Employer Access to Employee Text and Social Media Communications

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Employer access to employee text message and social networking communications is both a new and controversial issue challenging today's Courts. What most don't realize is that the in *City of Ontario v. Quon* the United States Supreme Court seemingly paved the way for employers (at least public employers) to gain access to private text messages. *City of Ontario v. Quon*, 130 S. Ct. 2619 (U.S. 2010).

In that case, a police officer who used a city provided "alphanumeric pager" (cell phone) brought suit against the city on constitutional grounds, *inter alia*, when the city acquired transcripts of the officer's personal text communications. There, the city became curious about the utility of its cell phone service plan when a number of its officers exceeded their allotted use time and character limits. To investigate the city conducted an audit which revealed that Officer Quon had engaged in explicit and sexual personal texts. In a shocking display of testicular fortitude Quon then filed suit against the city for violations of his Fourth Amendment rights and the Stored Communications Act.

Interestingly, this series of events is eerily similar to the circumstances encountered by many of today's parents when little Jonny or Jessica exceeds his or her allotted cell phone minutes on their parents' plan. After getting caught with inappropriate messages on their phone the teen then cries foul when Mom and Dad search through a cell phone to investigate further. As it turns out, the rights of a parent to search through the cell phone do not deviate significantly from that of an employer.

The standard articulated by the Court essentially stated that an employer search with a legitimate work related purpose will be constitutional so long as the search is not excessive in nature. *See City of Ontario v. Quon*, 130 S. Ct. 2619 (U.S. 2010). It is not difficult to fathom the instances where an employee's cell phone messages might be searchable under this standard. What exactly constitutes a legitimate work related purpose has not been clearly defined by the court.

Setting aside the implications to criminal law (the area where 4th amendment "reasonable expectation to privacy" jurisprudence has been most significant) the holding has a tremendous impact for employers. The Court in this case treaded carefully and was mindful of the potentially far reaching implications of its holding; they took pains to limit the scope of the holding. Still employees, and public employees in particular, should be put on notice that their emails, text messages, and social media communications are open season for employer searches. *See* 2 EMPL. RTS. & EMPLOY. POL'Y J. 49, 55 (2008) ("Many employees remain under the illusion that the content of their workplace emails and internet use are private.).

Social media communications (i.e. Facebook, Twitter, Myspace) stand apart from text messages and emails, in that where text messages and emails are generally sent from one recipient to another without any expectation that the message will be read by a third party, social media communications are posted on the internet and are available to a large group of people. At its least, Facebook status updates are viewable only to "friends" of the individual posting, ranging anywhere from a few to a few hundred people. Without imposing privacy restrictions, these status updates are potentially open for anyone with internet access to view.

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The federal courts have always viewed information, effects, papers, or contraband to be beyond the scope of 4th amendment protections when the individual claiming the protections has made those items publicly available. *Katz v United States*, 389 US 347 (1967). ("What a person knowingly exposes to the public, even in his own home or office, is not a subject of Fourth Amendment protection".) Given that Myspace and Facebook entries are at times available to the public at large the issue compounded by user policies which acknowledge that information shared is not private. Consequently, the courts are increasingly trending away from giving social media communications any 4th amendment protection whatsoever. *E.g. Romano v Steelcase Inc.,* 2010 NY Slip Op 20388 (N.Y. Sup. Ct. Sept. 21, 2010) quoting Facebook user agreement "You post User Content…on the Site at your own Risk. Although we allow you to set privacy options that limit access to your pages, please be aware that no security measures are perfect or impenetrable.")

In New York the courts have generally adhered to the trend. In *Romano v Steelcase Inc* a New York Court ruled that where portions of a Plaintiff's publicly available Facebook page revealed information which contradicted her legal claims, the remainder of the information on the Facebook page would be discoverable. *Romano v Steelcase Inc*., 2010 NY Slip Op 20388 (N.Y. Sup. Ct. Sept. 21, 2010). On the other hand, the Second Circuit Court has held that a state employee who was found to have used his office computer to conduct private business had a reasonable expectation of privacy regarding the content of the computer**,** even though the search (by New York State Department of Transportation Investigators) was conducted without a warrant**.** In reaching its conclusion, the Second Circuit cited (1) the fact that the employee did not share the office or his computer with co-workers and, (2) the absence of a practice, procedure, our routine of accessing or monitoring of workplace computers. *Leventhal v. Knapek*, 266 F.3d 64 (2d Cir. N.Y. 2001); *See also* 12 Empl. Rts. & Employ. Pol'y J. 49, 71 (2008).

With legislatures unable to keep pace with ever changing technologies, the Supreme Court providing only limited guidance, and other courts struggling to develop a resolute set of standards there is only one clear-cut solution to address the question of accessibility of employee social media and text communications: The employment agreement. Employment agreements, in both the private and public sector can be crafted in way which strikes a mutually acceptable balance to the competing interests of employee privacy and employer access. More likely these agreements can be drafted to protect the employer's interest to give them unfettered access. Judge Posner has stated that an employer could attach whatever conditions to employee computer use that the emloyer desires. *See Muick v. Glenayre Elecs*, 280 F.3d 741, 743 (7th Cir. Ill. 2002); 12 EMPL. RTS. & EMPLOY. POL'Y J. 49, 55 (2008). Posner goes on, "the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible". *Id.* For the employee, the safest recourse is to not type, text, or tweet anything on the internet about their job that they would not say to their boss.