

Supreme Court Ruling Offers Employers Hints for Searching Employee Electronic Communications

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The United States Supreme Court recently held that a California city did not violate a SWAT officer's Fourth Amendment privacy rights when it examined sexually explicit text messages the officer sent and received on a city-issued pager. The Court's ruling suggests that it will be sympathetic to employers who promulgate clear policies and have valid work-related reasons to review employee emails, text messages, and other communications.

In *Quon v. City of Ontario* (June 17, 2010), the city issued pagers to facilitate text-based communications among its SWAT officers. To investigate repeated surcharges on the city's monthly texting bills (which were based on the total number of messages sent by the officers), the City asked the service provider, Arch Wireless, for transcripts of the officers' messages. A review of those transcripts showed that Officer Quon had sent numerous sexually explicit text messages to various other officers. In response to resulting discipline by the city, Officer Quon filed a lawsuit alleging that his Fourth Amendment privacy rights had been violated by the city and that Arch Wireless had violated the Stored Communications Act (SCA) by allowing the city to see the messages without Quon's consent.

When it agreed to hear Quon's case, the Supreme Court did not grant review of

the 9th Circuit Court of Appeals' ruling that Arch Wireless violated the SCA by sharing Quon's messages with the city. The SCA prohibits unauthorized access to certain types of stored electronic messages, such as text messages. Though the city owned the equipment, the 9th Circuit found that, under the SCA, the *user* of the equipment, not the owner, controls access to the content of the messages. Thus, the court ruled, the city was not entitled to review of the messages without Quon's consent.

Having declined to review the SCA issue, the Supreme Court ruled that the city had not violated any "reasonable expectation of privacy" Quon may have had when it searched his messages without his consent, and without a warrant. In doing so, however, the Court sidestepped the biggest question: did Quon have any "reasonable expectation of privacy" in his messages in the first place? The Court's answer was: whether he did or not is irrelevant, because either way the city's investigation was narrowly tailored to achieve the legitimate purpose of reviewing the content and volume of messages being sent on its equipment by its officers. In other words: privacy rights are not absolute, and the city's review of the messages was reasonable.

The *Quon* case teaches several important lessons for both public and private sector employers. First, employers

should ensure that their electronic resources policies are comprehensive, broadly distributed, and clearly inform employees that they have no expectation of privacy in content sent or received on employer-provided devices. As noted by the Supreme Court, employers' policies on employee electronic communications "will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." Second, employers should obtain employees' written consent to the company's access to communications sent from and received on company-provided hardware. Obtaining such consent at the outset will allow later access as necessary, without any potential violation of the SCA.

In addition, employers should ensure that their policies are strictly enforced, and prevent informal modifications or practices that could give employees

different expectations of the policies. Finally, employers are well advised to establish and follow procedural safeguards when reviewing employees' electronic communications. The Court's reasoning suggests that a private employer will not violate an employee's privacy rights when the employer's investigation is conducted for a work-related purpose and is reasonably limited in scope.

The *Quon* decision offers valuable insight for private-sector employers seeking to implement effective electronic resources policies. By broadly distributing comprehensive and strictly-enforced policies and following precautions to ensure that investigations are conducted for legitimate business reasons, , employers may effectively manage their electronic resources while reducing the risk of liability for employees' privacy-related claims.

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