

Human Resources Bulletin



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Supreme Court Validates Public Employer's Search Of An Employee's Text Messages

One of the last cases decided by the United States Supreme Court before its summer recess was an important one for employers in today's digital and social media-driven world. In *City of Ontario, Calif. v. Quon*, the Court was faced with the question of whether a public employer's search of an employee's text messages, which were received and sent from an employer-owned device, was a violation of the employee's Fourth Amendment right against unreasonable searches and seizures. In a unanimous decision, the Supreme Court said no.

How The Dispute Arose

The case arose from the City of Ontario, Calif., whose police department (OPD) issued pagers to several of its officers. Under the OPD's contract with its wireless service provider, Arch Wireless, there was a monthly limit on the number of characters each pager could send or receive. Any usage beyond the limit would result in an additional fee, which would be paid by the employee. When Officer Jeff Quon and others exceeded their monthly character limits for several months, the OPD investigated whether the overages were for personal or work-related messages.

At the OPD's request, Arch Wireless provided transcripts of Quon's and another employee's text messages over a two-month period. In reviewing the transcripts, an OPD investigator discovered that the vast majority of messages sent or received on Quon's pager were not work-related and that some of his messages were sexually explicit. The police department disciplined Quon for violating rules contained in OPD's "Computer Usage, Internet and E-Mail Policy," which also applied to text messaging on OPD pagers.

Lower Court Decisions

Quon and others sued the City and the OPD (among others), alleging that the OPD violated their Fourth Amendment rights by searching Quon's messages. The trial court found that Quon had a "reasonable expectation of privacy" in the content of his text messages. But the City and OPD nonetheless prevailed at trial because the OPD's search of Quon's text messages was deemed reasonable under the circumstances.

On appeal, the Ninth Circuit Court of Appeals reversed the trial court and ruled in favor of Quon. Though agreeing with the trial court that Quon had a reasonable expectation of privacy in his text messages, the court of appeals found that the OPD's search was not reasonable. Even though OPD was motivated by a legitimate work-related purpose, the court of appeals found that the OPD search was unreasonable in scope.

Supreme Court Decision

The City appealed to the United States Supreme Court, which reversed the ruling of the court of appeals and decided the case in favor of the City and the OPD. In doing so, the Supreme Court took a slightly different approach than either of the lower courts. The Supreme Court expressly declined to decide whether Quon had a reasonable expectation of privacy in the text messages sent and received on his employer-issued device. Rather, the Court held that *even if* Quon had a reasonable expectation of privacy, the OPD's search did not violate Quon's Fourth Amendment right to be free from unreasonable searches and seizures.

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Interestingly, the Court did not enunciate a clear rule that guided the analysis of whether a public employer's search of this kind was "reasonable" under the Fourth Amendment. The Court noted that one of its prior cases, *O'Connor v. Ortega* (decided in 1987), set forth two different approaches for analyzing the Fourth Amendment rights of public employees. Under one approach, a public employer's intrusion into the privacy rights of employees must be "judged by the standard of reasonableness under all the circumstances" if the intrusion is for a work-related purpose (such as, for example, investigation of work-related misconduct). Under the alternative approach (advocated by Justice Antonin Scalia), "government searches to retrieve work-related materials or to investigate violations of workplace rules" do *not* violate the Fourth Amendment. Justice Scalia viewed such searches as "reasonable in the private-employer context" and saw no reason to view them differently when the government is the employer.

The Supreme Court deemed the OPD's search to be valid under either of these approaches. The Court emphasized the fact that the text-message search was motivated by a "legitimate work-related purpose" and was not excessive. The Court also found that the search of the text messages was reasonably related to the OPD's objective in the search, which was to ensure that its employees were not being forced to pay overages out of their own pockets for work-related messages. The review of the transcripts given by the service provider was an "efficient and expedient way"

to make this determination. Similarly, because the City had a legitimate reason for the search and it was not excessively intrusive in light of that justification, the search would be "regarded as reasonable and normal in the private-employer context" and thereby satisfy Justice Scalia's preferred mode of analysis.

Conclusion

Although the *City of Ontario v. Quon* case dealt with the constitutional issues surrounding a public employer's search of an employee's text messages, the case is still instructive for private employers. At the very least, the Court's opinion provides some insight into what actions would be deemed reasonable by employers, not only from a constitutional perspective but from a private employer perspective. And it should not be lost upon employers that this case dealt with employee conduct that violated an explicit policy governing electronic communications on employer-owned devices. The Court's view of the investigation conducted by the employer in this case might have been different had no such policy been in place. Thus, it is prudent for employers of all kinds to have policies in place governing the use of employer-owned devices for electronic communications and notifying the employees of the employer's right to monitor such use.

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