EMPLOYMENT LAW UPDATE

Supremes Put Workplace Texting in a "Quon"dary

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Write this date down: June 17, 2010. On this day the United States Supreme Court, in a unanimous decision, regarding "electronic" privacy in the workplace, "decided not to decide" in a case of first impression.

In 2002, the Ontario, California Police Department, issued alpha-numeric pagers (when was the last time you heard those words together?) to its S.W.A.T. team. Sergeant Jeff Quon was a recipient of one of those devices. Before issuing these pagers, the City of Ontario put in place a "Computer Usage, Internet and E Mail Policy". This policy included the provision that the *City "reserves the right to monitor and log all network activity, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources."* Sergeant Quon signed off on an acknowledgement of this policy.

After a few months passed, Chief of Police, Lloyd Scharf, became increasingly concerned that an amount of text messages consistently in excess of the package amount, were being sent & received over these pagers. Any overage charges were the responsibility of the officer it was issued to. The Chief wanted to determine if the overage was due to work related texts and thus requiring officers to unfairly pay for business use. Chief Scharf, upon reviewing some of Sergeant Quon's texts, found that more than 85% (over 450) of Sergeant's Quon's on-duty texts were personal in nature. Some of these messages contained sexually explicit content. This was in contradiction to the Departmental policy in this area.

Sergeant Quon brought actions against both the outside pager service provider and the City of Ontario. He alleged several violations, including a breach of the Fourth Amendment's right to privacy and protection against unreasonable searches.

In this case the Court did find that this action by the Ontario Police Department was in fact a search. However, they determined it to be reasonable and thus did not violate the Fourth Amendment's prohibition against unreasonable searches. Justice Kennedy delivered the opinion of the Court. Here is a telling quote from his decision. *"The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a governmental employer. The judiciary risks error by elaborating too fully on the Fourth Amendment implication of emerging technology before its role in society has become clear."* The Court chose to limit their holding in this case to governmental employers. However precedence tells us that decisions regarding privacy on the public stage have been considered in private sector litigation.

Savvy public sector employers may wish to take note of the human resource measures the City of Ontario instituted well before this action was brought. The Court viewed these steps in their totality when finding for the City. These measures included but were not limited to: having a written policy informing employees they should have no expectation of electronic privacy and obtaining a written acknowledgment from the employee; notification that employee's electronic communications could be monitored; if you conduct such a search, it should not be "excessively intrusive" but should be predicated on a legitimate business reason. Seeking expert advice in advance here may later mean the difference between wearing an expensive suit or defending one.

Stay tuned…