STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2008AP0967

KAREN SCHILL, TRACI PRONGA,
KIMBERLY MARTIN, ROBERT DRESSER, and
MARK LARSON,

Plaintiffs-Appellants,

v.

WISCONSIN RAPIDS SCHOOL DISTRICT, and
ROBERT CRIST,

Defendants-Respondents,

and,

DON BUBOLZ,

Intervenor-Respondent.

APPEAL FROM THE STATE OF WISCONSIN
CIRCUIT COURT FOR WOOD COUNTY
THE HON. CHARLES A. POLLEX,
CIRCUIT JUDGE, PRESIDING

AMICUS CURIAE BRIEF
FOR AFSCME DISTRICT COUNCIL 40

Submitted By:

EHLKE, GARTZKE, BERO-LEHMANN &
LOUNSBURY, S.C.
Bruce F. Ehlke
State Bar. No. 1011270
6502 Grand Teton Plaza, Suite 202
Madison, WI 53719
Tel: (608)827-5426
Attorney for AFSCME
District Council 40

I N D E X

Authorities Cited

Cases

Page

Wisconsin Statutes

CERTIFICATION

I certify that this Amicus Curiae Brief conforms to the rules contained in Wis. Stat. Sec. 809.19(8)(b) and (c) for a brief produced using the following font:

Monospaced font: 12 characters per inch; double spaced, 1.5 inch margin on left side and 1 inch margin on the other three sides. The length of this brief is 9 pages, exclusive of the case caption.

Dated: August 24, 2009.

_____
BRUCE F. EHLKE

ELECTRONIC BRIEF CERTIFICATION

The text of the electronic copy of this brief is identical to the text of the paper copy of the brief.

Dated: August 25, 2009.

_____
BRUCE F. EHLKE

STATE OF WISCONSIN

IN SUPREME COURT

Appeal No. 2008AP0967

KAREN SCHILL, TRACI PRONGA,
KIMBERLY MARTIN, ROBERT DRESSER, and
MARK LARSON,

Plaintiffs-Appellants,

v.

WISCONSIN RAPIDS SCHOOL DISTRICT, and
ROBERT CRIST,

Defendants-Respondents,

and,

DON BUBOLZ,

Intervenor-Respondent.

AMICUS CURIAE BRIEF FOR AFSCME DISTRICT COUNCIL 40

INTRODUCTION AND BACKGROUND

The Wisconsin Rapids School District's computer use policy allows teachers who are employed by the School District to use the School District's E-mail system for personal communications. The teachers who are parties to this appeal used the School District's E-mail system for personal communications. The School District has agreed that the teachers' use of its E-mail system was appropriate and did not violate its computer policy.

The indicated personal communications of the teachers are stored and maintained on the School District's E-mail system. Don Bubolz, a resident of the School District, has demanded to see the indicated personal communications that are stored and maintained on the School District's E-mail system. He has indicated that he wants to review those personal communications in order to determine whether the teachers used the E-mail system to discuss school board candidates, or organizations supporting or opposing school board candidates.

Bubolz has contended that the personal, private communications in question are "public records", because they were sent and received using the School District's E-mail system, and because they are stored and maintained on that system. He has based his demand that he be given access to these personal communications on the Wisconsin Public Records Law, Secs. 19.31-19.39, Wis. Stat. The School District has acceded to Bubolz' demand.

As everyone who ever has worked in an office setting knows, ever since the technology to do so has been available, both private and public sector employers have permitted their employees to communicate to some extent or another during working hours with people outside of the office regarding personal matters. Employers have permitted

this personal use of their office communication systems for both altruistic and for practical reasons.

For many years this permitted personal employee communication relied on the employers' office telephone systems. More recently, the communications in question have tended to rely on the employers' E-mail systems.

Beyond the difference in the ease of the communication, a critical difference between the telephonic and the electronic communication of personal messages is that, absent a recording device, once the content of the telephonic voice message is transmitted it ceases to exist in a retrievable verbatim format. The electronic message, on the other hand, once transmitted, remains in a reviewable verbatim format in storage of some sort or another.

This difference means that where previously the fact of an employee's private communication with a spouse, a doctor, a child's teacher or some other personal contact might be subject to review by an employer, or by others, the content of the communication would not be subject to such an invasion of privacy. Because of the change in technology, however, someone, like Bubolz, now can take advantage of the change to argue that, because it now is

possible to review the content of such private communications he has a right to review the same.

Neither private nor public sector employees enjoy any absolute right of privacy in their personal communications when they use their employers' communication systems to transmit their personal messages, at least not as it relates to their employers' right to some extent to review those communications. On the other hand, third parties have no right whatsoever routinely to review the personal communications of private sector employees; and the content of the personal, private communications of public sector employees is protected even against review by their employers, unless the review or "search is reasonable", within the contemplation of the Fourth Amendment to the United States Constitution, e.g., Quon v. Arch Wireless Operating Co., 529 F3d 892, 903-904 (9th Cir. 2008).

ISSUE PRESENTED

The issue presented on this appeal is whether the personal messages that, consistent with the computer use policy of their employer, are sent and received by public sector employees using the employer's E-mail system, and then are stored and maintained on that system, become "public records" as a result of the utilization of that

system. It is the position of AFSCME District Counsel 40 that personal, private messages do not become "public records" merely because they are communicated by means of an employer's E-mail system and then stored and maintained on that system.

ARGUMENT

THE PERSONAL COMMUNICATIONS OF PUBLIC SECTOR EMPLOYEES DO NOT BECOME "PUBLIC RECORDS" MERELY BECAUSE THEY ARE SENT AND RECEIVED USING THE EMPLOYERS' E-MAIL SYSTEMS AND THEN STORED AND MAINTAINED ON THOSE SYSTEMS.

In this case the Wisconsin Rapids School District appears to have assumed that the personal messages that are the subject of Don Bubolz' "fishing expedition" are "public records", because they were sent and received by the school teachers using the School District's E-mail system and then stored and maintained on that system; and it has argued its position before the Supreme Court in terms of whether one of the statutory exclusions to the disclosure of such "public records" apply here. Defendants-Respondents Brief at 6-13. Similarly, the Wisconsin Department of Justice and the Wisconsin Freedom of Information Council and Others, in filing their unusually late and awkwardly timed motions to intervene in this case, have assumed that the personal messages in question are "public records" and, therefore, that the School District's decision to publicize those

private messages is subject to the judicial review limitations of Sec. 19.356, Wis. Stat.

With all due respect, the School District and the parties that belatedly now seek to intervene in this case have assumed the answer to the issue presented; and their arguments have missed the mark. Unlike "balancing of interests" cases, such as, for example, Woznicki v. Erickson, 202 Wis.2d 178, 549 N.W.2d 699 (1996), and Village of Butler v. Cohen, 163 Wis.2d 819, 472 N.W.2d 579 (Ct. App. 1991), the threshold issue here is whether the communications in question are "public records" in the first place.[1]

The stated purpose of the Wisconsin Public Records Law is to make available to our citizens "information regarding the affairs of government and the official acts of those officers and employees who represent them". Sec. 19.31, Wis. Stat. (underscoring added). Although the definition of a "record" is broad, it does not include "materials prepared for the originator's personal use" or "materials which are purely the personal property of the custodian and have no relation to his or her office". Sec. 19.32(2), Wis.

[1] Liberally construed, the pleadings filed by the teachers have sought a declaratory judgment in this case regarding this issue, Sec.806.04(12), Wis. Stat.; and there is no merit whatsoever to the proposed intervenors' assertions.

Stat. (underscoring added). In short, the statute clearly draws a line between "public" records and "personal" material that just happens to be subject to potential access by a public employer.

If someone's neighbor agrees to store his or her lawn mower, in return for helping him with his chores, the fact that the neighbor has custody of the lawn mower does not make the machine his lawn mower. The lawn mower continues to be its owner's personal property and the neighbor has no right to give it to someone else for their use, at least not without its owner's agreement.

If a municipal police officer, firefighter or city laborer is permitted to store his or her personal property in a locker that is owned and maintained by the employer, use of the locker does not make the personal things that are stored in the locker -- including personal, private documents that may be kept there -- public property. Although the employer may inspect the locker from time to time, consistent with the requirements of the Fourth Amendment to the United States Constitution the employer has no right to make the individual's personal possessions accessible to view by the general public, or to turn over any of those possessions to any member of the public who asks to see them.

By parity of reasoning, the fact that a public employer, in consideration for the services that they provide during the work day, may permit its employees to use the office E-mail system to send and receive personal, private messages, and then to store and maintain those messages on that system, does not make the messages the employer's property: the messages continue to belong to the employees. They are no more a public record than the letters that are sent and received through use of the United States Postal Service, and sometimes even stored in Post Office boxes maintained by that service.

Consistent with the requirements of the Fourth Amendment, a public employer has no more right to release its employees' personal, private messages to the public, than it would have to browse through those messages itself without having a "reasonable", government related purpose for engaging in such a search. E.g., Quon v. Arch Wireless Operating Co., 529 F.3d at 905. This is so, notwithstanding the existence of a state "open records law". Id. at 907.

CONCLUSION

In this case there is no dispute that the communications in question were private messages, and personal to the teachers, and that their transmission using the Wisconsin Rapids School District's E-mail system had

complied with the School District's computer use policy. Further, there was no showing that there was any government related need for anyone to view the content of the communications in question. The School District itself had not determined that there was any need for such a review; and Don Bubolz' "fishing expedition" certainly was not a constitutionally permissible basis for such a search. The communications in question were not "public records".

The Supreme Court should determine that the personal, private communications that are sent and received by public employees using their employers' E-mail systems, and then stored and maintained on those systems, are not "public records" the release of which to the public is subject to the Wisconsin Public Records Law. The Court also should hold that, absent a showing that there exists a substantial nexis to the "affairs of government", Sec. 19.31, Wis. Stat., and a basis for a "reasonable search" that is consistent with the requirements of the Fourth Amendment to the United States Constitution, Quon v. Arch Wireless Operating Co., 529 F.3d at 903-904, the contents of such communications are not subject to review by a public employer, let alone release to the general public.

Dated August 24, 2009.

Respectfully Submitted:

EHLKE, GARTZKE, BERO-LEHMANN & LOUNSBURY, S.C.

Bruce F. Ehlke
State Bar. No. 1011270
6502 Grand Teton Plaza, Suite 202
Madison, WI 53719
Tel: (608)827-5426
Attorney for AFSCME
District Council 40