

Docket No. 11-0107

In the Supreme Court of the United States

Spring Term, 2011

POVTAK GROUP,

Petitioner,

- against -

ROBERTA WAGNER

& PROFESSIONAL ELECTRICAL WORKERS UNION, LOCAL 12-22,

Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Thirteenth Circuit

BRIEF FOR PETITIONER

Team No. 1

QUESTIONS PRESENTED

- I. Whether an employer violates the Fourth Amendment privacy rights of an employee for searching an employee's company-issued phone and reviewing an employee's social networking site profile when the employee agreed to a no-privacy policy on company-issued electronics and when the employee provided the employer access to the employee's social networking site profile.
- II. Whether a new employer is bound to the substantive terms of its predecessor's collective bargaining agreement when the successor won a service contract, made changes to the services provided, hired some of the predecessor's employees, brought in new management, and did not acknowledge the existence of the predecessor's collective bargaining agreement.

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OPINION BELOW

The Memorandum and Order of the United States District Court for the Western District of Froessel is reported at *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 185 F.Supp.3d 1 (W.D. FrI. 2009). The Judgment of the United States District Court for the Western District of Froessel is reported at *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 231 F.Supp.3d 20 (W.D. FrI. 2009). The opinion of the United States Court of Appeals for the Thirteenth Circuit is reported at *Local 12-22, Professional Electrical Workers Union and Roberta Wagner v. Povtak Group*, 1214 F.3d 1 (13th Cir. 2010).

FEDERAL STATUTES AND REGULATIONS INVOLVED

The following amendment to the U.S. Constitution and federal statute appear in the appendices following this brief: Fourth Amendment to the U.S. Constitution; 29 U.S.C. § 185 (2006).

STATEMENT OF THE CASE

A. Procedural History

On March 5, 2008, Roberta Wagner and Local 12-22 filed a Verified Complaint with the U.S. Equal Opportunity Employment Commission (EEOC) alleging that Povtak Group discriminated against her by demoting her to the bus division on the basis of her national origin. (R1. at 9.)¹ The EEOC's Determination and Order found no probable cause to sustain Wagner's allegations but issued Wagner a "right to sue" letter on June 19, 2008. (R1. at 9.)

Wagner then brought an action against Povtak in the United States District Court for the Western District of Froessel, alleging a deprivation of rights in violation of the Title VII of the

¹ For clarity, the Memorandum and Order of the United States District Court for the Western District of Froessel is designated "R1." The Judgment is designated "R2." The opinion of the United States Court of Appeals for the Thirteenth Circuit is designated "R3."

Civil Rights Act of 1964 and Local 12-22 brought action against Povtak to enforce the terms of a collective bargaining agreement entered into by Povtak's predecessor, Crimaldi. (R1. at 1.)

On August 6, 2009 the United States District Court for the Western District of Froessel denied Wagner and Local 12-22's motion for summary judgment with respect to the privacy claim, granted Povtak's motion for summary judgment with respect to all other claims, and denied Wagner counter motion for summary judgment. (R1. at 19.) On December 18, 2009 the United States District Court for the Western District of Froessel granted judgment in favor of Povtak. (R2. at 22.)

Wagner appealed to the United States Court of Appeals for the Thirteenth Circuit and the that court found that Wagner adduced enough evidence to support a fact finder's conclusion that her privacy was violated and thus, reversed the judgment as a matter of law. (R3. at 15.) In finding that Povtak was bound by the grievance procedures of the CBA, it reversed the District Court's grant of summary judgment to Povtak and granted Local 12-22's motion for summary judgment.

This Court granted the petition for writ of certiorari to the United States Courts of Appeals for the Thirteenth Circuit on January 10, 2011. (R4. at-10-20.)

B. Statement of the Facts

After two of Crimaldi's high executives were indicted for charges relating to organized crime, the City of Dynes (City) officials informed Crimaldi that its transportation contract would not be renewed and that the City would accept bids prior to the contract's expiration date. (R1. at 2.) Prior to the solicitation of bids, City officials held a pre-bid conference in which employees of Crimaldi were present to allow them to ask questions regarding their future employment at the City terminal. (R1. at 2.) Among those employees were members of Local 12-22. (R1. at 2.)

During the conference Povtak's Chief Financial Officer Deborah Quine was asked if any Crimaldi employees would be hired by Povtak and Quine stated that "[Povtak] would need all the help [it] can get." (R1. at 2.)

As the lowest bidder, Povtak earned the City contract early in January of 2008 and became the provider of transportation to the City. (R1. at 2.) The transportation contract may be automatically renewed; but is otherwise set to expire January 30, 2013. (R1. at 2.) Since winning the contract from the City, Povtak has obtained funds from the U.S. Department of Transportation and the U.S. Environmental Protection Agency for operating "green transportation," such as natural gas-powered buses and light rails, and creating and/or maintaining "green jobs." (R1. at 3.)

Povtak offered employment to only 212 out of Crimaldi's 342 employees. (R1. at 3.) Out of those, Povtak also hired sixteen employees had been worked as electricians or electrical workers represented by Local 12-22 in the City's garage facilities. (R1. at 3.) The Collective Bargaining Agreement ("CBA") between Crimaldi and Local 12-22 contained a traditional "just cause for discharge" provision and a grievance/arbitration provision. (R1. at 3.)

The City had a fleet of approximately 40 buses, all of which harnessed traditional internal combustion engines. (R1. at 2.) But Povtak began making changes as soon as it won the transportation contract with the City. (R1. at 3.) Povtak renovated the entire City bus fleet with either electric or organic-diesel burning engines, cleaner exhaust systems, and retro purple headlights. (R1. at 3.) Povtak also changed all City's bus routes to transport more citizens while traveling shorter distances. (R1. at 3.) Because all electricians' responsibilities' expanded to encompass work on the new more environmentally sound, electrical engine buses, Povtak held

training courses to prepare them in assisting with the work that the new buses would require. (R1. at 3.)

Shortly after becoming the City's new transportation service provider, Povtak issued an Electronic Communications Policy (the "ECP"). (R1. at 3.) Povtak required all its employees to sign a User Acknowledgment Form that reflected they read and understood the ECP. (R1. at 4.) Wagner, who was hired by Crimaldi in 2004, to work as a junior electrician in the light rail division reviewed and signed the User Acknowledgment Form shortly after receiving it on February 9, 2008, but did not give it much thought. (R1. at 4.)

Povtak, like many other corporations, decided to launch a Facepage profile in early February of 2008. (R1. at 4.) It encouraged its employees to "become friends with" its profile and it recommended that employees post positive stories about Povtak's green initiatives on its Facepage profile. (R1. at 4.) Wagner, who also had created a Facepage profile decided to become friends with Povtak's profile and posted on it often. (R1. at 4.) Wagner's connection with her supervisors on Facepage was through Povtak's own profile since she was not friends with any of her supervisors' profiles. (R1. at 4.)

In an attempt to build goodwill with its new employees, Povtak replaced all Crimaldi-issued phones with ePhones for all its employees. (R1. at 4.) Wagner downloaded four applications onto her ePhone immediately after receiving it. (R1. at 5.) Two of these applications were work-related and two were not. (R1. at 5.) While discussing the new ePhones with her supervisor in the light rail division, Shane Leibson, Wagner showed Leibson the applications she had downloaded. (R1. at 5.)

On February 27, 2008, Wagner was transferred from the light rail division to the bus division. (R1. at 5.) Wagner's duties remained largely unchanged and she did not suffer a

decrease in salary or fringe benefits. (R1. at 5.) She posted on her own Facepage profile stating, “Just been transferred to the ghetto.” (R1. at 5.) One friend responded to her comment and reminded her to be careful about what she wrote on her profile. (R1. at 5.)

Wagner continued posting messages regarding Povtak’s green initiative but simultaneously complained about her work environment and supervisors on her own Facepage profile. (R1. at 5.) She also read comments on the “Crossing the Wires” blog which criticized several Povtak projects. (R1. at 5.) Wagner posted links to some of these articles on her Facepage profile. (R1. at 6.) These posts were made during both working and non-working hours. (R1. at 5.) One of the blog postings, which appeared in a local newspaper, was critical of some of the green initiatives undertaken by Povtak. (R1. at 6.) The post was made under the user name “PugLuv86,” and it contained intimate details about the inner workings of Povtak which led many to believe that a disgruntled employee must have made the post. (R1. at 6.)

Following this news article, Povtak supervisors who were mentioned in the article began investigating the allegations that were made and began searching for the identity of PugLuv86. (R1. at 6.) A memorandum was issued from Povtak corporate headquarters to all shift supervisors to review their employees’ comments on Povtak’s Facepage profile. (R1. at 6.)

Wagner’s job performance was submitted for a routine employee performance review by Povtak’s HR about the same time the newspaper article was published. (R1. at 6.) A common aspect of all performance reviews was an audit of the employee’s comments on Povtak’s Facepage profile. (R1. at 6.) Povtak believed that positive posts from an employee demonstrated overall positive feelings for the company. (R1. at 6.) The performance review also required submissions of evaluations from supervisors. (R1. at 6.) Wagner’s former shift supervisor, Leibson, submitted positive reviews and noted that Wagner had informed him about four

applications she had downloaded onto her ePhone and noted that these applications improved her work performance. (R1. at 6.) Leibson also stated that he encouraged other employees to download the same applications. (R1. at 7.)

Frank Milmine, Wagner's new supervisor in the bus division, submitted screen shots of Wagner's Facepage profile and all of Wagner's posts contained therein. (R1. at 7.) As a supervisor, Milmine was able to access Povtak's profile and therefore Wagner's because Wagner had become friends with Povtak. (R1. at 7.) It is unclear whether Milmine viewed Wagner's profile as part of the performance review or as part of the investigation into the identity of PugLuv86. (R1. at 7.)

The overall results of her performance evaluation were neither positive nor negative; Wagner received a B and HR placed Milmine's screen shots of Wagner's Facepage profile in her official personnel file. (R1. at 7.) HR did not notify either Wagner or Local 12-22 about the addition of the Facepage profile screen shots to her official personnel file. (R1. at 7.) It is also unclear whether HR merely reviewed the notes and placed them in Wagner's personnel file or continued to monitor her profile. (R1. at 7.)

Soon after the performance review, Wagner noticed a battery problem with her ePhone and turned it into Povtak's Technical Support Office (TSO). (R1. at 7.) Upon inspecting the ePhone, a technician noticed that Wagner had installed four applications. (R1. at 7.) The technician filed a report about the battery and the applications with his supervisor. (R1. at 8.) Thereafter the technician's supervisor reviewed his notes and made additional comments on the report about the possibility of a connection between the blog and the newspaper article. (R1. at 8.)

Wagner was subsequently terminated for violating the terms of the ECP. (R1. at 8.) Following Wagner's termination, Local 12-22 business agents Rahim Roth and Stefan Blancato submitted a grievance at the HR offices. (R1. at 8.) During that visit, Roth and Blancato spoke with HR secretary Christian Arko who advised them that Assistant HR Manager Audrey Livramento was unavailable. (R1. at 8.) Roth and Blancato handed him a grievance, pursuant to Article 14.1, Step 4 of the Crimaldi CBA objecting to Wagner's termination "without just cause in violation of Article 7.1 of the CBA." (R1. at 8.) The grievance demanded that Wagner be reinstated with full back-pay, benefits, and seniority rights restored, and for her to be made whole in all other respects. (R1. at 8.)

After Livramento was informed by Arko about what had transpired, Livramento called Blancato in order to schedule a meeting for the following Monday, March 10, 2008. (R1. at 8.) At the beginning of the March 10th meeting, Livramento made clear to Roth and Blancato that the sole purpose of the meeting was to explain Povtak's ECP under which Wagner was terminated. (R1. at 8.) She stated that Wagner had been terminated for a violating the ECP. (R1. at 8.)

Blancato and Roth angrily responded that they should have been notified by HR before Wagner was discharged pursuant to Article 14.1, Step 4 of Crimaldi's CBA. (R1. at 8.) However, Livramento said that they were "out of line" and that a reason was not needed. (R1. at 8.) Roth then told her to expect a formal letter from Local 12-22 and possibly an unfair labor practice charge. (R1. at 8.) Before closing her door Livramento stated that she expected them to file both and that her door was always open to them. (R1. at 8.) On March 12th, in an email to George Daks, the Povtak's HR General Manager, Roth requested to meet to discuss the termination. (R1. at 9.) He also attached the grievance. (R1. at 9.) Roth subsequently sent Daks another email on

March 22nd, stating that Local 12-22 was appealing Wagner's termination to arbitration under Article 14.2 of Crimaldi's CBA. (R1. at 9.) Daks responded via email that Povtak would not participate in the arbitration. (R1. at 9.)

C. Standard of Review

This Court reviews a trial court's determination of a question of law *de novo*. *Williams v. Taylor*, 529 U.S. 362, 384 (2000). The only questions this Court has recognized are legal questions concerning the interpretation of the Fourth Amendment to the U.S. Constitution and the 301 of the Taft-Hartley Act, 29 U.S.C. § 185. Therefore, the appropriate standard of review by this Court is *de novo*.

SUMMARY OF THE ARGUMENT

The Fourth Amendment to the U.S. Constitution protects people from unreasonable searches and seizures in limited circumstances in the workplace. A person can waive their right to privacy in certain circumstances, for instance by a no-privacy agreement. Wagner signed Povtak's ECP, which effectively waived her right to privacy with company issued electronic devices, such as her company-issued ePhone. Because she waived this right, when Wagner submitted her phone to be repaired, she waived any right to privacy. Therefore, when the technician found the applications she installed on her ePhone and reported her violation, Povtak had just cause to terminate Wagner.

An employee must have a reasonable expectation of privacy and society must be willing to recognize it as a reasonable expectation. Wagner's ePhone was company-issued and Facepage was accessible on her ePhone. She was also friends with Povtak on Facepage, which she was aware gave Povtak an opportunity to view her profile. Based on the facts, Wagner did not have a reasonable expectation of privacy and even if she did, society would not recognize it as such.

Under Crimaldi's CBA, Wagner's termination would only have been unreasonable if just cause had not existed. This first assumes that Povtak must abide by Crimaldi's CBA. Every new employer, however, is not required to abide by its predecessor's CBA. Serious inequities would occur otherwise, because employers would not be free to make changes to failing businesses and unions would not be free to adjust to new ownership and management. The objective of national labor policy is to prevent industrial strife by balancing two goals, allowing employers to be free in rearranging and acquiring businesses and protecting employees from changes in employers.

This Court has made several decisions in the successorship area. The Court has defined several factors which determine whether substantial continuity exists between a new employer and its predecessor. These include the similarity in: employers, working conditions, and the production process and customers. If these are not met with a sufficient amount of similarity, then substantial continuity does not exist. Povtak does not sufficiently meet these factors to have substantial continuity with Crimaldi so Povtak should not be required to arbitrate according to the terms of Crimaldi's CBA.

Even if this Court finds that there is substantial continuity, however, Povtak must also fulfill one of three other requirements. Povtak must, in addition to having substantial continuity, be either a "perfect successor" to Crimaldi, have accepted the terms of Crimaldi's CBA, or be Crimaldi's "alter ego." Povtak does not meet any of these additional circumstances and it should not be ordered to abide by Crimaldi CBA.

ARGUMENT

I. POVTAK DID NOT VIOLATE WAGNER'S FOURTH AMENDMENT RIGHT IN THEIR SEARCH BECAUSE THERE IS NO REASONABLE EXPECTATION OF PRIVACY IN COMPANY- ISSUED PHONES OR IN COMMENTS POSTED ON PUBLIC NETWORKING SITES AND POVTAK'S SEARCH WAS REASONABLE.

The Fourth Amendment of the United States provides that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated" U.S. Const. amend. IV. For the protections of the Fourth Amendment to apply to the workplace, the search in question must have been conducted by or with the participation of a government agent. *Nat'l Treasury Employees Union v. Von Raab*, 489 U.S. 656, 665 (1989). Furthermore, the workplace search has to constitute a "search or seizure" under the Fourth Amendment.

A plurality of this Court, in the seminal case of *O'Connor v. Ortega*, 480 U.S. 709, 718, 725-26 (1987), provided a framework by which to analyze employment searches that consists of a two-fold inquiry into the employee's expectation of privacy and the reasonableness of the search. The test to determine whether a public employee has the right of privacy in his workplace depends on whether that employee has a reasonable expectation of privacy based on the circumstances of his workplace. *Id.* at 717. If a court finds that the employee enjoyed such an expectation, the court will then address the question of whether the employer's search infringed upon that employee's expectation of privacy. *Id.* at 718. This in turn hinges on whether the search was justifiable at its inception and in its scope. *Id.* at 726. A search is justified at its inception if there are reasonable grounds for suspecting that "the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose." *Id.* Furthermore, the scope of a search is reasonable when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive" *Id.* (citing *New Jersey v. T.L.O.*, 469 U.S., at 342).

This Court, however, decided a case that dealt with an employer-issued pager subject to a no-privacy policy. *City of Ontario v. Quon*, 130 S. Ct. 2619 (U.S. 2010). Quon, a public-sector employee, alleged violation of his Fourth Amendment right to privacy when his employer read the personal text messages sent from his employer-issued pager. *Id.* at 2624. However, this Court assumed Quon maintained an expectation of privacy in his text-messages but reasoned that "because the search was motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable." *Id.* at 2632.

- A. Wagner did not have a reasonable expectation of privacy in the contents of her company-issued iPhone or in the posts and comments made on her Facepage profile.

Wagner did not maintain a reasonable expectation of privacy in the use of her company-issued iPhone because when Wagner read and reviewed Povtak's ECP and then signed the ECP's User Acknowledgment Form, she effectively agreed to bound herself to the policy and was immediately put on notice of Povtak's no-privacy policy. (R1. at 4.) In *Quon*, this Court recognized that "...employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent such policies are clearly communicated." *Quon*, 130 S. Ct. at 2630.

Wagner should have reasonably expected that at that some point Povtak, or its agents, would access and become aware of her Facepage profile's contents. Because Wagner's Facepage profile was set to "Friends", and Povtak was a Facepage friend, Wagner logically lacks a legitimate expectation of privacy in the materials she intended for publication on her Facepage. Individuals may not enjoy an expectation of privacy in internet postings or emails that have reached their recipients. *United States v. Lifshitz*, 369 F.3d 173, 190 (2d Cir. 2004).

Likewise, whether one has a reasonable expectation of privacy in e-mails and other writings that have been shared with others, including entries on Facebook and MySpace, is an issue that has come up in the courts; *Moreno v. Hanford Sentinel Inc*, 172 Cal. App. 4th 1125 (Cal. Ct. App. 2009) (no person would have reasonable expectation of privacy where person took affirmative act of posting own writing on MySpace, making it available to anyone with a computer and opening it up to public eye); *Dexter v. Dexter*, 2007 Ohio 2568 (Ohio Ct. App. 2007) (no reasonable expectation of privacy regarding MySpace writings open to public view).

1. Wagner waived her expectation of privacy when she signed a form acknowledging she had read and understood Povtak's explicit no privacy policy concerning the use of company-issued electronic systems.

Wagner's expectation of privacy concerning her use of a company-issued iPhone was unreasonable given her explicit acceptance of Povtak's ECP, which outlined a no-privacy policy

in regards to the use of the company's electronic systems (App. B. 1.) This Court determined in *Quon* that "...employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent such policies are clearly communicated." *Quon*, 130 S. Ct. at 2630.

In determining an employee's expectation of privacy, the courts have looked at factors like the employee's 'exclusive use' of his workspace, the degree to which his co-workers could have access to the workspace, and whether the employer distributed an anti-privacy policy to put its employees on notice for monitoring. *See Am. Postal Workers Union v. United States Postal Service*, 871 F.2d 566 (6th Cir. 1989); *Schowengerdt v. Gen. Dynamics Corp.*, 823 F.2d 1328 (9th Cir. 1987).

In *Biby v. Board of Regents*, 419 F.3d 845, 850-51 (8th Cir. 2005), the Eighth Circuit held that when employers reserve the right to monitor workplace technology by means of a no-privacy policy, employees cannot have a reasonable expectation to privacy in communications exchanged via workplace computers or cell phones. No-privacy policies can also be dispositive as to whether an employee had a reasonable expectation of privacy. *American Postal Workers Union*, 871 F.2d 556. In *American Postal Workers Union*, the Sixth Circuit concluded that a postal worker had no reasonable expectation of privacy "in light of the clearly expressed provisions permitting random and unannounced locker inspections." *Id.* at 560.

Additionally, in *Muick v. Glenayre Elecs.*, 280 F.3d 741, 743 (7th Cir. 2002), Glenayre "had announced that it could inspect the laptops that it furnished for the use of its employees, and this destroyed any reasonable expectation of privacy that Muick might have had. . . ." The rulings above show that in light of Povtak's no-privacy policy, Wagner's Fourth Amendment

claim should fail because she placed an unreasonable expectation of privacy in the contents of her company-issued ePhone.

In establishing whether Dr. Ortega enjoyed a reasonable expectation of privacy in his workplace, this Court said that a number of factors should be taken into consideration, for example, that the Hospital had not established a reasonable policy discouraging employees such as Dr. Ortega from storing personal items in their desks or file cabinets. *Id.* at 718-19.

The fact that the items searched in *Ortega* and our case are not the same, should not be dispositive, for it is the existence of a no-privacy policy, or its lack thereof, an important factor in the determination of an expectation of privacy. Povtak required all employees to sign a form acknowledging their acceptance of the ECP, which limited their expectation of privacy in the use of company-issued electronic systems (R1. at 4.). The employer in *Ortega* never established a policy warning employees like Dr. Ortega that they should not have an expectation of privacy within the confines of their offices. *Ortega*, 480 U.S. at 718-19. Wagner, however, reviewed and signed an acknowledgment form, which stated that she had read, understood, and would be bound by the terms of Povtak's ECP in the use of her company-issued ePhone (R1. at 4.)

- a. Wagner waived her expectation of privacy when she turned her ePhone over to Povtak's IT Department.

In *Ortega*, a plurality of this Court announced that public-sector employees may enjoy some privacy in the physical workplace, such as desks and file cabinets, based on whether the context of a particular workplace fosters within an employee a reasonable expectation of privacy. *Ortega*, 480 U.S. at 716. The employer in *Ortega*, a state hospital, searched Dr. Ortega's office as part of a sexual harassment investigation that ultimately resulted in his termination. *Id.* at 712. The Hospital searched and seized items from Dr. Ortega's desk and file cabinets, including several personal items. *Id.* at 713. This Court concluded that Dr. Ortega had a reasonable

expectation of privacy in his desk and file cabinets because, among other factors, the evidence suggested that Dr. Ortega did not share his desk or file cabinets with any other employees. *Id.* at 718-19.

The ePhone search in our case is distinguishable from the desk and file cabinets search in *Ortega* in yet another way; Wagner voluntarily shared her ePhone with Povtak's TSO. (R1. at 7.) Two days after routine performance reviews, Wagner noticed a problem with her company-issued ePhone's battery so she turned it into Povtak's TSO. (R1. at 7.) The technicians there serviced and repaired the phone and conducted another search to make sure there were no other technical issues with the phone. (R2. at 21.) Wagner should have reasonably anticipated that the TSO would be inspected to locate the source of the problem. It was while the phone had been voluntarily submitted to the TSO that one of the technicians discovered the 'unauthorized software' on Wagner's phone. (R2. at 21.) The discovery of these applications prompted the IT technician to report it to his superiors. (R1. at 7-8.) These applications were in violation of Povtak's ECP thus providing just cause for Wagner's termination. (R2. at 21-22.)

Hypothetically, had Dr. Ortega's file cabinet malfunctioned and closed shut, he might have solicited a co-worker's help in opening it. In doing so, however, Dr. Ortega would have had to reasonably expect that his co-worker might see the items contained in his cabinets. Accordingly, Wagner should have reasonably expected that, by turning her ePhone into the TSO, the contents of her phone would be revealed to the technician who fixed the phone. Because Wagner voluntarily turned her Povtak-issued ePhone for inspection into Povtak's TSO she waived any expectation of privacy she may have had in the contents of such.

- b. Supervisor Leibson's approval of the applications in Wagner's company-issued ePhone did not undermine the application of Povtak's no-privacy policy.

Leibson's approval of the downloaded applications in Wagner's iPhone did not undermine the application of Povtak's ECP because Leibson, as Supervisor of the Light Rail Division, did not have Povtak's authorization to exempt Wagner from being subjected to the ECP, was not a policy maker, and his approval, was nothing more than an informal, unauthorized, and ineffectual misapplication of Povtak's ECP.

In *Quon*, this Court encountered a very similar situation where Quon was told by his Lieutenant that his messages "were considered e-mail and could be audited" but that he could reimburse the City of Ontario for the overage fee instead of having the City audit his text messages. *Quon*, 130 S. Ct. at 2626. Although this Court ultimately found the City's review of Quon's text messages reasonable, it did so without answering whether "Duke's statements could be taken as announcing a change in Ontario Police Department (OPD) policy, and if so, whether he had, in fact or appearance, the authority to make such a change and to guarantee the privacy of text messaging..." *Id.* at 2629.

Unlike *Quon's* Lieutenant Duke, Leibson's informal endorsement of Wagner's iPhone applications were not sufficiently formal and authoritative to have overridden or destabilized the applicability of Povtak's ECP. Lt. Duke was the OPD officer responsible for the City's contract with the City's pager service provider. *Id.* at 2625. It follows that, as such, Lt. Duke was in a much more superior and dispositive position when it came to decisions regarding the use of the pagers than Leibson was of the decisions regarding the iPhones. Leibson never made a conditional arrangement with Wagner to give her the impression that Povtak's ECP would no longer apply to her.

2. Wagner did not have a reasonable expectation of privacy in the public Facepage comments that she published.

Wagner did not have a reasonable expectation of privacy in the contents of her Facepage profile because Wagner chose to publish her Facepage profile comments and posts. Even though the posts on Wagner’s Facepage profile could only be read by her “Friends” (R1. at 4), she should have expected that those “Friends” and any individuals with access to their profiles could view Wagner’s posts.

The Supreme Court of the State of New York addressed the issue of privacy regarding comments or posts made on a social medium greatly alike Facepage, Facebook, in *Romano v. Steelcase Incorporated*, 907 N.Y.S.2d 650 (N.Y. Sup. Ct. 2010). The *Romano* court determined that disclosing the plaintiff’s posts found on her Facebook profile did not amount to a violation of her privacy “[p]laintiffs who place their physical condition in controversy, may not shield from disclosure material which is necessary to the defense of the action...” *Id.* at 652. The court held it was “reasonable to infer from the limited postings on Plaintiff’s public Facebook and MySpace profile pages that her private pages may contain materials and information that are relevant to her claims or that may lead to the disclosure of admissible evidence.” *Id.* at 655. The court also rejected the argument that the release of the information would violate her Fourth Amendment right to privacy. *Id.*

Wagner’s comments about Povtak, just like Romano’s posts were not meant to be private. Both Wagner and Romano were aware that they were sharing these posts with other people on Facepage and Facebook respectively. Unlike verbally expressing one’s thoughts to a friend, a post made on Facepage remains, which decreases the author’s expectation of privacy in that post. If Wagner truly intended for the comments on her Facepage profile to remain private she should have abstained from sharing them on a public forum.

The Court of Appeals incorrectly concluded that when Milmine used any postings on Wagner's Facepage profile for employment purposes, namely, Wagner's employment performance evaluation, Povtak violated Wagner's Fourth Amendment rights. (R3. at 6.) This conclusion, nevertheless, rests on the erroneous assumption that Wagner maintained separate her personal life from her work life. The Thirteenth Circuit determined that "the distinction between workplace and private activities became blurred on Povtak's Facepage profile," (R3. at 5.) but the reality is that those distinctions became blurred when Wagner chose to add her employer as a Facepage "Friend." (R1. at 4.) Wagner held an unreasonable expectation of privacy by assuming that her supervisors at Povtak would never read her Facepage comments.

Even if this Court determines Wagner had some level of expectation of privacy in the contents of her Facepage profile, by downloading and using a Facepage application on her no-privacy company-issued iPhone she exposed her Facepage profile to possible scrutiny by Povtak under its ECP terms.

- a. Wagner did not have a reasonable expectation of privacy in her Facepage profile and the posts she made therein because Povtak was her Facepage friend.

Facepage gives its users the option to customize their own privacy settings. (R1. at 4.) Users' privacy settings range from "Friends", which only allow that user's friends to view his or her profile, to "Everyone" which impliedly lacks any expectation of privacy over that user's profile. (R1. at 4.) A Facepage user's privacy setting is insightful into that user's actual expectation of privacy vis-à-vis their Facepage profile and its contents.

In this case, while Povtak's Facepage privacy setting was set to include "Everyone," Wagner's Facepage privacy setting was set to "Friends." (R1. at 4.) Still, the Court of Appeals erroneously concluded that Wagner's "Fiends" privacy setting translated into a reasonable expectation of privacy with the intention that that her profile be inaccessible to every Facepage

user. (R3. at 5.) This conclusion is wholly unsupported by the fact that Wagner intended her profile to be seen by her “Friends,” which included Povtak. This Court has concluded that while an individual may maintain a reasonable expectation of privacy in his own home, “[w]hat a person knowingly exposes to the public, even in his own home or office, is not subject of Fourth Amendment protection.” *Katz v. United States*, 389 U.S. 347, 351 (1967).

- b. Even if Wagner maintained a subjective expectation of privacy in the comments she posted on Facebook, this expectation is not one that society is willing to recognize as reasonable.

Advances of technology have a perceptible effect in society’s expectation of privacy and this Court has expressed that “[i]t would be foolish to contend that the degree of privacy secured to citizens by the Fourth Amendment has been entirely unaffected by the advance of technology.” *Kyllo v. United States*, 533 U.S. 27, 33-34 (2001). More specifically, and in regards to cell phones and text message communications, this Court has recognized that “...the ubiquity of those devices has made them generally affordable...that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.” *Quon*, 130 S. Ct. at 2630.

Taking into account this Court’s observations, even if Wagner had assumed some level of privacy would inhere in the contents of her Facebook profile, it would not have been reasonable for Wagner to rely on the assumption that the comments on her profile were in all circumstances immune from scrutiny, especially from Povtak, one of her Facebook friends. This digital age has allowed individuals to communicate in remarkable ways and at amazing speed. If Wagner had sought to keep certain information private she should not have posted it on such a public forum as Facebook is.

B. Povtak's search of Wagner's ePhone and Facepage profile were reasonable at their inception and in their scope.

Because Povtak's searches of Wagner's company-issued ePhone and Facepage profile were conducted for a non-investigatory, work-related purpose, they were reasonable at their inception. Povtak's search of the ePhone was work-related and it was conducted to locate the source of a technical problem. Likewise, Wagner's Facepage profile search was conducted as part of a performance evaluation which sought to ascertain employees' satisfaction with their jobs, a legitimate work-related concern, and this Court has concluded that "[p]ublic employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees." *Ortega*, 480 U.S. at 724.

The second prong in the *Ortega* two-fold inquiry into the determination of a workplace violation of the Fourth Amendment turns to the reasonableness of the search conducted by the employer. *Id.* at 725. A court must conclude whether a search was justifiable at its inception and in its scope. *Id.* at 726. A search is justified at its inception if there are reasonable grounds for suspecting that "the search will turn up evidence that the employee is guilty of work-related misconduct, or that the search is necessary for a noninvestigatory work-related purpose." *Id.* Furthermore, the scope of a search is reasonable when "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive..." *Id.*

Even if this Court finds that Wagner had some level of expectation of privacy in the contents of her ePhone and in her Facepage profile's comments and posts, this Court's decision in *Quon* made it clear that an employer may overcome a court's finding that an employee enjoyed a reasonable expectation of privacy if the employer's search was reasonable at its inception and in its scope. *Quon*, 130 S. Ct. at 2619 (finding that even if Quon had a reasonable

expectation of privacy, his employer did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts of Quon's pager). Because Povtak's search of Wagner's ePhone and Facepage was work-related and not too intrusive in light of Wagner's expectations of privacy, the Court of Appeals incorrectly determined that Povtak violated Wagner's Fourth Amendment right to privacy.

1. The ePhone search was reasonable because it was not too intrusive and Povtak retained all control of company issued systems.

The search of Wagner's ePhone was reasonable at its inception and in scope because the search was not at all intrusive in light of its context; the ePhone was only searched to determine the cause of technical problems, a legitimate work-related reason conducted at the request of Wagner. (R1. at 7.) Wagner was having problems with her ePhone, so she turned it into Povtak's TSO for inspection on her own accord. (R1. At 7.) There, a technician examined her ePhone battery and resolved the issue. (R2. at 21.) After the technician fixed Wagner's phone, he conducted an overall search of the phone to make sure there were no additional sources for the phone's technical problem. (R2. At 21.) It was during this legitimate ensuing search that the technician discovered that Wagner had downloaded unauthorized software contrary to Povtak policy which were justifiable grounds for Wagner's termination. (R2. at 21-22.)

Furthermore, Povtak's User Acknowledgment Form, which Wagner was required to sign after receiving and reading Povtak's ECP, explicitly states, "I further acknowledge and understand that the Company's Electronic Systems, as defined in the Policy, are not private and that I have no expectation of privacy with regard to any use of these Electronic Systems." (App. B at 4.) Povtak's ECP is clear and unambiguous in its language regarding an employee's expectation of privacy in their company-issued devices,

[t]hese systems are the sole property of the company, and the following policy shall govern and control the use of all of the Electronic Systems of Povtak Group

(the Company) regardless of whether use occurs at a company facility, the User's home or at any other location. The Company has the absolute right to access, monitor and view all electronic communications and other components of its Electronic Systems at any time for any reason whatsoever. Violation of this Policy can result in the loss of network access and discipline up to and including discharge.

(App. B at 1.), therefore it was unreasonable for Wagner to hold an expectation of privacy in her company-issued iPhone.

The facts in our case are most analogous to the facts in *Quon*, where the OPD audited the text messages sent from the department-issued pager of one of its officers. *Quon*, 130 S. Ct. at 2622. The officer involved claimed that his employer's audit had violated his Fourth Amendment right to privacy in his pager. *Id.* This Court concluded that the pager audit had been conducted in a reasonable manner because "Chief Scharf ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's need." *Id.* at 2631. Just like OPD's search of officer Quon's text messages, Povtak's search of Wagner's phone was justified at its inception because the search was "necessary for a noninvestigatory work-related purpose..." *Ortega*, 480 U.S. at 726. The search of Wagner's phone was reasonable, not only because Wagner voluntarily subjected her phone to be searched by a fellow co-worker but the search itself was curtailed to the circumstances which gave rise to it in the first place; fixing the iPhone technical issue.

Assuming, arguendo, that Wagner had a reasonable expectation of privacy in the contents of her company-issued iPhone in spite of Povtak's ECP warnings to the contrary, the search of Wagner's iPhone was still reasonable because it was limited in scope. (R2. at 21.) Compared to the searches in *Ortega* and *Quon*, which yielded items of a highly personal nature, Povtak's search of Wagner's phone generated no such thing alike, which may have increased her expectation of privacy. Povtak's search of Wagner's phone was reasonable in its scope.

In the alternative, Wagner claims that Povtak's ECP does not explicitly mention and thus does not apply to iPhones or iPhone applications, but the ECP covers these items albeit not by name. Povtak's ECP mentions "electronic systems" and "unauthorized software, which refer to company-issued iPhones and iPhone applications respectively.

2. Povtak's review of Wagner's Facepage was conducted for a non-investigatory, work-related purpose and was reasonable at its inception and in its scope.

Supervisor Milmine's review of Wagner's Facepage did not violate her Fourth Amendment right to privacy because Milmine's review was not excessively intrusive in light of Wagner's expectation of privacy. This Court has expressed that "the extent of an expectation is relevant to assessing whether the search was too intrusive." *Quon*, 130 S. Ct. at 2631 (Scalia, J. Concurrence). In this case, Wagner's Facepage profile was set to "Friends" which is indicative of her expectation of privacy vis-à-vis those who were allowed to view her profile. Povtak was among the group of "Friends" who had access to and could see Wagner's profile.

Wagner claims, however, that she became friends with Povtak on Facepage at Povtak's request. However, Povtak in no way characterized its suggestion to become its friend on Facepage as anything other than what it really was, a suggestion. (R1. at 4.) The Court of Appeals concluded that Wagner's comments made on Facepage were not meant to be viewed by the public at large. However, the 'public at large' Wagner refers to does not include Povtak. Wagner's supplemental argument is that she did not intend for these posts to be viewed by her supervisor at Povtak since she was not Facepage friends with her supervisor.

The use of social networking sites is common place. Just from this case we can ascertain that even inanimate corporations, like Povtak, can have their own Facepage profiles. (R1. at 4.) As Wagner would most likely agree, a Facepage profile must be created by a person usually referred to as the "user", just like when she created her own Facepage profile in 2006. (R1. at 4.)

A most reasonable possibility and something Wagner should have expected is that Povtak's profile may be accessed and managed by co-workers or even a supervisors, just as it happened in this case. (R1. at 7.)

Wagner would have this Court entertain her contention that she did not reasonably expect any of her supervisors to be able to view her Facepage profile. (R3. at 5.) But to do that would be to entertain an unreasonable expectation that her comments immune to being viewed by a supervisor, especially when Povtak was her Facepage friend. Wagner's claim that she did not expect her supervisor to view her profile is unreasonable because Povtak was her Facepage friend and Povtak authorized one of its agents, Milmine to log in to Povtak's Facepage profile. (R1. at 7.)

Even after one of Wagner's Facepage friends warned her and reminded her to be careful about what she posted on her profile, Wagner continued to assert that she expected total privacy in the contents of her Facepage profile. (R1. at 5.) This shows how others are mindful about the possibility that things being posted on Facepage may venture out of it.

The Court of Appeals concluded that the distinction between workplace and private activities became blurred on Povtak's profile. (R3. at 5.) Furthermore, the Court of Appeals marked this as occurring when Milmine used his access to Povtak's profile to search Wagner's profile during her performance evaluation, thereby using Povtak's friendship with Wagner for employment purposes. (R3. at 6.) Nevertheless not only did Wagner add Povtak as a friend on Facepage thus inviting Povtak into her "private" Facepage profile (R1. at 4.) she also downloaded application onto her company-issued phone. (R1. at 5.) Because the record is unclear as to whether Milmine viewed Wagner's Facepage profile as part of the performance

evaluation or as part of the investigation into the identity of PugLuv86 (R1. at 7.), the Court of Appeals erroneously concluded that Milmine's search violated Wagner's privacy.

II. POVTAK IS NOT OBLIGATED TO ARBITRATE BECAUSE IT IS NOT BOUND TO THE SUBSTANTIVE PROVISIONS OF A COLLECTIVE BARGAINING AGREEMENT ENTERED INTO BY CRIMALDI.

Reviewing cases under section 301 of the Taft-Hartley Act, 29 U.S.C. § 185, this Court has stated that substantive federal law should apply concerning the policy of our national labor law. *Textile Workers Union of Am. v. Lincoln Mills of Ala.*, 353 U.S. 448, 456 (1957). The primary objective of the national labor policy requires that owners be free to rearrange their businesses or terminate them balanced by some protection to employees from sudden changes in employment. *John Wiley & Sons, Inc. v. Livingston*, 376 U.S. 543, 549 (1964). Holding a new employer or even a union "bound to the substantive terms of an old collective bargaining contract may result in serious inequities." *NLRB v. Burns Int'l Sec. Servs.*, 406 U.S. 272, 287 (1972). The duty to arbitrate does not survive in every case in which the business ownership or structure changes. *Wiley* at 551.

Labeling Povtak as the "successor employer" to Crimaldi does not help the analysis in this case, because the term "successor" does not have a single definition for every legal context. *Howard Johnson Co. v. Detroit Local Joint Executive Board*, 417 U.S. 249, 264 (1974). In one sense the term can mean one thing and in a legal sense it can mean another. *Ameristeel Corp. v. Int'l Bhd. of Teamsters*, 267 F.3d 264, 267-68 (3d Cir. 2001). In determining whether a new employer is a "successor" in the legal context, the approach must be "primarily factual in nature and based upon the totality of the circumstances." *Fall River Dyeing & Finishing Corp. v. NLRB*, 482 U.S. 27, 43 (1987). The "substantial similarity of operation and continuity of identity of the business enterprise before and after a change in ownership" are necessary to bind a CBA

to the successor employer. *Wackenhut Corp. v. Int'l Union, United Plant Guard Workers*, 332 F.2d 954, 958 (9th Cir. 1964).

Even with substantial continuity, at least one other factor must be present to order a successor to arbitrate according to the terms of its predecessor's CBA. *Ameristeel* at 269. The successor must also be a "perfect successor, have accepted the terms of the CBA, or be an "alter ego" of its predecessor. *Local 348-S, UFCW, AFL-CIO v. Meridian Mgmt. Corp.*, 583 F.3d 65, 79-80 (2d Cir. 2009). Povtak shares some characteristics with Crimaldi, but it does not meet the requirements for substantial continuity and even if this Court determines that it does, it does not meet any of the additional requirements and therefore it should not be bound by Crimaldi's CBA.

A. Povtak is not bound to arbitrate according to Crimaldi's collective bargaining agreement because Povtak fails to satisfy the Substantial Continuity test.

A successor ordinarily "is not bound by the substantive provisions of the predecessor's collective-bargaining agreement." *Fall River* at 40. Substantial continuity is a required condition to impose arbitration. *Ameristeel* at 269. The focus of the substantial continuity test is on the substantial continuity in identity between the predecessor and successor employer. *Fall River* at 43. A "successor . . . is not bound by the substantive provisions of the predecessor's" CBA when hiring the predecessor's employees. *Id.* at 40.

Hiring enough of the predecessor's employees to require the new employer to bargain with the union is wholly insufficient for implying that the new employer agreed to the predecessor's CBA. *Burns* at 286-87. This would discourage potential employers from taking over failing companies or enterprises. A "successor" employer does not assume the obligations under a predecessor's CBA from the mere fact that the "successor" employer "is doing the same work in the same place with the same employees as [its] predecessor." *Id.* at 291. Serious inequities could occur if potential employers are held to predecessors' CBA's and cannot make

necessary “changes in corporate structure, composition of the labor force, work location, task assignment, and nature of supervision.” *Id.* at 287-88.

1. Supreme Court precedent indicates that Povtak is not bound by Crimaldi’s CBA because it does not satisfy the Substantial Continuity test.

Several rulings by this Court confirm the District Court’s decision that Povtak is not bound by the terms of Crimaldi’s CBA. The most relevant Supreme Court cases on successorship liability include: *Wiley*, *Burns*, *Howard Johnson*, and *Fall River*. *Marathon Ashland Petroleum v. Int’l Bhd. of Teamsters Local No. 120*, 300 F.3d 945, 948-49 (8th Cir. 2002).

Congress has not chosen to make the bargaining freedom of employers and unions subordinate to preventing industrial strife. *Burns* at 287. It is also important not to “hand-cuff” a new employer with a previous employment agreement which may deter employers from taking over a moribund business. *Id.* at 287-88. The ultimate rules of law defined by these cases are all in line with the ultimate goal of preventing industrial strife by protecting the employees in a union while at the same time not discouraging or inhibiting employers from transferring capital. *Id.*

Of these cases, the facts in this case are most analogous to the facts in *Burns*. *Burns* took over a contract to provide plant protection service for a factory that was previously held by Wackenhut Corporation and it hired the majority of Wackenhut’s guards. *Id.* at 275. The *Burns*’ employees were performing “the same tasks at the same place they had worked in the past.” *Id.* at 278. *Burns* had been informed at a pre-bid conference that Wackenhut’s employees were not only represented by a union but they had a CBA in place. *Id.* at 275.

Povtak took over the City transportation contract from Crimaldi just as *Burns* took over Wackenhut’s protection services contract. Both cases involve service contracts with broad

purposes. Povtak's electricians were not performing the same tasks, because the buses had been modified, whereas in *Burns*, the employees continued to perform the exact same tasks. And finally, Burns was informed of Wackenhut's CBA, but no evidence has been offered that Povtak was even aware of a CBA with Crimaldi. Povtak electricians experienced less continuity than Burns International Security Service's employees and therefore, Povtak should not be bound by its predecessor's CBA either.

In *Howard Johnson*, "[t]he business continued without interruption at the same location, offering the same products and services to the same public, under the same name and in the same manner, with almost the same number of employees." 417 U.S. at 267. First of all, Howard Johnson bought the assets of the former employer, but kept a minority of the its employees. *Id.* at 249. Secondly, it did not buy out or merge with its predecessor, so there was a viable corporation it could force to arbitrate and find a remedy. *Id.* at 249. Howard Johnson had no ownership interest in the restaurant or motor lodge prior to its purchase, so the sale was not "a paper transaction without meaningful impact on the ownership or operation of the enterprise." *Id.* at 261. Finally, the CBA of Howard Johnson's predecessor stated that successors would be bound by the CBA. *Howard Johnson*, 417 U.S. at 266. Howard Johnson did not have a duty to follow the CBA and arbitrate, because there was no substantial continuity of identity in the work force. *Id.* at 249.

Howard Johnson may appear to be very different than the present case, but below the surface, there are many similarities in details and concepts. Multiple factors evidence substantial continuity in the business in *Howard Johnson*, despite the most obvious difference, that Howard Johnson did not hire a majority of its predecessor's employees and Povtak did. *Id.* Povtak took over some assets also, but it went a step further than Howard Johnson and made changes

immediately. (R1. at 3.) Povtak changed the service provided (e.g. environmental friendly buses), provided new routes to pick up different and greater amounts of customers, and was a different company in name and officers. (R1. at 2, 3.) Howard Johnson did not negotiate with the union or approve of the CBA and neither did Povtak. *Id.* at 261. Crimaldi's CBA never mentioned successors at all, let alone that a successor would be bound by the CBA as in *Howard Johnson*.

It could be argued that since this Court in *Howard Johnson* made substantial continuity a requirement for ordering arbitration, the reverse would also be true, that with substantial continuity comes a requirement to arbitrate. *Ameristeel*, 267 F.3d at 272. The Appellate Court has also implied that *Howard Johnson* stands for this proposition by using it to support its statement that substantial continuity is one of the four factors sufficient to bind a successor to its predecessor's CBA. (R3. at 7.) This, however, would completely overturn *Burns*, which has been repeatedly upheld by this Court. Therefore, *Howard Johnson* should be limited to its holding, that without substantial continuity, a successor cannot be bound to arbitrate according to its predecessor's CBA.

The *Fall River* case primarily interprets the ruling in *Burns*. *Fall River*, 482 U.S. at 27. Several factors made *Fall River* a "successor" because it had "substantial continuity" with its predecessor company. *Fall River*, 482 U.S. at 28, 45. *Fall River* acquired much of its predecessor's real property, introduced no new products, used the same production process, hired mostly supervisors from the predecessor, and the employees felt their jobs had not changed. *Fall River*, 482 U.S. at 44. The purpose of purchasing many of these particular assets was for the express purpose of acquiring the predecessor's assets. *Id.*

The *Fall River* factors, along with the union's bargaining demand, are above and beyond the evidence in this case and only led to a requirement for Fall River to bargain with the union. *Id.* at 50-54. Povtak made numerous changes immediately upon winning the contract and although it acquired many of the buses and hired a majority of Crimaldi's employees, Povtak modified the buses and trained the Union electricians to meet its requirements. (R1. at 3.)

The aforementioned cases are substantially different from the oldest case, *Wiley*. *Wiley* can be distinguished, because John Wiley & Sons merged with the existing company and the union made its position known well before the merger. *Wiley*, 376 U.S. at 545, 551. Although there is often no basis for distinguishing a case such as this as a merger, this tends to show that the CBA was within a reasonable expectation of John Wiley & Sons and due to the merger, the predecessor company no longer existed. *Howard Johnson*, 417 U.S. at 257. In the present case, Crimaldi was not taken over as a company (e.g. merger, sale of capital stock, etc.) like the predecessor employer in *Wiley*; Povtak won a bid and took over a city contract that was previously held by Crimaldi. (R1. at 2.) Povtak also did not have any transactions with Crimaldi and no evidence has been provided which shows it was aware of Crimaldi's CBA, unlike John Wiley & Sons who was well aware of its predecessor's CBA.

Wiley and *Burns* may appear to be in complete contravention of each other, but this Court, in subsequent cases, has repeatedly confirmed that they are not. *Wiley's* narrow set of facts led to the court's finding that John Wiley & Sons was bound to arbitrate. *Ameristeel*, 267 F.3d at 273. Whereas, *Burns* is much broader and led to further cases, such as *Howard Johnson* and *Fall River*, which reinforced *Burns* and have continued to define what a successor employer's obligations are to a previous employer's CBA. *Id.*

2. Povtak does not satisfy the factors for substantial continuity to bind it to Crimaldi's CBA based on the *Fall River* factors.

There is no perfect course to follow in the analysis of the Supreme Court cases in the successorship area. *Id.* at 268. This Court, however, stated that the National Labor Relations Board (Board) should examine a number of factors between the predecessor and the successor employer: (1) whether the business is essentially the same; (2) whether the employees are doing the same jobs in the same working conditions under the same supervisors; and (3) whether the production process is the same, products produced are the same, and the body of customers is basically the same. *Fall River*, 482 U.S. at 43. The Board, while conducting this analysis, looks at the facts in regard to the totality of the circumstances and “keeps in mind the question whether ‘those employees who have been retained will understandably view their job situations as essentially unaltered.’” *Id.* (quoting *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 184 (1973)).

This Court has noted in *Burns* and *Howard Johnson* the significance of the fact that a case involves a merger. The Third Circuit, despite this, stated in *AmeriSteel* that the fact that a case involves a merger is not significant, but a stock sale was significant to determining whether substantial continuity existed with the predecessor and successor. *General Teamsters, etc. v. Bill's Trucking, Inc.*, 493 F.2d 956, 964 (3d Cir. 1974). Despite the appearance of incongruity, the significance of these transitions is not in the transition itself as much as it is in whether it alters the employment relationship viewed by the employees. *Id.* For example, it was significant in *Wiley* based on the totality of the facts, because the predecessor became the successor, John Wiley & Sons, by a merger and there was no evidence that employment conditions changed. *Wiley*, 376 U.S. at 544-45.

The Board must determine whether the successor has acquired substantial assets of its predecessor and whether the successor continued the predecessor’s business operations, without

interruption or substantial change. *Golden State Bottling*, 414 U.S. at 184. Based on this type of “sliding scale” analysis, Povtak does not meet the requirements for substantial continuity.

- B. Even if there is a substantial continuity of identity in the business enterprise between Crimaldi and Povtak, Povtak is not bound by the substantive terms of the Collective Bargaining Agreement.

There is confusion by the lower courts in determining what is required under Supreme Court precedent to order a successor to arbitrate under the substantive terms of its predecessor’s CBA. (R1. at 16.) *Wiley* was narrowed by subsequent cases to its holding, that substantial continuity is required to impose arbitration through a predecessor’s CBA, but it is not sufficient by itself. *Ameristeel*, 267 F.3d at 269. If the substantial continuity requirement is met, there are additional circumstances necessary in which a successor employer could be held to the terms of its predecessor’s CBA: (1) when the employer is a “perfect successor” of its predecessor; (2) when the employer has expressly or impliedly assumed the obligations of its predecessor’s CBA; and (3) when the employer is the “alter ego” of its predecessor. *Meridian*, 583 F.3d at 79-80. Only if there is substantial continuity and at least one of these circumstances has been met should this Court order a successor to arbitrate under the terms of its predecessor’s CBA.

A successor company generally does not have to abide by the predecessor’s CBA unless “there has been a merger, where the company expressly or impliedly assumed the CBA, or where the ‘successor employer’ is in fact simply the alter ego of the predecessor employer.” *Id.* at 79. Povtak won the contract with the City and no evidence shows Povtak even contacted Crimaldi at any point, let alone that it merged with Crimaldi. (R1. at 2); (R3. at 8.). Povtak never mentioned Crimaldi’s CBA and no action by Povtak could even imply that it followed Crimaldi’s CBA. Crimaldi did not restructure itself and simply change its name. Povtak does not fit any of the conditions required to bind it by the substantive terms of Crimaldi’s CBA.

1. Povtak is not a “perfect successor” and did not expressly or impliedly consent to the terms of Crimaldi’s CBA.

“The obligation of a new employer to negotiate the initial terms and conditions of employment depends on whether the new employer is an ordinary successor or a ‘perfectly clear successor.’” *Dupont Dow Elastomers, L.L.C. v. NLRB*, 296 F.3d 495, 500 (6th Cir. 2002). A successor can only be considered a “perfect successor” if it actively, or by tacit inference, misled employees into believing that the terms and conditions of employment would not change. *Spruce Up Corp. v. Brown*, 209 N.L.R.B. 194, 195 (1974). An unconsenting successor employer cannot be bound to the CBA of its predecessor. *Ameristeel*, 267 F.3d at 265.

In *Coastal International Security Inc. v. NLRB*, 320 Fed. Appx. 276, 285 (5th Cir. 2009), Coastal International Security executed letters of understanding which stated it would agree to be bound by the terms of its predecessor’s CBA. It also told its predecessor’s “employees that the terms and conditions of employment would not be changed.” *Id.* Povtak, unlike Coastal International Security, did not discuss the CBA with Crimaldi’s employees or tell them that employment terms and conditions would stay the same.

In *Dupont*, the successor company, DDE, made it clear that it intended to hire the predecessor’s employees fifteen days before it announced new terms and conditions of employment. *Dupont*, 296 F.3d at 501-02. Employees were thus led to believe that the terms and conditions would be substantially the same. *Id.* at 502. The evidence does not show that Povtak ever stated it would hire all of the employees of Crimaldi or that it would keep the terms of employment the same, unlike in *Dupont* who announced new terms and conditions fifteen days after stating it would hire its predecessor’s employees. DDE misled its predecessor’s employees by stating it would hire them then announcing new terms and conditions of employment fifteen days later, whereas Povtak after hiring some of Crimaldi’s employees did

not then present new terms and conditions of employment. This case is distinguishable from *Dupont*, and Povtak should not be considered a perfectly clear successor to Crimaldi.

In *Spruce Up*, 209 N.L.R.B. 194, 194-95 (N, the NLRB modified its previous decision stating that the new owner, and lowest bidder of 19 barber shops, did not forfeit his right to set initial terms due to his statement “all the barbers who are working will work.” 209 N.L.R.B. at 194-95. Povtak stated it would need all the help it could get, similar to the successor’s comment in *Spruce Up*, but *needing help* is different than stating *everyone will work*. Povtak won the City’s contract by being the lowest bidder just like in *Spruce Up*. (R1. at 2.) Like *Spruce Up* though, Povtak is not a “perfect successor” simply because of its single statement to Crimaldi’s employees.

In *Ameristeel*, AmeriSteel expressly stated that it would not be bound to the CBA. *Ameristeel*, 267 F.3d at 266. Povtak, unlike AmeriSteel, could not have done the same because it did not purchase Crimaldi or negotiate a contract with them and there is no evidence that the Union made Povtak aware of the CBA. *Id.*

Povtak did not in any way actively, or by inference, mislead employees into believing that the terms and conditions of employment with Povtak would be the same as with Crimaldi. Povtak did not have an opportunity to expressly state that it would not consent to the CBA, because it did not deal with Crimaldi, it only dealt with the City in its bid for the City contract. Therefore, Povtak cannot be a “perfect successor” to Crimaldi and did not consent to the terms of the CBA.

2. Povtak is not the “alter ego” of Crimaldi.

An “alter ego” successor “is nothing more than ‘a disguised continuance of the old employer.’” *Id.* at 267 (quoting *NLRB v. Omnitest Inspection Servs.*, 937 F.2d 112, 118 (3d Cir. 1991)). It is “a mere technical change in the structure or identity of the employing entity,

frequently to avoid the effect of the labor law, without any substantial change in its ownership or management.” *Howard Johnson*, 417 U.S. at 259. For instance, the successorship doctrine does not apply to stock sale transactions, because the new company is essentially the “alter ego” of the old company. *Esmark, Inc. v. NLRB*, 887 F.2d 739, 751 (7th Cir. 1989).

In *Amalgamated Meat Cutters & Butcher Workmen v. NLRB*, 663 F.2d 223, 225-26 (D.C. Cir. 1980), the 18% minority owner of the predecessor owned 50% of the successor, but because the other 82% group owner of the predecessor had no ownership interest in the successor, the successor was not an alter ego of the predecessor. There is no evidence that Crimaldi’s owners have any ownership interest in Povtak and therefore, Amalgamated, who was not an “alter ego” successor, was more like an alter ego than Povtak.

The court in *Esmark* determined that Sipco, after multiple corporate restructuring maneuvers (including creating publicly owned stock), was not a “new” company. *Esmark*, 887 F.2d at 743. Sipco had merely changed its name and given away some of its operations. Almost all of its “new” employees had worked for the “predecessor” company. *Id.* at 744-45. Sipco was not a new company or a successor company according to the substantial continuity doctrine. Sipco was the exact same company or at the very least its alter ego.

Esmark is similar to *Wiley*, because neither case involves buyouts or winning bids to bring about a true successor company. Instead, each case involves companies who have simply evolved into an enhanced version of its previous self in order to avoid either a union, a CBA, or both. Povtak is unlike the “successor” companies in these cases, because it had no discussions with Crimaldi, won a bid for the City transportation services contract, brought in new management, and assets Povtak acquired were immediately changed. (R1. at 2, 3); (R3. at 7, 8.)

AmeriSteel purchased the predecessor company, hired the majority of its employees to do exactly the same jobs, and was virtually the exact same enterprise as the one before, but was not required to arbitrate under the predecessor's CBA. *Ameristeel*, 267 F.3d at 266, 278.

AmeriSteel negotiated purchase of the predecessor's assets, whereas Povtak never dealt with Crimaldi at all even if the employees' jobs did not change and the business identity was otherwise the same. *Id.* at 267; (R3. at 8.) The court held that AmeriSteel had no duty to arbitrate despite showing more continuity between it and its predecessor. *Id.* at 277.

Povtak is a completely new owner and Crimaldi had no ties to Povtak whatsoever. There has not been a mere technical change in ownership or management, but a substantial and complete change. Based on the facts, Povtak is a new company and only won a contract to provide similar services as Crimaldi previously did.

CONCLUSION

For the reasons stated in Point I, Petitioner respectfully requests this Honorable Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit, and find that no reasonable expectation of privacy existed in a company-issued phone subject to a no-privacy policy or in public postings made on a social networking site. For the reasons stated in Point II, Petitioner respectfully requests this Honorable Court reverse the decision of the United States Court of Appeals for the Thirteenth Circuit, and find that a successor employer is not bound by the substantive terms of its predecessor's CBA under these circumstances.

Respectfully Submitted,

Team 1
Counsel for Petitioner
Submitted February 7, 2011

APPENDIX A

United States Constitution

The Fourth Amendment is set forth as follows:

Unreasonable searches and seizures.

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Const. amend. IV.

APPENDIX B

National Labor Relations Act (“NLRA”)

301 of the Taft Hartley Act is set forth as follows:

Suits by and against labor organizations.

(a) Venue, amount, and citizenship. Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this Act, or between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties.

(b) Responsibility for acts of agent; entity for purposes of suit; enforcement of money judgments. Any labor organization which represents employees in an industry affecting commerce as defined in this Act and any employer whose activities affect commerce as defined in this Act shall be bound by the acts of its agents. Any such labor organization may sue or be sued as an entity and in behalf of the employees whom it represents in the courts of the United States. Any money judgment against a labor organization in a district court of the United States shall be enforceable only against the organization as an entity and against its assets, and shall not be enforceable against any individual member or his assets.

(c) Jurisdiction. For the purposes of actions and proceedings by or against labor organizations in the district courts of the United States, district courts shall be deemed to have jurisdiction of a labor organization (1) in the district in which such organization maintains its principal office, or (2) in any district in which its duly authorized officers or agents are engaged in representing or acting for employee members.

(d) Service of process. The service of summons, subpoena, or other legal process of any court of the United States upon an officer or agent of a labor organization, in his capacity as such, shall constitute service upon the labor organization.

(e) Determination of question of agency. For the purposes of this section, in determining whether any person is acting as an "agent" of another person so as to make such other person responsible for his acts, the question of whether the specific acts performed were actually authorized or subsequently ratified shall not be controlling.

29 U.S.C. § 185 (2006).