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June 29, 2010

US SUPREME COURT HOLDS THAT CITY DID NOT VIOLATE EMPLOYEE RIGHTS BY READING TEXT MESSAGES

On June 17, 2010 a unanimous United States Supreme Court held that the City of Ontario, California did not violate a police officer's constitutional rights when it audited his text messages sent on a city-issued pager. See *City of Ontario v. Quon*. The United States Constitution's Fourth Amendment protects individuals from being subjected to unreasonable searches and seizures by the government. In the context of employment, an employer is not permitted to conduct a warrantless workplace search unless it is (i) justified at its inception and (ii) reasonable in scope. As discussed below, the *Quon* Court found that the challenged text message search to be reasonable, without reaching the question of whether the officer had an expectation of privacy.

Underlying Facts

The City of Ontario issued a text-messaging pager to Jeff Quon, a police sergeant and a member of the SWAT team. This was one of 20 pagers issued "to SWAT Team members in order to help the SWAT Team mobilize and respond to emergency situations." At the time it issued the pagers, the City already had a broad "Computer Usage, Internet and E-Mail Policy". The policy expressly stated that the City reserved "the right to monitor and log all network activity including e-mail and Internet use, with or without notice" and that "[u]sers should have no expectation of privacy or confidentiality when using these resources." Although the policy did not expressly address text messaging, the City verbally informed Quon and others that their text messages were subject to the electronic communications policy and they had no expectation of privacy or confidentiality in their pager communications.

The City's contract with its pager-service provider allowed for each pager to send/receive a limited number of characters each month; overage fees were to be assessed for texts in excess of these limits. A supervisor told officers that if all overage charges were reimbursed to the City then the City would not audit pager use to determine whether the overage was due to personal or work-related communications. Quon (and others) reimbursed the City for overage charges. Several months later, however, the City's police chief decided to "audit" the text messages to determine whether the contracted-for character limit was too low for sending work-related text messages. The OPD obtained text message transcripts for two months for this purpose. After review, the City determined that many of the messages sent and received on Quon's pager during work hours were not work-related, and that some messages were sexually explicit. This led to an internal affairs investigation into whether Quon was violating OPD rules by pursuing personal matters while on duty.

Quon sued the City, alleging (among other things) that the City violated his Fourth Amendment rights by conducting the audit and reading his personal text messages. The district court granted summary judgment for the City; although agreeing that Quon had a reasonable expectation of privacy in his text messages, but

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trial court found no violation of the Fourth Amendment because the audit of the text messages occurred for a legitimate business purpose. The Ninth Circuit Court of Appeals reversed; it agreed that Quon had a reasonable expectation of privacy, but disagreed that the search was reasonable in scope and noted that there were less intrusive means of conducting the audit.

The United States Supreme Court Decision

The United States Supreme Court unanimously reversed the Ninth Circuit decision and ruled in favor of the employer. The Court said that it did not need to consider whether or not Quon had a reasonable expectation of privacy because, even assuming he did, the City, the Court concluded that the audit was motivated by a legitimate work-related purpose (whether the character threshold in the City's contract with its pager-service provider was sufficient to meet the City's needs) and was not excessive in scope (the audit was limited to a two month sample and included a review only of on-duty text messages).

Lessons for Employers

The Supreme Court's decision in *Quon* applies directly only to public employers. Nevertheless, it points to important lessons for *all* employers who utilize electronic communications in the workplace.

- **Have an electronic systems policy**. The Supreme Court correctly referred to "[r]apid changes in the dynamics of communication and information transmission [that] are evident not just in the technology itself but in what society accepts as proper behavior" and did not attempt to define the limits of a reasonable expectation of privacy. This is an increasing complex question, as illustrated by technological advances that enable employees: to use employer-issued equipment to access personal email accounts or send personal messages; and to use personal smart phones to conduct employer-related business. The Supreme Court essentially acknowledged that the City's electronic communications policy, and later verbal statements, created a factual question as to whether or not Quon's expectation of privacy was reasonable. In this environment, it is essential for an employer to have a well-crafted, specific and broadly distributed policy describing and explaining how and when the employer will access electronic communications; this will help an employer to later demonstrate an employee does not have a reasonable expectation of privacy in a particular electronic communication.
- **Keep policy tailored, relevant and current**. Employer policies need to be relevant and current. In Quon, the City's electronic communications policy did not directly address text communications by pager; moreover, the City did not modify its policy when it issued pagers to address pager communications. This led to confusion and ultimately to litigation. Employers should use and maintain as current policies that "fit" their workplaces; this investment up front will pay dividends when an employer initiates a disciplinary proceeding based on these policies.
- **Train on your policy.** The lower court decisions that Quon had a reasonable expectation of privacy in his text communications was driven, in part, by the fact that supervisors had verbally informed Quon it did not intend to audit text communications if he paid the overage fee. This undercut the previous verbal statement that the City's electronic communications policy applied to text messages. Thus, in addition to having a well-drafted policy, it also is important to train supervisors and employees on the scope of this policy. Importantly, a supervisor should know where s/he has discretion under a policy and where s/he does not, so that unlike the supervisor in *Quon*, s/he does not contradict the policy with verbal assurances.

Bullard Law will continue to monitor emerging issues regarding technology and the workplace and to help employers develop, implement and train on electronic systems policies. Please feel free to contact us if you have questions or comments about these issues, or any other labor, employment and benefits matters.

~EMILY Q. SHULTS
~MARYANN YELNOSKY