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Do Employees Have a Reasonable Expectation of Privacy With Respect to Text Messages?

By: Philip S. Holloway, Esq.

The world is shrinking. With the rapid advance of communication technology, we are all more connected than at any point in history. This connectivity has also spilled over into the business world, increasing productivity and efficiency in ways unimaginable even ten years ago. Electronic mail, cellular telephones, PDAs, etc., have made communication between employer and employee more efficient than ever. The line between an employee's work and personal life has become blurred. Many employees work from home or have some sort of flex-time arrangement between their home and office. One minute an employee can send an email to a client from a PDA provided by the employer and, in the very next minute, can dash off a text message to a family member. The new relationship between employer and employee that has arisen out of the advances in electronic communication have, of course, raised new legal issues that must be addressed. One of these issues is whether employees using employer-owned electronic devices, such as PDAs or cellular

telephones, have a reasonable expectation of privacy in the text messages sent over such devices. Likewise, do those non-employees or employees who use employer-provided personal text devices to send text messages have a reasonable expectation of privacy in their communications?

The Ninth Circuit Court of Appeals addressed these very issues regarding text messages in the employer/employee context. In [Quon v. Arch Wireless Operating Company, 529 F.3d 892 \(9th Cir. 2008\)](#), Ontario, California's police department issued wireless text messaging devices to several of its officers, including the plaintiff, Jeff Quon (Quon). Prior to the department issuing the devices, Quon had signed an employee acknowledgment that, among other things, provided that "the City of Ontario reserves the right to monitor and log all network activity including email and Internet use, with or without notice" and that "users should have no expectation of privacy or confidentiality when using these resources." The department had no formal policy that mentioned text messages or their use, but Quon's superior officer told Quon and others that the text messages "were considered email and that those messages would fall under the City's policy as public information and be subject to audit."

Quon and his fellow officers were allotted 25,000 characters per month for text messages on the department's devices. When Quon and others began exceeding their allotment, Quon's superior officer told them that he would not audit their text messages as long as they paid for any amount of characters over the 25,000 limit. Quon exceeded the 25,000 character limit several times, but each time paid the amount of the overage to his superior officer. Tiring of functioning as a "bill collector" for the overages, Quon's superior officer complained to the Chief of Police for Ontario, who in turn ordered him to request the transcript for Quon's text message device from the service provider of the text messaging service to the police department. The company provided the transcripts to Quon's superior officer upon his request. Within the transcript were both sent and received text messages, some sexually explicit, between Quon and other department employees. Quon, his wife, and those employees who used their personal devices to send Quon messages brought a lawsuit against the service provider under the Stored Communications Act, and against the police department, alleging an unconstitutional search and seizure.

The Ninth Circuit found that Quon's wife and co-employees who sent and received messages from Quon on their personal wireless devices certainly had an expectation of privacy in those messages, stating, "appellants did not expect that Arch Wireless would monitor their text messages, much less turn over the messages to third parties without their consent." However, the Court placed limits on the expectation of privacy, finding that, if Quon had voluntarily permitted the police department to review his text messages, those who used their personal devices to send text messages to Quon would have no valid claims. The Court likened the text messages to telephone calls, stating that "the maker of a telephone call has a reasonable expectation that police officials will not intercept and listen to their conversation; however, the conversation itself is held with the risk that one of the participants may reveal what is said to

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others." The Court found, however, that the police department violated the Fourth Amendment by surreptitiously reviewing the messages that all the parties (including Quon, but for reasons discussed below) reasonably believed were free from third party review.

The Court then turned to Quon's claim. The Court acknowledged that the police department had a written policy in place that might have negated Quon's expectation of privacy in his text messages, given that the policy explicitly provided that there was no expectation of privacy and Quon's superior officer informed him and his fellow officers that the written policy applied to the text messages. The department's mistake, the Court found, was in Quon's superior officer telling Quon and others that the department would not audit their text messages as long as they paid for any amount over the 25,000 character allotment. Further, Quon relied on his superior officer's informal policy several times and paid for his overages without the department reviewing his text messages. In short, the Court found that the department's actions regarding the text messages contradicted its written policy and that therefore, Quon had a reasonable expectation of privacy in those text messages.

What lessons does the *Quon* case hold for employers when it comes to employees' expectations of privacy in text messages? First, employers should make sure that their written policies regarding electronic communication include text messaging and provide that employees have no reasonable expectation of privacy in text messages received or sent via company-provided electronic devices. Second, employers should take the time to update their electronic communication policies such that new and emerging communication technologies are addressed. Finally, employers should monitor the enforcement of their electronic communication policies to ensure that they are applied consistently and without contradiction.

Quon involved a public employer sued for violating the Fourth Amendment. Nevertheless, a private employer who gives employees reason to believe that their e-mail and text messages will remain private, and then frustrates that expectation, is dangerously exposing itself to potential liability for invasion of privacy.

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