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# *City of Ontario v. Quon*, 130 S. Ct. 2619 (2010)

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Background Facts

Sgt. Quon, a member of the City's SWAT team, used a City-issued pager for the purpose of promptly responding to emergencies. The City's contract with the wireless provider allowed for texting of 25,000 characters per month at a flat rate, after which overage charges kicked in. Quon signed a policy agreeing that electronic transmissions should not be sexual in nature and acknowledging that they were subject to audit and employees have no expectation of privacy therein. When the pagers were distributed, a written memo was issued (along with an oral reminder) stating texts were treated the same as emails under the policy and, as such, were subject to audits. A supervisor, however, later told him that as long as he paid the overage charges, the Department did not intend to delve into the content of the texts. Quon's and several other officers' overages became so frequent and excessive, that management felt an audit was needed to determine if the 25,000 character limit was too low for work-related texts. The City requested two months of transcripts from the wireless provider of the texts of those officers with high overages, and, to protect their privacy, deleted any texts sent outside of working hours. The review showed that a majority of Quon's on-duty texts were personal (in one month, 399 out of 456), and often sexually explicit.

 

Quon sued the City, claiming unreasonable search under the Fourth Amendment, as well as violation of the Stored Communications Act. The Court reversed the bitterly divided Ninth Circuit's decision, and held that the City's investigation was reasonably narrow in scope to protect any Fourth Amendment privacy interests Quon may have had.

The Court's Analysis

- The Court assumed, without deciding, that the officer had a reasonable expectation of privacy under the Fourth Amendment in communications on employer-issued pager[1]
- The Court focused on the purpose and scope of the search in deciding if it was reasonable:
    - City had a legitimate interest in determining if the character limit was sufficient for work related texts, and/or if employees were charging the city for personal use of the pagers
    - The purpose of the search was non-investigatory and work-related
    - Reasonable to conclude that the search, *at its inception*, was necessary for the non-investigatory purpose
    - Scope was reasonable as it only involved two months of transcripts of text messages and text messages sent outside of work hours were redacted
    - Search was an "efficient and expedient way to determine whether Quon's overages were… work-related"
- Contributing to the reasonableness of the search was the fact that Quon's (assumed) expectation of privacy in the pager was limited, because:

[1] The Court explained: "The Court must proceed with care when considering the whole concept of privacy expectations in communications made on electronic equipment owned by a government employer. The judiciary risk error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. . . A broad holding on concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted." *Quon,* at 2629-30.

    - he was told his texts were subject to audit; and,
    - given that he is a law enforcement officer, along with the purpose of the pagers, he should have known they could be audited and subject to public and legal scrutiny, based on the "operational realities" of the police department workplace.
- Assuming, without deciding, that the wireless provider violated the Stored Communications Act (SCA) in giving the City the text message transcripts, this violation did not render the City's search unreasonable *per se*
- The Court rejected the Ninth Circuit's "least intrusive means" standard for determining reasonableness of searches under the Fourth Amendment[2]

Reactions from "Out There" to the Decision

- The Electronic Frontier Foundation (EFF), which filed an amicus brief with the Court in favor of Quon, issued a statement that the decision was "hopeful" because: "Rather than automatically concluding that communications stored with third party providers are entitled to no Fourth Amendment protection at all, . . . the Court made clear it would instead cautiously make such decisions based on society's privacy expectations and its level of reliance on new communications technologies." www.eff.org, 6/17/10
- Employer's groups disappointed that the decision left open the expectation of privacy issue, citing the "cry for clarity" in the area of electronic communications
- New expectation of privacy rulings needed to replace the "creaky" 20-year-old *O'Conner v. Ortega* case, because of the societal merging of work and personal time and communications
- Many bloggers felt that if the policy was more specific to texts, it would less likely be overridden by a supervisor's comments; the vaguer the writing, the stronger the verbal "clarification."

[2] The lower court suggested, for example, that Quon could have been asked to review his texts first and delete all personal information before the City did so.

- Many lay responders had difficulty understanding how an employee could possibly believe that electronic communications using employer-issued equipment were private

Guidance

- Extremely important to have clear, well-defined communications policies that employees must sign
    - Policy should be broad enough to cover emerging technology
    - Policy should provide that it can only be changed in writing by the Director/CEO/HR manager, etc.
- Train management and supervisors on the policy and advise them to be careful not to make inconsistent statements to employees
- The policy should be broadened and/or reinforced when any new communication technology is implemented/distributed by the Company
- When doing a search, employers should remember that the intent of the search is crucial and that the search techniques should be narrowly devised to satisfy the intent
- Employers should understand at least the basics of the SCA