²⁰ Because the criminal law precedent principally examines whether the location being monitored is open to visual surveillance when determining a justifiable privacy interest, employees operating a vehicle in the public view may not have a privacy interest in an automobile. States that provide for an employee's right to privacy may grant greater protections to employees, in addition to common law recognition of torts of unreasonable intrusion upon seclusion and invasion of privacy.

B. Claimed Violations of State-Provided Rights to Privacy

In addition to the Fourth Amendment protection against unreasonable searches and seizures, many states also provide employees with state statutory protections against violations of privacy by their

¹⁷ *Id.* at 262.

¹⁸ *Commonwealth v. Connolly*, 913 N.E. 2d 356, 369 (Mass. 2009).

¹⁹ *People v. Weaver*, 909 N.E.2d 1195, 1200 (N.Y. 2009).

²⁰ CLIFFORD S. FISHMAN & ANNE T. MCKENNA, *WIRETAPPING AND EAVESDROPPING: SURVEILLANCE IN THE INTERNET AGE* § 29:37 (3d. ed. 2008) ("the federal circuits courts to have addressed (*sic.*) the issue have applied the *Knotts/Karo* line of reasoning and rationale to GPS cases").

employers.²¹ Two states lead in the regulation of tracking devices: California and Connecticut. These two states exemplify the challenge faced by state courts and state legislatures in dealing with emerging tracking technology. In California it is a misdemeanor to use an electronic tracking device to determine the location or movement of a person without his or her consent.²² In Connecticut, the state legislature statutorily prohibits any employer from electronically monitoring an employee's activities without prior notice to all employees who may be affected.²³

The Supreme Court of Connecticut in *Gerardi v. City of Bridgeport* interpreted the Connecticut statute prohibiting an employer from electronically monitoring an employee's activities without prior notice, holding the statute did not create a private right of action.²⁴ The employer, the City of Bridgeport, had installed the GPS in a city-owned vehicle. The plaintiff operated the vehicle as part of his job as a fire inspector for the city.²⁵ The plaintiff claimed the City violated the Connecticut electronic monitoring statute when information gained through the GPS device, without the plaintiff's knowledge, was used to discipline the plaintiff for poor job performance.²⁶ The Supreme Court of Connecticut held the statute does not entitle an employee to any specific relief or remedy.²⁷ Therefore, the only enforcement mechanism for claimed violations of the Connecticut electronic monitoring statute

²¹ See, e.g., CAL. PENAL CODE § 637.7 (West, 2009) (electronic tracking of a person's location violates a person's reasonable expectation of privacy); CONN. GEN. STAT. § 31-48d (2003) (requiring every employer engaging in any type of electronic monitoring to give notice to all employees who may be affected by the monitoring); see also H.B. 16, 150th Gen. Assemb., Reg. Sess. (Ga. 2009) (amending GA. CODE ANN. § 16-11-62.1, to read that "no person shall use a electronic tracking device to determine the location or movement of another person without such other person's consent"). Cf. DEL. CODE ANN. tit. 11. §1335(a) (2007) (crime to knowingly install location tracking device in motor vehicle without consent of owner, lessor or lessee of vehicle).

²² See, e.g., CAL. PENAL CODE § 637.7 (West, 2009).

²³ CONN. GEN. STAT. § 31-48d (2003).

²⁴ *Gerardi v. City of Bridgeport*, 985 A.2d 328, 335 (Conn. 2010).

²⁵ *Gerardi*, 985 A.2d at 335.

²⁶ *Id.*

²⁷ *Id.*

is limited to proceedings before the state labor commissioner; employees do not have the right to bring a civil action under the statute.

The Superior Court of Connecticut in *Girardi* reached both the issue of administrative exhaustion and the plaintiff's substantive claim that the City violated the state electronic monitoring statute.²⁸ The court looked to the criminal law precedent set out in *Karo* and found the City did not violate the employee's expectation of privacy. The monitoring of the GPS device did not reveal information that could not be obtained through visual surveillance of the public roads. As the lower court in *Girardi* demonstrates, courts are likely to draw on Fourth Amendment standards for privacy protections in the employment context. An employee may have a judicially cognizable claim if the information gained by the GPS device reveals personal information not in the public view.

C. Common Law Torts of Unreasonable Intrusion and Invasion of Privacy

Due to the lack of statutory regulation of GPS by the federal government and most states, plaintiffs may seek remedy for an invasion of an employee's privacy under the common law tort of unreasonable intrusion upon the seclusion of another.²⁹ Tort claims for an invasion of privacy require the plaintiff meet an objective standard by showing the intrusion would be highly offensive to a reasonable person.³⁰ Precedent illustrates that employees will struggle to meet this burden of showing objective offensiveness caused by an employer installing a GPS device in an employer-owned vehicle.

In *Elgin v. St. Louis Coca-Cola Bottling Co.*,³¹ for example, the plaintiff sued his employer for the tort of intrusion upon seclusion for placing a GPS tracking device in one of the employer's company

²⁸ *Gerardi v. City of Bridgeport*, No. CV080423011S, 2007 WL 4755007 (Conn. Super. Ct. 2007), *aff'd on other grounds*, 985 A.2d 328 (Conn. 2010).

²⁹ RESTATEMENT (SECOND) OF TORTS § 652B (1977).

³⁰ *Id.*

³¹ *Elgin v. St. Louis Coca-Cola Bottling Co.*, No. 4:05CV970-DJS, 2005 WL 3050633 (E.D. Mo. Nov. 14, 2005).

vehicles.³² The federal district court concluded an individual's privacy claim as to an automobile's path of travel was limited.³³ Here, the plaintiff did not consent to the placement of the GPS tracking device, nor did he know about its attachment to the vehicle until after it had been used during a workplace investigation of cash shortages from vending machines.³⁴ The employer tracked the employer-owned vehicle assigned to the plaintiff during both working and non-working hours.³⁵ The court found "use of the tracking device on defendant's company car, even though it was assigned to plaintiff, does not constitute a substantial intrusion upon plaintiff's seclusion, as it revealed no more than highly public information as to the van's location."³⁶ Because the common law tort of intrusion upon seclusion is limited to actions that intrude unreasonably into the individual's expectation of privacy and does not extend to activities that are public, the plaintiff failed to demonstrate the substantial intrusion necessary to be successful on the action.³⁷ The court granted summary judgment in the defendant's favor.

On similar facts, in *Tubbs v. Wynne Transportation Services* a federal district court found no unreasonable intrusion by the employer.³⁸ Tubbs sued his former employer, Wynne Transport Service Inc. ("Wynne") for defamation, invasion of privacy, false arrest, false imprisonment, malicious prosecution and race discrimination.³⁹ The federal judge granted Wynne's motion for summary judgment on the tort claim of invasion of privacy finding that Tubbs, who drove employer-owned trucks that were each outfitted with a GPS device that

³² The plaintiff also sued the defendant for discrimination in violation of the Missouri Human Rights Act. The court granted the defendant's motion for summary judgment as to that claim. *Elgin*, 2005 WL 3050633, at *3.

³³ *Elgin*, 2005 WL 3050633, at *4 (quoting *United States v. Knotts*, 460 U.S. 276, 281 (1983)).

³⁴ *Id.* at *1.

³⁵ *Id.*

³⁶ *Id.* at *4.

³⁷ *Id.*

³⁸ *Tubbs v. Wynne Transp. Servs. Inc.*, No. H-06-0360, 2007 WL 1189640, at *10 (S.D. Tex. Apr. 19, 2007).

³⁹ *Id.* at *1.

transmitted the truck's location to the company, failed to meet the objective standard of showing an unreasonable intrusion under these facts.⁴⁰

Thus, courts that have considered the issue have concluded that an employer may install a GPS device in an employer-owned vehicle.

III. USING GPS IN THE WORKPLACE

Although no challenge to an employer's use of GPS has been successful in court, it remains good business practice for employers to implement written policies defining the use of GPS.⁴¹ Both public and private employers who want to employ a GPS device in the workplace may consider several possible responses such as developing a policy for electronic monitoring or giving employees prior notice of the GPS use.

Employers that choose to use GPS should determine whether the jurisdiction has statutory protections against the use of electronic tracking devices. Even without statutory prohibitions against tracking, employers should be cautious of state constitutional protections of an employee's privacy if the information obtained reveals personal information unrelated to employment.

An employer intercepting electronic communications may want to provide actual notice to employees that the tracking device is monitoring the employer-owned vehicle to encourage better compliance with company policy. Further, an employee's knowledge of the GPS monitoring may establish notice of the privacy invasion in the event of litigation. In *Brantley v. Muscogee County School District*, the court highlighted the employer's written policy for all employer-owned vans to have GPS installed, and the plaintiff's knowledge of this plan, in finding that there was no objectively reasonable belief that the GPS was installed discriminatorily.⁴² A clear written employment policy

⁴⁰ *Id.*

⁴¹ *Cf.* *TBG Ins. Services Corp v. Superior Court*, 117 Cal. Rptr. 2d 155, 161 (Cal. Ct. App. 2002) (holding an employer's written electronic and computer use policy gave advance notice to the employee and the employee's written consent to the policy defeated the employee's claim to a reasonable expectation of privacy).

⁴² *Brantley v. Muscogee Cnty. Sch. Dist.*, No. 4:06-CV-89, 2008 WL 794778, at *10 (M.D. Ga. March 20, 2008) (court found GPS was not installed in a discriminatory

regarding location surveillance may encourage employee compliance with employer rules and procedures.

In addition, employers that provide actual notice to employees prior to the installation of tracking devices may be able to prevent employee claims of a subjective privacy interest. Even though private employers are not subject to the same Fourth Amendment limitations as public employers, the case law has referred to Fourth Amendment protections when deciding the scope of an individual's expectation of privacy.⁴³ Employers who provide notice to employees of the GPS monitoring can seek employee compliance with policies while also putting the employees on notice that there is no expectation of privacy in the location of the employer-owned vehicle.

CONCLUSION

Recent judicial decisions have found an employer's interest in employer-owned property generally trumps employee privacy interests regarding location surveillance. Employees seeking to limit employers' use of GPS have brought various causes of action including alleged violations of state constitutional, statutory, and common law rights to privacy, and claims of federal discrimination. Although no employee challenging an employer's use of GPS has been successful in litigation, the increased use of GPS in the employment setting is likely to lead to disagreements about the privacy of employees. Additional states may begin regulating the use of GPS as these devices become more popular as a business tool to gather information about employees' movement. Because there is currently no direct federal regulation of GPS surveillance, employers should carefully plan implementation of GPS, should they choose to use it, according to the legal requirements in the states where they operate.

manner and the employer did not violate Title VII of the Civil Rights Act of 1965).

⁴³ See, e.g., Jenn Heidt White, *Text Message Monitoring After Quon v. Arch Wireless: What Private Employers Need to Know About the Stored Communications Act and an Employee's Right to Privacy*, 5 SHIDLER J.L. COM. & TECH. 19 (2009).

PRACTICE POINTERS

- Employers should establish the use of GPS as tied to the ordinary course of business by developing a written policy for location surveillance that explains: the (1) purpose of the location surveillance corresponding to the specific needs of the company, (2) type of location data processed (active or passive tracking), (3) duration that location data will be stored, and (4) the individuals or third parties with access to data.
- Employers should consider providing actual notice to employees prior to the installation of the tracking device to encourage employee compliance with employment policies and to put the employee on notice that there is no expectation of privacy in the location of the employer-owned vehicle.
- Employers should be cautious when targeting the installation of GPS tracking devices to a vehicle assigned to an employee who will take the vehicle to his or her private residence.