2016 Hospitality Law Conference

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The Importance of Company Policies

Presented by:

Craig A. Woodcook, General Counsel for Ben E. Keith Company

& David Johnson, Managing Shareholder Winstead, PC

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PRESENTERS

Craig A. Woodcook

General Counsel, Ben E. Keith Company

Mr. Woodcook is the General Counsel for Ben E. Keith Company, a large beer and food distributor with over $3b in revenue and 4k employees. Mr. Woodcook began his career with Ben E. Keith Beers in 1997. During his tenure at Ben E. Keith Company, Mr. Woodcook was promoted through various financial, operational, and legal positions and obtained a M.S. in Economics (UNT), JD (Texas Wesleyan School of Law), and LLM (SMU).

His practice includes litigation and transaction work in the areas of Corporate Governance, Employment Law, Food & Beverage Law, Real Estate & Environmental Law, Mergers & Acquisitions, and general business law.

PRESENTERS

David F. Johnson

Managing Shareholder, Winstead, P.C.

David maintains an active general commercial trial and appellate practice. David is the primary author of the Texas Fiduciary Litigator blog, which reports on legal cases and issues impacting the fiduciary field in Texas.

David is Board Certified in Civil Appellate Law, Civil Trial Law, and Personal Injury Trial Law by the Texas Board of Legal Specialization. He is only one of twenty attorneys in Texas with that combination of certifications.

David has authored many legal articles and spoken at over 150 legal education courses on both trial and appellate issues. His articles have been cited as authority by many commentators, federal courts, the Texas Supreme Court (four times), and the Texas Courts of Appeals located in El Paso, Waco, Texarkana, Beaumont, Tyler, and Houston.

David is managing shareholder of Winstead PC's Fort Worth Office and has a state-wide practice.

2016 HOSPITALITY LAW CONFERENCE

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IMPORTANT REASONS TO IMPLEMENT AND CONSISTENTLY ENFORCE COMPANY POLICIES

REASONS FOR WRITTEN COMPANY POLICIES

- To clarify employment is “at-will.”
- To protect confidential information, intellectual property, and trade secrets.
- To explain an employee has no expectation of privacy regarding the use of the employer’s computer systems.
- To communicate facts and basic information to employees.

REASONS FOR WRITTEN COMPANY POLICIES

- To encourage the proper corporate culture and promote operational effectiveness.
- To encourage uniform rules within an organization.
- To encourage regular review of policies.
- To document expectations and encourage compliance with state and federal laws.
- To document alternative dispute resolution procedures.

TITLE VII, RELATED CLAIMS & THE MCDONNELL DOUGLAS PARADIGM

MCDONNELL DOUGLAS PARADIGM

- Under the McDonnell Douglas burden shifting paradigm, the Title VII plaintiff has the initial burden of establishing a prima facie case of discrimination.

- Once a case is established, the burden shifts to the employer to articulate a legitimate, non-discriminatory reason for terminating the plaintiff.

- If the employer makes such a showing, the plaintiff must then demonstrate the stated legitimate, non-discriminatory reason for termination was mere pretext for discrimination.

TWYMON V. WELLS FARGO & COMPANY

- Minority employee filed a Title VII race discrimination claim after being terminated and replaced by a majority employee.
- Employee was told to 'be a good black' and act like an 'Uncle Tom.'
- Company policy prohibited excessive personal use of company computers and accessing pornographic materials.

Twymon v. Wells Fargo & Co., 462 F.3d 925, 929-31 (8th Cir. 2006)

TWYMON V. WELLS FARGO & COMPANY

- An audit showed employee visited hundreds of non-work related and pornographic websites, and also had pornographic images on her hard-drive.
- Employee was fired for “gross violation of company’s computer policy.”

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TWYMON V. WELLS FARGO & COMPANY

- The Court noted "We have consistently held that violating a company policy is a legitimate, non-discriminatory rationale for terminating an employee."
- "A common way of proving pretext is to show similarly situated employees were more favorably treated."
- The employee failed to offer any admissible evidence regarding the Company's treatment of similarly situated employees.

TWYMON V. WELLS FARGO & COMPANY

- The employer was able to provide a legitimate, non-discriminatory reason for termination, because the employer had a policy and followed the policy consistently.

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RUDIN V. LINCOLN LAND COMMUNITY COLLEGE

- Majority female employee applied for a new professor position.
- Position was filled with a minority male.
- Majority female employee filed Title VII race and gender discrimination claims.
- Employer claimed the successful candidate was the most qualified candidate because of a second master's degree and he was working toward his doctorate.

Rudin v. Lincoln Land Cmty. Coll., 420 F.3d 712 (7th Cir. 2005)

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RUDIN V. LINCOLN LAND COMMUNITY COLLEGE

- The employer departed from its hiring policies during the interview process because the screening committee failed to meet and discuss each candidate.
- “The screening committee chair did not take into consideration the input presented by … members before identifying his candidate of choice … to his superiors as required by company policy.”

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RUDIN V. LINCOLN LAND COMMUNITY COLLEGE

- "The systematic abandonment of its hiring policies is circumstantial evidence of discrimination."
- "This court has held in the past that an employer's failure to follow its own internal employment procedures [i.e. policies] can constitute evidence of pretext."
- Thus, the employer's failure to follow its policies constituted evidence: (1) showing the employer's discrimination and (2) showing the employer's proffered legitimate, nondiscriminatory reason was pretext.

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QUEZEDA V. EARNHARDT EL PASO MOTORS, LP

- Terminated employee filed an age discrimination claim under the ADEA.
- Employee claimed he was not counseled about his poor performance prior to his termination as recommended by company policy.
- The court held "an inference of pretext arises when an employer fails to follow its internal policies."

Quezada v. Earnhardt El Paso Motors, LP, 592 F. Supp. 2d 915, 923 (W.D. Tex. 2009)

TITLE VII, RELATED CLAIMS & THE FARAGHER-ELLERTH DEFENSE

BURLINGTON INDUS., INC V. ELLERTH

- An employer can be subject to vicarious liability for a hostile work environment created by a supervisor of the employee.
- In Burlington, the US Supreme Court adopted an affirmative defense for Title VII sexual harassment-hostile work environment claims when no tangible employment action is taken by the employer.
- This is called the Faragher-Ellerth affirmative defense.

Burlington Indus., Inc v. Ellerth, 524 U.S. 742 (1998)

BURLINGTON INDUS., INC V ELLERTH

- To be successful, the employer must prove:

  a) the employer exercised reasonable care to prevent and promptly correct any sexually harassing behavior, and

  b) the employee unreasonably failed to take advantage of preventative or corrective opportunities.

- The Court stated, "While proof that an employer had an anti-harassment policy … is not necessary in every instance … the need for a stated policy suitable to the employment circumstances may be appropriately addressed in any case when litigating the first element of the defense."

See companion case: *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).

LEOPOLD V. BACCARAT, INC.

- Employee alleged Title VII hostile work environment claim.
- Employee alleged the employer's "anti-harassment policy and complaint procedure" were insufficient to satisfy the Faragher-Ellerth defense.
- The employer had an anti-harassment policy which defined harassment, stated the consequences for harassment, and allowed the employee to by-pass their supervisor.

Leopold v. Baccarat, Inc. No. 95-CV-6475JSM, 2000 WL 174923

LEOPOLD V. BACCARAT, INC.

- The Court noted, “One way that an employer can prove reasonable steps is by producing a written anti-harassment policy and complaint procedure… the law is very clear that any reasonable policy will do.”
- In short, a written anti-harassment policy, even if not robust, is critically important to an employer’s ability to successfully utilize the Faragher-Ellerth defense.

UPJOHN CO. V. U.S.

- The Upjohn case does not involve the Faragher-Ellereth defense, but is a seminal case on the attorney-client and attorney work-product exemption in the internal investigation context and is thus integral to any Faragher-Ellereth discussion.
- In *Upjohn*, the general counsel conducted an internal investigation into potentially illegal payments to foreign governments to secure business and voluntarily submitted the final report to the SEC and IRS.

Upjohn Co. v. U.S., 449 US 383 (1981)

UPJOHN CO. V. U.S.

- The IRS sought discovery of various investigation related documents and argued the attorney-client privilege belonged to the client-corporation and only officers and employees capable of directing Upjohn's actions constituted the "client."
- The IRS contended Upjohn waived the attorney-client privilege in regards to the general counsel's employee questionnaires and interview notes in regard to low level employees.

UPJOHN CO. V. U.S.

- The US Supreme Court rejected the IRS's contention and noted the attorney-client privilege "exists to protect not only the giving of professional advice to those who can act on it but also the giving of information to the lawyer to enable him to give sound and informed advice."

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UPJOHN CO. V. U.S.

- With regard to the work-product exemption, the Court held: “Forcing an attorney to disclose notes and memoranda of witnesses' oral statements is particularly disfavored because it tends to reveal the attorney's mental processes … (‘the statement would be his [the attorney's] language, permeated with his inferences’).”
- In short, many documents prepared by or under the direction of an attorney in the context of an internal investigation are protected by the attorney-client privilege and work-product exemption.

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ATTORNEY-CLIENT PRIVILEGE

- Attorney-Client Privilege
  - Federal Rule of Evidence 501
  - Texas Rule of Evidence 503
- Key Points
  - Between attorney and client (client owns the privilege)
  - Communication for the purpose of facilitating legal advice

THE WORK-PRODUCT EXEMPTION

- **The Work-Product Exemption**
  - Federal Rule of Civil Procedure 26(b)(3)
  - Texas Rule of Civil Procedure 192.5
- **Key Point**
  - Prepared in anticipation of litigation

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KOUMOULIS V. INDEP. FIN. MKTG. GROUP, INC.

- The Koumoulis Court addressed both the attorney-client privilege and the work-product exemption in the context of internal investigations and the Faragher-Ellereth defense.
- The court held: "Defendants waive any otherwise applicable privilege with respect to all documents relating to the reasonableness of their efforts to correct the allegedly discriminatory behavior and the reasonableness of their investigatory policies and procedures."

Koumoulis v. Indep. Fin. Mktg. Group, Inc., 29 F. Supp. 3d 142 (E.D.N.Y. 2014)

KOSS V. PALMER WATER DEP'T

- The court noted "when a Title VII defendant affirmatively invokes a Faragher-Ellereth defense that is premised … on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation."

Koss v. Palmer Water Dep't. 977 F. Supp. 2d 28 (2012)

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MCKENNA V. NESTLE PURINA PETCARE

- In McKenna, the Court held "the waiver [of privilege due to the Faragher-Ellereth defense] extends only to documents which constitute evidence of the investigation of the claim of harassment or discrimination."
- The court also noted, "if an attorney had been consulted about an investigation but did not ... participate in the investigation itself, the ... attorney's advice to the client ... remain privileged."

McKenna v. Nestle Purina PetCare Co., 2:05-cv-0976, 2007 WL 433291(S.D. Ohio Feb. 5, 2007)

WAUGH V. PATHMARK STORES, INC.

- The Waugh Court denied an employee's motion to compel (i) the deposition of employer's in-house counsel and (ii) the production of the in-house counsel's created documents.
- The court repeatedly stressed the employer's in-house counsel's role was only that of "legal advisor" because he did not conduct the internal investigation.

Waugh v Pathmark Stores, Inc., 191 F.R.D. 427 (2000)

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THE FAIR LABOR STANDARDS ACT (“FLSA”) & WAGE AND HOUR CLAIMS

RICHARDSON V. WELLS FARGO BANK, N.A.

- Employees allege they were not compensated for work performed off the clock and filed for class certification under the Fair Labor Standards Act ("FLSA").
- The employer maintained the following policies:
  - All employees were required to accurately report all hours worked,
  - All employees were entitled to pay for all actual hours worked … even those not authorized, and
  - Managers were prohibited from allowing off the clock work.

Richardson v. Wells Fargo Bank, N.A., 4:11-CV-00738, 2012 WL 334038 (S.D. Tex. Feb. 2, 2012)

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RICHARDSON V. WELLS FARGO BANK, N.A.

- The court noted: "Although written policies are not dispositive … written policies are relevant consideration when assessing workers' arguments about the existence of a company-wide policy."

- The court also noted "there is no evidence that managers, nationwide, failed to follow [written overtime] policies, nationwide certification is inappropriate."

- **In essence, the employer's policies prohibiting unpaid off-the-clock work, in the absence of countervailing evidence, were sufficient to defeat class certification.**

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BURCH V. QWEST COMMUNICATIONS INTERN.

- Employees brought various FLSA and Wage & Hour claims and filed for class certification.
- Employer maintained a policy that all Employees would be paid 1.5X for hours worked in excess of 40 hours and that all work would be included.
- Employer tracked call center employee time by use of their phones.
- Employees were required to work on computers when not on the phone and the time was not tracked or paid.

Burch v. Qwest Commc'n Intern., Inc., 500 F. Supp. 2d 1181 (D. Minn. 2007)

BURCH V. QWEST COMMUNICATIONS INTERN.

- The court noted “the mere fact that Quest has a written policy does not defeat Plaintiffs’ motion in light of the Plaintiff’s countervailing evidence of a centralized policy to not pay overtime.”
- Because the employer’s regular practices conflicted with their written policy, the policy was not sufficient to defeat class certification.

OTHER MISCELLANEOUS EMPLOYMENT CLAIMS

GREEN V. RANSOR

- Employee on an overnight business trip drove a company vehicle to a bar, became intoxicated, and caused an accident injuring the plaintiff.
- Employer maintained the following company policies:
  - Operating company vehicles after the consumption of alcoholic beverage is strictly prohibited, and
  - A company vehicle may be used for certain limited personal purposes after working hours, but emphasized there should be no consumption of alcohol.

Green v Ransor, 175 S.W. 3d 513 (Tex. App. – Fort Worth 2005)

GREEN V. RANSOR

- The plaintiff alleged respondeat superior and noted "a presumption arose that … [the employee] was acting within the course and scope of his employment because … [he] was an employee driving a company vehicle at the time of the accident."
- Under the doctrine of respondeat superior, an employer is responsible for the negligence of an employee acting within the course and scope of his employment, even though the employer has not personally committed a wrong.

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GREEN V. RANSOR

- To prove an employee acted within the course and scope of employment, a plaintiff must show the act was:
  - within the general authority given to the employee,
  - in furtherance of the employer's business, and
  - for the accomplishment of the object for which the employee was employed.

GREEN V. RANSOR

- The Court held "Appellee's uncontroverted evidence show that not only did … [Employee] violate company policy by driving the company truck while intoxicated, he also did not have the general authority – or permission from his employer – to drive the truck to or from a bar…"
- The employer's policies prohibiting certain conduct and denying authority or permission for certain conduct may be sufficient to prevent vicarious liability and win summary judgment.

CONT'L COFFEE PROD. CO. V. CAZAREZ

- Employee was terminated for violation of employer's three-day attendance rule after filing a workers' compensation claim.
- The employee claimed she was still on her permitted leave at the time of termination.
- The employee filed a retaliation claim under Texas workers' compensation laws.

Cont'l Coffee Prod. Co v. Cazarez, 937 S.W.2d 444 (Tex. 1996).

CONT'L COFFEE PROD. CO. V. CAZAREZ

- In order to establish a workers' compensation retaliation claim, an employee must show a:
  (1) casual connection between;
  (2) her discharge and
  (3) the filing of a workers' compensation claim.

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CONT'L COFFEE PROD. CO. V. CAZAREZ

Circumstantial evidence sufficient to establish a causal link between termination and filing a compensation claim includes:

(1) knowledge of the compensation claim by those making the decision on termination;
(2) expression of a negative attitude toward the employee's injured condition;
(3) failure to adhere to established company policies;
(4) discriminatory treatment in comparison to similarly situated employees; and
(5) evidence that the stated reason for the discharge was false.

CONT'L COFFEE PROD. CO. V. CAZAREZ

- The court found there was some evidence the employer failed to follow its three-day policy, which was the employer's only proffered explanation for termination.
- Thus, the court held there was some evidence of causation and upheld the trial court's award of actual damages (but reversed on other grounds for punitive damages).

LA TIER V. COMPAQ COMPUTER CORP.

- An employee sued her former employer for retaliation for filing a Texas workers' compensation claim.
- The employer asserted it terminated the employee for taking food home thus violating company policy prohibiting dishonesty, theft, and misuse of company assets.
- The court noted the employer admitted there was no company policy prohibiting food from being taken or requiring permission before taking food.

La Tier v. Compaq Computer Corp., 123 S.W.3d 557 (Tex. App.—San Antonio 2003, no pet.)

LA TIER V. COMPAQ COMPUTER CORP.

- The court held the employer’s knowledge of the claim and its negative attitude toward the employee’s injured condition, and “the conflicting evidence regarding whether La Tier was treated differently than others in response to taking left over food was sufficient to raise a genuine issue of material fact with regard to whether a causal link existed between La Tier's termination and her filing of a workers' compensation claim.”

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TEXAS DIVISION-TRANTER V. CARROZZA

- An employee filed a workers' compensation claim and received compensation benefits and medical leave.
- Company policy called for mandatory termination of any employee absent three consecutive work days without receiving permission beforehand or giving notice during those three days.
- Employee did not inform the employer before or during his absence he would not report to work as scheduled.
- Employee was terminated for violation of company's "three-day rule."

Texas Division-Tranter, Inc. v. Carrozza, 876 S.W.2d 312 (Tex. 1994)

TEXAS DIVISION-TRANTER V. CARROZZA

- The court noted "Uniform enforcement of a reasonable absence-control provision does not constitute retaliatory discharge."
- Employee offered no evidence challenging company's explanation he was terminated solely for violating the three-day rule.
- **Again, because the employer had a policy and followed that policy, the court ruled in favor of the employer.**

PASKUASKIENE V. TEX. WORKFORCE COMM'N & MICROCONSULT, INC.

- Former employee filed for unemployment benefits, and former employer contested her right to receive benefits.
- TWC hearing officer determined former employee was ineligible to receive benefits because she was terminated for misconduct related to her work (i.e. violating company policy).

Paskuaskiene v. Tex. Workforce Com'n & Microconsult, Inc., No. 02-12000358-CV, 2013 Tex. App. LEXIS 9900 (Tex. App.—Fort Worth August 8, 2013, pet. denied).

PASKUASKIENE V. TEX. WORKFORCE COMM'N & MICROCONSULT, INC.

- Texas Labor Code section 201.012(a) defines "misconduct" as "mismanagement of a position of employment by action or inaction, neglect that jeopardizes the life or property of another, intentional wrongdoing or malfeasance, intentional violation of a law, or violation of a policy or rule adopted to ensure the orderly work and the safety of employees."

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PASKUASKIENE V. TEX. WORKFORCE COMM’N & MICROCONSULT, INC.

- The court held the denial of the employee's application for unemployment benefits was proper because the employer's company policy provided for termination upon dishonesty or falsification of records, and the employee admitted the misconduct – she signed at least one such report without reviewing the entire document.

- Therefore, company policies can support a decision to terminate an employee and contest a claim for unemployment benefits.

NEGLIGENCE AND STANDARD OF CARE ISSUES

INTERNAL POLICIES & STANDARDS OF CARE

- *Fence v. Hospice in the Pines,* 4 S.W.3d 476, 481 (Tex. App.—Beaumont 1999, pet. denied).
  - Texas court of appeals explained: a company's internal policies "alone do not determine the governing standard of care."
- *Titchnell v. United States, 681 F.2d 165, 173 (3d Cir.1982)*
  - A federal court of appeals also held that a defendant's internal policies do not, taken alone, establish the applicable standard of care.

INTERNAL POLICIES & STANDARDS OF CARE

- *Cox v. City of Fort Worth,* 762 F.Supp.2d 926 (N.D. Tex. 2010).
  - "Plaintiffs' negligence claim, grounded on Texas Health's alleged negligent implementation of its internal policies, thus cannot pass the first hurdle: it fails to allege a legal duty. Having alleged no duty outside of the implementation of Texas Health's own internal policies, plaintiffs' negligence claim fails."
- *Titchnell v. United States, 681 F.2d 165, 173 (3d Cir.1982)*
  - A federal court of appeals also held that a defendant's internal policies do not, taken alone, establish the applicable standard of care.

GROSS NEGLIGENCE & KNOWLEDGE

DALWORTH TRUCKING V. BULEN

- Employee was held negligent and the employer grossly negligent in the death of the plaintiff.
- Employer maintained a “three-strikes and you’re out” policy with its drivers that after a driver accumulated three safety violations.
- Employer failed to follow the “three-strikes and you’re out policy” and allowed the driver to accumulate 66 safety violations in the week preceding the accident.

Dalworth Trucking v. Bulen, 924 S.W. 2d 728 (Tex. App. – Texarkana 1996)

DALWORTH TRUCKING V. BULEN

- "Gross negligence" means … an entire want of care that establishes that the act or omission was the result of **actual conscious indifference** to the rights, safety, or welfare of the person affected.
- Gross negligence has both objective and subjective elements: (1) when viewed from the actor's standpoint, the act or omission must involve an extreme degree of risk, considering the probability and magnitude of the potential harm to others, and (2) **the actor must have actual, subjective awareness of the extreme risk involved but nevertheless proceed in conscious indifference to the rights, safety, or welfare of others.**

Dalworth Trucking v. Bulen, 924 S.W. 2d 728 (Tex. App. – Texarkana 1996)

DALWORTH TRUCKING V. BULEN

- After noting the employee's numerous breaches of the employer's safety policies and the employer's failure to follow its "three strikes and you're out policy," the court noted:
- "Dalworth's management **knew** of an extreme risk of impending harm from allowing Halbert to continue to drive without supervision, discipline, or admonishment, and that it nevertheless failed to do so in conscious disregard of the safety of those who might be affected.
- "Dalworth's managers could **reasonably foresee** a similar consequence from their failure to suspend or discipline the driver."

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DALWORTH TRUCKING V. BULEN

- Notably, because its manager failed to follow company policies, only the employer was found to be grossly negligent and not the employee.
- Court upheld $1.3m in compensatory damages and $1m in punitive damages.
- In short, this decision can be read as implying that company policies may constitute evidence of an employer's knowledge.

ACCESS TO EMPLOYEES' CONFIDENTIAL AND PRIVILEGED COMMUNICATIONS

ACCESS TO EMPLOYEE'S CONFIDENTIAL OR PRIVILEGED COMMUNICATIONS

- If there is no company policy addressing the use of the employer's computers and email systems, then courts have been willing to find that the emails with the employee's attorney were protected by the attorney-client privilege because there was an expectation of privacy.

ACCESS TO EMPLOYEE'S CONFIDENTIAL OR PRIVILEGED COMMUNICATIONS

- However, courts have held that where the company has a written policy that clearly states that the employee has no right to privacy in using the company's computer system, the company may review and use the employee's confidential emails.
- The question of privilege comes down to "whether the [employee's] intent to communicate in confidence was objectively reasonable."

QUESTIONS?