Client Alert.

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U.S. Supreme Court Upholds Employer's Inspection of Employee Text Messages

By Christine Lyon and Julie O'Neill

This morning, the United States Supreme Court issued its opinion in the closely watched matter of *City of Ontario v. Quon*.[1] This case raised the question of whether a public-sector employer violated an employee's Fourth Amendment privacy rights when it reviewed personal text messages that he sent and received on his employer-owned pager. As explained below, the Court rejected the employee's privacy claim, concluding that the employer's inspection of the text messages was conducted in a lawful manner. This decision provides valuable guidance for employers with respect to monitoring of employees' electronic communications.

BACKGROUND

The defendant employer in this case was the City of Ontario, California (the "City"). The City issued pagers to its SWAT team members, including plaintiff Jeffrey Quon. The text messaging service was provided through a third party, Arch Wireless. Under the service contract, each pager had a monthly cap on the number of characters sent or received. Arch Wireless charged the City additional fees if an employee exceeded his or her monthly allotment.

The City maintained a written policy limiting use of its computers and related equipment to City business, and warning employees that it could monitor such use. The policy did not expressly extend to pagers or text messages. However, Lieutenant Duke (who was responsible for the department's electronic equipment) informed the officers that text messages would be treated the same way as emails, and would be equally subject to auditing. At the same time, Lt. Duke indicated that he would not audit text messages for personal use as long as the officer paid any charges due for exceeding the monthly character limit. Quon exceeded his limit several times and, each time, paid for the overages.

When Lt. Duke tired of collecting overage payments each month, the police chief told him to obtain the relevant officers' text messages to determine whether the officers' overages were caused by personal use or by work use (in which case, the department would consider increasing the monthly character limit). Arch Wireless produced transcripts of those messages upon request. The transcripts revealed that many of Quon's messages were personal and some were sexually explicit. Quon filed a lawsuit, alleging that the City had violated his privacy rights under the Fourth Amendment and the California Constitution by obtaining and reviewing his personal messages without his consent. He also alleged that Arch Wireless had violated the Stored Communications Act by disclosing the content of his text messages to his employer.

LEGAL ANALYSIS

The District Court found that Quon had a reasonable expectation of privacy in his text messages under the "operational realities of the workplace" standard set by the Supreme Court in *O'Connor v. Ortega.*[2] Specifically, although the department had a written monitoring policy, Lt. Duke had chosen not to enforce it, instead making it clear to the officers

[1] *City of Ontario, California, et al. v. Quon*, 560 U.S. ___ (2010) (June 17, 2010).
[2] 480 U.S. 709 (1987).

that he would not audit the personal use they made of their pagers as long as they paid for any overages. Finding that his actions gave the officers a reasonable basis to expect privacy in the content of their text messages, the court turned to whether the review was reasonable at its inception, a question that it said turned on the police chief's intent in obtaining the transcripts. The matter was presented to a jury, which found that the City's purpose in reviewing the messages was to determine the efficacy of the existing character limits and not to determine whether officers were engaged in misconduct. The court found that this purpose justified the search, so it held that no Fourth Amendment violation had occurred and ruled in favor of the City.[3]

On appeal, the Ninth Circuit agreed with the District Court that the "operational reality" of the department created a reasonable expectation of privacy in the text messages.[4] The Ninth Circuit disagreed with the District Court, however, on the issue of whether the search was reasonable. Even if the purpose of the search was justified, the Ninth Circuit concluded that the scope of the search was unreasonable because the City had less intrusive ways to obtain the information it sought.[5]

The Supreme Court reversed the Ninth Circuit's decision. Even assuming that Quon had a reasonable expectation of privacy in his text messages, the Court concluded that the employer's inspection of his text messages satisfied the two-part test in *O'Connor*: it was conducted for a legitimate work-related purpose and it was reasonable in scope.[6] The Court expressly rejected the Ninth Circuit's position that a search must be conducted in the least intrusive manner possible, in order to be reasonable.[7] Consequently, the Court held that the City did not violate Quon's Fourth Amendment privacy rights because the search was reasonable.

In summary, even if an employee had a reasonable expectation of privacy, the employer would not violate the Fourth Amendment as long as the search was found to be reasonable in the circumstances.[8] As the Court cautioned, however, each case is decided on its own facts, and employers should avoid drawing broad generalizations from this decision.[9]

IMPLICATIONS FOR EMPLOYERS

Although the Court's Fourth Amendment analysis is only directly applicable to public-sector employers, the decision still provides useful guidance for private-sector employers. Additionally, California employers should keep in mind that similar privacy claims can be raised under the California Constitution, by either public-sector or private-sector employees.[10]

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[3] 445 F. Supp. 2d 1116 (C.D. Cal. 2006).
[4] 529 F.3d 892, 907 (9th. 2008).
[5] The Ninth Circuit stated that because the scope of the search was "excessively intrusive in light of the noninvestigatory object of the search, and because [Sgt. Quon] had a reasonable expectation of privacy in [his] messages, the search violated [his] Fourth Amendment rights." *Id.* at 909.
[6] *Quon,* 560 U.S. __, 16 (2010).
[7] *See id.* at 15. The Court also rejected the argument that the inspection of the messages could not be reasonable, if Arch Wireless had violated the Stored Communication Act in disclosing those messages. *See id.* at 15-16 ("But even if the Court of Appeals was correct to conclude that the SCA forbade Arch Wireless from turning over the transcripts, it does not follow that [the employer's] actions were unreasonable….The otherwise reasonable search by [the employer] is not rendered unreasonable by the assumption that Arch Wireless violated the SCA by turning over the transcripts.").
[8] *See, e.g., id.* at 12 ("Even if Quon had a reasonable expectation of privacy in his text messages, petitioners did not necessarily violate the Fourth Amendment by obtaining and reviewing the transcripts….The Court has held that the 'special needs' of the workplace justify [an] exception.").
[9] *See id.* at 10 ("Prudence counsels caution before the facts in this instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.").
[10] As mentioned above, Quon asserted claims under both the Fourth Amendment and the California Constitution. The Ninth Circuit analyzed these claims together under the Fourth Amendment framework, based on guidance from the California Supreme Court that the right of privacy under Article I, Section 1 of the California Constitution is no broader than the right of privacy protected by the Fourth Amendment.

First, employers should provide clear notice to employees about monitoring communications made over employer-provided equipment,[11] systems, or networks.[12] This usually takes the form of a written policy that is issued to all employees. Employers should also try to ensure that the policy is communicated consistently by managers, to avoid the types of verbal assurances that became an issue in this case.

Second, employers should conduct searches or inspections in a manner that is designed to be legally defensible, if the search or inspection is found to implicate an employee's privacy rights. This includes identifying a legitimate work-related justification for performing the search or inspection, and reasonably tailoring the search or inspection to that purpose.[13]

In conclusion, while the Supreme Court's decision appears favorable for employers, it demonstrates that employers must exercise caution in monitoring employees' electronic communications.

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[11] Employers using third-party carriers should also be aware that the Stored Communication Act may prevent the carrier from disclosing the content of the messages, as discussed in the Ninth Circuit's decision.
[12] At least two states, Connecticut and Delaware, have passed laws requiring employers to notify employees if their electronic communications are subject to monitoring.
[13] The California Supreme Court recently addressed similar workplace privacy issues in *Hernandez v. Hillsides.* Additional information about this California analysis may be found in our client alert, "California Supreme Court Clarifies Standards for Workplace Video Surveillance."