# Supreme Court Recognizes Right Of Public Employers To Search Electronic Communications

Insights
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On June 17, 2010 the U. S. Supreme Court unanimously held that a public employer's search of an employee's text messages was reasonable and did not violate the employee's constitutional rights. The decision overturned a ruling by the United States Court of Appeals for the 9th Circuit, which found the employer's search was unreasonable in scope and, therefore, violated the Fourth Amendment of the Constitution which prohibits unreasonable searches and seizures. *City of Ontario v. Quon.*

The decision marked the first time the Supreme Court has considered the privacy protections applied to text messages and helps to define the boundaries of privacy protections in electronic communications. The decision's affirmation of an employer's right to conduct reasonable searches in furtherance of legitimate workplace objectives is a victory not only for employers, but also for President Obama's administration, which had argued that government employees generally have no reasonable expectation of privacy in electronic messages sent on computers or communication devices supplied by their employer.

**Use of Company Pagers Nothing to LOL About**
Since 1999, the City of Ontario, California, had a written "Computer Usage, Internet and E-mail Policy," which restricted employees use of city-owned computers and associated equipment and programs, such as email. The policy warned employees that they had no expectation of privacy in network activity and that the city reserved the right to monitor and log all online activity. Additionally, the policy strictly prohibited employees from using "inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the email system." Sgt. Jeff Quon, an employee of the city police department, signed a statement acknowledging that he had read and understood the policy.

In 2001, the city obtained pagers with text-messaging capabilities and issued them to members of the SWAT team, including Sgt. Quon, so team members could more rapidly and effectively coordinate responses to emergencies. In a staff meeting, team members were reminded that all pager messages were considered email messages and, therefore subject to the Computer Usage, Internet and E-mail Policy. Later, the city sent a memorandum expressly stating that messages sent on pagers were considered email messages and subject to the policy.

Each pager issued to SWAT team members had a monthly character limit and a supervisor who had "fiscal responsibility" for the department. Lt. Steven Duke, oversaw the bills for the pagers. Lt. Duke

"fiscal responsibility" for the department, Lt. Steven Duke, oversaw the bills for the pagers. Lt. Duke reminded Quon that messages sent on the pagers could be audited. If an employee exceeded the character limit, Lt. Duke requested that the employee pay the overage amount and stated that if the overage amount was paid, he would not audit or review the messages. Sgt. Quon exceeded his character limit on multiple occasions and each time paid the city for the overage.

After Lt. Duke grew tired of being the "bill collector," the Chief of Police decided to audit the messages of two officers who exceeded the character limit, including Sgt. Quon. The purpose of the audit was to determine if overages were caused because the character limit set by the city was too low or if it was due to personal use of the pagers.

To conduct the audit, the city obtained the transcripts for two months of messages and Lt. Duke reviewed the transcripts. Lt. Duke determined that many of the messages sent and received by Quon were not work related and some were sexually explicit. Lt. Duke reported his findings to the Police Chief and Quon's supervisor. After reviewing the transcripts, the Police Chief referred the matter to the internal investigations division and an investigator was assigned to conduct an internal affairs review.

Prior to reviewing the text messages, the investigator redacted all messages sent or received while Quon was off-duty. Thereafter, he reviewed the content of the messages sent during work time and determined that in one month only 57 of 456 messages sent during work hours were work related. Several of the personal messages contained sexually explicit communications between Sgt. Quon and three individuals: his wife, a female co-worker with whom he was romantically involved, and another officer. Based on the investigation, Quon was found in violation of city rules and allegedly disciplined.

**Legal Battle Over Sexting And Privacy**

Soon after he learned that his employer had reviewed his personal text messages, Sgt. Quon and his messaging partners filed suit against the City of Ontario, several employees of the city, and the wireless company that provided the texting service. Quon asserted he had a reasonable expectation of privacy when sending the text messages and the city's search was unreasonable. A jury found that the search was not unreasonable and judgment was granted in favor of the city.

On appeal, the United States Court of Appeals for the 9th Circuit reversed the jury's determination. The Court of Appeals determined that the city's practice of not auditing messages if overages were paid created an expectation of privacy in the content of employee's messages. According to the 9th Circuit, the expectation of privacy was reasonable, even though the messages were legally "public records" that could be requested by the public. Since Sgt. Quon had a reasonable expectation of privacy, the 9th Circuit analyzed whether the search was reasonable and determined it was not because it was not the "least intrusive means" to determine if Sgt. Quon was exceeding the character limit for work-related reasons. Accordingly, the 9th Circuit found the search was unreasonable and, therefore, unlawful.

The City of Ontario appealed the case to the Supreme Court, arguing that "[t]o warrant Fourth Amendment protection, a government employee's expectation of privacy must be one that society is prepared to consider reasonable under the operational realities of the workplace." The city also argued that based on the its policy and the reality of the workplace – particularly for public employees – Sgt. Quon's belief that messages sent on his work pager were private was unreasonable.

The city's position was that "the SWAT team sergeant failed to comport himself as a reasonable officer would have, and he and the other plaintiffs embarrassed themselves through their lack of restraint in using a city-owned pager for personal and highly private communications. The City of Ontario should not have to pay for that." The Supreme Court accepted the appeal, heard oral arguments on April 19, 2010, and issued today's opinion.

**Court Declines To Set Boundaries As To When A "Reasonable Expectation Of Privacy" Exists**

Searches and seizures of public employees' property is subject to the Fourth Amendment. A public employer's searches for work-related purposes are judged by a standard of reasonableness. Prior Supreme Court decisions suggested a two-step analytical framework for determining whether an employer's search was unconstitutional. First, a court must consider the operational realities of the workplace to determine whether an employee had a reasonable expectation of privacy. Second, if the employee had a reasonable expectation of privacy, then an employer was permitted to conduct a search for "noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct," if the search was reasonable.

In its decision, the Supreme Court noted that the parties disagreed whether Quon had a reasonable expectation of privacy. In particular, while the city's policy and statements made clear that employees did not have a reasonable expectation of privacy in text messages, Quon alleged that Lt. Duke's statements that he would not audit the messages overrode the official privacy and gave Quon a reasonable expectation of privacy.

The Supreme Court expressly declined to determine whether Quon had a reasonable expectation of privacy. Eight of the Justices concluded that the judiciary "risk[ed] error" by defining the constitutional protections of privacy in electronic communications before the role of technology in our society has become clear. The Court noted, "[r]apid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior. . . At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve."

The Court determined that a broad ruling on the scope of employees' privacy expectations in employers' technological equipment would be premature because society's expectation of privacy in technology are still evolving. Therefore, the Court presumed that Quon had a reasonable expectation of privacy and focused its decision on whether the search was reasonable.

The Court's decision not to issue an opinion defining or clarifying the standard for determining when an employee has a reasonable expectation of privacy in electronic communications means the law in this area remains unsettled and will continue to develop as technology develops. The Court's opinion signaled that whether an employee has a reasonable expectation of privacy in electronic communications will be shaped, in part, by society's evolving perception of privacy in the era of social networking, text messages, and blogging.

**The Purpose And Scope Of The Search**

Generally, searches without a warrant are unlawful under the Fourth Amendment. But the Supreme Court has recognized that an employer's search, when conducted for a noninvestigatory, work-related purpose or for investigation into work-related misconduct is reasonable and permissible if two conditions are met: 1) The search was "justified at its inception" by a legitimate, work-related purpose; and 2) "[T]he measures adopted are reasonably related to the objectives of the search and are not excessively intrusive." The Supreme Court held that the search conducted by the City of Ontario satisfied both conditions and was a reasonable, lawful search under the Fourth Amendment.

The Court concluded that conducting a search to determine whether the character limit on messages was sufficient to meet the needs of employees and the city was a "legitimate, work-related rationale." In particular, the city had a legitimate interest in ensuring that employees were not paying overages fees for work-related messages and that the city was not paying for excessive personal communications by its employees.

Finding that the search was justified by a work-related purpose, the Court next considered whether the scope of the search was reasonable in light of the circumstances. The Court concluded that "[a]s for the scope of the search, reviewing the transcripts was reasonable because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use."

In support of its conclusion, the Court noted that the city only requested and reviewed two months of transcripts and the investigator redacted all off-duty messages to reduce the intrusiveness of his review. Moreover, the Court noted that even if Quon had a reasonable expectation of privacy, it would not be reasonable for him to expect that all of his messages were immune from auditing or review because the pager had been issued by his employer, it was issued for a work-related purpose, and recovery of electronic communications might be necessary for certain work-related functions, such as assessing a response to an emergency situation. The fact that the search revealed intimate details about Quon's personal life, did not make the search unreasonable.

The Supreme Court rejected the 9th Circuit's finding that the search was unreasonable merely because less intrusive means existed to conduct the search. The Court noted that it had repeatedly refused to require that a search be the "least intrusive" means in order for it to be reasonable and to require employers to use only the least intrusive means to conduct a search would place an unworkable burden on employers. In the Court's view judges evaluating an employer's conduct after

the fact can always almost imagine an alternative way to conduct the search that would have been less intrusive, but because a search could have been performed in an alternate manner does not mean the search that was conducted was unreasonable. Accordingly, all nine Justices concluded that because the City of Ontario's search was "motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable" and lawful.

**Learning From *Quon* – What This Means For Employers**

*Update your policies*

Many employers, like the City of Ontario, have written policies that restrict employee's email and Internet use; state that employees should limit their use of their work computers, email and devices for personal purposes; and warn that employees' activity and communications will be monitored. But many policies have not been updated to reflect all of the mainstream forms of electronic communications.

Any Internet or email policy should be updated to specifically address text messaging, the use of company-issued electronic devices, and the use of social networking sites both during work hours and while off-duty. -Your policy should specifically state that employees' messaging and communications on electronic devices issued by the company are subject to monitoring, and employees have no expectation of privacy in the use of such devices. The purpose for such policies is to dispel employees' expectations of privacy.

*Audit your practices*

The Supreme Court's decision expressly noted that the City of Ontario's policy made clear that employees had no expectation of privacy. But the Court declined to determine whether a supervisor's oral statements could override an official policy. Therefore, you should not simply rely on the written policies to set employees' expectations of privacy in electronic communications. Rather, you must audit *practices* to ensure that neither their practices nor any "informal" policies are inconsistent with the written policy. Remind supervisors and managers to never assure employees that their messages and online activity will not be monitored.

*Tailor Searches Narrowly*

The law regarding expectations of privacy in electronic communications is more settled for private employers. Generally, employees of private companies lack an expectation of privacy when using their employer's network or equipment. But all employers should exercise caution when conducting a search of an employee's electronic communications. Conduct searches using only employees who have been trained in your policies, including policies on electronic communications, harassment, and confidentiality.

Prior to conducting the search, you should be able to articulate a legitimate, work-related reason for auditing or searching communications, such as determining whether an employee is using work-

time appropriately or whether an employee's communications with a co-worker violated the employer's harassment policy. Finally, any search should be narrowly tailored to serve the purpose for which it is being conducted and the results of a search or audit should be communicated only to those employees who have a legitimate reason to know the content of the communications.

For more information about how this decision may affect your workplace, or about electronic policies generally, contact your Fisher Phillips attorney.

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*This Legal Alert provides an overview of a specific Supreme Court decision. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*