

Viewing Employees' Text Messages May Be Illegal

By **Olivia Goodkin**

An important case regarding employees' privacy expectations in the workplace was decided on June 18, 2008 by the Ninth Circuit Court of Appeals. In the case of *Quon v. Arch Wireless Operating Company*, the court examined whether the Ontario Police Department had violated an employee's right to privacy when its supervisors viewed the contents of his text messages that were transmitted using Department pagers.

The court held, among other things, that the Department's written and oral policies regarding the monitoring of email, computer and text messages were overridden when a supervisor told the employees that he would audit their text messages only if the employees failed to pay for overages on the Department's text-message provider's plan. Because the employee at issue had paid all overages resulting from his use of pager text messages, the review of the employee's text messages was deemed illegal.

While the *Quon* case expounds on numerous areas of law, including the liability of the company that provided the text message transcripts, this issue of *The Laboring Oar* explores the details of the *Quon* case that are most relevant to employers in California.

The Ontario Police Department's Policies

The Ontario Police Department issued a pager with text-messaging capabilities to Sergeant Jeff Quon. Quon acknowledged the Department's "Computer Usage, Internet and E-Mail" policy, which stated that the City of Ontario reserved the right to monitor and log all network activity, including email and Internet use, with or without notice. The policy further stated that users should have no expectation of privacy in their communications when using those resources.

Later, the Department announced at a staff meeting that the written policies concerning computers applied as well to the use of pagers. Under the City's contract with Arch Wireless Operating Company ("Arch"), the wireless communications company providing the paging service, each pager was allotted 25,000 characters. The City was required to pay any overage charges; supervising officers were responsible for procuring payment for overages from individual users, such as Quon.

The Oral "Amendment" to the Written Computer, Internet and E-Mail Policy

About Olivia Goodkin



Olivia Goodkin has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation.

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About Rutter Hobbs & Davidoff

Century City-based law firm Rutter Hobbs & Davidoff Incorporated represents clients in matters involving bankruptcy and corporate reorganization, business disputes and litigation,

Quon's supervising officer, Lieutenant Duke, told Quon that it was not his intent to audit employees' text messages for the purpose of seeing whether or not the texts were personal messages. He said he would only conduct an audit if Quon did not pay for the overages. Quon did pay the City for overages each time they occurred.

When several officers exceeded their 25,000 character limit, Lieutenant Duke was ordered to obtain the transcripts of text messages to determine if the messages were personal or business-related. Arch provided the transcripts, which included personal messages, including several from Quon to his wife.

Quon and others sued Arch for divulging the transcripts of their text messages, and also sued the Ontario Police Department and various Department supervisors.

The Right to Privacy and Fourth Amendment Issues

The Fourth Amendment to the U.S. Constitution protects the right "of the people" to be secure in their "persons, houses, papers, and effects, against unreasonable searches and seizures." Quon and others involved sued the Ontario Police Department and its various supervisors for violation of their Fourth Amendment rights, alleging that a public entity (the Ontario Police Department) improperly obtained the text messaging transcripts.

The court analogized the privacy rights of the Fourth Amendment to those found in the California Constitution, opining that whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis.

In the case before it, the court said that Quon's expectation of privacy "turns on the Department's policies regarding privacy in his text messages." Importantly, the court pointed out that if the policies of the Department were reflected only in the written Computer, Internet and Email policy, with the oral amendment that it would apply to text messages, the case would end there. Those policies were clear regarding no expectation of privacy in using those resources.

However, once Lieutenant Duke told Quon and the staff that he would not audit their text messages as long as they paid for any overages, the policies were in effect amended, and created an expectation of privacy. Since Quon paid for overages as they occurred, he had a reasonable expectation in the privacy of the content of the messages.

Because the *Quon* case involved a Fourth Amendment claim, which applies when there is a "state" or government action, the court moved to the second prong of determining a Fourth Amendment violation, namely, whether the search was unreasonable. It determined that it was. The court sent the case back to the trial court for a determination of Quon's claims in light of these legal rulings.

Why the *Quon* Case Applies to Your Private Company

The Ninth Circuit Court of Appeals, which covers the Western states,

corporate and securities, estate planning and litigation, family law, intellectual property, labor and employment, and real estate. For more than one-third of a century, the firm's experienced attorneys have represented middle market companies, early stage entities, large corporations and individuals.

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including California, held that the privacy rights of the Fourth Amendment are no broader than those found in the California Constitution. For this reason, the holdings regarding an employee's expectation of privacy are critical, as they may well apply to any case involving a California employer--whether it is a public or private entity.

The key issue for California employers was the finding that an oral representation made by a supervisor overrode the written policies of the company. Specifically, Lieutenant Duke's assurance that he would not review text messages, except in the limited situations that did not apply to the *Quon* case, superseded the written computer, Internet and email usage policies that specifically restricted employees' rights of privacy.

What to Do In the Aftermath of the *Quon* Case

Employers must train their supervisors regarding its policies and procedures. It is not enough to have written policies which seek to define privacy rights. Deviations from policies and exceptions to procedures can create different expectations or rights.

We suggest that you review your written Internet, computer, email, cell phone and other electronic usage policies to see if they reflect your company's needs. Then, discuss the policies with all of your supervisors to ensure that they understand the implications of making exceptions to the established written policies.