July 9, 2010

In the case of *City of Ontario California v. Quon*, 560 U.S. ___ (2010), the Supreme Court held that a public employer's review of an employee's text messages sent via an employer-provided pager did not violate the Fourth Amendment's prohibition on unreasonable searches and seizures under the circumstances of the case. Though the Court issued a narrow, fact-specific opinion that expressly avoided deciding certain issues, the case provides important lessons for public and private employers in addressing employees' personal use of employer-provided electronic communication devices.

Jeff Quon was employed as a police officer by the Ontario Police Department. The Department issued pagers to Quon and other members of the SWAT team. Officers were permitted to send or receive a certain number of characters per month, but they were expected to pay for any additional usage. The Department had a written "Computer Usage, Internet and E-Mail Policy" that stated employees had no expectation of privacy when using Department issued equipment. The policy did not explicitly cover text messages, but officers were told repeatedly, orally and in a written memorandum, that text messages were included within the policy.

Shortly after receiving the pager, Quon exceeded the monthly allotment and he paid for the overage. His supervisor reminded him that his messages could be audited, but also suggested that Quon could simply pay for the excess usage rather than have his messages audited. However, after Quon repeatedly exceeded his character limits, his supervisor decided to audit the messages to determine whether the character limits were too low to cover all work related usage or whether the overages were for personal messages. In connection with that audit, the wireless provider sent the transcripts of messages sent and received by Quon to his supervisor.

An analysis of messages sent and received while Quon was on duty (messages sent while off duty were redacted) revealed that only a small percentage of them were for work purposes and some were sexually explicit. Quon was allegedly disciplined for his actions.

Quon sued, alleging that the Department violated his Fourth Amendment rights as well as the Stored Communications Act ("SCA") and California law. The District Court determined that Quon had a reasonable expectation of privacy in his messages. It further held that the search nonetheless would be permissible if it was done to determine the sufficiency of the existing character limits to ensure officers were not personally paying for work expenses, but not if it was done only to determine whether Quon was playing games or wasting time while at work. A jury found that the Department was acting to audit the sufficiency of the character limits and therefore no constitutional violation occurred.

The Ninth Circuit reversed. It held that, even if there was a legitimate work rationale for the search, it was unreasonable because there were numerous less intrusive ways the audit could have been conducted to achieve the Department's objective.

The Supreme Court reversed in a unanimous opinion, holding that the Department had a legitimate reason for the search and the search was not excessively intrusive in light of its purpose. Separately, and potentially more importantly for private sector employers, the Court held that the "search would be ‘regarded as reasonable and normal in the private-employer context." The Court further stated that the Department was not required to use the least intrusive means for the search and the fact that the wireless provider may have violated the SCA in handing over the messages to the Department did not render the Department's review of them constitutionally suspect.

Though the Court assumed *arguendo* that Quon had an expectation of privacy in the messages, and explicitly stated it was

refraining from a broad pronouncement of privacy expectations in the workplace given rapidly evolving technology and societal and workplace norms regarding technology, the decision provides important lessons for employers going forward. Specifically, the Court accepted that Quon had, at most, a limited expectation of privacy given that he was told his messages were subject to audit. ***Therefore, the decision underscores that it is critical for employers to have clear and explicit policies informing their employees that all of their communications—including all forms of employer-provided technologies —are subject to review***. Further, though the Court, unlike the Ninth Circuit, did not appear particularly concerned about Quon's supervisor's statement that an audit could be avoided if he simply paid the overage charges, ***employers should ensure that their managers do not make statements that could be read as undercutting or weakening their formal policies and the employer's rights thereunder.***

As recognized by the Court, societal and legal norms regarding the respective rights of employers and employees in communications on employer-provided electronic communication devices are still developing. New rules and standards, that may vary by jurisdiction, are likely to be enacted in the months and years to come.

Cooley's Employment Group practice has in-depth experience regarding electronic systems usages and workplace privacy counseling and litigation issues. If you would like to discuss these issues further, or have questions about this *Alert*, please contact one of the attorneys listed above.

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