

To Text, or Not to Text?

SUPREME COURT'S DECISION IN 'QUON' LEAVES MANY ISSUES UNRESOLVED WITH RESPECT TO EMPLOYEE PRIVACY RIGHTS

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Image: courtesy photo

On June 17, the United States Supreme Court issued its opinion in **City of Ontario v. Quon**, 10 C.D.O.S. 7565. In *Quon*, the court unanimously rejected a Fourth Amendment challenge to the City of Ontario's review of personal, and often embarrassing, text messages that one of its police department employees sent and received on a city-provided pager.

Quon has been praised by business groups as a pro-employer milestone and lamented by labor advocates as a setback for workers. The reality, however, is more nuanced. And in California, where privacy protections elsewhere reserved for public employees extend to the private workplace, the decision is likely to foster only greater uncertainty when determining the line between employer oversight and employee privacy — a line that is already increasingly fuzzy due to such trends as telecommuting, smart phones and enhanced monitoring tools. Any lawyer handling employment matters in this state will be wise to keep pace and advise clients accordingly.

In *Quon*, the City of Ontario issued text-capable pagers to Sgt. Jeff Quon and other police officials. The city informed the employees of its right to audit the use of its equipment, although a supervisor told Quon he did not intend to do so. The city also seemingly had no global objection to personal use of the pagers, provided the employees paid charges for any usage beyond the city's monthly limit under its service plan.

After Quon exceeded the monthly limit repeatedly, however, the city obtained transcripts from its text service provider for two months of texts for Quon and another worker who exceeded the limit. The city reviewed the texts to see if its plan limit was sufficient for work use or whether the extra texts were merely personal and thus, no plan change was needed. After discovering some of Quon's messages, while on duty, involved not only personal matters, but also sexually explicit content, the city disciplined him.

The Ninth Circuit held the city violated Quon's Fourth Amendment rights when it reviewed his text messages. It further held the service provider violated the Stored Communications Act (SCA), 18 U.S.C. §2701, by furnishing the transcripts to the city without Quon's consent. The Supreme Court granted the city's petition for *certiorari* (interestingly, the high court denied the service provider's petition, thus leaving in force the Ninth Circuit's somewhat controversial SCA ruling).

In a unanimous decision written by Justice Kennedy, the Supreme Court reversed the Ninth Circuit, holding the city did not violate Quon's constitutional rights because its text review was "motivated by a legitimate work-related purpose" and "not excessive in scope." The court did not decide whether Quon had a "reasonable expectation of privacy" in his messages; rather, it assumed he had such an expectation and based its ruling instead on the purpose and scope of the city's investigation. Nevertheless, the court took four pages of its opinion to muse on how complex the expectation of privacy inquiry is and how technological and cultural trends make it all the more so. By approving the city's review of employee messages on the pagers it provided, the court recognized the interest of employers in determining how their equipment is used. But given the fact-specific nature of the court's analysis — an employer's limited audit of on-duty text messages to assess its policy on the number of texts employees need for work-related purposes — the reach of that analysis in determining the legitimacy of future investigations is more limited than many have claimed.

The reasonableness of the city's actions in *Quon* insulated it from liability, but what if the facts were slightly different? What if, for example, the purpose of the city's review was to monitor personal text usage, not just evaluate its plan needs? Or what if the city reviewed all employee messages, and not just two months of messages for those who had exceeded the plan limit? It is easy to perceive both legitimate employer interests and valid employee concerns under such circumstances, but the court's fact-specific analysis offers no firm guidance.

Perhaps the court was wise to avoid the thorny issue of "reasonable expectation of privacy" for texting, particularly given the ever-changing nature of the technology. But the court's

speculation on the matter, devoid of any definitive guidance, is likely only to provoke more litigation over how such questions should be answered. As Justice Scalia warned in concurrence, "[t]he-times-they-are-a-changin' is a feeble excuse for disregard of duty." Should it matter whether the device is portable and can be used from home? What if the employer otherwise allows personal use? Are there certain "inappropriate" uses for which an employer should have an absolute right to investigate regardless of any purported claim to privacy? These and other important questions are left unresolved.

In light of *Quon*, any risk-averse employer should update the policies on the use of its equipment and ensure such policies are clearly communicated to employees and consistently applied. Any prudent employer should also have a strong business purpose for any review of the use of its equipment and ensure any such review is narrowly tailored to that business purpose. For employers under California law, the purpose and scope of an investigation have already been stressed by the California Supreme Court in *Hernandez v. Hillsides, Inc.*, 47 Cal.4th 272 (2009), where the court approved video monitoring at work, but only in very limited circumstances.

Beyond the limited lessons of clear, consistent equipment policies and narrow, business-related investigations, however, the long-range impact of *Quon* is unclear. Perhaps that is what the court intended. But that is of limited benefit to all who seek clarity in balancing legitimate business concerns and personal autonomy in the ever-changing modern workplace. For better or worse, "it depends" is likely to continue to be a practitioner's answer to client questions on employee privacy, with a cutting-edge understanding of both technology and law playing a key role in any such advice.

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