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Expert Analysis

Top Court Review: Computer Access, Union Taking, Vicarious Liability

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The U.S. Supreme Court, during the 2020-2021 term, and the New York Court of Appeals, so far in 2021, issued several decisions with important implications for employers. This month's column reviews decisions pertaining to unlawful computer access under the Computer Fraud and Abuse Act of 1986 (CFAA), union access grants amounting to takings and how far vicarious liability for employers extends in New York for claims of discrimination and sexual harassment.

Computer Access

In *Van Buren v. United States*, 141 S.Ct. 1648 (2021), the Supreme Court held that under the CFAA it is unlawful for an individual to obtain information from particular areas in a computer (e.g., files, folders, or databases) which the individual is not authorized to access, but it is not unlawful to simply access information for an improper purpose which the individual is otherwise authorized to access.

Van Buren involved a former police sergeant who used his patrol car computer to access a law enforcement database to run a license plate search in exchange for money. The department policy only authorized him to use the database for law enforcement purposes. The CFAA makes it unlawful to "intentionally access a computer without authorization or exceed authorized access." "Exceed[ing] authorized access" is defined as "access[ing] a computer with authorization and [using] such access to obtain or alter information in the computer that the accessor is not entitled so to obtain."

A jury convicted Van Buren of violating the CFAA and he was sentenced to 18 months in prison. The U.S. Court of Appeals for the Eleventh Circuit affirmed the decision, siding with the First, Fifth and Seventh Circuits, taking the broader view that the CFAA makes it unlawful to access information for an "inappropriate reason," instead of the more narrow view taken by the Second, Fourth, Sixth and Ninth Circuits. The Supreme Court granted certiorari to resolve this circuit split. It considered whether the CFAA is applicable only to situations where an individual accesses information which they do not

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have authorization to access, or extends to situations, like that at issue in *Van Buren*, where an individual has authorized access but obtains information for an improper purpose.

In a 6-3 opinion, the Supreme Court adopted a narrow view of the CFAA. As a result, employers may invoke the CFAA in a more limited set of cases arising from the theft of trade secrets. Historically, many employers have relied on the CFAA to bring claims with federal subject matter jurisdiction against employees who took electronic records. *Van Buren* now prevents employers from asserting a CFAA claim against an employee who is granted unlimited access to the employer's computer system, and obtains information for improper purposes, even if in violation of an employer's policy. Going forward, employers may wish to revise their computer access protocols to limit employees from accessing particular files, folders, and databases they would not otherwise need access.

Union Takings

In *Cedar Point Nursey v. Hassid*, 141 S.Ct. 2063 (2021), the Supreme Court held that a California state regulation granting union organizers a right to access a private agricultural employer's premises constituted a per se taking under the Fifth and Fourteenth Amendments of the U.S. Constitution, requiring just compensation. California Regulation §20900, which has been in effect since 1975, grants labor organizations a "right of access … to the premises of an agricultural employer for the purpose of meeting and talking with employees and soliciting their support." Specifically, the regulation allows union organizers a right to physically enter and occupy the grower's land for three hours per day, 120 days per year. The case involved two instances of union organizers entering, or attempting to enter, employers' property, without notice, to organize un-unionized employees.

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The Supreme Court distinguished between per se and regulatory takings, explaining that a per se taking occurs when the government appropriates private property for itself or a third party and a regulatory taking occurs when the government restricts a property owner's ability to use his own property. The court held that the California regulation does not merely amount to a regulatory taking to which the Supreme Court would apply the *Penn Central* balancing factors to determine whether a taking had occurred, but instead was a per se taking because it appropriates a right to invade the property.

Absent the regulation, the employers would have had the right to exclude union organizers from their property. The court stressed the importance of the right to exclude as a "fundamental" property interest in the bundle of property rights. It explained that a per se taking occurs whenever there is a physical appropriation, regardless of whether it is permanent or temporary and that the duration of the appropriation bears only on the amount of compensation required—the fact that the regulation grants access to union organizers only for a limited time did not transform the regulation from a per se taking into a regulatory taking.

Employers who are subject to state regulations allowing union organizers access to an employer's premises should be aware

that they may be entitled to compensation from the state.

Vicarious Liability For NY Employers

In *Doe v. Bloomberg L.P.*, 36 N.Y.3d 450 (2021), the New York Court of Appeals held that an owner and officer of a company is not an "employer" within the meaning of the New York City Human Rights Law (NYCHRL) and cannot be held vicariously liable for a supervisor's discrimination, sexual harassment and sexual abuse. The plaintiff in *Doe* sued Bloomberg L.P., her employer, as well as Michael Bloomberg, the co-founder, chief executive officer and president of Bloomberg L.P., in his individual capacity, for vicarious liability for the conduct of her direct supervisor who engaged in a continuous pattern of sexual harassment, including rape.

The NYCHRL imposes vicarious liability on an employer for the conduct of an employee where: (1) the employee exercised managerial or supervisory responsibility; (2) the employer knew of the employee's conduct and acquiesced or failed to take corrective action; or (3) the employer should have known of the employee's conduct and failed to exercise reasonable diligence to prevent it. The statute does not, however, define "employer."

In searching for a definition of "employer," the court noted that the NYCHRL specifically imposes vicarious liability on employees who engage in discrimination based on gender, but specifically excludes imposing liability on owners and officers for such conduct. Relatedly, the court points to the Legislature's choice to impose liability upon owners and managers of a place of public accommodation or owners of a housing accommodation, but chose not to impose vicarious liability on owners and officers of private businesses.

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The court also noted the importance of the business incorporation process, and that "the law permits the incorporation of a business for the very purpose of enabling its proprietors to escape personal liability." As such, the court interpreted "employer" under the NYCHRL to not include "the shareholders, agents, limited partners, and employees" of a plaintiff's business entity employer. Instead, the court stated that "those individuals may incur liability only for their own discriminatory conduct, for aiding and abetting such conduct by others, or for retaliation against protected conduct."

Going forward, employers should note that the business entity may still be held liable for unlawful discrimination and sexual harassment by an employee under the NYCHRL, but should provide some comfort that such liability does not extend to the business entity's shareholders, agents, limited partners and employees.