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Legal Update

June 2010

SUPREME COURT: SEARCH OF EMPLOYEE TEXT MESSAGES WAS REASONABLE

By Seth A. Stern

The United States Supreme Court held in a 9-0 ruling on June 17, 2010 in *City of Ontario v. Quon* that a police department's search of an officer's text messages did not violate the officer's Fourth Amendment rights. The search led to the officer being disciplined when a department audit found he had sent sexually explicit messages while on duty. While the Fourth Amendment does not apply to private companies, the case will likely influence how courts approach similar issues arising under state and federal privacy laws.

The department audited text messages after noticing that officers were regularly exceeding the department plan's character limit. It obtained transcripts of these messages from its service provider to learn whether the overages were caused by work-related or personal texts so that it could determine whether to increase the character limit. Before conducting the audit, the department redacted texts that the officer sent while off duty.

Expectation of Privacy

The Supreme Court declined to decide whether the officer in fact had an "expectation of privacy" in his text messages. The Court also passed on deciding whether the department waived its policy that all messages were subject to monitoring through informal assurances that it would not monitor messages as long as officers paid for overage charges.

The Court did indicate that, if there is an expectation of privacy in text messages, it is not a complete expectation of privacy. "Under the circumstances," the Court stated, "a reasonable employee would be aware that sound management principles might require the audit of messages . . . ."

While "expectation of privacy" is a Fourth Amendment term applicable to government conduct, courts often apply similar principles in analyzing privacy rights of nongovernment employees.

The uncertainty regarding employees' privacy expectations in text messages makes an employer's policies all the more important. As the Court recognized, "employer policies concerning communications will of course shape the reasonable expectation of their employees, especially to the extent that such policies are clearly communicated."

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Reasonableness of the Search

Rather than deciding the threshold "expectation of privacy" issue, the Court assumed for the sake of argument that the officer had an expectation of privacy in his text messages and held that the search was nonetheless reasonable in purpose and scope.

Importantly, the Court rejected the officer's argument that the department should have used the least intrusive means possible to investigate the overages. Instead, the Court held, the search need only be reasonable in scope and related to a "legitimate work-related rationale."

Although the appellate court had previously pointed out that the department could have achieved its goal by, for example, warning the officer that his messages would be audited, or asking the officer himself to redact his messages, the Supreme Court held that the search "was reasonable because it was an efficient and expedient way to determine whether [the] overages were the result of work-related messaging or personal use." The Court did note that the department minimized intrusiveness by redacting the officer's off-duty messages and auditing his messages only over a two month period, even though he had exceeded the character limit a number of times.

Further, the Court explained that the reasonableness inquiry focuses on the intended scope of an employer's search, not what the search inadvertently turns up: "That the search did reveal intimate details of Quon's life does not make it unreasonable, for under the circumstances a reasonable employer would not expect that such a review would intrude on such matters."

Violations by Service Providers

The appellate court, in addition to addressing the officer's claims against the department, determined that the department's service provider had violated the Stored Communications Act by turning over the transcripts of officers' text messages to the department. The Supreme Court did not review this determination but observed that even if the appellate court was correct, "it does not follow that [the department's] actions were unreasonable."

This reasoning may allow employers to focus their attention on privacy laws that directly apply to them rather than the myriad of regulations affecting communications service providers. This does not mean, however, that an employer can intentionally collude with a service provider to illegally monitor employees or knowingly request that a service provider break the law.

Conclusion

The *Quon* Court's opinion is as notable for the questions it did not answer as for those that it did. Nonetheless, the opinion indicates that employers, whether public or private, may monitor employee text messages (and, presumably, other electronic communications) sent or received via work-issued equipment, at least when the following conditions are met:

1. The examination is for a work-related purpose;

2. The employer communicates to the employee, preferably in a written policy, that the employee's text messages and other communications may be monitored;

3. The scope of the search is reasonably related to the legitimate work-related purpose.

As FVLD member Damon Dunn told the Los Angeles Times the day after the ruling, employees "need to anticipate their communication devices may be monitored for seemingly routine business purposes, even if the search reveals intimate and embarrassing information."

FVLD prepares policies and handbooks for employers including policies relating to employees' text messages and other electronic communications.

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