PUBLIC EMPLOYER VIOLATES PRIVACY RIGHTS BY MONITORING TEXT MESSAGES ON COMPANY PAGER

By Judd Lees

The 9th Circuit Court of Appeals handed down a controversial decision recently regarding a public employer's right to monitor employee use of employer-issued communication devices for personal use. It also provided a strong message to the providers of electronic communication services regarding their potential liability under the Stored Communications Act for providing the text of communications to employers without employee permission. In Quon v. Arch Wireless Operating Company, the Court determined that the city of Ontario, California, violated the constitutional rights of a police sergeant by reviewing text messages sent and received by him on a police department-issued pager and that the Arch Wireless Operating Company violated the federal Stored Communications Act by providing the city with transcripts of the employee's text messages. The case is an excellent illustration of how a broad employer policy proscribing personal use of company-issued communication devices can be completely undercut if not uniformly applied.

The city of Ontario, California, distributed two-way pagers to its police officers. The city did not have a specific policy regarding text messages other than a broad policy proscribing the personal use of city-owned computers and all associated equipment. The policy advised police officers that the use of e-mail was not confidential and could be monitored. Plaintiff signed a form acknowledging that he had reviewed and would abide by the policy.

At a meeting with his supervisor, plaintiff was advised that text messages on the pagers were treated the same as e-mail and were covered by the policy. However, the supervisor indicated that officers would be required to pay overage charges if they exceeded the plan's allotment of 25,000 characters per month for text messaging. In return, the supervisor advised

the officers, the city would not audit their text messages in order to determine how many were private and how many were work-related. In doing so, the supervisor created an opening which the Court of Appeals seized in its decision.

The supervisor later became frustrated as a result of subsequent excessive overages involving text messaging on the pagers and contacted the service provider requesting transcripts in order to determine whether the overages were caused by personal messages or work-related messages, ostensibly to determine whether the city needed to increase the character limit. The transcripts were received and reviewed and the investigation determined that many of Quon's messages were both personal and sexually explicit.

When Quon learned of the investigation, he filed a lawsuit against the service provider and the city alleging violations of the federal Stored Communications Act, the Fourth Amendment and certain privacy provisions of the California Constitution. The federal district court rejected the claims but the 9th Circuit reversed and determined that service provider Arch Wireless violated the Stored Communications Act by turning over the transcripts and that the city violated Quon's privacy rights under the Fourth Amendment by reading the contents of the messages.

The Court's reasoning was as follows. The Stored Communications Act distinguishes between two types of providers: (1) remote computing services ("RCS") which may disclose communications held in storage with the consent of the account holders (typically the employer); and (2) electronic communication services ("ECS") which cannot divulge the contents of stored communications except with the consent of the sender or intended recipient. The Court determined that Arch Wireless was the latter since it enabled Quon to send or receive electronic

communications. As a result, it violated the Act by disclosing the stored information without Quon's consent.

With regard to the city, the Court determined that Quon had a reasonable expectation of privacy in the text messages he sent because of the supervisor's announced policy that the contents of the text messaging would not be audited as long as Quon paid for any overages. The court brushed aside the city's general policy which included monitoring, since Quon had exceeded the 25,000 character limit many times without any sort of monitoring. The Court also determined that the search was unreasonable since the city could have utilized other, less-invasive ways to determine whether personal or business-related text messaging was causing the overages. The Court determined that review of the contents of all the messages was excessively "intrusive in light of the non-investigatory object of the search."

Based on this Quon decision, public employers need to revisit and perhaps tighten their policies regarding both personal use of company-issued electronic equipment as well as monitoring of that equipment. A simple proscription on personal use of company information technology may not be enough if such use is not monitored and not enforced. In addition, employers need to make sure all supervisory personnel understand and uniformly apply the policies governing use of company-provided technology. This is critical in ensuring that there are no inconsistent employer messages creating a reasonable expectation of privacy on the part of employees. Further, all employees should review their electronic communication policies to make sure that they cover all types of electronic communication and that their practices comply with relevant laws.