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The City of Ontario v. Quon Supreme Court Decision

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Think twice before sending personal messages on that department-issued electronic device!

In *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (2008) the Ninth Circuit held that a police department's review of an officer's text messages on a department-issued pager violated the Fourth Amendment. But the recent Supreme Court decision in *City of Ontario v. Quon*, #08-1332, 2010 U.S. Lexis 4972, 2010 WL 2400087, has reversed the Ninth Circuit, holding instead that the Department's review of the officer's text messages was reasonable and did not violate the Fourth Amendment.

❖ **Background** (taken from the opinion)

According to the Court, in 2001, the City of Ontario issued alphanumeric pagers to

several members of the Ontario Police Department. The City's contract with the service provider, Arch Wireless, provided for a monthly limit on the number of characters each pager could send and receive.

Prior to acquiring the pagers, the City had announced a "Computer Usage, Internet and E-Mail Policy," which specified that the City "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have **no** expectation of privacy or confidentiality when using these resources." In a staff meeting, a lieutenant said that messages sent on the Department-issued pagers were considered e-mail messages and would be eligible for auditing.

The plaintiff exceeded his monthly character limit on at least four occasions, and each time he reimbursed the City for the overage charges. This reimbursement option was suggested by the lieutenant, who reminded the plaintiff that text messages sent on the pagers could be audited, though he said it was not his intent to audit the messages and suggested that the plaintiff simply pay the overage fees instead.

Because the plaintiff exceeded the limit on several occasions, and another officer exceeded the limit at least once, Chief of Police Lloyd Scharf decided to determine whether the monthly limit was too low – which would mean officers were having to pay fees for work-related messages – or whether the overages were due to the sending and receiving of personal messages. Chief Scharf instructed the lieutenant to obtain transcripts of text messages sent by the plaintiff and the other employee in August and September of 2002.

The lieutenant's review of the transcripts revealed that many of the plaintiff's messages were not work-related, and many were sexually explicit. Chief Scharf then referred the matter to internal affairs for investigation into whether the plaintiff was pursuing personal matters while on duty.

Internal affairs used the plaintiff's work schedule to redact the transcripts in order to eliminate any messages sent while the plaintiff was off duty, and reviewed only the messages sent during work hours. The investigation report concluded that the plaintiff had violated Department rules by sending personal messages while on duty.

The plaintiff sued the City and Arch Wireless, alleging that the City violated his Fourth Amendment rights and the Stored Communications Act (SCA) by obtaining and reviewing the pager transcripts, and alleging that Arch Wireless violated the SCA by turning over the transcripts to the City.

❖ District Court ruling

The District Court denied the City's motion for summary judgment as to the Fourth Amendment claim, holding that the plaintiff had a reasonable expectation of privacy in the content of his text messages, and that whether the audit was reasonable depended on Chief Scharf's intent in auditing the messages.

A jury concluded that the purpose of the audit was to determine the efficacy of the monthly limits, to ensure officers were not paying fees for work-related messages. The District Court therefore held that the audit was reasonable and did not violate the Fourth Amendment.

❖ Ninth Circuit ruling

The Court of Appeals agreed that the plaintiff had a reasonable expectation of privacy in the text messages but held that the search was not reasonable in its scope, even though it was conducted for "a legitimate work-related rationale." The Court of Appeals observed there were other, less intrusive means the Department could have used to determine the efficacy of the monthly limit, instead of resorting to an audit, such as warning the plaintiff at the beginning of each month or asking the plaintiff to redact the transcripts himself.

❖ Supreme Court's ruling

The Supreme Court has reversed the Ninth Circuit decision, ruling that the search in this case was reasonable. Acknowledging the settled principle that the "Fourth Amendment applies as well when the Government acts in its capacity as an employer," the Court discussed its holding in *O'Connor v. Ortega*, 480 U.S. 709 (1987), in which the Justices disagreed on the proper analytical framework for Fourth Amendment claims against

government employers.

Ultimately, the Court in this case decided it was not necessary to resolve whether the plaintiff had a reasonable expectation of privacy in his text messages - either way, the Court concluded the search was reasonable.

O'Connor concerned a physician who claimed that his state hospital employer violated his Fourth Amendment rights when hospital officials searched his office and seized personal items from his desk and filing cabinet. A majority of the Court agreed that, although "individuals do not lose Fourth Amendment rights merely because they work for the government," the warrant and probable cause requirement is nonetheless impracticable for government employers.

The four-Justice plurality in *O'Connor* concluded that the proper analysis is as follows: First, because "some government offices may be so open to fellow employees or the public that **no** expectation of privacy is reasonable," it is necessary to consider "the operational realities of the workplace" to determine whether a public employee's Fourth Amendment rights are implicated.

Under this analysis, the question of whether a reasonable expectation exists is addressed on a case-by-case basis. Second, when an employee is found to have a legitimate privacy expectation, a search "for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."

Justice Scalia concurred in the *O'Connor* judgment but offered a different analysis. His opinion would have concluded that public employees are covered by the Fourth Amendment as a general matter, eliminating the need for a case-by-case analysis of privacy expectations.

But his opinion would have further held that public employers' searches "to retrieve work-related materials or to investigate violations of workplace rules - searches of the sort that are regarded as reasonable and normal in the private-employer context - do not violate the Fourth Amendment," therefore eliminating the need for a case-by-case analysis of reasonableness for work-related searches by public employers.

❖ **Future path uncertain**

In *Quon*, the Court declined to decide which analysis of public employees' Fourth Amendment rights is controlling, and declined to decide what kind of privacy expectation a public employee has in electronic communications made on a device owned by the employer.

In the Court's view, it is too early to decide this question because of "rapid changes in the dynamics of communication and information transmission" and the still-emerging role of technology in society and in the workplace.

Concerned that a broad holding regarding expectations of privacy in employer-provided technological equipment could have unpredictable consequences for future cases, the Court held that the search of the plaintiff's text messages was reasonable regardless of his privacy expectations.

- The Court held that the Department's review of the plaintiff's text messages was justified at its inception because of the legitimate work-related purpose, specifically, ensuring that employees were not being forced to pay overage fees out of their own pockets for work-related messages, and on the other hand ensuring that the City was not paying for messaging devices that were being used for personal communications.

- The Court also held the search was reasonable in its scope because it was an efficient way to determine whether the monthly overages were related to work or personal matters, and because the search was not excessively intrusive.

The Court pointed to the fact that the Department only audited two months of messages, even though the plaintiff had incurred overage fees at least four times, and the fact that the Department redacted all messages sent during the plaintiff's off-duty hours. The Ninth Circuit erred in applying a "least intrusive" standard to this search, and the Supreme Court made it clear in this ruling that a search does not have to use the least intrusive option available in order to be considered reasonable.

In assessing the scope of the search, the Court also stated that the extent of a privacy

expectation, if any, is relevant to determining whether the intrusion is excessive. Important to the Court's decision was the fact that the plaintiff had been advised and later reminded that the text messages were considered e-mail under the City's computer policy and were subject to auditing.

❖ Conclusion

Although the Court left the question of privacy expectations to be resolved in the future, the Court's holding regarding the reasonableness of the search is enough to send a clear message regarding the need for caution when using employer-issued technology for personal matters. Even if the Court ultimately decides that employees have a privacy expectation in department-issued technology, a search is likely to be found reasonable if the department can demonstrate a legitimate work-related rationale, particularly if employees have been clearly advised that their communications are subject to review.

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