

NEW YORK LAW SCHOOL MOOT COURT ASSOCIATION
THE 35TH ANNUAL ROBERT F. WAGNER
NATIONAL LABOR & EMPLOYMENT LAW MOOT COURT COMPETITION

IN THE
Supreme Court of the United States

SPRING TERM, 2011
Docket No. 11-0107

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 THE RESPONDENTS

*Team No. 39
Counsel for Respondents*

QUESTIONS PRESENTED

1. Whether the Fourth Amendment protects a public employee's exclusive workspace and private social networking profile from an employer's scrutiny during a company-wide internal investigation.
2. Whether a successor employer is bound by the obligations in a predecessor's CBA when the successor assumed the government contract of the predecessor along with all of the represented employees, failed to tell the represented employees the terms and conditions of their employment were changed, and acted pursuant to what the agreement required.

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STATUTORY PROVISIONS

The statutory and constitutional provisions involved in this case are as follows:

1. 42 U.S.C. §1983 provides in pertinent part:

“Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable...”

2. The Fourth Amendment to the United States Constitution provides:

“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.”

3. 29 U.S.C. §185 (“The Taft-Hartley Act”) provides:

“(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 chapter, 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 chapter and any employer whose activities affect commerce as defined in this chapter 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.”

STATEMENT OF THE CASE

For more than fifty years, Crimaldi Corporation (“Crimaldi”) provided the City of Dynes, Froessel (“the City”) with public transportation services. Local 12-22, Prof’l Elec. Workers Union v. Povtak Grp., 185 F. Supp. 3d 1, 2 (W.D. Frl. 2009). However, in 2006, when Crimaldi’s executives were indicted for numerous RICO offenses, City officials decided to accept bids from other companies to assume the responsibilities of Crimaldi’s contract, which was due to expire on February 1, 2008. Id. at 2, 3. The City held a pre-bid conference with Crimaldi employees so the employees could ask Povtak Group (“Povtak”), a company vying for the transportation contract, questions regarding the future of their employment. Id. at 2; Fact Pattern, App. C at 5. The members of Local 12-22, Professional Electrical Workers Union (“Local 12-22”) attended the conference as well. Local 12-22, 185 F. Supp. 3d at 2. When asked if Povtak would retain any Crimaldi employees, Povtak Chief Financial Officer Deborah Quine (“Quine”) asserted, “[Povtak] would need all the help [it could] get.” Id.

Povtak won the City contract in January 2008, one month before the expiration of Crimaldi's contract. Id. Upon assuming responsibility of Crimaldi's transportation contract, Povtak retained 212 of Crimaldi's 342 employees to work at the city terminal. Id. at 2, 3. Povtak "took no affirmative steps to hire outside" the existing labor pool at the terminal. Local 12-22, Prof'l Elec. Workers Union v. Povtak Grp., 1214 F.3d 1, 21 (13th Cir. 2010). All sixteen electricians represented by Local 12-22 remained at the Dynes terminal under Povtak's employment. Local 12-22, 185 F. Supp. 3d at 3. When Povtak hired the Local 12-22 employees, it had the "knowledge that they had completed Local 12-22's prestigious apprenticeship program and had entered the ranks of journeymen." Local 12-22, 1214 F.3d at 14. Local 12-22 has represented the electricians working under the City's transportation contract since 1957. Local 12-22, 185 F. Supp. 3d at 2. This representation included Roberta Wagner ("Wagner"), an electrician who worked at the Dynes terminal since 2004. Id. at 4. When Povtak assumed the responsibilities under the City contract, the electricians were working under a collective bargaining agreement ("CBA") implemented by Crimaldi and Local 12-22. Id. at 2, 3.

To meet the City of Dynes' transportation needs, Crimaldi used traditional internal combustion engines. Id. at 2. After assuming Crimaldi's transportation contract responsibilities, including Crimaldi's fleet, Povtak received funds from the U.S. Department of Transportation and the U.S. Environmental Protection Agency to operate "green" transportation. Id. at 3. Local 12-22, 1214 F.3d at 13. The green transportation included some modifications, such as refitting the bus fleet with retro purple headlights, electric or organic-diesel burning engines, cleaner exhaust systems, and implementing more efficient bus routes. Local 12-22, 185 F. Supp. 3d at 3. As a result, Povtak trained the Local 12-22 electricians to assist on the electrical engines, but their roles at the terminal remained mostly unchanged. Id.

After assuming the contract responsibilities from Crimaldi, Povtak attempted to build goodwill among its new employees, including Ms. Wagner, by issuing new internet-capable “ePhones.” Id. at 4-5. These new smartphones allowed employees to download applications onto the devices. Id. As a result, Ms. Wagner downloaded a variety of applications, including a link to her work e-mail and the technical support page for Povtak’s tram cars. Id. at 5. When Ms. Wagner’s light rail supervisor, Shane Leibson (“Leibson”), knew she downloaded an application that linked to “Facepage,” a social networking site, as well as an electricians’ blog called “Crossing the Wires,” he did not object. Id.

Incidentally, Povtak launched its own Facepage profile in February 2008 and urged employees to “friend” its profile and post positive stories about Povtak’s environmentally-friendly initiatives. Id. at 4. With Povtak’s instructions in mind, Ms. Wagner “friended” Povtak’s profile and frequently posted supportive comments about Povtak’s “green” program. Id. Ms. Wagner otherwise maintained her privacy on Facepage, setting her account to “Friends Only” (which only allowed named “friends” to view her profile) and refusing to “friend” any of her supervisors. Id.; Local 12-22, 1214 F.3d at 5.

Meanwhile, a local newspaper published an article from “Crossing the Wires.” Local 12-22, 185 F. Supp. 3d at 6. This article, written by the anonymous “PugLuv86,” criticized several Povtak projects for failing to live up to their “green” labels. Id. Assuming a disgruntled employee wrote the piece, Povtak began an extensive mole-hunt for the identity of PugLuv86. Id. Povtak consequently issued a memo instructing its supervisors to audit the employee comments on Povtak’s Facepage profile. Id.

Unfortunately, Ms. Wagner’s routine performance review coincided with the search for PugLuv86. Id. The performance review required supervisor evaluations as well as an audit of

Ms. Wagner's Facepage comments on the Povtak profile. Id. Mr. Leibson, Ms. Wagner's former light rail supervisor, submitted positive reviews and praised Ms. Wagner for downloading the applications on her iPhone because they dramatically increased her productivity. Id. In fact, Mr. Leibson encouraged other employees to download the applications because of Ms. Wagner's stellar performance and mourned her absence at the light rail station. Id.

On the other hand, after Povtak transferred Ms. Wagner to its bus station, her new supervisor, Frank Milmine ("Milmine"), submitted screen shots of Ms. Wagner's Facepage profile that he had gathered by signing into the Povtak profile. Id. at 7. Ms. Wagner was not "friends" with Mr. Milmine on Facepage. Id. The screen shots contained Ms. Wagner's thoughts about Povtak's green programs, her work environment, and occasional links to the "Crossing the Wires" blog, but Ms. Wagner herself never posted any comments on the blog. Id. at 5-7. Povtak refuses to clarify whether Mr. Milmine obtained the screenshots as a part of Ms. Wagner's performance review or during the search for PugLuv86's identity. Id. at 7. Povtak's Human Resources Department placed the screen shots in Ms. Wagner's personnel file without her consent or knowledge. Id.

Two days later, Ms. Wagner turned her iPhone into Povtak's Technical Support Office for a battery malfunction. Id. After thoroughly inspecting the device, a technician cataloged Ms. Wagner's Facepage and "Crossing the Wires" applications and the technical support supervisor suggested Ms. Wagner was PugLuv86. Id. at 7, 8. The next day, Povtak fired Ms. Wagner for violating its Electronic Communications Policy ("ECP"). Id. at 8.

After Povtak fired Ms. Wagner, Local 12-22 took action according to the procedures outlined in the CBA. Id. According to Article 7 of the CBA, the employer could only discharge an employee for "just cause." Id. at 3, Fact Pattern, App. A at 5. Moreover, Article 14 of the

CBA outlined the grievance procedures the union and employee must comply with and the arbitration process if a grievance arising under the CBA could not be resolved between the parties. Fact Pattern, App. A at 7, 8. Accordingly, on Monday, March 3, 2008, Local 12-22 business agents Rahim Roth (“Roth”) and Stefan Blancato (“Blancato”) submitted a grievance stating Ms. Wagner’s discharge was “without just cause in violation of Article 7.1 of the CBA” to Povtak’s Human Resources (HR) office, which they gave to HR Secretary Christian Arko (“Arko”). Local 12-22, 185 F. Supp. 3d at 8; Fact Pattern, App. C at 7. The grievance “demanded that [Ms.] Wagner be reinstated with full back-pay, benefits, and seniority rights restored, and for her to be made whole in all other respects.” Local 12-22, 185 F.Supp.3d at 8. Mr. Arko then gave the grievance to Assistant HR Manager Audrey Livramento (“Livramento”). Id.

Upon receipt of the grievance, Ms. Livramento called Mr. Blancato to schedule a meeting for the following Monday, March 10, 2008. Id. Article 14.1 of the CBA stated that in the event of an employee discharge, the union and director of labor relations must meet within five days to attempt to resolve the grievance. Id.; Fact Pattern, App. A at 7, 8. At the meeting on March 10, 2008, Ms. Livramento stated the purpose of the meeting was to explain the ECP, and then explained Ms. Wagner was fired for violating the ECP. Local 12-22, 185 F. Supp. 3d at 8. The agents were angry that Ms. Livramento had not abided by Article 14.1, Step 4 of the CBA, which stated Local 12-22 must be notified before discharge. Id.; Fact Pattern, App. A at 7, 8. Ms. Livramento then claimed she did not need any reason to terminate Ms. Wagner’s employment. Local 12-22, 185 F. Supp. 3d at 8. However, when Mr. Roth told Ms. Livramento he intended to send a formal letter from Local 12-22 and possibly pursue an unfair practice charge, Ms.

Livramento acknowledged “I’m sure you will pursue both” before slamming her door in the representatives’ faces. Id.

Two days later, Mr. Roth emailed the grievance along with a request to discuss the termination to George Daks (“Daks”) the General Manager of HR at Povtak. Id. at 9. After Mr. Daks ignored the grievance and request for ten days, Mr. Roth notified Mr. Daks that Local 12-22 was pursuing arbitration of Ms. Wagner’s termination pursuant to Article 14.2 of the CBA. Id.; Fact Pattern, App. C, Exhibit. Mr. Daks notified Mr. Roth that “[w]hile it is regretful that Ms. Wagner failed to comply with the ECP, there is nothing further which requires the attention of Povtak’s employees in this matter.” Fact Pattern, App. C, Exhibit. Mr. Daks further stated Povtak was an at-will company and would therefore not participate in the arbitration of the grievance. Id.

After receiving a “right to sue” letter from the Equal Employment Opportunity Commission, Ms. Wagner brought suit, claiming illegal employment discrimination and violations of her Fourth Amendment right to be free from unreasonable search and seizure under 42 U.S.C. § 1983. Local 12-22, 185 F. Supp. 3d at 1, 9. Local 12-22 joined with Ms. Wagner as a plaintiff, suing Povtak under Section 301 of the Taft-Harley Act, 29 U.S.C. § 185, to enforce the CBA against Povtak. Id. at 1. The United States District Court Western District of Froessel issued summary judgment in favor of Povtak on the discrimination and collective bargaining claims. Id. at 11, 19. Ms. Wagner’s Fourth Amendment claim was tried before a jury and the jury found Povtak engaged in unreasonable searches under the Fourth Amendment. Local 12-22, Prof’l Elec. Workers Union v. Povtak Grp., 231 F. Supp. 3d 20, 20 (W.D. Frl. 2009). However, the District Court granted Povtak judgment as a matter of law and subsequently reversed the jury’s verdict. Id.

On appeal, the Thirteenth Circuit of the United States Court of Appeals reversed the District Court's grant of summary judgment on Local 12-22's collective bargaining agreement claim as well as the judgment as a matter of law on Ms. Wagner's Fourth Amendment claim. Local 12-22, 1214 F.3d at 15. The court found Ms. Wagner presented sufficient evidence that Povtak violated her reasonable expectation of privacy in both her iPhone and Facepage profile, and the searches were unreasonable in inception and scope. Id. at 5

In addition, the court found Povtak was bound by the grievance procedures of the CBA per the Taft-Hartley Act. Id. at 6. The court found sufficient substantial continuity between Crimaldi and Povtak for three main reasons. Id. at 15. First, Crimaldi and Povtak were essentially the same because Povtak assumed the same responsibilities as Crimaldi. Id. at 13. Second, the electricians' basic responsibilities did not change. Id. at 14. Finally, Povtak did not change the nature of Crimaldi's industry, as the customers remained the same. Id. at 15. Accordingly, the appellate court granted Local 12-22's motion for summary judgment. Id.

Ms. Wagner and Local 12-22 did not appeal the discrimination claim. Povtak subsequently petitioned for certiorari with the United States Supreme Court, which granted the petition.

SUMMARY OF THE ARGUMENT

The Fourth Amendment protects an individual's privacy from unwarranted intrusion. As technology shapes the ways we communicate, courts utilize the Fourth Amendment to protect the intimate details of citizens' lives. Furthermore, the Fourth Amendment protects employees' privacy in the workplace despite employers' attempts to trespass upon that right.

Here, Povtak searched Ms. Wagner's Facepage profile and iPhone in spite of her reasonable expectation of privacy during an investigation into a suspected disloyal employee.

Ms. Wagner expressed a subjective expectation of privacy because she took affirmative steps to block the public's access to her Facepage profile by limiting her audience to only the named persons she approved. In addition, Povtak's ECP did not cover Ms. Wagner's ePhone. Society recognizes Ms. Wagner's subjective expectation of privacy as reasonable because it accepts that employees will intermingle their business and personal lives in the workplace, but can do so without losing their privacy. Therefore, Povtak's actions constituted a search under the Fourth Amendment.

Moreover, in order for the Ortega exception to the warrant requirement to apply, the search must be work-related and either non-investigatory or an inquiry into workplace misconduct. As Povtak's searches fall under neither category, Povtak could not search Ms. Wagner's Facepage or ePhone without first obtaining a warrant, making the searches *per se* unreasonable.

In the alternative, under Ortega's reasonability analysis, Povtak's searches of Ms. Wagner's Facepage profile and ePhone were not reasonable in inception and were excessively intrusive in scope. The searches were not related to Ms. Wagner's performance review, nor were they routine monitoring. Rather, Povtak engaged in a widespread hunt to unearth the identity of a disloyal employee suspected of posting unfavorable opinions about the company online and tried to justify its inappropriate invasions by shifting the blame onto Ms. Wagner. The Fourth Amendment does not permit this type of pretextual action, even in an age where technology threatens to outpace traditional privacy protections.

Furthermore, Povtak is bound by the CBA negotiated between its transportation predecessor, Crimaldi, and Local 12-22, Ms. Wagner's professional electrician union. Since CBAs are essential to maintaining stable labor relations, courts may require successor employers

to recognize the CBAs of their predecessor, namely if the successor is substantially continuous with the predecessor, fails to notify the employees it is changing the terms of its predecessor, or assumes the obligations of the CBA.

Here, Povtak's business was substantially continuous with Crimaldi's, as Povtak merely took over for Crimaldi in providing the people of Dynes with transportation. All of the electricians represented by Local 12-22 remained on the job with mostly the same co-workers. While the electricians were helping implement the green initiatives of the company, their core responsibilities as electricians did not change, and minor additions to responsibility do not change the nature of an employee's job. Therefore, Povtak maintained a business enterprise in almost perfect continuity with Crimaldi in all relevant aspects, which binds Povtak to the obligations in the CBA that Crimaldi owed its employees.

In addition, Povtak intimated it would retain all of the Crimaldi employees, including the electricians, and then subsequently retained all of the electricians represented by Local 12-22., making Povtak a perfect successor to Crimaldi. However, Povtak failed to notify the electricians that it would not be fully abiding by their predecessor's CBA. As a result, Povtak misled the electricians and the union into believing the CBA governed the employment relationship, which binds Povtak to the substantive terms of the CBA.

Finally, Povtak's actions bind it to the CBA. By meeting with the Local 12-22 representatives and attempting to explain Ms. Wagner was fired for just cause, Povtak assumed the employer's obligations in the CBA. Povtak's subsequent subjective intent is irrelevant because Povtak's actions demonstrate it was acting under the CBA. Therefore, Povtak is bound by the CBA and Local 12-22 can enforce the terms against Povtak under Section 301 of the Taft-Harley Act.

Accordingly, Ms. Wagner and Local 12-22 ask this Court to affirm the Thirteenth Circuit's order in favor of both Ms. Wagner's Fourth Amendment claim and Local 12-22's Section 301 claim.

ARGUMENT

I. POVTAK VIOLATED MS. WAGNER'S FOURTH AMENDMENT RIGHT AND IS BOUND BY THE PROVISIONS OF THE COLLECTIVE BARGAINING AGREEMENT.

The purpose of the Fourth Amendment is to protect "personal privacy and dignity against an unwarranted intrusion by the State," which is a value "basic to a free society." Winston v. Lee, 470 U.S. 753, 761 (1985). The Fourth Amendment protects these values by recognizing a person's "legitimate expectations that in certain places and certain times he has the right to be let alone – the most comprehensive of rights and the right valued most by civilized men" and women. Id. at 758. Advances in technology that allow for easier access to private information do not destroy individuals' legitimate expectations of privacy. See Kyllo v. United States, 533 U.S. 27, 35-36 (2001). Indeed, as "rapid changes in the dynamics of communication and information transmission" confront modern Americans, the Court must examine what behavior society considers "proper" when searching electronic devices. City of Ontario, Cal. v. Quon, 130 S.Ct. 2619, 2630 (2010). In the workplace, the Court safeguards Fourth Amendment interests by focusing upon the employee's expectation of privacy and the nature of the information searched, rather than "permit [the Fourth Amendment's] gradual decay as technology advances." Dow Chem. Co. v. U.S., 476 U.S. 227, 240 (1986) (Powell, J., concurring in part and dissenting in part).

In addition, collective bargaining agreements ("CBAs") are essential in keeping industrial peace among employers and employees. John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 548-49 (1964). When one employer assumes another's business, the successor can be

responsible for maintaining the predecessor and union's CBA to encourage peacefulness. Gen. Teamsters Local Union No. 249 v. Bill's Trucking, Inc., 493 F.2d 956, 959 (3d Cir. 1974).

Through the two companies' composition, practices, or the successor's own actions or inactions, courts can enforce a predecessor's CBA on a successor over the successor's objection under Section 301 of the Taft Hartley Act. 29 U.S.C. § 185 (2006); U.S. Can Co. v. NLRB, 984 F.2d 864, 868-69 (7th Cir. 1993).

Here, Povtak violated Ms. Wagner's Fourth Amendment right against unreasonable search and seizure by searching her Facepage profile and ePhone without rational justification. Moreover, under Section 301 of the Taft-Hartley Act and successorship principles, the substantive provisions of the CBA bind Povtak.

II. POV TAK INFRINGED UPON MS. WAGNER'S FOURTH AMENDMENT RIGHTS WHEN IT SEARCHED HER FACEPAGE PROFILE AND EPHONE.

Compared to the development of the Fourth Amendment in the criminal context, the rights of public employees against unreasonable searches and seizures are still emerging. Public employees undeniably retain protection against unreasonable searches and seizures in the workplace. O'Connor v. Ortega, 480 U.S. 709, 716 (1987) (hereinafter, "Ortega"). However, in certain cases, courts treat searches of public employees as "special needs" exceptions to the warrant requirement, balancing employees' privacy rights against the efficiency needs of the government. Ortega, 480 U.S. at 725. To balance these interests, courts generally use the principles set out in Ortega, which were recently considered in Quon. 130 S.Ct. at 2619. However, because Ortega was a plurality and no controlling standard exists, the decision created inconsistencies in lower courts which Quon failed to clarify. See Shields v. Burge, 874 F.2d 1201, 1203-04 (7th Cir. 1989) (noting confusion over which opinion controls).

To determine if a search occurred, Justice O'Connor's four-justice plurality in Ortega retained the "reasonable expectation of privacy" test from Justice Harlan's concurrence in Katz v. United States, 389 U.S. 347, 361 (1967). Ortega, 480 U.S. at 718. Therefore, when a public employee has a reasonable expectation of privacy, a government employer must obtain a warrant based on probable cause in order to search that employee. Oliver v. United States, 466 U.S. 170, 178 (1984). However, under O'Connor's plurality in Ortega, two types of searches – 1) non-investigatory work-related searches; and 2) investigatory searches for work-related misconduct – are exceptions to this general rule. Ortega, 480 U.S. at 723. Under this public employee exception to the general warrant requirement, the search must be reasonable in both inception and scope in order to escape liability for violating the employee's Fourth Amendment rights. Id. at 725-26. Justice Scalia concurred with the ultimate outcome in Ortega, but thought the public employer standard should be consistent with, not less protective than, the private employer standard. Id. at 732.

After Quon, it remains unclear whether the O'Connor or Scalia approach controls public employer searches. Quon found both approaches led to the same result and did not resolve which standard generally governs. Quon, 130 S.Ct. at 2629. Furthermore, Quon did not address which standard applies to searches that fall outside of the two types articulated by Ortega. 130 S.Ct. at 2628-2629. Thus, the default standard for these searches requires a warrant supported by probable cause. Camara v. Mun. Ct., 387 U.S. 523, 534 (1967). O'Connor's plurality opinion in Ortega remains the most workable approach for evaluating searches of public employees because the narrow exception to the warrant requirement adequately balances the safeguarding of individual rights with administrative efficiency. See Quon, 130 S.Ct. at 2630.

Here, the lower court found Povtak was a state actor, a finding Povtak never challenged and is not on appeal. Furthermore, Ms. Wagner had a reasonable expectation of privacy in both her Facepage and ePhone and neither search falls under the Ortega plurality exception. Therefore, the traditional “warrant plus probable cause” standard governs this case, which Povtak failed to meet. However, even assuming the Ortega exception applies, Povtak acted unreasonably and therefore violated Ms. Wagner’s privacy rights.

A. Povtak executed a search because Ms. Wagner had reasonable expectations of privacy in both her Facepage profile and ePhone.

A search occurs whenever a government actor invades an individual’s reasonable expectation of privacy. United States v. Jacobsen, 466 U.S. 109, 114 (1984). An individual has a reasonable expectation of privacy when she demonstrates “an actual (subjective) expectation of privacy” that “society is prepared to recognize as reasonable.” Katz, 389 U.S. at 361 (Harlan, J., concurring). While employees do not possess ownership interests in employer-provided resources, they still maintain privacy rights over business equipment and workspaces. United States v. Taketa, 923 F.2d 665, 672 (9th Cir. 1991). Property rights are not the touchstone of the search analysis; rather, the inquiry focuses on the intimate nature of the information accessed. Id. Here, Ms. Wagner had a subjective and objective expectation of privacy in both her Facepage profile and her ePhone. As a result, Povtak executed a search within the meaning of the Fourth Amendment.

1. Ms. Wagner exhibited a subjective expectation of privacy in her Facepage profile by allowing only certain chosen people to access it and downloading personal applications in her ePhone.

A subjective expectation of privacy exists whenever an individual takes affirmative steps to block the public’s access or view of her activities. Oliver, 466 U.S. at 193. In Katz, the Court found the process of occupying a telephone booth, shutting the door, and paying the fee for use

entitles a person to expect that whatever he speaks into the mouthpiece “will not be broadcast to the world.” Katz, 389 U.S. at 352. Similarly, in Ortega, the employee of a university hospital showed a subjective expectation of privacy when he placed personal materials in the drawers of a desk inside his private office because the action indicated a desire to shield the items from the prying eyes of his co-workers. Ortega, 480 U.S. at 718-719. Furthermore, an employee who retains exclusive use over work devices or spaces creates a subjective expectation of privacy in that area. United States v. Blok, 188 F.2d 1019, 1021 (D.C. Cir. 1951) (finding employee’s exclusive use of her desk created a subjective expectation of privacy).

Here, Ms. Wagner expressed a subjective expectation of privacy in both her Facepage profile and ePhone. Ms. Wagner took affirmative steps to block the general public’s access to her Facepage profile by limiting her Facepage audience to a select number of named persons, similar to the plaintiff in Katz, who shut the door of the phone booth to ensure people on the street would not hear his conversation. In order to access Ms. Wagner’s information, Ms. Wagner’s “friends” had to go through a number of steps – entering their username and password at the home page, “friending” Ms. Wagner, having their request accepted, etc. This process is much like gaining access to the personal materials inside the desk in Ortega, which entailed opening the locked door to a private office and breaching the confines of the desk, and is very different than broadcasting information in the internet for *all* to see. Furthermore, Ms. Wagner shielded her information from the prying eyes of her co-workers by refusing to “friend” her supervisors. In compliance with Povtak’s initiative that employees bolster the company’s reputation by posting accolades on its profile, Ms. Wagner only “friended” Povtak as a corporation and did not intend to make her information available to her supervisors. Indeed, Ms.

Wagner took affirmative steps to keep her work and private lives separate in an age where the lines between the two spheres blur, demonstrating a subjective expectation of privacy.

Furthermore, Ms. Wagner expressed a subjective expectation of privacy in her ePhone. Povtak issued the phone for Ms. Wagner's exclusive benefit, much like the employee in Blok had exclusive use of her desk and therefore a subjective expectation of privacy in the item. Accordingly, Ms. Wagner downloaded personal applications on her ePhone. Therefore, Ms. Wagner anticipated the phone and the personal information inside of it would remain in her exclusive control, safe from the "prying eyes" of her co-workers and supervisors, just as she did with her Facepage.

2. Ms. Wagner's expectations of privacy in her Facepage and ePhone were reasonable because society expects employees will use their employer-issued equipment for reasonable personal use.

Whenever an individual's subjective expectation of privacy is also objectively reasonable, the Fourth Amendment prohibits invasion by public employers. Jacobsen, 466 U.S. at 113. The Court maintains no "talisman" that determines the privacy expectations society is prepared to recognize as reasonable. Oliver, 466 U.S. at 178. Instead, the employee's use of the location and the severity of the invasion determine whether an objective expectation of privacy exists. Id. As the line between the private and workplace spheres blurs, careful scrutiny of government invasion becomes more important, lest the twin threats of the expanding work sphere and evolving technology engulf citizens' Fourth Amendment rights. See Stengart v. Loving Care Agency, Inc., 201 N.J. 300, 307 (2010).

As many Americans view their offices as second homes, society recognizes a reasonable balance between personal and business uses of workplace materials. Quon, 130 S.Ct. at 2629. The two worlds are not mutually exclusive. Mancusi v. DeForte, 392 U.S. 364, 369 (1968)

(finding a union employee's private office at work deserved Fourth Amendment protection). In fact, deeply rooted societal expectations demand courts safeguard privacy interests on business premises. Vega-Rodriguez v. Puerto Pico Tel. Co., 110 F.3d 174, 179-80 (1st Cir. 1997). While certain "operational realities," like shared workspaces, might reduce the expectation of privacy, when an employee has exclusive use over a work item or space, society recognizes a reasonable expectation of privacy in that item or space. Schowengerdt v. Gen. Dynamics Corp., 823 F.2d 1328, 1335 (9th Cir. 1987) (holding employee's exclusive use of his locked desk created a reasonable expectation of privacy), abrogated on other grounds by Pollard v. The Geo Group, Inc., 2010 WL 5028447 (9th Cir. 2010).

Moreover, whenever employers give areas or equipment to employees for their personal use, the employer must provide unambiguous notice that employees have no reasonable expectation of privacy whatsoever and it intends to search and seize the areas or items at any time. Schowengerdt v. United States, 944 F.2d 483, 487 (9th Cir. 1991). Especially in cases involving work electronics and Internet access, employers must make it perfectly clear their policies completely prohibit personal use of business devices and allow supervisors to monitor and access Internet logs and files. United States v. Simons, 206 F.3d 392, 398 (4th Cir. 2000). For most people, computers are their most private spaces – vessels for self-expression and identification – and thus require the strictest protection. United States v. Ziegler, 474 F.3d 1184, 1189 (9th Cir. 2007).

Here, Ms. Wagner's use of Facepage on her ePhone typifies the inevitable overlap between personal and workplace lives in the modern employment context. Yet Ms. Wagner created harmony between her two lives – while she downloaded two personal applications, she also downloaded business applications that increased her job performance. Like the locked desk

in Schowengerdt, Ms. Wagner's exclusive control of her ePhone created the reasonable expectation that the phone was hers to use. Ms. Wagner's exclusive use of Facepage and the ePhone meant that no "operational realities" reduced her expectation of privacy, regardless of the workplace context in which she used them. Moreover, neither of the personal applications impacted her efficiency, as Povtak concedes. Ms. Wagner responsibly managed the inevitable mingling of her home and work lives, and thus may exercise her right to be left alone.

In addition, Povtak issued Ms. Wagner her ePhone under an ambiguous policy that failed to provide employees with clear notice about the types of electronic behavior it would tolerate. Povtak did not even list the ePhone as an electronic device covered by the ECP. Povtak easily could have revised its ECP to include the ePhone and prohibit downloading applications onto the ePhones, but failed to do so. However, even if the ECP did cover the ePhone, nothing in the ECP prohibited occasional personal use of the ePhones. The foreseeable consequence of issuing the smartphones, designed to download applications from the Internet, is that employees will use the full capabilities of the device. Povtak cannot consequently shift the blame to Ms. Wagner for using her phone in ways that the ECP did not explicitly cover. For these reasons, a reasonable jury could have found Ms. Wagner had a reasonable expectation of privacy in her Facepage and ePhone. Therefore, the Fourth Amendment limits Povtak's search and the jury verdict in favor of Ms. Wagner should be upheld.

B. Povtak's unwarranted searches of Ms. Wagner's Facepage profile and ePhone did not fall under the *Ortega* exception to the warrant requirement and therefore violated the Fourth Amendment.

Searches by public employers require a warrant supported by probable cause unless the Ortega exception applies. See Camara, 387 U.S. at 534. The Ortega exception only operates in two carefully defined cases: 1) non-investigatory work-related searches; or 2) investigatory

searches for work-related misconduct. Ortega, 480 U.S. at 723. Therefore, if a public employer conducts an employee search that falls outside of either of these categories, or lacks a warrant, the search is unreasonable and unconstitutional. Katz, 389 U.S. at 357; Ortega, 480 U.S. at 720.

Non-investigatory work-related searches only occur when the employer immediately needs a work-related item and the custodial employee is unavailable to provide access. United States v. Fernandes, 272 F.3d 938, 943 (7th Cir. 2001) (finding a non-investigatory work-related search occurred when fellow prosecutors entered government attorney's office to obtain pending case files). The policy behind such innocuous searches is efficiency-based—the state needs certain time-sensitive materials in order to provide citizens with government services and cannot do so if hampered by warrant requirements. Ortega, 480 U.S. at 723. On the other hand, investigatory searches for work-related misconduct only exist in situations where an individual employee is suspected of inefficiency or mismanagement. Ortega, 480 U.S. at 724. Such searches require reasonable cause and are only permitted because the government needs to manage incompetent employees before they harm the public interest. Taketa, 923 F.2d at 764 (finding a search for work-related misconduct during search of private office for evidence of misappropriated pen registers an investigatory search).

Here, Povtak's searches of Ms. Wagner's Facepage and ePhone fall outside the two types of searches covered by Ortega and therefore required a warrant. Povtak's search of Ms. Wagner's Facepage fails to qualify as an innocuous non-investigatory work-related search because her profile did not contain information Povtak immediately needed in order to efficiently provide its transportation services. Furthermore, Ms. Wagner did not submit her ePhone in order for the technician to obtain transportation information stored in the device. Ms. Wagner directed the technician to fix the battery, nothing more. Additionally, Povtak's searches do not fall under the

category of investigatory searches for work-related misconduct either. Povtak had no reasonable cause to suspect Ms. Wagner of incompetence, nor was an internal investigation underway regarding other aspects of her work. Rather, Povtak's internal investigation only concerned the identity of PugLuv86 and Povtak had no reason to think Ms. Wagner was the anonymous blogger. Therefore, because the searches are neither of the types covered by the Ortega exception and Povtak failed to obtain a warrant supported by probable cause, the searches violated the Fourth Amendment.

C. Even under the *Ortega* exception, Povtak's searches were unreasonable at inception and scope and therefore violated Ms. Wagner's Fourth Amendment rights.

In order for public employer searches to be reasonable, not only must they fall under one of the two categories of searches specified in the Ortega plurality, but the employer must also show that the searches were reasonable in inception and scope. Ortega, 480 F.3d 726. In doing so, the Court must scrutinize the actions of the employer for consistency and rationality. Leventhal v. Knapek, 266 F.3d 64, 74 (2nd Cir. 2001). However, the scope and inception inquiries are not identical for investigatory and non-investigatory searches. In non-investigatory searches, the scope and inception inquiries converge into a single question: whether the employer showed its efficiency-related purpose was not simply pretext for its true purpose of gathering evidence against the employee. See United States v. Long, 64 M.J. 57, 64 (C.A.A.F. 2006). On the other hand, investigatory searches require a showing of individualized suspicion of the employee's work-related misconduct and cannot expand to include personal indiscretions. Wiley v. Dep't of Justice, 328 F.3d 1346, 1353 (Fed. Cir. 2003). First, under the non-investigatory analysis, Povtak maintained no efficiency justification for its search. Second, Povtak's search did

not fulfill the requirements of an investigatory search because it had no individualized suspicion that Ms. Wagner was a disloyal employee.

1. Povtak's justifications for its searches were mere pretext for its actual purpose: gathering evidence of PugLuv86's identity.

Non-investigatory work-related searches must demonstrate that the employer innocuously accessed the protected area in order to resolve a problem that threatens the efficiency of the enterprise. Fernandes, 272 F.3d at 943. In Monroe, when a network administrator for the Air Force opened several sexually explicit e-mail messages from an officer after they accumulated in the base's electronic directory because they were too large to send out, the search was reasonable in inception and scope because the administrator needed to diagnose the cause of the network problems. United States v. Monroe, 52 M.J. 326, 328 (C.A.A.F. 2000). On the other hand, employers cannot use pretextual non-investigatory grounds to justify an investigatory search. Leventhal, 266 F.3d at 74. For example, when a network administrator accessed an employee's computer under the premise that a log-on banner allowed "routine monitoring," his search was unreasonable in inception and scope because the search was not actually routine – rather, the administrator was searching for evidence of personal misconduct and attempted to use the log-on banner as a justification for his unwarranted intrusion. Long, 64 M.J. at 64-5. While employers often rely on policies like the one in Long to regulate non-investigatory searches, when they execute a search pursuant to such a policy, searches are only valid when the policy is enforced frequently and consistently in order to avoid pretextual searches. Leventhal, 266 F.3d at 74.

Here, Povtak did not innocuously access Ms. Wagner's Facepage and ePhone in order to address an efficiency problem. Unlike the network administrator in Monroe, who had to check the content of e-mails slowing down his network, the technician who worked on Ms. Wagner's ePhone did not access the software to address her battery issue. Nor did Ms. Wagner's Facepage

profile present a problem to Povtak's efficient operation, as it contained no information pertinent to her job performance. Instead, the facts of Ms. Wagner's case are more similar to that of Long, where the network administrator used the company log-on banner to justify a pretextual invasion into the intimate details of the employee's life. Povtak's search of Ms. Wagner's Facepage profile was not routine, as supervisors were not instructed to access personal profiles during the routine performance reviews. Rather, Povtak's justifications for the searches remain groundless attempts to rationalize its snooping into Ms. Wagner's personal life in order to uncover the identity of PugLuv86. Furthermore, even if the ECP did include ePhones on the list of covered devices, Povtak failed to enforce its provisions consistently. Mr. Leibson, the light rail supervisor, knew about Ms. Wagner's Facepage application well before the phone technician reported it and did not discipline her. In fact, Mr. Leibson actually encouraged other employees to download the applications. Without frequent and consistent enforcement, Povtak cannot rely on the ECP to salvage an unreasonable search.

2. Povtak had no individualized suspicion to search Ms. Wagner and the searches were excessively intrusive into intimate details of her life.

Investigations into work-related misconduct are only justified at inception if the employer has individualized suspicion that the employee is engaging in misconduct at work. Chandler v. Miller, 520 U.S. 305, 322 (1997) (holding suspicionless drug testing of candidates for political office unreasonable without a warrant); compare with New Jersey v. T.L.O., 469 U.S. 325, 342, n. 8 (1985) (finding reasonable cause based on an individualized tip from a student for searching another student's purse for drugs). In Wiley, an anonymous tip that a public employee kept a gun in his car did not give the employer sufficient cause to search the vehicle, despite a sign posted in the parking lot that warned vehicles were subject to search at any time. 328 F.3d at 1353.

Furthermore, the scope of an investigatory search must be limited to the employee's work-related misconduct, not intimate details about the employee's life outside the workplace. Shields, 874 F.2d at 1205. Investigatory searches are excessively intrusive when they extend to details unrelated to the employee's performance of his or her job, or non-work-related information. Id. For example, when a public employer searched an employee's office for misappropriated state property, the search became excessively intrusive as soon as the employer began to rifle through a locked desk and credenza for evidence of the employee's sexual activities. Schowengerdt, 823 F.2d at 1336. Thus, the Fourth Amendment consistently prohibits pretextual "fishing expedition[s]" for personal information. Shields, 874 F.2d at 1205.

Here, if Povtak's searches were intended to investigate employee misconduct, the searches lacked reasonable grounds to suspect they would produce evidence that Ms. Wagner was PugLuv86. Povtak had no individualized suspicion before the searches that Ms. Wagner was PugLuv86, nor that she violated any company policy. Povtak did not even have the benefit of the anonymous tip in Wiley, which was still woefully insufficient to support an investigatory search. Even if Povtak relies on its disclaimers in the ECP, like the Wiley sign in the parking lot, the existence of a policy does not independently justify searches lacking individualized suspicion.

Finally, the scope of Povtak's searches expanded well past any potential work-related misconduct by Ms. Wagner and excessively intruded upon her personal thoughts. While Ms. Wagner developed her own point of view about Povtak's green program, she kept her thoughts separate from her job. Moreover, the fact that she often posted positive comments on Povtak's Facepage profile leads to the conclusion that Ms. Wagner could separate her personal beliefs from her professional demands. The record contains no evidence that her thoughts about Povtak

bled into her job performance. Like the employer in Schowengerdt, which justified its search of the employee's office because it thought he misappropriated state property, Povtak was within its authority to audit Ms. Wagner's comments on *its* Facepage profile. However, just as the Schowengerdt employer exceeded the scope of its search by rummaging through the locked desk and credenza in the office for sexual materials, Povtak exceeded the scope of its search by probing into Ms. Wagner's personal Facepage profile, which contained no work-related material. Similarly, Povtak's technician crossed the line between the personal and the professional when he cataloged Ms. Wagner's ePhone software rather than containing his search to the actual causes of the hardware problem. Povtak's actions, taken together, rise to the level of impermissible "fishing expeditions" that the Fourth Amendment prohibits and are therefore unreasonable under Ortega.

Therefore, because Povtak failed to obtain a warrant and Povtak's searches were unreasonable in inception and scope under Ortega, its searches violated the Fourth Amendment. Thus, the jury properly found in favor of Ms. Wagner.

III. POVTAK IS BOUND BY THE SUBSTANTIVE PROVISIONS OF THE CBA BECAUSE POVTAK CONTINUED CRIMALDI'S ENTERPRISE; THEREFORE, LOCAL 12-22 CAN ENFORCE THE CBA AGAINST POVTAK.

The federal common law enforcing CBAs under Section 301 of the Taft-Harley Act is "fashion[ed] from the policy of our national labor laws." Textile Workers Union of Am. v. Lincoln Mills, 353 U.S. 448, 456 (1957). While federal courts generally use contract principles to enforce CBAs under Section 301, a CBA "is not an ordinary contract." John Wiley & Sons, Inc. v. Livingston, 376 U.S. 543, 550 (1964). Rather, a CBA "calls into being ... the common law of a particular industry" to cover "the whole employment relationship." Id. at 550 (internal quotations omitted). National labor law requires new employers to balance business choices

with giving “protection to the employees from a sudden change in the employment relationship.” Wiley, 376 U.S. at 549. As a result, courts do not treat CBAs as “run of the mill” contracts. Instead, the important interests present in the labor context, namely the “overriding policy” of industrial peace, govern the enforcement of CBA agreements. Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 38 (1987).

As a result of the important policy considerations present in the labor context, CBAs are like trade agreements governing the terms and conditions of the relationship between employers and union represented employees. J.I. Case Co. v. NLRB, 321 U.S. 332, 335 (1944). Moreover, courts recognize CBAs as the primary tool “for promoting stable labor relations” and enforce CBAs to achieve this goal. Thomas Benjamin Huggett, Successor Clauses: What They Are and Why Every Union Should Have One, 46 Cath. U. L. Rev. 835, 849-50 (1997). Therefore, CBA obligations employers did not voluntarily assume and might “strongly prefer to avoid” may be imposed upon a successor to achieve the goal of stable labor relationships. U.S. Can Co. v. N.L.R.B., 984 F.2d 864, 869 (7th Cir. 1993).

Here, Povtak is bound by the CBA. First, under the Wiley, Burns, and Howard Johnson trilogy, the successorship doctrine binds a successor to the CBA of its predecessor in certain situations. Next, Local 12-22 can show Povtak assumed and operated Crimaldi’s business with such substantial continuity that essentially nothing changed in the eyes of the employees, therefore binding Povtak to the substantive provisions of the CBA. Furthermore, Povtak perfectly succeeded Crimaldi and assumed the obligations of the CBA by its actions, also binding Povtak to the CBA. Finally, in the alternative, Povtak, as Crimaldi’s successor, has a duty to arbitrate Ms. Wagner’s grievance with Local 12-22.

A. The Wiley, Burns, and Howard Johnson trilogy allow courts to bind successor employers to their predecessor's CBA based on the specific facts of each case.

“Broadly stated, in the law of labor relations the successorship issue deals with the extent to which an employer is obligated to honor the legal relations established between another employer and a union.” Gen. Teamsters, Chauffeurs and Helpers, Local Union No. 249 v. Bill's Trucking, Inc., 493 F.2d 956, 959 (3d Cir. 1974). An employer is a successor if it succeeded the responsibilities of the previous employer, and what obligations the successor is under varies given the strength of the successorship. Local 12-22, 1214 F.3d at 10; see also Ameristeel Corp. v. Int'l Bhd. of Teamsters, 267 F.3d 264, 286 (3d Cir. 2001) (Becker, C.J. dissenting) (stating the obligations imputed to the successor depends on the degree of continuity between the employers). Federal courts employ numerous methods to determine when a successor employer is bound by the CBA of its predecessor and each method looks particularly at the specific facts of each case. Howard Johnson Co. v. Detroit Local Joint Execs. Bd., 417 U.S. 249, 256 (1974) (discussing the importance of a case-by-case analysis).

While some lower courts perceive conflict in the Supreme Court cases that discuss when to apply the substantive provisions of a predecessor's CBA to a successor, the holdings of these cases are not at odds. The factually distinct nature of Wiley, Burns and Howard Johnson dictated the outcome of each. First, Wiley stated “in appropriate circumstances” a successor employer is bound by the CBA of its predecessor, contingent upon the facts of each case. Wiley, 376 U.S. at 548. In Wiley, the successor absorbed all of the predecessor's employees during a merger while keeping the business essentially unchanged and was therefore bound by the CBA of its predecessor. Wiley, 376 U.S. at 551-52. Wiley thus recognized courts should consider substantial continuity between the predecessor and successor's business enterprise and protect the remaining employees by binding the successor to the CBA. Wiley, 376 U.S. at 551.

Burns then reinforced Wiley by finding the successor was not automatically bound by the CBA of its predecessor, specifically when the successor makes it clear *before* the employees began working that the employees would not be hired on the same terms as the predecessor's CBA. NLRB v. Burns Int'l Sec. Servs., Inc., 406 U.S. 272, 275, 291 (1972). Essentially, a clear disclaimer that the CBA would not control the new employment relationship before employees begin working could negate continuity between the employers. Id. at 308. This holding did not overturn the substantial continuity doctrine articulated in Wiley, but the decision did allude to additional ways a successor may be bound: by perfectly succeeding the predecessor or assuming the obligations under the CBA. Id. at 291, 294-95. Additionally, Burns recognized the resolution of whether the successor was bound by its predecessor's CBA "turn[ed] to a great extent on the precise facts involved," reinforcing that a broad rule would not adequately protect the important interests present in the labor context. Burns, 406 U.S. at 274.

Finally, Howard Johnson held a successor employer cannot be obligated to the CBA of its predecessor when the successor hires only nine of fifty three employees from its predecessor and makes it very clear to the union and employees *before* the employees began working that it would not assume the obligations of the CBA. Howard Johnson, 417 U.S. at 252, 260-62.

Howard Johnson also stressed the importance of taking a fact-intensive approach when determining if a predecessor's CBA applies to a successor. Howard Johnson, 417 U.S. at 256. Neither Howard Johnson nor Burns relegated Wiley to the "dustbin of history." Ameristeel, 267 F.3d at 281. Therefore, a successor employer may be bound by its predecessor's CBA when the employer hires a majority of its predecessor's employees, along with other evidence of continuity, or fails to give the new employees fair notice it would not follow the CBA, or assumes the obligations in the CBA.

B. Povtak was a substantially continuous employer with Crimaldi, a perfect successor of Crimaldi, and assumed the obligations of the CBA, and is therefore bound by the substantive provisions of the CBA.

In any successorship analysis, the overarching consideration is whether the retained employees view their jobs as “essentially unaltered,” which ensures the underlying policy of labor peace. Golden State Bottling Co. v. NLRB, 414 U.S. 168, 184 (1973). Indeed, “[i]f the employees find themselves in essentially the same jobs after the employer transition and if their legitimate expectations in continued representation by their union are thwarted, their dissatisfaction may lead to labor unrest.” Fall River Dyeing & Finishing Corp. v. NLRB, 482 U.S. 27, 43-44 (1987). By emphasizing the employee’s perspective, courts promote the policy of treating employees fairly in situations which they have no control over, thereby ensuring employees interests are upheld after an employment transition. Wiley, 376 U.S. at 549.

Accordingly, a successor is bound by the substantive terms of its predecessor’s CBA when the successor employer: 1) maintains a substantially similar business enterprise as its predecessor; 2) fails to make it perfectly clear it was hiring all of the employees under different working conditions; or 3) assumes the obligations of the CBA. Surely employees would view their jobs as essentially unaltered if all three are found, as is the case here.

1. Povtak is bound by the obligations in the CBA because Povtak’s business enterprise was more than substantially continuous with Crimaldi’s

Whenever a successor employer’s business is substantially continuous with its predecessor, the substantive provisions of a CBA between the predecessor and a union bind the successor. Wiley, 376 U.S. at 551; Ameristeel, 267 F.3d at 286. Under the totality of the circumstances, substantial continuity exists when the successor acquires and continues the business of the predecessor without substantial change. Fall River, 482 U.S. at 43. However,

substantial continuity can exist by the successor merely retaining all of the represented employees of its predecessor. Wiley, 376 U.S. at 551. In addition, considerable similarity between the business of the employers, the employee working conditions, and the service offered and customers served demonstrate substantial continuity. Fall River, 482 U.S. at 43. Here, Povtak retained all of the Local 12-22 represented electricians, ran the same type of business as Crimaldi, kept the employees working conditions similar, and offered the same service to the same customers as Crimaldi.

a. Povtak established complete continuity in the identity of its employees by retaining all of the electricians from Local 12-22.

Retaining the employees of a predecessor demonstrates overall substantial continuity between two employers. Local 348-S, UFCW v. Meridian Mgmt. Corp., 583 F.3d 65, 74 (2d Cir. 2009) (holding a successor retaining a majority of its predecessor’s represented employees after assuming the cleaning duties of its predecessor showed continuity between the employers). While hiring a simple majority of employees fulfills this factor, “relevant similarity and continuity of operation across the change in ownership is adequately evidenced by the wholesale transfer” of employees from the predecessor to the successor. Wiley, 376 U.S. at 551. In Wiley, the successor employer absorbed all of the union represented employees. Id. Just this “wholesale transfer” of employees created enough continuity between the two employers to bind the successor to its predecessor’s CBA. Id. Therefore, a successor employer hiring all of the employees represented in the bargaining unit of its predecessor’s CBA results in overall substantial continuity. Id.

Here, Povtak established complete continuity in the identity of its represented employees by retaining the Local 12-22 electricians. Povtak did not just retain a majority of represented employees like in Meridian where a mere majority demonstrated substantial continuity in the

workforce. Povtak retained all sixteen electricians represented by Local 12-22. Instead, Povtak's actions are exactly like the employer in Wiley who retained all the employees represented in the CBA of its predecessor. Because Povtak kept all sixteen electricians, and only supplied the rest of its employees for the Dynes job from Crimaldi's workforce, Povtak created substantial continuity between it and Crimaldi in the identity of its employees.

b. Povtak and Crimaldi are substantially similar as employers, as both fulfilled the responsibility of providing bus transportation for the City of Dynes.

The more similar the business enterprise of the successor and predecessor, the more substantial continuity between the employers is established. Meridian, 583 F.3d at 75. In Meridian, the similarity between the successor and predecessor's businesses demonstrated the substantial continuity of the employers. Id. Both businesses provided janitorial services to commercial enterprises in the New York metropolitan area, even though the successor provided more than just janitorial services as part of its building maintenance services. Id. Thus, substantial continuity is reinforced when a successor conducts basically the same type of business as its predecessor with some minor additions.

Here, Povtak and Crimaldi conducted the same type of business: providing Dynes with public transportation. To provide Dynes with public transportation, Povtak used the same fleet of buses from the same terminal as Crimaldi. Similar to Meridian, where the employers conducted the same business even though the successor provided more services than its predecessor, Povtak conducted the same business as Crimaldi even though Povtak added green initiatives. In the employees' eyes, Povtak merely assumed the transportation business of Crimaldi with added considerations for the environment. Both Povtak and Crimaldi provided

Dynes with public transportation using the same buses and location; therefore, Povtak and Crimaldi are substantially similar as employers.

c. The electricians performed the same jobs in substantially similar working conditions while working under Povtak and Crimaldi.

Overall substantial continuity is significantly demonstrated whenever the working conditions remain the same after a transition from the predecessor to the successor. Meridian, 583 F.3d at 75. In Meridian, substantial continuity existed because the employees, who merely “woke up one morning to find that they were now employed” by the successor rather than the predecessor, “went to the same location and performed the same job in substantially the same working conditions as they always did.” Id. Furthermore, when employees are surrounded by the same coworkers as their previous working environment, substantial continuity is reinforced. NLRB v. DeBartelo, 241 F.3d 207, 211 (2d Cir. 2001) (finding substantial continuity, in part, because the employees had the same co-workers).

In addition, employees conducting the same basic jobs demonstrate substantial similarity between the business enterprises. Fall River, 482 U.S. at 44. A successor’s slight addition of responsibilities to the same basic responsibilities the employer had under the predecessor does not change the substantial continuity between the working conditions. NLRB v. Cablevision Sys. Dev. Co., 671 F.2d 737, 738-39 (2d Cir. 1982). In Cablevision, substantial continuity existed when the employees’ jobs remained the same even though “as time passed they were ‘cross-trained’ to perform certain additional duties.” Id. at 738. Keeping the retained employees in the same job classifications is further evidence of substantial continuity. Fall River, 482 U.S. at 44 (finding substantial continuity supported where employees job classifications were the same). Therefore, when the employees’ working conditions and jobs stay essentially unaltered

nothing has changed in the employees eyes and substantial continuity between the successor and predecessor is significantly demonstrated.

Here, the Local 12-22 electricians, including Ms. Wagner, had the same working conditions once Povtak took over. Similar to Meridian, where the employees merely “woke up one morning” to find themselves technically employed by another employer but working in exactly the same place, the electricians worked in the Dynes terminal just as they had under Crimaldi. Furthermore, the Local 12-22 electricians worked with the same electricians and a substantial majority of other coworkers from Crimaldi, demonstrating the working environment remained essentially unaltered under Povtak, just as in DeBartelo where the same coworkers demonstrated the working conditions remained the same.

As the appellate court recognized, the nature of the electricians’ jobs also remained the same. Working on electrical engines only slightly expanded the electricians’ responsibilities but did not alter the nature of their job: to perform electrical work at a bus transportation terminal. These facts are similar to Cablevision where court found substantial continuity when the employees performed the same job even though over time they were trained to assume more responsibilities. Moreover, Povtak hired the electricians with the knowledge that these workers had gone through local 12-22’s prestigious apprenticeship program and cannot now claim additional training destroys continuity when the electricians already possessed advanced electrical skills. Furthermore, the Local 12-22 employees remained classified as electricians, just as in Fall River where the employees had the same job classification. The electricians had the same working conditions and remained working as electricians at the terminal, therefore proving the substantial continuity between Povtak and Crimaldi from the viewpoint of the employees.

d. Povtak provided the same service in the same manner to the same customers as Crimaldi.

Finally, the successor providing the same basic service in a similar manner to the same customers as its predecessor demonstrates substantial continuity. Fall River, 482 U.S. at 44. However, this does not require perfect similarity, as minor changes in operations are unavoidable. See Retail Clerks Union Local No. 1552 v. Lynn Drug Co., 299 F. Supp. 1036, 1040 (S.D. Ohio 1969) (finding substantial continuity where the product lines, merchandising techniques and operating procedures were “similar”). Furthermore, changes in the service provided that do not alter the basic nature of the business are irrelevant. Local Joint Exec. Bd., Hotel and Rest. Emp. Int’l Union v. Joden, Inc., 262 F. Supp. 390, 392 (D. Mass. 1966). In Joden, even though the successor employer had added new equipment to the kitchen and items to the restaurant menu, the court found this did not “alter the basic nature of the business enterprise” and its services, and therefore substantial continuity between the employers existed. Id. Finally, providing the service to the same customers further exemplifies the substantial continuity between the employers. DeBartelo, 241 F.3d at 211 (finding substantial continuity, in part, because the successor served the same customers as its predecessor).

Here, Povtak provided the same service in a substantially similar manner as Crimaldi to Crimaldi’s former customers. Like Lynn Drug, where the companies’ production process was fundamentally the same, Povtak was still providing public transportation even though they provided cleaner-running buses. Furthermore, Povtak’s more efficient, shorter route did not change the basic nature of providing public transportation, just as in Joden where the successor adding kitchen equipment and menu items did not change the fundamental nature of the restaurant. The natural progression of the public transportation industry to become more environmentally aware is not a fundamental change in providing transportation services by bus

to the public. Finally, just as in DeBartelo where the successor dealt with the same customer base, Povtak provided transportation for the exact same customers as Crimaldi, the public of Dynes, which links Povtak and Crimaldi together as successor and predecessor.

Under the substantial continuity doctrine, Povtak is either substantially or perfectly similar to Crimaldi in all relevant aspects. Therefore, because Povtak acquired and continued the business of Crimaldi without significant change, Povtak is bound by the substantive provisions of the CBA.

2. Povtak is also a perfect successor of Crimaldi, which reinforces applying the CBA to Povtak and requiring Povtak to arbitrate Ms. Wagner's grievance.

The substantive provisions of a predecessor's CBA bind a successor when the successor makes it perfectly clear it would retain the employees of its predecessor and fails to "clearly announce its intent to establish a new set of conditions prior to inviting former employees to accept employment." Spruce Up Corp., 209 N.L.R.B. 194, 196 (1974). The perfectly clear doctrine is "intended to prevent an employer from inducing possibly adverse reliance upon the part of employees it misled or lulled into not looking for other work." S & F Mkt. St. Healthcare, L.L.C. v. NLRB, 570 F.3d 354, 359 (D.C. Cir. 2009). Therefore, successors must give notice to employees that the terms and conditions of their employment are going to change. Burns, 406 U.S. at 286 (successor employer "made it perfectly clear that it had no intention of assuming" the CBA of its predecessor before security guard employees were given uniforms and began working).

When a successor employer misleads employees into believing they would be retained without a change in the terms or conditions of employment by never addressing its intent to change the terms, the successor is bound by the predecessors CBA. See Canteen Co., 317 N.L.R.B. 1052, 1053 (1995) (holding successor employer was prohibited from unilaterally

changing the terms and conditions of employment because it had “effectively and clearly communicated to the Union its plan to retain the predecessor employees”). An employer may not avoid recognizing the union and its represented employees by unilaterally setting new terms and conditions of employment. See U.S. Marine Corp. v. NLRB, 944 F.2d 1305, 1320 (7th Cir. 1991). The employer cannot benefit from its wrongdoing and must adhere to the terms of its predecessor’s CBA in order to prevent employees from avoiding the union and its represented employees. Id.

Here, Povtak told the electricians it would hire them and failed to clearly announce it was changing the terms and conditions of employment from that under the CBA, which misled the electricians and Local 12-22 into believing the terms were the same. Prior to taking over Crimaldi’s contract with the city, Povtak CFO Quine explained to the Crimaldi employees that “[Povtak] would need all the help [it] can get” and subsequently hired all of the represented electricians. This is similar to Canteen where the successor employer made it clear it would retain the predecessor employees and therefore could not unilaterally change the predecessor’s terms of employment. Furthermore, Povtak failed to clearly announce it was changing the terms and conditions of the electricians’ employment. In fact, Povtak failed to announce anything at all about the terms of employment for the Local 12-22 employees, leading Ms. Wagner and the union to conclude the terms and conditions were unchanged. Therefore, because Povtak misled the electricians and Local 12-2 into believing the employment relationship was governed by the CBA, Povtak must now adhere to the CBA.

3. Povtak also assumed the obligations contained in the CBA by meeting with Local 12-22 representatives to explain Ms. Wagner’s termination.

Whenever a successor adheres to its predecessor’s CBA, the successor assumes the responsibilities in the CBA. Pine Valley Div. of Ethan Allen, Inc., 218 N.L.R.B. 208, 219

(1975), enf'd in part, 544 F.2d 742 (4th Cir.1976). A successor adheres to its predecessor's CBA through conduct, such as providing the union with information required by the CBA. Chicago Dist. Council of Carpenters Pension Fund v. R.J. Ward Constr., No. 93 C 980, 1994 WL 63000, at *4 (N.D. Ill. Feb. 17, 1994). Indeed, only a collective bargaining agreement would oblige a successor to provide the union with information Laborers' Int'l Union of N. Am. v. Foster Wheeler Corp, 26 F.3d 375, 382, n. 4 (3d Cir. 1994). In R.J. Ward the successor was bound by the CBA of its predecessor when it complied with the union's request for information under the CBA. R.J. Ward, 1994 WL 63000, at *4. Even though the successor's representative told the union it did not find the request appropriate, the court found it "highly unlikely" the successor would have consented to the request if it "genuinely believed" it had no obligations to the union or the CBA. Id. The successor's intent is irrelevant when the successor's "outward manifestations" indicate acceptance of the CBA. Id. at *4-5.

Here, Povtak assumed the CBA by fulfilling its obligations under the agreement. Povtak knew the meeting with the Local 12-22 representatives pertained to a Step 4 Grievance and fully complied with the employer's commitments under the CBA. By explaining to the Local 12-22 representatives that Ms. Wagner was fired for allegedly violating the ECP, Ms. Livramento was showing just cause existed, the required standard for termination under the CBA. If Povtak were not bound by the CBA, it could fire Ms. Wagner at will and would not have felt compelled to explain the termination to the union representatives. Povtak's sharing of information is similar to R.J. Ward where the successor assumed the CBA by providing information pursuant to its predecessor's CBA. Furthermore, Ms. Livramento made sure to meet with Local 12-22 representatives within five working days of receiving the grievance, just as Article 14 section 4 of the CBA requires. Finally, Povtak's private intent, that it met with the Local 12-22

representatives to discuss the ECP, is irrelevant when the actions of the employer show the employer assumed the CBA. In fact, this admission further demonstrates Povtak felt obligated to justify its reasons for firing Ms. Wagner. Therefore, Povtak assumed the obligations of the CBA by complying with the grievance procedure and cannot now attempt to discharge its obligations.

Povtak assumed the obligations under the CBA, failed to clearly announce it was changing the terms of employment for the electricians and kept substantial continuity between itself and Crimaldi, when only one of these conditions is required to bind a successor. Therefore, Povtak's actions have bound it to the substantive provisions of the CBA.

C. In the alternative, Povtak must arbitrate Ms. Wagner's grievance and any other grievance arising under the CBA.

Instead of determining the entire CBA binds successors, some courts have found a successor has a duty to arbitrate those questions its predecessor was bound to arbitrate under its CBA when the successor runs the business of its predecessor without "significant change." United Steelworkers of Am. v. Reliance Universal Inc., 335 F.2d 891, 893, 895 (3d Cir. 1964). In Reliance, the successor employer was required to arbitrate a grievance that arose under the CBA of its predecessor because the successor did not significantly change the business, even though the sales contract stated the successor assumed no obligations of the predecessor. Id. at 893. Therefore, a substantially similar successor must arbitrate those questions which his predecessor was bound to arbitrate under a CBA. Id. at 895.

Here, Povtak at least has a duty to arbitrate Ms. Wagner's grievance. Like Reliance where the successor did not significantly change the business of its predecessor, Povtak maintained substantial continuity with Crimaldi and easily meets the lower standard required for an order to arbitrate. Therefore, because the "transition from one corporate organization to another will in most cases be eased and industrial strife avoided if employees' claims continue to

be resolved by arbitration rather than by the relative strength of the contending forces,” Wiley, 376 U.S at 549., Povtak must fulfill its duty to arbitrate Ms. Wagner’s grievance under the CBA.

CONCLUSION

Ms. Wagner demonstrated a reasonable expectation of privacy in her Facepage and ePhone. Therefore, Povtak’s searches required probable cause and a warrant because the Ortega exception does not apply. However, even if Ortega governs, Povtak failed to demonstrate a reasonable justification for searching these items, as the searches were unrelated to Ms. Wagner’s performance as an electrician and impermissibly invaded the intimate details of her life. Therefore Povtak violated Ms. Wagner’s Fourth Amendment rights against unreasonable search and seizure.

In addition, Povtak is bound by the substantive provisions of the CBA because Povtak assumed Crimaldi’s business and maintained the enterprise in a substantially continuous manner, and therefore must honor Crimaldi’s agreement with Local 12-22. Furthermore, Povtak hired all of the Local 12-22 employees and failed to tell them that the terms of their employment were changing, therefore Povtak must adhere to the CBA. Finally, Povtak assumed the CBA by adhering to the employer obligations under the agreement and cannot disavow this binding document.

For the foregoing reasons, we request this court affirm the Thirteenth Circuit’s order reinstating the jury verdict in favor of Ms. Wagner and granting summary judgment in favor of Local 12-22.

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Respectfully Submitted,

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