Supreme Court Issues Highly Anticipated City of Ontario v. Quon Decision

June 22, 2010 by Adam Santucci

On June 17, 2010 the United States Supreme Court issued the highly anticipated decision *City of Ontario v. Quon (pdf)*. The case was closely watched by many in the human resources and employment law spheres because it was thought that the case would shed valuable light on employees' privacy rights in the area of employer-provided electronic devices. The Court admitted that the case raised issues of "far-reaching significance," but nonetheless unanimously decided the case on previously established legal principals, and left many questions unanswered.

Quon was appealing for many reasons, not the least of which were the facts of the case. In 2001, the City of Ontario, California, Police Department issued members of the SWAT team two-way pagers in an effort to help the team mobilize and respond to emergencies quickly. The City had a contract with Arch Wireless Operating Company (Arch), also a party to the litigation, to provide wireless services for the pagers. The City's "Computer Usage, Internet, and E-Mail Policy" applied to text messages sent via the pagers, and the policy specifically put employees on notice that they should have no expectation of privacy or confidentiality.

Quon and other officers exceeded the monthly text message limit many times, but a Lieutenant informed Quon, and others, that if they paid for the excess text messages, he would not audit the text message records to determine whether the excess messages were work-related or personal. Quon and other officers took advantage of this opportunity and paid for the excess text messages. After several months, the Chief of Police determined that an audit should be conducted to determine whether the text message limit was too low, or whether the officers were using the pagers for personal reasons too often. The audit revealed that Quon was "sexting" his wife and his mistress while on duty. Presumably, Quon was disciplined for his actions.

Quon and others filed suit against the City, the Department and the Chief, alleging that the audit violated their Fourth Amendment right to be free from unreasonable searches. Quon also filed suit against Arch, alleging a violation of the Stored Communications Act, because Arch turned over the transcripts of the text messages to the Chief. The Ninth Circuit Court of Appeals reversed the District Court (pdf) and held that the City, the Department and the Chief did in fact violate Quon's Fourth Amendment rights, and held that Arch violated the Stored Communications Act by turning over the text transcripts.

The Supreme Court agreed to review the case only on the Fourth Amendment issue, and therefore, the Stored Communications Act judgment against Arch Wireless remains intact. The Court made many assumptions in its decision, and therefore failed to answer many questions presented by the case. Instead, the Court focused on one narrow issue, i.e. whether the search was "reasonable," to determine the outcome. The Court determined that the review of Quon's text messages was reasonable, and therefore, not a violation of the Fourth Amendment.

In order to be reasonable, a public sector employer's work-related search must be justified before the search, and the search must be reasonably related to the justification and cannot be excessively intrusive. The Court held that the search of Quon's records was justified because many officers exceeded the text message limit, and the Chief needed to determine whether that was because the limit was too low, or because the officers' personal usage was too high. The Court also concluded that the scope of the search was appropriately limited. Importantly, the Court noted that it would not have been reasonable for Quon to have concluded that his messages were in all circumstances immune from review. Thus, the search was justified and not excessive, and therefore, there was no Fourth Amendment violation.

While the *Quon* decision was highly anticipated for many reasons, including the interesting facts and the potentially far-reaching implications of any decision outlining employees' privacy rights in the workplace, it left many observers wanting more. The decision did leave the door open for both employees and employers to further define the landscape of employees' privacy rights in the workplace, and dropped clues as to what the Court will consider when the issue of employee privacy appears again.

In addition, the decision was important for public sector employers that provide electronic communication devices to employees. Public sector employers are permitted to "search" electronic records when the search is justified and appropriately limited in scope to the justification. In other words, although not every search is permissible, a well-justified and well-tailored search will not be found to be a violation of the Fourth Amendment.

Finally, all employers, public and private, should make certain that supervisors and managers are properly trained regarding policies related to electronic resources and devices to ensure that they are not waiving any of the employer's rights to enforce the policy. Therefore, all employers should review the Court's decision and determine what, if any, policy and procedure changes are necessary.