



Monitoring Employee Use of Email and Other Electronic Communications

By Brian M. Flock

The use of mobile electronic devices such as Blackberries and iPhones has become so commonplace that one can hardly imagine a world without 24/7 connectivity. As common as these technologies have become, however, it was only in June 2010 that the U.S. Supreme Court had its first opportunity to examine a workplace policy allowing an employer to monitor employee electronic communications. In *City of Ontario v. Quon* the Court upheld a city's search of a SWAT officer's text messages for compliance with its electronic communications policy. Although the Court was careful not to make any broad pronouncements, its decision nonetheless offers significant insight into the Court's leanings on employer monitoring of employee communications at work. It also provides guidance to employers on how to craft and enforce effective policies for monitoring employee communications that will withstand judicial scrutiny.

The *Quon* Decision

The City of Ontario Police Department issued two-way text messaging pagers to all of its SWAT officers, including Quon. The City contracted with Arch Wireless to provide service to the pagers, and paid Arch a monthly fee covering the first 25,000 characters for each pager (the City was charged a fee for additional characters).

The City had previously adopted (as many employers have) a "Computer Usage, Internet and E-mail Policy," and advised its officers that use of the pagers would be governed by that policy. The City's policy:

- Reserved the right to monitor and log all network activity without notice;
- Warned employees that they had "no expectation of privacy" in their communications;
- Advised that all communications on the City's network were City property;
- Prohibited use of the City's electronic resources for personal use; and
- Banned "inappropriate, derogatory, obscene, suggestive, defamatory or harassing" communications.

Quon routinely exceeded the 25,000 character limit on his pager, but always paid the overage fee due. He was told by a supervisor that as long as he did so, the City would not audit the content of his messages.

Because more and more officers were routinely paying overage fees, the City decided to audit pager use to ensure that its character limits were adequate. At the City's request, Arch provided copies of the text messages sent to and from the City's pagers. During the audit of those messages, it was discovered that Quon was using his pager to send lewd messages to a female officer. After reviewing Quon's messages sent during his on-duty hours, the City discharged him.

Quon brought suit against the City for invasion of privacy under the Fourth Amendment, alleging that he had a reasonable expectation of privacy in his text messages, and that the City's search of his messages was unreasonable. A trial court found no invasion to Quon's privacy. The U.S. Court of Appeals for the Ninth Circuit reversed that decision, holding that Quon had a reasonable expectation of privacy in the text messages because his supervisor had told him that his messages would not be audited

if he paid the overage fee. The Ninth Circuit also held that the City's search was not the least restrictive means by which it could accomplish its goal of determining whether its character limit was reasonable, making the search unreasonable.

The Supreme Court took a different view. It assumed without deciding that Quon had a reasonable expectation of privacy in the messages, but held that even in the face of that expectation the City's search was reasonable. The Court determined that the City did not need to engage in the least restrictive means available for auditing its character limits. Instead, consistent with prior Fourth Amendment cases, the City's search need only be narrowly tailored to accomplish its legitimate business purpose. Under this test, the Court reasoned, the City's review of Quon's messages was reasonable, because it was limited to messages from a two-month period that were sent or received while Quon was on duty. The Court therefore upheld the City's search and found no violation of Quon's privacy.

So What?

Some have suggested that *Quon* is limited by its facts to a Fourth Amendment search by a public employer. This myopic view, however, fails to understand *Quon*'s broader import. First, similar standards apply to common law invasion of privacy claims and claims brought under the Fourth Amendment. Second, and more importantly, *Quon* offers a first glimpse at areas the Court considers important in examining an electronic communications policy, and provides useful guidance about elements that should be part of every employer's policies and practices, including:

- Clear communication and broad distribution of any electronic communications policy, including ongoing reminders (like splash screens or warnings at log-on) to employees about the policy and what it covers;
- A broad definition of covered communications to include all communications using the employer's equipment or concerning the employer's business, regardless of whether those communications are transmitted on or off of the employer's network;
- Consistent enforcement of the policy and an express statement that the policy can be modified only in writing by a high-ranking employee (i.e., oral promises by a supervisor are not sufficient);
- Training for managers and supervisors to abide by the policy as written and not to deviate from the policy or make statements (or promises) inconsistent with the policy;
- Periodic review of the policy to ensure that it accounts for new and emerging technologies; and
- Limiting searches and reviews of communications to those reasonably necessary to achieve a legitimate business purpose.

Employee privacy in the digital era is an ever-emerging area of law. For better or worse, *Quon* is likely only the first in a line of decisions carving out acceptable behavior on the part of employers. Keeping abreast of changes in this area, as well as technological advances that may impact electronic communications, is important for all employers.

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