



## Legal Alert: Supreme Court Upholds City's Review of Employees' Text Messages

6/22/2010

In a unanimous decision, the U.S. Supreme Court has held that the City of Ontario did not violate its employees' Fourth Amendment right to be free from unreasonable searches by reviewing the employees' text messages sent on pagers provided by the City. See *City of Ontario v. Jeff Quon* (June 17, 2010). The Court did not rule on whether the employees had a privacy interest in the text messages, but instead assumed that they did and ruled on the issue of whether the City's search violated the Fourth Amendment. Although the decision involves a government employer, which is subject to the Fourth Amendment's restrictions, private employers may also find the decision instructive because the Court noted that the City's search also would have been reasonable in the private workplace. Thus, employers considering searching their employees' electronic communications should be aware of the factors the Court considered in finding the City's search reasonable.

### **Background**

In this case, the City issued Quon and other members of its SWAT team pagers that were capable of sending text messages. Each pager was limited to a certain number of characters per month and the City was charged an overage fee for usage in excess of the character limit. The City had a Computer Usage, Internet and E-Mail policy, which, among other things, specified that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." Quon acknowledged that he had read and understood the policy. Although the Computer Usage policy did not specifically mention the text messages sent on pagers, Quon and other employees were informed that the text messages would be treated like e-mails, meaning that they would fall under the City's policy as public information and would be eligible for auditing.

Quon exceeded his character limits for several months. At first the City permitted him to simply pay for the overage, but eventually it decided to review the text messages to determine if the character limit was set too low or if employees were using the pagers for personal reasons during work time. Upon review, the City discovered that many of Quon's text messages were not work related and some were sexually explicit. The situation was investigated by internal affairs, which reviewed only the messages Quon sent during work hours. The internal affairs report determined that Quon sent

or received 456 messages during August 2002, of which only 57 were work related. Quon was disciplined and subsequently sued the City and the police department, claiming the review of his text messages violated the Fourth Amendment.

The Supreme Court granted certiorari and overturned the Ninth Circuit's determination that the City violated the Fourth Amendment by reviewing Quon's text messages.

### ***Court did not Determine Employees' Expectation of Privacy***

The Court did not determine whether the employees had a reasonable expectation of privacy in the text messages, noting that it must "proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer." Recognizing that a broad holding addressing employees' expectations of privacy in employer-provided technological equipment might have implications for future cases that it could not predict, the Court stated that it preferred to dispose of the case on narrower grounds.

### ***Presumptions***

Accordingly, the Court made several presumptions before reaching a decision: (1) Quon had a reasonable expectation of privacy in text messages sent on the pagers provided to him by the City; (2) the City's review of the text messages constituted a search within the meaning of the Fourth Amendment; (3) the principles applicable to a government employer's search of an employee's physical office apply with at least the same force when the employer intrudes on the employee's privacy in the electronic sphere.

### ***City's Search was Reasonable***

The Court held that even if Quon had a reasonable expectation of privacy in the text messages, the City did not violate the Fourth Amendment by reviewing transcripts of the text messages. Applying the standard set forth by earlier Supreme Court cases, the Court held when a search is conducted for a noninvestigatory work-related purpose or to investigate work-related misconduct, a government employer's warrantless search is reasonable if it is "justified at its inception" and if the measures adopted are "reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search." The Court held that the City's review of the text messages satisfied this standard.

The Court held that the search was justified at its inception because there were "reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose." The search was ordered to determine whether the character limit on the City's pager contract was sufficient to meet the City's needs. The Court held that the City had a legitimate interest in determining that its employees were not being forced to pay out of their own pockets for work-related expenses and that the City was not paying for extensive personal communications. Further, the Court held that reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use.

The Court also held that the review was not excessively intrusive – the City

only reviewed two months out of several in which Quon exceeded his monthly allotment in order to obtain a large enough sample to decide whether the character limits were efficacious.

Further, assuming that Quon had a reasonable expectation of privacy in the contents of his messages, the extent of such an expectation is relevant to assessing whether the search was too extensive. The Court held that it was not reasonable for Quon to conclude that his messages were in all circumstances immune from scrutiny. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises – and given that Quon had received no assurances of privacy – Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.

For these same reasons – that the employer had a legitimate reason for the search and that the search was not excessively intrusive in light of that justification – the Court also concluded that the search would be "regarded as reasonable and normal in the private-employer context."

**Employers' Bottom Line:**

The Court's decision emphasizes the importance of having clear and well-communicated electronic usage policies, which may reduce any expectation of privacy an employee may have in communications on employer-provided electronic equipment. Additionally, under the Court's decision in *Quon*, an employer's search of an employee's electronic communications should be deemed reasonable where the employer can justify the search based on work-related needs and where the search is not excessively intrusive.

If you have any questions regarding the Court's decision or other labor or employment related issues, please contact the Ford & Harrison attorney with whom you usually work.