

U.S. Supreme Court Unanimously Overturns Ninth Circuit, Finding Employer's Review of Personal Text Messages Reasonable

June 17, 2010

Today, in a decision authored by Justice Anthony Kennedy, the U.S. Supreme Court unanimously overturned a decision by the U.S. Court of Appeals for the Ninth Circuit in a case involving an employee's assertion that a government employer had violated the Fourth Amendment by unreasonably obtaining and reviewing personal text messages sent and received on employer-issued pagers. Justices Stevens and Scalia issued concurring opinions in *City of Ontario v. Quon*, No. 08-1332.

Jeff Quon, an officer in the City of Ontario Police Department, was issued a pager for work and allotted a monthly character limit. Written department policies warned that employees had no expectation of privacy in electronic communications, and the department made clear that text messages could be audited. After several months of overages by Quon and others, which were paid for by the employees pursuant to an informal practice instituted by a supervisor, the department decided to evaluate its wireless contract to determine whether the character limits for text messaging were too low. It requested and received transcripts of Quon's text messages from its wireless provider, Arch Wireless, and conducted an audit to determine whether the additional text messages were work-related and justified a change to its contract. Upon review, the department discovered Quon had misused the pager by sending personal text messages on duty, many of which were sexually explicit in nature, and referred the matter to the internal affairs department.

The District Court, although agreeing with Quon that he had a reasonable expectation of privacy in the content of his messages, granted summary judgment to the city and Arch Wireless upon a jury's finding that the city had a legitimate purpose for its search, which was therefore reasonable under the Fourth Amendment. The U.S. Court of Appeals for the Ninth Circuit disagreed, and held on appeal that Quon's expectation of privacy in his text messages was reasonable due to the city's informal policy of allowing employees to pay for overages, and that the city's search was not reasonable, despite being conducted for legitimate, work-related purposes, because the city did not use the least intrusive means to conduct the search. In support of its decision, the Ninth Circuit pointed to a number of less intrusive means the city should have utilized to conduct its audit. For its role in providing the city with a copy of Quon's text messages transcript, Arch Wireless was found to have violated the federal Stored Communications Act ("SCA").

The Supreme Court rejected the reasoning of the Ninth Circuit, concluding that since the city's search of Quon's text messages was reasonable, the city did not violate Quon's Fourth Amendment rights. In reaching this conclusion, the Supreme Court presumed that Quon had a reasonable expectation of privacy, choosing to resolve the case on narrow grounds and declining to make a sweeping pronouncement on the proper standard for determining the existence and extent of expectations of privacy under the Fourth Amendment where employees use employer-issued communication devices. The Court did note, however, that the department had "made it clear that pager messages were not considered private" through its written policies and practices.

The Supreme Court found that the city's warrantless review of Quon's text message transcripts was reasonable under the plurality decision in *O'Connor v. Ortega*, 480 U.S. 709 (1987), a case in which the Court had disagreed on the proper analysis for resolving Fourth Amendment claims against a state hospital alleging that the government employer had violated an employee's rights by searching his desk and seizing personal items. Based on the plurality's approach, the *Quon* Court found that the city was motivated by a non-investigatory, legitimate work-related purpose since the city sought to determine whether it was providing sufficient character limits to its employees under its wireless contract. Second, the Court concluded that the search was reasonably related to the objective of the search and not excessive. The audit was limited to only a certain number of months and the search was conducted efficiently and expeditiously. In reaching this conclusion, the Supreme Court rejected the Ninth Circuit's "least intrusive" means approach, finding it to conflict with controlling Supreme Court authority. For the same reasons, the Court found that the audit would also satisfy Justice Antonin Scalia's concurring approach in *O'Connor* since it would be "regarded as reasonable and normal in the private-employer context."

The decision is a victory for employers and provides helpful guidance for management of electronic communication systems and workplace searches. The decision confirms that employers can and should institute policies and procedures designed to inform employees that they should not and do not have a expectation of privacy in electronic communications on employer-provided equipment and networks. It noted, however, that the rapidly changing way in which employees communicate for work and changing technology, as well as state laws, may impact future determinations of when an expectation of privacy may exist in electronic communications. The decision also confirms that searches motivated by legitimate work-related purposes, including work-related investigations of workplace misconduct, and not excessive in scope are generally lawful when the employer has a policy that warns employees that their electronic communications are not private.

In light of *Quon*, employers should ensure that they have appropriate policies in place to put employees on notice that communications transmitted on employer equipment and networks are not private. They should also continue to monitor developments in this area, particularly with regard to state laws.

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