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United States Supreme Court: Public Employer Did Not Violate Fourth Amendment Rights Of Employee By Reviewing Transcript Of Text Messages Sent And Received On Employer-Issued Pager

In *City of Ontario, California v. Quon*, 08 1332 (June 17, 2010), the United States Supreme Court considered whether a public employer violated the Fourth Amendment rights of its employee when it obtained and reviewed a transcript of text messages sent and received on an employer-issued pager. The Supreme Court found the warrantless review of the transcript of the text messages was reasonable because it was motivated by a legitimate work-related purpose and it was limited in scope. In a holding that focused on the specific facts of the case, the Supreme Court held that the employer had not violated the employee's Fourth Amendment rights.

Facts

Jeff Quon ("Quon") was employed as a police sergeant by the Ontario Police Department ("Department"). The City of Ontario ("City") contracted with Arch Wireless Operating Company ("Arch") to provide text-messaging services through the use of alphanumeric pagers. Arch provided wireless services for the pagers and the pager messages were not transmitted through the City's telephone or computer networks.

Before purchasing the pagers, the City implemented a "Computer Usage, Internet and E-Mail Policy" that applied to all employees. In this policy, the City reserved "the right to monitor and log all network activity including e-mail and Internet use, with or without notice" and warned that "[u]sers should have no expectation of privacy or confidentiality when using these resources." While the policy did not specifically refer to the pagers or text messages, the City informed employees, including Quon, that text messages would be treated the same as e-mails and would be eligible for auditing. Quon signed a statement acknowledging that he had read and understood the policy.

Note:

This Legal Alert updates our previous Legal Alert on this case entitled, "Police Sergeant And The Individuals He Communicated With Via A Pager Provided By His Department Had Reasonable Expectation Of Privacy In Their Text Messages Stored On Wireless Service Provider's Network," July 14, 2008.

The City purchased a pager plan that included a fixed number of alphanumeric characters the user could transmit each month without incurring additional charges. Quon received a pager from the City and exceeded his character allotment within the first or second billing cycle after he received the pager. Quon's superior, Lieutenant Steven Duke ("Duke"), informed Quon of the overage and reminded him that the messages could be audited. However, Duke also told Quon that he did not intend to audit employee text messages to determine if the overage was due to work-related transmissions. Duke then suggested that Quon pay for the overage rather than having Duke audit the messages. Quon then wrote a check for the overage. Quon exceeded his limit three or four time more times and, each time, he reimbursed City for the overages.

After several months of collecting overage charges from Quon and another officer, Duke told the Department's Chief, Lloyd Scharf ("Scharf") that Duke no longer wished to collect reimbursements for pager overages. In response, Scharf asked Duke to request transcripts of those pagers with overages, including Quon's pager, to determine if the messages were work related or personal. Scharf directed that the text messages be audited to determine if existing character limits were too low and if officers were being asked to pay hidden work-related costs.

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Arch Wireless provided the transcripts to the City. Duke reviewed the transcripts and discovered that many messages on Quon's pager were not work-related and some were sexually explicit. The Department then investigated whether Quon was using the pager for personal matters while on duty. During the investigation, the Department reviewed pager messages that Quon had sent and received during a two-month period. The investigator reviewed only those messages Quon had sent while on duty. None of the messages that Quon sent while off-duty were included in the investigation. The investigator determined that in August 2002, Quon sent or received 456 messages during work hours, but no more than 57 were work related. The Department concluded Quon violated Department rules and Quon was allegedly disciplined.

Quon and individuals with whom he communicated through text message brought a lawsuit against Arch and the City alleging that the review of the text messages violated the Fourth Amendment and the Stored Communications Act. A federal district court ruled in favor of Arch and the City and held that Arch and the City had not violated either the Fourth Amendment or the Stored Communications Act. The Ninth Circuit Court of Appeals overturned that decision and determined that the City's review of the text messages was an unreasonable search in violation of the Fourth Amendment. The Ninth Circuit also determined that Arch had violated the Stored Communications Act by releasing the messages to the City. The United States Supreme Court agreed to review whether the City had violated the Fourth Amendment but declined to review whether Arch had violated the Stored Communications Act.

Decision

The Supreme Court held that the search conducted by the City and the Department "was reasonable" and "did not violate Quon's Fourth Amendment Rights." The Fourth Amendment guarantees "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . ." The rights guaranteed by the Fourth Amendment apply not only in the sphere

of criminal investigations but also "when the Government acts in its capacity as an employer." "[I]ndividuals do not lose Fourth Amendment Rights merely because they work for the government instead of a private employer."

The Supreme Court did not provide any additional guidance on when an employee has a reasonable expectation of privacy in electronic communications. Instead, it explained that it "must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer." The Court stated, "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear." Given the lack of clarity on the role of electronic equipment in the workplace and in society at large, the Court stated, "Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence and extent, of privacy expectations enjoyed by employees when using employer-provided communications devices." The Court expressed concern that the technology of communication and information transmission is changing so rapidly that "[a] broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted." As such, the Court decided explicitly to decide this case on narrow grounds and the specific facts.

The Court expressly assumed that Quon had a reasonable expectation of privacy in the text messages he sent on the pager provided by the City. The Court further assumed that the review of the transcripts constituted a "search" for the purposes of the Fourth Amendment. The Court's third assumption was that an employer's search within the "electronic sphere" is protected by the same Fourth Amendment protections that would protect the search of an employee's physical office.

The Court discussed workplace searches and how the "special needs" of the workplace may justify an exception to the general rule that warrantless searches are *per se* unreasonable.

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If a search is conducted for a “noninvestigatory, work-related purpose” or for investigating “work-related misconduct,” a warrantless search by a government employer “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.”

The Supreme Court found that the search at issue here satisfied both of these conditions. “The search was justified at its inception because there were ‘reasonable grounds for suspecting that the search [was] necessary for a noninvestigatory work-related purpose.’” A jury found the police chief ordered the search to determine whether the character limit was sufficient to meet the City’s needs. The City had a legitimate interest in making sure the officers were not being forced to pay for work-related expenses and that City was not paying for the officer’s personal communications.

The Court further determined that the scope of the search was not “excessively intrusive.” Even if Quon could assume some level of privacy in his messages, it would be unreasonable for him to conclude that all his messages were completely private because the Department told him that messages could be audited. In addition, as a law enforcement officer, Quon should have been aware that his actions and messages could come under legal scrutiny.

Furthermore, the search was not unreasonable in scope. The Court upheld prior precedent and held that searches need not use the “least intrusive” means possible in order to be reasonable under the Fourth Amendment. In this case, the search was not unreasonable because, although Quon went over his monthly character allowance several times, the Department only requested and reviewed transcripts for two months. When reviewing the transcripts, the investigator redacted all messages sent while Quon was off duty. The Court opined, “That the search did reveal intimate details of Quon’s life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters.”

Accordingly, the Court concluded the “search was permissible in its scope.”

What Employers Need to Know

The *Quon* case applies specifically to public employers, because it is focused on the Fourth Amendment, which applies only to the public sector. However, California employers should be aware that the Article I, section I, of the California Constitution provides a right of privacy that applies to the private sector. Employers can take several steps to assure that searches of electronic communications are proper:

1. Adopt an electronic communications policy, which applies to all forms of electronic communications, including e-mail, instant messages, text messages, pager messages, and any other communications sent or received on equipment owned or provided by the employer;
2. Ensure that the policy states that the employee should have no expectation of privacy in these communications and grants the employer the right to monitor the communications;
3. Distribute the policy, provide training as necessary, and ensure that no manager makes promises inconsistent with the policy;
4. Monitor and update the policies regularly. Be sure to disseminate and provide training on any changes made; and
5. Have legitimate business purposes for any review of electronic communications. Focus on the business use of the communications. If the communications are improper, avoid reviewing private matters beyond what is necessary for the legitimate business purpose.
6. Consider whether to encourage or require employees to use their own cell phones, pagers, or other electronic devices for personal communications.

Questions

If you have any questions concerning the

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content of this Legal Alert, please contact the following from our office, or the attorney with whom you normally consult.

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