



LABOR & EMPLOYMENT DEPARTMENT

ALERT

SUPREME COURT OPINES ON EMPLOYEE PRIVACY RIGHTS IN THE WORKPLACE

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On June 17, 2010, in *City of Ontario v. Quon*, the U.S. Supreme Court held that an employer's review of an employee's text messages, sent via an employer-issued pager, did not violate the employee's Fourth Amendment privacy rights. Although the Supreme Court's decision involved a public sector employer, and was ostensibly decided on narrow and fact-specific grounds, the decision provides some insight for private sector employers into the proper creation and implementation of electronic communication policies (ECPs).

The Factual Dispute

In *Quon*, the Ontario, California Police Department (Department) issued pagers to certain police officers, including Quon. The Department provided the pagers in order to help officers more quickly respond to crises. Each pager was allotted a certain number of characters. Pursuant to its contract with the pagers' wireless service provider, the Department was required to pay overage charges when employees exceeded their character limits. The Department's ECP did not cover pagers, but the Department informed its officers at a meeting, and in a subsequently issued memorandum, that the pagers, like e-mail, were subject to auditing.

Notwithstanding, the Department had an actual practice of not reviewing the content of the officers' pager text messages so long as the officers paid a fee for any texting overages. However, after the overages

continued to occur, the Department, without informing Quon, or the other officers, reviewed a two-month period of text message transcripts for those officers who had overages. Quon was one of those officers. Prior to reviewing the transcripts, the Department redacted any messages Quon sent while off duty. The review revealed that Quon was sending many personal text messages on his pager, some of which were sexually explicit. Quon was allegedly disciplined as a result.

The Lower Courts Disagree

The California District Court, although finding that Quon had a reasonable expectation of privacy in his pager texts, held that the Department's search was reasonable, because it was conducted for a legitimate purpose, i.e., to determine the efficacy of the existing character limits to ensure officers were not paying hidden work-related costs.

The Ninth Circuit agreed that Quon had a reasonable expectation of privacy in his text messages, and that the Department's search was conducted for a legitimate purpose. However, it concluded that the Department's search was unreasonable in scope, because the Department could have used less intrusive means to verify the propriety of the character limit, such as asking Quon to redact any personal messages before reviewing the transcripts.

The Supreme Court's Decision

The U.S. Supreme Court disagreed with the Ninth Circuit, and found that the search was reasonable, and therefore, did not violate Quon's Fourth Amendment rights. The Court, relying on *O'Connor v. Ortega*, 480 U.S. 709 (1987), used a two-factor inquiry in determining whether the Department's actions were lawful: (1) whether the operational realities of the workplace provided for Fourth Amendment privacy protection; and, if so, (2) whether the investigation was reasonable under all the circumstances.

Rather than decide the first issue, the Court assumed, for purposes of its analysis, that Quon had an expectation of privacy.

As to the second factor, the Court concluded that the search of Quon's text messages was reasonable at its inception because the city conducted its audit for a legitimate work-related purpose, i.e., to determine whether its character limit policy for its employees under its wireless contract was sufficient to meet the city's needs.

Moreover, the Department's review of Quon's text message transcripts did not unreasonably exceed the scope of its search because:

- The review was limited to a two-month period;
- Quon's off-duty messages were redacted prior to the review;
- Quon had been told his text messages were subject to auditing; and
- Quon should have anticipated the city might need to audit his pager messages to assess police officer response to emergencies.

In dicta, the Court explained that the Department's search would also be "regarded as reasonable and normal in the private-employer context," which is not altogether surprising given that private employers are not bound by Fourth Amendment constraints.

The Implications

While *Quon* was decided on Fourth Amendment grounds, generally inapplicable to private sector employers, it has valuable lessons for all employers, in that the Supreme Court emphasized:

- The importance of an employer's clearly communicated, written ECP, in terms of shaping employees' privacy expectations;
- The necessity of having a legitimate purpose for reviewing employees' electronic communications; and
- The need to appropriately tailor the employer's search in consideration of the employer's objective(s) in reviewing employees' electronic communications.

Generally, each of these criteria has been considered important by courts in addressing employers' conduct in the private sector. And, while employees in the private sector may not have Fourth Amendment protection, depending upon the state, they may have state Constitution, statutory and common law privacy protection.

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