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## **EMPLOYMENT LAW UPDATE**

**JUNE 2010**

### **U.S. Supreme Court Finds Employer's Review of Employee Text Messages Reasonable Under the Circumstances**

The United States Supreme Court held in *City of Ontario v. Quon* that the review of a police officer's text messages sent using an employer-issued pager did not violate his Fourth Amendment rights. While the decision was a victory for the employer, the Court noted that emerging technologies and the rapidly changing ways in which employees communicate in the workplace may impact future determinations of an employee's right to privacy in electronic communications.

#### **Background**

The City of Ontario ("City") distributed pagers to its police department SWAT team members, including plaintiff Quon. Under the City's contract with its service provider, Arch Wireless ("Arch"), each pager was allotted 25,000 characters per month, after which additional "overage" fees would accrue. While the City did not have a formal pager-use policy for its officers, it did have a computer usage, Internet, and e-mail policy, which warned that employees had no expectation of privacy in their electronic communications. While the policy did not address text messages by its explicit terms, police department supervisors advised officers that text messages sent on the pagers were treated the same way as e-mails.

Quon's supervisor instituted an informal policy under which employees, not the City, were responsible for paying for overages. After several months of overages by Quon and other employees, the police department conducted an investigation to determine whether officers were routinely exceeding the 25,000 character limit due to work-related messages or personal messages. When the department obtained transcripts of Quon's text messages, it discovered that many of his work-hour communications were personal, and included sexually explicit text messages, some of which were sent to co-workers. The investigation report concluded that Quon had violated police department rules, and he was disciplined.

Quon and other employees whose transcripts were reviewed filed suit against the City and Arch alleging, among others things, that they violated plaintiffs' Fourth Amendment rights and the Stored Communications Act ("SCA") by obtaining and reviewing the transcripts of the text messages, and that Arch had violated the SCA by turning over the transcripts to the City. The district court agreed with plaintiffs that they had a reasonable expectation of privacy in the content of their text messages. Whether the investigation was nonetheless reasonable, the court concluded, turned on the police department's intent. The court presided over a jury trial to determine the purpose of the investigation. The jury concluded that the purpose of the investigation was to determine the efficacy

of the 25,000 character limit. The court accordingly held that the City and Arch did not violate the Fourth Amendment.

On appeal the Ninth Circuit reversed in part. The Ninth Circuit agreed with the district court that Quon had a reasonable expectation of privacy in his text messages, but disagreed with the district court about whether the investigation was nonetheless reasonable. The Ninth Circuit found that the City's search was unreasonable and enumerated less intrusive means that could have been used to determine the cause of the overages, including warning Quon or letting him redact the transcripts prior to their review. The Ninth Circuit further concluded that Arch had violated the SCA by turning over the transcripts to the City.

### **Supreme Court Decision**

The United States Supreme Court granted certiorari on the Fourth Amendment issues, and reversed the Ninth Circuit. The Court intentionally avoided the question of whether plaintiffs had a legitimate privacy expectation, stating, “[t]he judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.” The Court also recognized the complexity of determining a public employee's expectation of privacy, given both the potential for litigation involving the public employee's actions and the need for compliance with state open records laws. The Court also recognized the reality that in this era, texting and on-the-fly emailing in the workplace are a part of everyday life for millions of employees.

In deciding the case, the Court made the following assumptions: 1) Quon had a reasonable expectation of privacy in his text messages; 2) the City's review of the transcript constituted a search within the meaning of the Fourth Amendment; and 3) the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere. The Court then held that the “special needs” of the workplace justified the warrantless search. It held that the search satisfied the test set forth in *O'Connor v. Ortega*, 480 U.S. 709 (1987), pursuant to which a warrantless search may be conducted for “noninvestigatory, work-related purposes” or for the “investigation of work-related misconduct” if it is “justified at its inception” and if “the measures adopted are reasonably related to the objectives of the search and not excessively intrusive.” Finally, the Court concluded that as a police officer, Quon should have known that his communications could be subject to scrutiny by his employer.

### **Practical Implications**

While *Quon* involved a government employer, the decision provides helpful guidance for all employers regarding the management of electronic communications in the workplace setting. Employers should take the following precautions to help reduce potential exposure to privacy claims:

- Establish and disseminate formal policies regarding electronic communications in the workplace. Providing employees with notice of such a policy can reduce a reasonable expectation of privacy in the workplace.
- Make sure that electronic communications policies are broad and flexible enough to cover emerging technologies, and update them regularly as new technologies are adopted in the workplace.

- Provide clear notice that electronic communications may be monitored and investigated by management.

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