Employment, Labor and Benefits Alert: Supreme Court Rules that Private Text Messages Are not Always Private

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By Martha J. Zackin

On June 17, 2010, the United States Supreme Court issued its decision in *City of Ontario. v. Quon*, finding that an employer—the police department of the City of Ontario, California—did not violate a police sergeant's constitutional right to be free from unreasonable search when it reviewed the sexually explicit, non-work related text messages he sent to co-workers, his wife, and a girlfriend on a department-issued pager. Although the case pertains specifically to government employers, it sends an important message to all employers, including those in the private sector, underscoring the importance of a written policy which puts employees on notice that their use of computers, pagers, and other employer-provided electronics is subject to monitoring, including a review of all messages sent or received by the employee.

The important facts of *Quon* are summarized as follows:

The city of Ontario issued text messaging pagers to members of its SWAT team. Despite a clearly worded "Computer Usage, Internet and E-mail Policy" (the "Policy") that prohibited the use of city-issued equipment for personal use, and despite the fact that Jeff Quon and his fellow SWAT-team officers signed statements acknowledging that users "should have no expectation of privacy or confidentiality when using these [city-owned] resources," Quon and his co-workers used their pagers to send and receive both personal and work-related text messages.

The city's contract with its communications provider, Arch Wireless (now USA Mobility Wireless) allowed for 25,000 characters per month, per device, before overage charges were incurred. After some officers consistently exceeded the 25,000 character limit, the city obtained transcripts of the messages sent and received by the two officers with the highest usage, one of whom was Quon. Reviewing the transcripts of Quon's messages, the city found that in a single month, Quon sent and received 456 personal and three work-related messages while on duty. Many of the personal messages, which included messages to his wife, his girlfriend, and a fellow officer, were sexually explicit.

Claiming that they were unaware that the city's Policy applied to their department and they had been told that their text messages would not be subject to review if they paid any charges incurred by excessive usage, Quon and several of his fellow officers sued USA Mobility, asserting that the city had invaded their privacy by reviewing their personal text messages. The United States Court of Appeals for the 9th Circuit ruled in favor of Quon, finding that the review of the contents of the messages without Quon's consent was "excessively intrusive" and, therefore, constituted an invasion of privacy.

The Supreme Court reversed, on narrow grounds. Specifically, the Court declined to decide whether and to what extent government workers like Sergeant Quon have any reasonable expectation of privacy in communications such as those at issue here. Rather, the Court assumed that Sergeant Quon had an expectation of privacy in the messages, but went on to determine whether the government employer's review of the messages was a reasonable search and seizure under the Fourth Amendment to the Constitution. Applying the principles applicable to a government employer's search of an employee's physical office to the search of electronic messages, the Supreme Court found that the review of the officers' messages was a reasonable search under the Constitution.

The Court attempted to limit the impact of its decision to Sergeant Quon and his co-workers, cautioning against using the facts of the case to establish "far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices." Nevertheless, the Court hinted at how it might decide similar cases in the private sector, through reference to evolving workplace norms, trends in employees' use of electronic media and, most importantly, clearly communicated employer policies.

Action Items for Employers

In light of the *Quon* decision, all employers—whether public or private—should review their electronic information policies to make certain that these policies clearly and unequivocally state that the employer has the right to access and review any and all information sent, received, or maintained on any employer-owned computers, smart phones, Blackberrys, pagers, or similar devices. As the Supreme Court noted, the ubiquity of these devices has made them generally affordable; employees who need them for personal matters can buy their own. This may imply that, to the extent messages are sent or received solely through personal devices, an employee may thereby keep his or her private communications private and free from review by their employer, at least where the communication is not going through employer-owned devices or equipment such as e-mail servers. Subject to further court rulings, the employer will likely retain the right to review such messages when they do go through its server or other equipment, and the employer's policy should make this clear.

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