

TEXT MESSAGES SUBJECT TO EMPLOYER REVIEW

By Kevin R. Martin

Are employee's text messages made during work considered private communications? It doesn't look like it. In its June 17, 2010 decision in *City of Ontario, California, et. al. v. Quon et al.*, 560 ___ (2010)(slip opinion) the United States Supreme Court has now explicitly acknowledged an employer's right to obtain and review transcripts of an employee's text messages sent during work hours as reasonable, as long as the employer can articulate non-investigatory, work-related purpose for the review or investigation for work-related misconduct and that the search is not excessively intrusive in light of that justification. This applies, the Supreme Court concludes, in both the government private employer context.

Quon involved a City of Ontario (the City) police sergeant (Jeff Quon) who was issued a pager by the City to its police department (OPD). Under the City's contract with the wireless server provider, each pager was allotted a limited number of characters sent or received each month. Excess usage by OPD members in any given month would result in an additional fee to the police department. At the time he received the pager, Quon was informed that OPD would treat text messages like email messages which were subject to audit.

Within the first or second billing cycle after the pagers were distributed, Quon exceeded his monthly text message character allotment. In reviewing Quon's usage amounts, the officer responsible for the City's contract with the wireless provider suggested that Quon reimburse the department for the overage fee rather than have his text messages audited, and thereafter Quon started reimbursing OPD for excess usage.

Over the next few months, Quon exceeded his character limit three or four times and at some point OPD decided to see whether the overage was a result of the character limit being too low or if the overages were for personal messages. Shortly thereafter, the department requested copies of the text message transcripts from its wireless provider. In reviewing Quon's transcripts, the department representative discovered that many of the messages sent and received on Quon's pager were not work related, and that some were sexually explicit. The issue was referred to OPD's internal affairs division which conducted a thorough review of the text messages. Following this review, OPD concluded that of the 456 messages sent or received by Quon during work hours in the month of August 2002, no more than 57 were work related. Quon had also sent as many as 80 messages during a single day at work and on an average workday, he would send or receive 28 messages, of which only 3 were related to police business. The internal affairs investigation concluded that Quon had violated OPD rules against pursuing personal business while on duty and Quon was allegedly disciplined.

Quon ultimately filed suit against OPD, the City, and others claiming that his Fourth Amendment right against unlawful search and seizure had been violated when OPD obtained and reviewed the text messages. The case was initially filed in United States District Court, Central District of California. Relying on the plurality opinion in

O'Connor v. Ortega, 480 U. S. 709, 711 (1987), the District Court determined that Quon had a reasonable expectation of privacy in the content of his text messages. Whether the audit of the text messages was nonetheless reasonable, the District Court concluded, turned on OPD's intent: "[I]f the purpose for the audit was to determine if Quon was using his pager to 'play games' and 'waste time,' then the audit was not constitutionally reasonable"; but if the audit's purpose "was to determine the efficacy of the existing character limits to ensure that officers were not paying hidden work-related costs, ... no constitutional violation occurred." 445 F. Supp. 2d, at 1146. Following trial on the issue, a jury concluded that OPD ordered the audit to determine the efficacy of the character limits and consequently the Court ultimately concluded that the text audit did not violate Quon's Fourth Amendment.

Quon appealed and the United States Court of Appeals for the Ninth Circuit reversed in part. 529 F. 3d 892 (2008). While the Ninth Circuit agreed with the District Court that Jeff Quon had a reasonable expectation of privacy in his text messages, it did not find that the search was reasonable. Even though the search was conducted for "a legitimate work-related rationale," the Court of Appeals concluded, it "was not reasonable in scope." *Id.*, at 908, and that there could have been less-intrusive means to verify the efficacy of the 25,000 character limit.

The Supreme Court granted certiorari. Relying upon the standard set out in *O'Connor*, when conducted for a "noninvestigatory, work-related purpos[e]" or for the "investigatio[n] of 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. 480 U. S., at 725-726. The search here satisfied the standard of the *O'Connor* plurality and was reasonable under that approach. The Supreme Court found that the warrantless review of Quon's pager transcript was reasonable under the circumstances because it was motivated by a legitimate work-related purpose, and because it was not excessive in scope. See 480 U. S., at 726. There were "reasonable grounds for [finding it] necessary for a noninvestigatory work-related purpose," *ibid.*, in that OPD (through actions of its chief of police) had ordered the audit to determine whether the contractual character limit in the pager contract was sufficient to meet the department needs. According to the Court, reviewing the transcripts was an efficient and expedient way to determine whether either of these factors caused Quon's overages. The Court also found that the review was not "excessively intrusive" because OPD had limited its review to just two months in order to obtain a large enough sample to decide the character limits' efficaciousness, and all the messages that Quon sent while off duty were redacted.

Critically, the Court went on to conclude that a search of this type would be regarded as reasonable and normal in the private-employer context as well. *Id.* at 732. The principle articulated in *Quon*, it seems, sets the standard for both government and private employer monitoring cases. Interestingly, however, the Court also emphasized in the opinion how the ever-changing dynamics of communication and information transmission weighs against drawing "far-reaching" premises from *Quon* regarding privacy expectations

enjoyed by employees when using employer-provided communication devices. Cautioning such an approach, the Court warns that “[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior” and that “many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency.” How this squares with the ever increasing texting phenomenon remains to be seen.