Electronic Privacy in the Workplace: the *Quon* Decision

The wave of new technology in the workplace has begun to change many people's conceptions of personal privacy. The lines of acceptable behavior while at work, as well as the ownership of physical and intangible property, have become blurred in many instances. In particular, the use of employer-provided electronic devices for personal uses has raised many difficult questions. When the employer is a public entity, such as the University or a municipality, the questions become even more complex. Are employees entitled to complete privacy in their electronic messaging, even when engaging in personal business while at work? Or can a public employer exercise reasonable control over the use of its own issued devices, while employees are on duty?

These were the questions raised in a recent decision of the United States Supreme Court. *City of Ontario, Cal. v. Quon*, 130 S.Ct. 2619, 2010 WL 2400087 (Jun. 17, 2010). The City of Ontario issued pagers with text messaging capabilities to its police officers. The City's service provider imposed a monthly character limit on text messages. The police officers were informed of this limit, as well as of the department's privacy policy with regard to electronic messages. The department expressly reserved the right to monitor any e-mails sent on its computers; the policy also stated that "users should have *no expectation of privacy* or confidentiality when using [the department's] resources." *Id.* at 4 (emphasis added). Although the published policy did not list text messages sent on the pagers, the department's supervising officers made it expressly clear to all police officers that text messages were indeed covered by the plan.

The plaintiff in the case, Officer Quon, began exceeding his limit on text messages immediately, along with several other officers. His lieutenant suggested that if he and the others simply paid the overage fees, they could avoid an audit by the department. Quon followed this advice, but he continued to exceed the text message limit for several months. The police department decided to initiate a review to determine if the limit had been set too low and employees were being required to pay for work-related messages, or if the overages were due to personal use. Upon the department's request, the wireless provider furnished the transcripts of several officers' conversations, including Quon's. The department's internal affairs division reviewed messages sent by Quon for two months and redacted the transcript to eliminate any messages sent while he was off-duty. The transcript revealed that many of Quon's messages were personal and some were sexually explicit. Quon was then disciplined for pursuing personal matters while on duty.

Quon and other police officers with whom Quon had exchanged messages during the two months in question then brought suit against the City, the police department, and the police chief, alleging violation of their Fourth Amendment rights (applied to the Defendants through the Fourteenth Amendment's Due Process Clause) against unreasonable search and seizure. The federal district court, after a jury trial, found no Fourth Amendment violation, holding that the search was reasonable due to the employer's legitimate purpose. The Court of Appeals for the Ninth Circuit reversed, however, viewing the search as unreasonable because the employer's legitimate rationale could have been accomplished by less intrusive means.

The City appealed the decision to the United States Supreme Court, which held that the search was reasonable and therefore not in violation of the Fourth Amendment. The Court followed the analysis set forth in an earlier Supreme Court decision, *O'Connor v. Ortega*, which recognized that government employers are indeed subject to the Fourth Amendment. 480 U.S. 709 (1987). However, there was no majority opinion in the *Ortega* case, and a plurality opinion was issued instead that constituted a "non-binding precedent." The lack of consensus in *Ortega* was due to the inability of the justices to reach agreement on the precise test for analyzing a government's alleged Fourth Amendment violation. Specifically, the justices differed on the threshold inquiry as to whether a government employee was *always* entitled to a "reasonable expectation of privacy" or whether such a determination should instead be based on the "operational realities" of the workplace. Little clarification has been provided by the Court on this issue during the period since *Ortega*.

The Court in *Quon* avoided having to address this issue by assuming, for the purposes of analysis (without actually deciding), that Quon was entitled to a reasonable expectation of privacy. The Court further assumed that the City's review of Quon's messaging transcript constituted a "search" under the Fourth Amendment and that the standards applying to a government employer's search of an employee's physical property apply equally "when the employer intrudes on the employee's privacy in the electronic sphere." *Id.* at 2630. The issue to be decided, then, was whether, given the foregoing assumptions, the City's search of Quon's text messages was an unreasonable search under the Fourth Amendment.

To answer this question, the Court turned to the second part of the test, which was also supported only by a plurality of the justices in that case. Under that test, a warrantless search by a government employer "for a 'non-investigatory, work-related purpose' or for the 'investigation of work-related misconduct'" is reasonable if the search is "'justified at its inception' and if 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' the circumstances giving rise to the search." *Quon*, at 2630 (quoting *Ortega*, 480 U.S. at 725-26). The Court concluded that the search here was justified at its inception because it served a "non-investigatory work-related purpose," namely, that of determining whether employees under the text message plan were having to bear the cost of work-related expenses or whether the City was bearing the cost of personal communications.

The Court then inquired into the issue of whether the measures used were "excessively intrusive" or not, an inquiry that focused on the scope of the search. Looking at the employee's transcripts was regarded by the Court as an efficient and appropriate way of accomplishing the department's goal of determining whether the overages were due to work-related or personal text messaging. Moreover, transcripts were viewed for only a two month period and only for work-time pager use. It was, therefore, not excessively intrusive. This conclusion was buttressed by the fact that, since Quon had received no assurances of privacy in the messages and in fact was told that they would be subject to audit, he had, at best, only a limited expectation of privacy. Under the circumstances, he could not reasonably have concluded that his messages would *always* be immune from monitoring. Thus, the search's scope was reasonable. Finally, the Court noted that an employer is not required to use the "least intrusive means" possible in order to comply with the Fourth Amendment, as the reasoning of the Ninth Circuit Court of Appeals

seemed to suggest. Because the search was "motivated by a legitimate work-related purpose" and not "excessive in scope," it was reasonable and there was no Fourth Amendment violation.

Two justices wrote concurring opinions in the case. Justice Stevens emphasized his approval of the Court's decision to not resolve the question of whether a government employee is always entitled to a reasonable expectation of privacy. Justice Scalia agreed with the majority that such a determination was unnecessary but then criticized its discussion of the issue anyway as creating an unintended precedent for lower courts.

After *Quon*, the lines of acceptable workplace conduct are more clearly, though not conclusively, defined. The decision certainly gives more power to employers to conduct searches of their employees' electronic data. At the very least, this case undercuts any confidence on the part of a public employee that a personal message he/she sends on an employer-provided device will always be private. Employees would do well to keep this in mind as they conduct activities on such devices. On the other side of the ledger, employers have not been given free rein to search even the electronic devices that they have provided. Rather, they must ensure that their purpose in doing so is legitimate and that the search is not excessive in scope.

The Court leaves unanswered the important question of whether a public employee is always entitled to a reasonable expectation of privacy in the workplace. Thus, circumstances that might limit such an expectation may prove relevant in future cases. The Supreme Court's decision in this case, raising a caution to employees while not conferring an overt victory to employers, illustrates the difficulties faced by the courts in applying traditional legal standards regarding workplace privacy to electronic communications.