

TIME BANDIT, OR TO CATCH A THIEF

By Leonard T. Bier, JD, CAPP

Technology has made it easier for employers to track the performance and location of their field employees using GPS locators embedded in company vehicles, cell phones, and tablets issued to employees in the ordinary course of business. In the June 2011 *The Parking Professional*, I examined the ability of a municipal government employer to track electronic communication such as cell phone use, text messaging, email, and web searches, of employees during working hours. The U.S. Supreme Court ruled that the government employer could, under reasonable circumstances, monitor workplace electronic devices and discipline employees for abusive nonessential use.

A recent New York Superior Court case, *Cunningham v N.Y. State Department of Labor*, examined whether a government employer could place a GPS tracking device on an employee's private vehicle to determine whether the employee was submitting false time sheets.

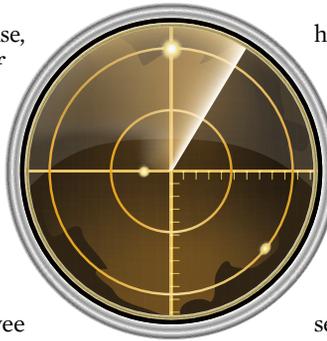
The Case

Cunningham was a long-time employee of the New York Department of Labor. His employer suspected him of falsifying his time sheets and attendance records. Cunningham was required to report his work-related arrival and departure times and destinations when using his personal vehicle. His work-related activities were monitored by a state investigator in 2008 and he was disciplined for breaches in conduct and record keeping that resulted in a two-month suspension without pay.

Following that, the department suspected that Cunningham was again falsifying his time sheets and attendance records and those of his secretary. The matter was referred to the state inspector general's office for handling; they decided to attach a GPS device to Cunningham's personal car without his knowledge or a warrant for a little more than a month, including evenings, weekends, and a family vacation.

The GPS and other surveillance techniques revealed that Cunningham was again falsely reporting his work hours, absences, and the time sheets of his secretary. He also falsely reported that they were engaged in work-related activities while he was at her apartment and when they were supposed to be at a business conference.

The department filed a second disciplinary action against Cunningham in 2008 seeking his termination of employment on 11 counts of official misconduct. A



hearing officer found Cunningham guilty of all 11 counts and granted the request for his discharge.

The New York chapter of the ACLU filed a complaint on behalf of Cunningham, who argued that the placement of the GPS device on weekends and while he was on an employer-approved family vacation constituted an unreasonable search and seizure of evidence.

The Decision

The court agreed that the 24-hour GPS surveillance was excessive. The court stated that it would not ordinarily exclude all the evidence collected, but only the evidence collected outside the reasonable timeframe of employment. But it also ruled that "because of the GPS device capacity to permit constant, relentless tracking of anything ... where the employer doesn't make a reasonable effort to avoid tracking an employee outside of business hours, the search as a whole must be considered unreasonable." "That conclusion ... requires suppression of the GPS evidence" and four counts of misconduct against Cunningham.

The lesson to be learned from the Cunningham decision is that a GPS device may be installed without the permission of an employee on his personal vehicle used for a business purpose, but it must be shut off or removed after work hours, on the weekend (if the employee is off-duty), and during employee vacation or sick and personal days, if reasonably possible.

Justice prevailed and Cunningham was discharged from Department of Labor employment based on the remaining seven counts of misconduct supported by EZ-Pass records, personal interviews, and the IG investigator reports, which were not suppressed by the court. **P**



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