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Supreme Court Rules that a Government Employer's Search of an Employee's Text Messages did not Violate his Fourth Amendment Privacy Rights

The United States Supreme Court recently issued an important ruling regarding the right of a government employer to search text messages produced by an employee using an employer-provided electronic communication device. The Court's ruling provides guidance to school boards in drafting acceptable use policies and conducting searches of content created by employees on board-provided electronic communication devices.

In *City of Ontario, California v. Quon*, the City of Ontario, California ("City") acquired pagers able to send and receive text messages. The City's contract with its service provider limited the number of characters each pager could send or receive per month. Before acquiring the pagers, the City announced a "Computer Usage, Internet and Email Policy" ("Policy") that applied to all employees. Among other provisions, the Policy specified the City "reserves the right to monitor and log all network activity including email and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." A later memo issued by the City clarified that the Policy applied to text messaging. Officer Quon signed an acknowledgement form that he had read and understood the Policy.

The City issued pagers to officer Quon and other officers of its police department. Officers who exceeded the character limits were required to reimburse the City for the overages. When Quon and other officers began to regularly exceeded their monthly character limits, their police chief sought to determine whether the character limits were too low or if the overages were for personal messaging.

The service provider produced transcripts of Quon's and another employee's text messages for a two month period. Upon review of the transcripts, the police chief discovered that many of Quon's text messages were not work related, and some were sexually explicit. Quon was disciplined for violating police department rules.

Quon filed suit against the City alleging its police department violated his Fourth Amendment privacy rights and the federal Stored Communications Act ("SCA") by obtaining and reviewing the transcript of his pager messages. Quon also claimed the service provider violated the SCA by providing the City with his transcripts.

A jury decided the police chief requested the pager transcripts for the legitimate reason of determining the efficacy of existing character limits to ensure that police officers were not paying for hidden work-related costs. Thereafter, the trial court granted the City summary judgment on the ground that the City did not violate Quon's Fourth Amendment privacy rights. However, the Ninth Circuit Court of Appeals reversed. The court of appeals held that Quon had a legitimate expectation of privacy in his text messages, and that the City's search was unreasonable even though it was conducted on a legitimate, work-related rationale. The appellate court cited to a host of less-intrusive means by which the police chief could have performed the

audit. The appellate court also held that the service provider violated the SCA by giving the City the transcripts.

The United States Supreme Court reversed the Ninth Circuit, holding that the City's search of Quon's text messages was reasonable and that the City did not violate Quon's Fourth Amendment right to be free from unreasonable searches and seizures. For argument sake, the Court made the following assumptions: (1) Quon had a reasonable expectation of privacy in the text messages he sent on the City's pager; (2) the City's review of the pager transcripts constituted a search within the meaning of the Fourth Amendment; and (3) the principals that apply to a government employer's search of an employee's physical space apply with at least the same force when the employer conducts a search into the electronic sphere.

The Court opined that when conducted for a "noninvestigatory work-related purpose" or for the "investigation 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." Applying this logic, the Court found that the police chief's audit was for a noninvestigatory work-related purpose (i.e. to determine whether the City's contractual character limit was sufficient to meet the City's needs). The Court also found the City's audit was "reasonably related to the objectives of the search" since the City had a legitimate interest in ensuring its employees were not being forced to pay out of their own pockets for work-related expenses, or that the City was not paying for extensive personal communications.

Likewise, the Court did not find that the City's audit was excessively intrusive. The City's Policy placed Quon on notice that his messaging was subject to audit. Also, as a law enforcement officer, the Court felt Quon should have known his actions may come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. The Court reasoned these factors lessened the risk the audit would intrude upon the highly private details of Quon's personal life. The court concluded that "even assuming there were ways that [the City] could have performed the search that would have been less intrusive, it does not follow that the search as conducted was unreasonable."

Lessons Learned:

The Court purposely chose not to decide whether Quon had a reasonable expectation of privacy in using his employer-provided electronic communication device. In avoiding this decision, the Court reasoned that information sharing and electronic communication technology is rapidly evolving (as is societal and workplace norms in this regard). Given this evolution, the Court was not ready to issue a "bright-line" ruling on employee's privacy rights while using employer-provided electronic communication devices. Therefore, it cannot be presumed that a school board employee has no reasonable expectation of privacy in using a board-provided electronic communications device. This is true even when, as in this case, the employee has signed an acceptable use policy that explicitly acknowledges he has no reasonable expectation of privacy when using an employer-provided electronic communication device.

Nonetheless, the Court relied upon the properly-executed acceptable use policy as a factor in deciding the City's search was not excessively intrusive in light of the circumstances giving rise to the search. Therefore, a school board should strongly consider having all employees who use employer-provided electronic communication and information sharing devices sign a carefully crafted acceptable use policy each year that addresses confidentiality and privacy rights. This would evidence a continuing understanding between the board and its employees on the issue, and would allow the board to update the policy to account for any changes in technology or the law that may occur.

Applying the Court's analysis to a school setting, a "non-investigatory work-related purpose" for a school board to search its employee's electronic communications, particularly while working, could include compliance with a public records request, an investigation into whether confidential student information has been protected, for purposes of completing performance evaluations, in defense of litigation concerning the lawfulness of the school district's actions, etc. Likewise, such content may be the proper subject of an

investigation into work-related misconduct, including allegations of inappropriate contact or communications with students.

Ultimately the facts of each circumstance will dictate the permissible scope of a government employer's search into an employee's electronic communications and on-line activities. Therefore, school boards should consult with their legal counsel prior to commencing a search into the electronic communications of its employees.

Family and Civic Engagement Teams

House Bill 1 requires all school districts to appoint a Family and Civic Engagement (FCE) team. The intent of the plan is for schools, families and communities to work together to fulfill family and civic engagement requirements for Ohio's schools and to ensure that all children have the supports needed to graduate from high school and be prepared for additional educational experiences, the workforce and healthy lifestyles.

By June 30, 2010, school districts must appoint their FCE team and submit a 5-year family and civic engagement plan to their local Family and Children First Council (FCFC). The FCE team is to work with the FCFC to write a job description for the position of FCE coordinator. Thereafter, the FCE team is to provide annual progress reports to the FCFC.

Ohio Revised Code 3313.821 allows the board to determine the membership of its FCE team, but requires the team to include parents, community representatives, health and human services representatives, business representatives, and any other representatives identified by the board. As an alternative to appointing both a business advisory council and FCE team, Ohio Revised Code 3313.822 allows the board of education for a city and exempted village school district to appoint one committee to function as both. However, this singular committee must perform all functions of both the business advisory council and the FCE team as required by statute.

A sample board resolution to appoint an FCE team can be found on the Ohio Department of Education's website.

Summer Jobs and Restrictions on Nepotism

The Ohio Ethics Commission recently issued a reminder bulletin about nepotism and the employment of family members of public officials in summer jobs. The bulletin reminds public officials and employees that Ohio's Ethics Law prohibits all public officials and employees from (1) hiring their family members for public jobs; (2) using their public positions to obtain public jobs (or other contracts) for family members; and (3) using their public positions to get promotions, selective raises, or other job-related benefits for family members.

Who is a "public official"?

A public official is any person, paid or unpaid, who is elected or appointed to a full-time or part-time public position or who is employed by a public agency in a full-time or part-time job. This definition includes school board members.

Who is a "family member"?

Family members include, but are not limited to, the public official's spouse, children, grandchildren, parents, grandparents, siblings, step-children and step-parents. These listed individuals need not be the official's

dependants in order to qualify as a "family member". Uncles, aunts, cousins, nieces, nephews and in-laws who live in the same household as the public official are also considered to be "family members".

Can a public official's family member work for the same agency as the official?

Yes, as long as the public official has not hired, recommended for hire, or otherwise been involved in any way in the hire of the family member and the family member is not the official's minor child. Public officials also are not allowed to be involved in the interviewing of other applicants for the same position for which his or her family member is applying.

A public official's minor child (or step-child) can work for the same agency only if the official can show that: (1) the agency's hiring process will be fair and open and will not favor the child; (2) the agency will provide a broad opportunity to qualified and interested applicants to submit applications; (3) all qualified and interested applicants who are not related to the official have already been hired; and (4) vacancies still exist. The official must also show that the public had full knowledge of the family relationship and the official did not participate in the agency's deliberation or decision involving the employment of the minor child.

Penalties

Hiring a family member in violation of the aforementioned laws can result in a felony criminal offense. A public official who uses his/her position to gain employment or promotions for a family member can be charged with a misdemeanor criminal offense. Furthermore, the family member who was hired in violation of these Ethics Laws may find his/her employment contract void and unenforceable, and that family member can be removed from employment at any time.

Immigration Issues that Educational Institutions Must Address

Dinsmore & Shohl has a staff of immigration lawyers that work with and are part of our Education Law Practice Group. When our university, college, school district, and other education industry clients hear this, they sometimes initially state that they do not need to know about that topic since they do not have any immigrants on their staff. Actually, all U.S. employers, whether the employer is the restaurant on the corner or a school district, must comply with the Immigration and Reform and Control Act ("IRCA") of 1986. IRCA requires all U.S. employers to complete an I-9 (Employment Eligibility Verification) form within the first three days of employment in order to verify the identity and work authorization of all workers, including U.S. citizens, that the employer has hired after November 6, 1986.

The law enables U.S. Immigration and Customs Enforcement ("ICE") to levy penalties in the thousands of dollars for each worker that it determines that the employer knowingly hired without authorization. The definition of "knowingly" is broad and expanding. It can include "constructive knowledge." ICE often alleges that constructive knowledge may be inferred when the employer fails to properly complete the I-9 form or spots warning signs on the form that indicate the worker may be presenting false documents. It also may exist when the employer receives a "no match" letter from the U.S. Social Security Administration ("SSA") and fails to investigate further. A "no match" letter, which may be issued by either SSA or, in some cases, the U.S. Department of Homeland Security ("DHS"), provides the employer with information that the government records relating to the employee's name and Social Security Number do not match (in the case of SSA) or name and work authorization do no match (in the case of DHS). Further, some employers, such as those who hold certain types of federal contracts, may need to complete the I-9 process in concert with using an E-Verify system that provides employers with an additional tool to identify new hires who may be presenting false documents during the I-9 process. Even where the employer has not knowingly employed any undocumented workers, the U.S. government can fine the employer between $110 and $1,100 **per worker** for "paperwork violations" which can include failing to complete an I-9 form or completing the form in a defective fashion. Such penalties can add up swiftly in large organizations.

For many years, the U.S. government did not aggressively enforce IRCA and the related I-9 process. September 11th changed the dynamic in dramatic fashion. ICE and kindred U.S. government agencies are actively auditing U.S. employers and, where they discover undocumented workers, they are often raiding the employers. The ICE website adds information about new raids almost every week. One notable development over the past year is that ICE is increasingly arresting managers at U.S. organizations in connection with these raids and charging them with crimes relating to knowingly hiring unauthorized workers and/or harboring them. ICE is even applying asset forfeiture provisions to both the organizations and the managers in some cases. ICE obviously views this approach as a way to deter organizations that do not take IRCA seriously and which turn a blind eye to the presence of undocumented workers. In many cases, the undocumented workers use the stolen identities of U.S. citizens to secure fraudulent documents and present them to the employer during the I-9 intake process.

Educational institutions are not without tools to ensure that they do not become the subject of tomorrow's press release. Instituting sound I-9 verification procedures as part of one's hiring process and conducting annual self-audits can help ensure that your organization is compliant. Dinsmore & Shohl offers one or two-hour I-9 training (led by a former attorney with the U.S. Department of Justice) and materials for an organization's staff that deals with the hire process. We also offer additional support such as guidance on how to conduct your own self-audit, and, as needed, technical support when I-9 questions arise during or after hire, such as when you receive a "no match letter" or tip that a worker on your staff may be undocumented.

Educational institutions also may tap into our firm's immigration experience when they wish to hire a foreign national workers. Our team has decades of experience in handling a wide variety of employer-sponsored work visa (and permanent residence) cases, including but not limited to H-1B and O-1 visa cases.

Finally, school districts increasingly encounter children who wish to enroll in the schools of the district whose unlawful immigration status and/or that of their parents is in question. In addition to counseling districts on the legal or constitutional issues involved in educating these children, our immigration practice group can provide guidance and support on what action the district must take to investigate the immigration compliance issues that oftentimes arise in these scenarios. We also can help you to sponsor foreign students and exchange visitors who wish to attend your institutions.

Hence, immigration issues are more pervasive than one may think in the world of education. If you have a need for support in this area, please feel free to contact your attorney at Dinsmore & Shohl's Education Law Practice Group and he or she will put you in touch with one of our immigration lawyers.

Upcoming Statutory Deadlines in Ohio

June 30th

Last day of 2009-2010 school year. R.C. 3313.62.

July 1st

First day of 2010-2011 school year. R.C. 3313.62.

Last day to provide written notice of annual salaries to teaching and non-teaching school employees. R.C. 3319.082, 3319.12.

Deadline for treasurer to certify available funds to county auditor. R.C. 5705.36

July 10th

Last day a teacher may terminate his/her employment contract without consent of the Board. R.C. 3319.15.