


# Viewing Employees' Text Messages May Be Illegal

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

According to the court, the Department's policies regarding the monitoring of e-mail, computer and text messages were overridden once a supervisor told employees their text messages would be audited if they failed to pay for overages on the text-message plan. Because the employee in the case had paid all overages resulting from his use of pager text messages, the review of the employee's text messages was deemed illegal.

## **Inside the Case: Looking at the Ontario Police Department's Policies**

The Ontario Police Department issued a pager with text-messaging capabilities to Sergeant Jeff Quon. He acknowledged the Department's "Computer Usage, Internet and E-Mail" policy, which explained that the City of Ontario had the right to monitor and log all network activity, including e-mail and Internet use. The policy also stated that users should have no expectation of privacy in their communications when using these forms of communication.

Later, the Department announced at a staff meeting that the policies also applied to using pagers. Under the City's contract with Arch Wireless Operating Company ("Arch"), the company providing the paging service, each pager was allotted 25,000 characters. The City was required to pay any overage charges.

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

Quon's supervising officer, Lieutenant Duke, told him 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 paid the City for overages each time they occurred.

When several officers went over their 25,000 character limit, Lieutenant Duke was ordered to obtain the transcripts to see 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 some of its 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 under this Amendment, alleging that a public entity (the Ontario Police Department) obtained the text messaging transcripts improperly.

The court said that Quon’s expectation of privacy “turns on the Department’s policies regarding privacy in his text messages.” The court pointed out that *if* the policies of the Department were reflected only in the written Computer, Internet and E-mail policy, with the oral amendment applying to text messages, then the case would end there. Those policies clearly indicated that Quon should have no expectation of privacy in using those resources.

However, once Lieutenant Duke told Quon and the staff that he wouldn’t 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, it was reasonable for him to expect his messages to remain private.

Because the *Quon* case involved a Fourth Amendment claim, which applies when there is a “state” or government action, the court decided there was a violation of the Fourth Amendment because the search was unreasonable.

### **Why the *Quon* Case Applies to Your Private Company**

An employee’s expectation of privacy can apply to any case involving a California employer – whether public or private. The key issue for California employers is that a verbal statement made by a supervisor can override the written policies of a company. In this case, 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 policies that specifically restricted employees’ rights of privacy.

### **What Should Employers Do Now?**

Employers must train supervisors regarding policies and procedures. It is not enough to have written policies that define privacy rights. Review written Internet, computer, e-mail, cell phone and other electronic usage policies to see if they reflect company needs. Then, discuss the policies with all company supervisors to ensure that they understand the repercussions of making exceptions to those policies.