

12 | 16 | 2009 Posted By

## **United States Supreme Court Grants Review of Employee Privacy/Text-Messaging Case**

On December 14, 2009, the United States Supreme Court granted review in the case of Quon v. Arch Wireless Operating and The Ontario Police Department, 529 F.3d. 892 (9th Cir. 2008). In this case, the Ninth Circuit Court of Appeal held that the City of Ontario violated the Fourth Amendment and California constitutional privacy rights of the SWAT team member and the officers he texted when, as part of an overage audit, Management read transcripts of the messages the officer sent on his City-issued pager.

As a reminder, in Quon, the Ninth Circuit ruled against the City despite the City's written "Computer Usage, Internet, and E-mail Policy," which stated that use of those devices was limited to city business only and that employees were to have no expectation of privacy when using those devices. Here, the problem was that a lieutenant told employees that text messages would not be audited as long as employees paid any overage charges incurred, and the employees argued that they had relied on this statement. The Ninth Circuit held that the lieutenant's oral agreement not to audit the messages trumped the written policy, thereby creating a reasonable expectation of privacy by the employees and any other individuals who sent messages to the employees. The Ninth Circuit further held that the City's review of the text messages was not reasonable in its scope as there were less intrusive means to audit overages.

The questions presented to the United State Supreme Court for review are:

- (1) Whether a SWAT team member has a reasonable expectation of privacy in text messages transmitted on his SWAT pager, where the police department has an official no-privacy policy but a non-policymaking lieutenant announced an informal policy of allowing some personal use of the pagers.
- (2) Whether the Ninth Circuit violated the Supreme Court's prior Fourth Amendment cases and created a conflict among the appellate courts by analyzing whether the police department could have used "less intrusive methods" of reviewing text messages transmitted by a SWAT team member on his SWAT pager.
- (3) Whether individuals who send text messages to a SWAT team member's SWAT pager have a reasonable expectation that their messages will be free from review by the recipient's government employer.

Regardless of its outcome, this case serves as a reminder to employers to ensure that not only are employee handbooks updated, but that they are also being strictly followed by managers.