COMMONWEALTH OF MASSACHUSETTS

Appeals Court

No. 2015-P-0901

Suffolk Superior Court Civil Action No. 2011-2808-BLS1

DEBRA L. MARQUIS,
Plaintiff-Appellant/Cross-Appellee,

v.

GOOGLE INC.,
Defendant-Appellee/Cross-Appellant.

ON APPEAL FROM A FINAL ORDER OF
THE SUFFOLK SUPERIOR COURT

DEFENDANT-APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

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I. INTRODUCTION

Plaintiff's Complaint seeks to manufacture a purported privacy violation out of routine business conduct that falls outside the scope of the Massachusetts Wiretap Act (the "Act"), and, as Google's opening brief explained, the trial court erred in failing to dismiss the Complaint as a matter of law on this ground. The Act is limited to precisely what its name suggests: the use of illegal devices to wiretap communications as they are being transmitted. In enacting the Act, the General Court expressly excepted a service provider from conduct done in the "ordinary course of its business." This common-sense provision fosters Google's and other providers' ability to deliver a plethora of benefits to users of their services while protecting individuals from improper wiretapping.

The Complaint concedes that Google offers its Gmail service for free and that it targets advertising through automated processes to generate revenue to help cover the costs of providing the Gmail service. This conduct is precisely the kind of legitimate business purpose that falls within the "ordinary course of its business" ("OCB") exception to the Act. The trial court accordingly erred in not dismissing the Complaint as a matter of law on this ground.

In her opposition to Google's cross-appeal, Plaintiff attempts to impose a "necessity" requirement and limit the exception to the employer-employee context. But these limitations are nowhere in the provision's text or the case law interpreting it.

This Court should accordingly reverse the trial court's decision and dismiss the case as a matter of law.

II. STATEMENT OF FACTS

Plaintiff repeatedly concedes in her Complaint that Google "offers Gmail to users for no charge and raises the necessary revenue to run Gmail at least in part through advertisements targeted at Gmail users." (JA 6, ¶ 2; JA 7, ¶ 8 (Gmail is "a 'free' service" that is made possible by "selling advertising" on Gmail).) Plaintiff further acknowledges that Google applies automated systems to scan emails, not to engage in surreptitious surveillance, but to "acquire[] keywords" for the purpose of "send[ing] ads related to those keywords . . ." to Gmail users. (JA 7, ¶ 9.) Plaintiff does not allege that Google shares any of her information with third-party advertisers, nor does she allege she suffered any actual harm from the challenged conduct.

III. ARGUMENT

A. The OCB Exception Applies to Routine Commercial Conduct that Has a "Legitimate Business Purpose."

Google's opening brief detailed how controlling precedent requires courts to apply a broad interpretation of the OCB exception. Indeed, as Google observed, the Supreme Judicial Court read the OCB exception expansively to include a company's routine business practices or conduct, which furthers a "legitimate business purpose." *O'Sullivan v. NYNEX Corp.*, 426 Mass. 261, 266-67 (1997); (Google's Opening Brief ("Def.'s Br.") at 21.) Plaintiff's response here notably does not dispute the interpretation of the OCB exception announced in *O'Sullivan* and applied in other Massachusetts wiretap cases. *See, e.g., Dillon v. Mass. Bay Transp. Auth.*, 49 Mass. App. Ct. 309, 319 (2000) (applying OCB exception under the reasoning in *O'Sullivan* by examining whether challenged conduct had "legitimate business purpose"); *Peters v. Equiserve Inc.*, No. 05-cv-1052, 2006 WL 709997, at *5 (Mass. Super. Ct. Feb. 24, 2006); *Restuccia v. Burk Tech., Inc.*, No. CA 952125, 1996 WL 1329386, at *2 (Mass. Super. Ct. Aug. 13, 1996).

Google also cited to a number of federal cases that broadly applied the parallel OCB exception in the context of the federal wiretap statute. (Def.'s Br.

at 22-23 (discussing cases).) In particular, the court in *In re Google, Inc. Privacy Policy Litig.*, No. C 12-01382, 2012 WL 6738343 (N.D. Cal. Dec. 28, 2012) ("*Google Privacy*"), dismissed a complaint for wiretap claims involving similar conduct to that alleged in this matter.[1] The pleading in *Google Privacy*, as here, conceded on its face that, among other things, Google had allegedly wiretapped emails by using the same systems it used every day to process and deliver emails. *Id.*, at *5-6. Because the complaint did not allege that Google "intercepted" the plaintiffs' emails with any "device" outside of Google's internal systems used in the normal course of providing the Gmail service, the court dismissed the case as a matter of law. *Id.*

As with the Massachusetts precedent, Plaintiff does not even address, let alone rebut, the holding in *Google Privacy* or any of the other cases Google cites. Given that the Supreme Judicial Court has "construe[d] the Massachusetts statute [in the OCB context] in accordance with the construction given the cognate Federal statute by the Federal courts," Plaintiff's

[1] In *Google Privacy*, the plaintiffs challenged changes to Google's privacy policies that allegedly permitted the company to "combine information collected from a consumer's Gmail account with information collected" from other Google services. 2012 WL 6738343, at *1.

total silence is damning here. *O'Sullivan*, 426 Mass. at 264 & n.5.

Thus, controlling precedent and other relevant case law establishes that the OCB exception applies to routine commercial conduct in furtherance of legitimate business purposes, including, among others, the provision of targeted advertising, *Kirch v. Embarq Mgmt. Co.*, 702 F.3d 1245, 1245-48 (10th Cir. 2012)(affirming dismissal of wiretap claim under OCB provision where "interception" of browsing histories was allegedly used to deliver targeted advertising), *Google Privacy*, 2012 WL 6738343, at *5 (same); or quality service monitoring for telemarketing purposes, *O'Sullivan*, 426 Mass. at 264.

B. The Trial Court Erred by Misapplying the OCB Exception Where Google's Alleged Conduct Was Routine and for a Legitimate Business Purpose.

Despite the clear pronouncement in *O'Sullivan*, the trial court did not properly apply the "legitimate business purpose" standard. Plaintiff's Complaint alleged the very facts necessary to resolve the question as a matter of law. She conceded (1) that Google was a "free service," (JA 7, ¶ 8) (internal quotations omitted) (2) which Google provided through "rais[ing] the necessary revenue . . . at least in part through advertisements targeted at Gmail users" (JA 6-7, ¶ 2), and (3) that this business model

involved the automated processing of emails to "acquire[] keywords" for the purpose of "send[ing] ads related to those keywords . . . " to Gmail users. (JA 7, ¶ 9.) As such, Google's challenged conduct clearly falls within the OCB exception.

Without explanation, Judge Lauriat ignored these concessions and held that "[a]t this preliminary stage, the court cannot conclude as a matter of law that intercepting and scanning emails for the purposes of 'interest-based advertising' is 'in the ordinary course'" of Google's business. (JA 21.) Judge Lauriat, however, did not undertake the analysis required under *O'Sullivan* to determine whether Google's conduct was in the routine course of its business and whether Google engaged in such conduct for a legitimate business purpose. Had the trial court done so, Plaintiff's allegations would have established that, as a matter of law, Google's conduct fell within the OCB exception.[2]

C. The Act Does Not Require Conduct Be "Necessary" to the Provision of the Service to Fall Within the OCB Exception.

Plaintiff finds no solace in her argument that the OCB exception must be limited to non-monetary

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[2] Plaintiff does not refute Google's arguments in its opening brief that the "communications common carrier" and "telephone/telegraph" elements of the OCB exception do not bar Google from invoking the exception. (*See* Def.'s Br. at 27-29 & n.15.)

conduct that is "necessary" to "the ordinary course of business of delivering email." (Plaintiff's Reply Brief ("Pl.'s Reply") at 8.) While the trial court did not reach this argument in denying Google's motion to dismiss, Plaintiff's attempt at an alternative rationale for affirming the trial court is grounded neither in the statutory text of the OCB exception or the case law interpreting it.

Statutory Text. Plaintiff does not cite to a single word or phrase in the Act's text to support her "necessity" argument. Indeed, there is no such language. Plaintiff is thus asking the Court to subvert the intent of the Legislature by imposing a limitation that appears nowhere in the text of the ordinary course of business exception. *Comm'r of Corr. v. Super. Ct. Dept. Cty. of Worcester*, 446 Mass. 123, 126 (2006) ("We do not read into the statute a provision which the legislature did not see fit to put there."). Moreover, the Legislature *did* employ "necessary" in *other* sections of the Act, *see, e.g.*, M.G.L. c. 272 § 99(D)(1)(a), confirming that the omission of any such requirement in the OCB exception was intentional. *Leary v. Contributory Ret. App. Bd.*, 421 Mass. 344, 348 (1995) ("[W]hen the Legislature has employed specific language in one part of a statute, but not in another part which deals with the same

topic, the earlier language should not be implied where it is not present.")(citations omitted).

Plaintiff's "necessary" requirement would also read out the word "business" from the statute. Plaintiff does not dispute that the ordinary meaning of "business" includes "commercial enterprise carried on for profit." (Def.'s Br. at 30 (quoting BLACK'S LAW DICTIONARY).) Nor does Plaintiff offer any reason to depart from this plain meaning, which controls. *Olmstead v. Dep't of Telecomms. and Cable*, 466 Mass. 582, 588 (2013) ("we give effect to a statute's 'plain and ordinary meaning' where the statute's words are clear"). Had the Legislature wanted to cabin the OCB exception to conduct "necessary" to the communication service, it would surely have chosen a different word than "business" to define the scope of the exception.

Case Law. Plaintiff does not cite a single case to support her claim that the OCB exception only excepts conduct "necessary" to provide the email service. This silence is telling. As Google already established in its opening brief, the great weight of Massachusetts and federal authority endorses a broad reading of the exception. (Def.'s Br. at 20-25.) Indeed, the conduct exempted in these cases was not "necessary" to the transmission of the communication allegedly intercepted. In *O'Sullivan*, for instance, the Supreme Judicial Court applied the OCB exception

to NYNEX's recording of marketing calls for quality assurance and training purposes. 426 Mass. at 266-67. The Supreme Judicial Court did not examine whether the recording of marketing calls was "necessary" to the provision of telephone services, and it is hard to conceive of a reason that such recording would have any effect on the provision of those services. *See also Dillon*, 49 Mass. App. Ct. at 319 (applying OCB exception without determining that the recording of calls by the MBTA was necessary to the provision of rail service).

At its core, Plaintiff's disagreement with Google's interpretation of the OCB exception is based—not on any reasoned analysis of the statute's actual terms or the case law interpreting it—but a misguided *policy* argument that the OCB exception should apply only in the narrowest of circumstances. But Plaintiff cannot substitute her policy desires with those the Legislature actually enacted. Plaintiff's interpretation effectively strikes the "ordinary course of its business" from the Act and replaces it with an entirely different criteria based on the technological steps necessary to transmit a message.[3]

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[3] In the *Google Privacy* matter, the federal court later dismissed the federal wiretap claim again in an amended pleading, noting that:

> The more fundamental problem with Plaintiffs' narrow construction of Section

This Court should give effect to the words the Legislature actually wrote, not Plaintiff's proposed re-writing of the statute.[4]

D. The OCB Exception Is Not Limited to the Employer-Employee Context.

Plaintiff's opposition again falls back on the unsupported argument that the OCB exception is not applicable to Google's conduct because it applies **only** where an employer monitors an employee's communications. But as Google argued in its opening brief, this artificial limitation appears nowhere in

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> 2510(5)(a)(ii) is that in defining "ordinary course of business" as "necessary" it begs the question of what exactly its [sic] means for a given action to be "necessary" to the delivery of Gmail. For example, in delivering Gmail is it really "necessary" do [sic] more than just the [sic] comply with email protocols such as POP, IMAP and MAPI? What about spam-filtering or indexing? None of these activities have anything specifically to do with transmitting email. And yet not even Plaintiffs suggest that these activities are unnecessary and thus lie outside of the "ordinary course business."

In re Google, Inc. Privacy Policy Litig., No. C-12-01382, 2013 WL 6248499, at *11 (N.D. Cal. Dec. 3, 2013).

[4] Additionally, Plaintiff fares no better with the argument, raised for the first time in her reply brief, that Google must establish a benefit to *her* as a non-Gmail user for the exception to apply. (Pl.'s Reply at 10.) Plaintiff has not only waived this argument by failing to raise it in the trial court, but does not cite any statutory text or case law to support her novel interpretation.

the statute. (Def.'s Br. at 25.) Plaintiff's attempt to read the words "employer" and "employee" into the OCB provision is contrary to established canons of statutory interpretation, *see Comm'r of Corr.*, 446 Mass. at 126 ("We do not read into the statute a provision which the legislature did not see fit to put there."), particularly when other sections of the same law contain such words, *Leary*, 421 Mass. at 348 ("[W]hen the Legislature has employed specific language in one part of a statute, but not in another part which deals with the same topic, the earlier language should not be implied where it is not present.")(citations omitted).

Plaintiff's reply also ignores the significant body of case law Google cited showing that the OCB exception has frequently been applied outside of the employer-employee context.[5] (Def.'s Br. at 5-6.) Moreover, Plaintiff makes no attempt to address Google's argument that her proposed employer-employee limitation would essentially criminalize numerous commonplace email functions including spam and virus detection. (Def.'s Br. at 7.) Courts should favor a plain meaning interpretation of the Act that avoids

[5] As noted above, cases applying the federal version of the OCB exception are highly persuasive authority. *O'Sullivan*, 426 Mass. at 264 & n.5 ("[W]e shall construe the Massachusetts statute in accordance with the construction given the cognate Federal statute by the Federal courts.").

such absurd results. *Molly A. v. Comm'r of Dep't of Mental Retardation*, 69 Mass. App. Ct. 267, 282 (2007) ("We are bound to avoid an absurd or unreasonable result when statutory language is susceptible of a sensible, workable construction.") (quoting *Green v. Bd. of Appeal of Norwood*, 358 Mass. 253, 258 (1970)).

Tellingly, Plaintiff fails to cite any case law supporting her argument. She relies instead on a distortion of Judge Lauriat's opinion on Google's Motion to Dismiss. Judge Lauriat did not "deny[] Google's Motion to Dismiss on the grounds that the OCB exception is limited to an employer intercepting communications where its employees is one of the parties." (Pl.'s Reply at 9.) To the contrary, Judge Lauriat expressly held that further facts would be needed to assess whether Google's practices fall within the ordinary course of business exception: "At this preliminary stage, the court cannot conclude as a matter of law that intercepting and scanning email for the purposes of 'interest-based advertising' is 'in the ordinary course of [Google's] business.'" (JA 21-22.) But even if Judge Lauriat had actually ruled on the OCB exception[6], that decision would have been in

[6] At summary judgment, Plaintiff argued that Judge Lauriat's ruling on the OCB exception was binding "law of the case." Plaintiff has failed to raise this argument on appeal and therefore has waived it. And even if she had raised it, the "law of the case" doctrine only applies to issues actually decided by

error because, for all of the reasons discussed above, there is no employer-employee limitation in the Act.[7]

Moreover, Plaintiff is incorrect that "established Massachusetts precedent"—which she does not identify—limits the OCB exception to the employer-employee context. The Massachusetts cases exploring the scope of the OCB exception have never cabined it in this manner. (*See* Def.'s Br. at 6-7.) Indeed, Plaintiff admits that *O'Sullivan* dealt with the recording by a business of a ***customer's*** call. (Pl.'s Reply at 9 n.2); 426 Mass. at 266-67. It was not a case, as Plaintiff would have the Court believe, where an employer was merely monitoring its employees' communications. In that case, the Supreme Judicial Court held that NYNEX had a legitimate business purpose to monitor the quality of its marketing calls, comply with statutory guidelines, and train its employees. 426 Mass. at 266-67. Given those business purposes, the *O'Sullivan* court explained that the

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the court. *See Winchester Gables, Inc. v. Host Marriott Corp.*, 70 Mass. App. Ct. 585, 593 (2007). Here, Judge Lauriat merely distinguished the facts of Google's cited cases. This cannot plausibly be interpreted as a dispositive ruling on the scope of the OCB exception.

[7] While Judge Lauriat erred in holding that the exception cannot be applied to Google's conduct on the face of the Complaint, it is clear that if he intended to limit the OCB exception to employee communications, he would not have said that further facts would be needed, since it is clear from the Complaint that Plaintiff is not a Google employee.

defendant could not be liable for a violation of the Act even though its customers received no notice of the recording. *Id.* at 262. The same conclusion is warranted here, particularly where Google (unlike NYNEX) has always publicly acknowledged the automated scanning its Gmail systems apply.

IV. CONCLUSION

Google respectfully asks this Court to reverse the trial court's determination on the motion to dismiss and, if it needs to reach the issues at all, to affirm the trial court's decisions on the motions for summary judgment and class certification.

Dated: February 19, 2016

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE
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I, Karen L. Burhans, hereby certify that the foregoing brief complies with the rules of court that pertain to the filing of briefs, including, but not limited to:

Mass. R.A.P. 16(a)(6) (pertinent findings or memorandum of decision);

Mass. R.A.P. 16(e) (references to the record);

Mass. R.A.P. 16(f) (reproduction of statutes, rules, regulations);

Mass. R.A.P. 16(h) (length of briefs);

Mass. R.A.P. 18 (appendix to the briefs); and

Mass. R.A.P. 20 (form of briefs, appendices, and other papers).

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I, Karen L. Burhans, attorney for Defendant-Appellee/Cross-Appellant Google Inc., hereby certify under the penalties of perjury that, on this 19th day of February, 2016, I caused to be served by hand delivery to counsel for the Plaintiff-Appellant/Cross-Appellee Debra L. Marquis, two copies of the foregoing document:

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