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THE TIMES THEY ARE A-CHANGIN': U.S. SUPREME COURT RECOGNIZES THE DIFFICULTIES IN ASSESSING EMPLOYEE PRIVACY EXPECTATIONS IN EVOLVING TECHNOLOGIES

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On June 17, 2010, the United States Supreme Court issued its opinion in *City of Ontario, California v. Quon*, No. 08-1332, where it addressed for the first time whether employees have a right to privacy in electronic communications made via company-issued devices. Though the Court's holding — that a police department's review of an employee's text messages did not violate the Fourth Amendment — directly affects only government employers, the Court's discussion of rapidly evolving technology and society's acumen and views on electronic means of expression and communication provide insight for all employers.

Jeff Quon was employed by the City of Ontario as a police officer and was a member of its SWAT team. In 2001, the City issued alphanumeric pagers to its SWAT team so that they could quickly respond to

emergencies. The City's computer usage and e-mail policy stated specifically that employees should have no expectation of privacy when using the City's electronic resources, but did not address pager usage directly. After the City issued pagers to the SWAT team, however, a supervisor verbally explained that the policy extended to the pagers. The e-mail policy's applicability to pager usage also was reiterated by way of a memorandum distributed to City employees.

The City paid for a limited number of characters to be transmitted monthly on each pager that it issued. Transmissions in excess of the character limit resulted in extra charges. Quon exceeded the character limit in each of the first two months that he used the pager. Quon's supervisor told him that he could pay an overage fee rather than have the City audit his usage to determine if the overages were work-related. Quon paid the overage fee. Over the next few months, Quon continued to exceed his

allotted characters and pay the overage fees.

In light of Quon's and other employee's consistent overages, the City decided to audit usage to determine if its character limits were too low. Specifically, the City wanted to find out if employees were paying to send work-related text messages or, conversely, if the City was paying for its employees' personal text messages. The City ordered transcripts of two months of messages from its service provider. The City reviewed Quon's transcripts and determined that the vast majority of the texts that he had sent and received while on-duty were personal, and some were sexually explicit. Quon's supervisor referred the matter to internal affairs and Quon was "allegedly" disciplined.

Quon filed suit, alleging that the City had violated his Fourth Amendment right to freedom from unreasonable

government searches and that both the City and its service provider had violated the Stored Communications Act (SCA), a federal statute that prohibits unauthorized access to stored electronic communications. A jury determined that the City had audited the text message transcripts for a legitimate business purpose – to determine whether either the City or its employees were paying for the other's usage, and the trial court found the scope of the search was reasonable. On appeal, however, the Ninth Circuit Court reversed, finding that the City should have used less intrusive available means to conduct its inquiry.

The Supreme Court decided the case on very narrow grounds and limited its holding to the specific facts presented. It assumed, without deciding, that Quon had a reasonable expectation of privacy in his text messages. Thus, its analysis was limited to determining whether the City's search was justified and reasonable in scope. It held that the search was justified by the City's legitimate business interest in ensuring that its employees were not paying for work-related texts and that the City was not paying for personal texts. It also held that the scope of the search was reasonable and not excessively intrusive, even despite the Ninth Circuit's conclusion that the City's service provider had violated the SCA by turning over the transcripts. The fact that the service provider may have violated the SCA, the Court said, did not make the City's search *per se* unreasonable.

Interestingly, the most insightful portion of the Court's opinion is not its ultimate holding in the case, but what the Court had to say about the state of evolving technology and its impact on privacy issues. The Court explained its reticence to announce a rule with far-reaching consequences in the technological realm:

The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear. . . . Prudence counsels caution before the facts in the instant case are used to establish far-reaching premises that define the existence, and extent, of privacy expectations enjoyed by employees when using employer-provided communication devices.

The Court noted that it is difficult to predict how employees' expectations in privacy will be shaped by changes in technology and "what society accepts as proper behavior." On the one hand, the Court explained, text messages "are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification." That consideration weighs in favor of an expectation of privacy. "On the other hand, the ubiquity of those devices has made them generally affordable," so employees can purchase their own devices and need not use devices supplied by their employer. That consideration weighs against an expectation of privacy.

Noting the ever-changing nature of both communications technology and societal views on its use, the Court declined to decide what constitutes a reasonable expectation of privacy.

The Court further noted that employers' electronic communications policies affect employees' expectations of privacy, "especially to the extent that such policies are clearly communicated." However, in this particular case, the Court questioned whether Quon's supervisor's verbal statement that the City did not intend to audit his text messages and that Quon could, instead, pay for his overages, might have overridden the written policy. Because the Court assumed that Quon had a reasonable expectation of privacy in his text messages, it did not decide the issue.

While the *Quon* decision does not have an immediate, direct impact on private employers, it does signal where the Court is headed on privacy issues, particularly with respect to electronic communications. The Court likely will render decisions with narrow holdings based on the particular facts of each case, as it did here, and refuse to establish any bright-line rule affecting technology. The two concurring opinions by Justices Stevens and Scalia make clear that the Court will be addressing these workplace privacy issues again. What does that mean for employers? It means that you can expect little guidance from the Court regarding what constitutes a comprehensive

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and enforceable electronic use and communications policy. More importantly, it means that you cannot assume that last year's policy is good enough for this year's technology.

In light of the *Quon* decision, consider taking the following steps:

- If you do not already have an electronic use and communications policy, consider implementing one. Make it clear that the policy applies to all existing and future communication systems. Consider including in the policy a statement that only the policy and written amendments to it – and not any verbal representations – govern the usage and monitoring of electronic communications.
- Take the time to review and update any existing electronic use and communications policy to ensure that it covers all existing systems and is

broad enough to apply to future systems.

- Confirm that all employees have received a copy of the electronic use and communications policy. Redistribute it occasionally and consider having employees sign an acknowledgement confirming receipt.
- Reassess the policy on a regular basis to ensure that it keeps pace with changes in technology and customs of usage.

If you have any questions about the *City of Ontario, California v. Quon* decision, please call any of the following members of the firm's Employment & Labor practice group: David M. Wissert, Amy Komoroski Wiwi or Joy N. Eakley at 973.597.2500. We also would be pleased to provide you with assistance with respect to other employment practices and workplace compliance issues.

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