

U.S. SUPREME COURT HOLDS EMPLOYER'S REVIEW OF EMPLOYEE'S TEXT MESSAGES SENT ON EMPLOYER'S PAGER WAS REASONABLE AND DID NOT VIOLATE FOURTH AMENDMENT

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In a closely watched case and in a nearly unanimous decision, the United States Supreme Court has held that the City of Ontario Police Department did not violate the Fourth Amendment privacy rights of its employee, police sergeant Jeff Quon, when it audited text messages he had sent and received on a department-issued paging device. *City of Ontario, California, et al. v. Quon, et al.*, 560 U.S. ____ (2010). The Court's decision was narrowly tailored and applies only in the government employment context, in which employees may have constitutionally based privacy rights. The Court specifically declined to issue a "broad holding concerning employees' privacy expectations vis-à-vis employer provided technological equipment." Nonetheless, employers and employees in both public and private employment settings may try to apply some of the Court's commentary to other contexts.

In *Quon*, the police department had a written policy notifying employees they should have no privacy expectation in their e-mails sent on employer devices, and told employees both in writing and orally that this policy applied to text messaging on employer devices as well. When employees' texting went over monthly usage limits, the department had an informal practice of not reviewing messages to determine if they were work-related so long as the employee paid for the overage charges. Because two employees' usage often was above the monthly limit, the department conducted an audit of a two-month period in 2002 to determine if it needed to expand its usage limits or if the overages related to non-work use. During this audit, it discovered that Quon's usage was overwhelmingly for personal reasons and included sexually explicit messages, and Quon was disciplined. He sued, claiming that his constitutional right to privacy under the Fourth Amendment was violated by the "search" of his text messages.

Saying that it wanted to decide the case on very narrow grounds, the Supreme Court stated that it "must proceed with care" when considering the concept of privacy expectations

in electronic communications made on equipment owned by a government employer. "The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear ... 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 communication devices." 560 U.S. at _____. Noting that "many employers expect or at least tolerate personal use of such equipment by employees because it often increases worker efficiency," the Court went on to state that "it is uncertain how workplace norms, and the law's treatment of them, will evolve."

The Court assumed for purposes of argument that Quon had a reasonable expectation of privacy in text messages sent on his employer-provided pager device, and that the review of those text messages constituted a search within the meaning of the Fourth Amendment. It assumed further that the principles applicable to a public employer's search of an employee's office also apply to employer searches within the electronic communications sphere. The Court relied on a 1987 decision, *O'Connor v. Ortega*, 480 U.S. 709 (1987), which involved an analysis of an office search in the public employment context, and held that when a search is conducted for a non-investigatory, work-related purpose or for the investigation of work-related misconduct, a public employer's search is reasonable if it is "justified at its inception" and if the measures used in the search are "reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search."

The "search" at issue in *Quon* was found to be reasonable because its purposes were (a) to determine whether the messaging limit was sufficient, (b) to determine whether employees were being forced to pay out of their own pockets

for work-related messaging, and (c) to ensure the police department was not paying for excessive personal messaging. The search also was limited enough not to be excessively intrusive, because the employer did not look at the content of after-work-hours messages (apparently assuming those to be personal, without review), and only looked at two months' worth of messages. The fact that the review revealed details of Quon's personal life did not make the review unreasonable. The Court relied in part on Quon's status as a law enforcement officer to find that he should have expected scrutiny of his on-the-job communications, and also held that the method the employer chose to use to review the messages did not need to be the "least intrusive" method. Justice Scalia urged the Court to find that if the search would be considered reasonable in a private employment context, it should be

considered reasonable in a public employment context, but the remaining justices did not accept this standard. However, it seems clear that all nine justices participating in this decision would have found the search in Quon reasonable in a private employment context.

It is ironic that the justices were so trepidacious about reaching a decision about privacy relating to electronic communications technology, and avoided an opportunity to set any real standard on how to evaluate privacy concerns in a new era of electronic communication, when employers and other authorities must make daily decisions about these issues. They will continue to have to do so despite the lack of clear guidance from the Supreme Court - and may face the consequences of their decisions in courts and lawsuits.