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The GSH 60-Second Memo

July 7, 2010

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What's Next for Texts: An Employee's Right to Privacy After *Quon*

By Kenneth B. Chang, Esq.

Employment law attorneys everywhere, including us here at Gonzalez Saggio & Harlan, have kept a close eye on *City of Ontario v. Quon*, a case that provided the U.S. Supreme Court with an opportunity to clarify the scope of an employee's right to privacy in electronic communications made on employer-provided electronic devices. *See* 2010 WL 2400087 (June 17, 2010). As previous 60 Second Memos have discussed, this case arose when the Chief of the Police Department of Ontario, California ("OPD") noticed that several officers had exceeded their monthly text message character limits, resulting in overage charges. The Chief wanted to determine whether the existing character limits were too low. During his investigation, it was discovered that some of Officer Quon's text messages were sexually explicit. The Chief referred these findings to the OPD's internal affairs division for further investigation, and Officer Quon was subsequently disciplined. He later sued the City of Ontario, alleging (among other things) that the OPD had violated his Fourth Amendment rights by obtaining and reviewing his text messages.

Employers and their attorneys were eager to have the Supreme Court weigh in on a key question: Whether Officer Quon had a "reasonable expectation of privacy" in text messages sent or received by his employer-issued pager. Although the case involved a public sector employee (and thus implicated his Fourth Amendment rights against "unreasonable searches and seizures" by the government), it was expected that the Court's decision may clarify the privacy rights of private sector employees as well.

Alas, the Court declined to provide such clarification in *Quon*. Instead, for purposes of deciding Officer Quon's case, the Court assumed -- without deciding -- that Officer Quon did have a

reasonable expectation of privacy in his text messages. The Court was then able to decide the case on a much narrower question: Was the City of Ontario's review of Officer Quon's text messaging, conducted in this particular way and under these particular circumstances, reasonable under the Fourth Amendment? The answer, said the Court, is yes.

In deciding that the search had been reasonable, the Court noted that the Chief's investigation had been motivated by the legitimate, work-related purpose of evaluating the OPD's text messaging plan. The Court observed that reviewing the text message transcripts was an "efficient and expedient" way to achieve that purpose. Importantly, the Court found that the review was not "excessively intrusive"; although Officer Quon had exceeded his monthly limit several times, OPD requested transcripts for only two months and redacted all off-duty messages sent by Officer Quon prior to the review. Finally, the Court observed that Quon likely had only a limited expectation of privacy in his work-issued pager, which he could reasonably have expected to be reviewed by his employer. Under these specific circumstances, the search did not violate the Fourth Amendment.

The most interesting question, from an employer's perspective, was specifically left undecided: does a public employee have any expectation of privacy in a work-issued pager? The issue was very much in play; even though the City of Ontario had a formal policy stating that its employees should have no expectation of privacy in messages sent to and from their pagers, Officer Quon had argued that his supervisor had overridden that policy by telling him text messages would not be audited so long as the OPD was reimbursed for any overages. Even though the Court avoided deciding this issue, the opinion's wording hints that employees may be entitled to at least some privacy in electronic communications. The precise scope of that entitlement, unfortunately, has been left unresolved for now.

Even so, *Quon* offers some immediate lessons for public employers, and these lessons should be heeded by private employers as well. First, it is absolutely critical that employers have in place a written policy that clearly states that communications over any employer-provided systems or devices are not private and may be subject to review by the employer. Second, employers should routinely audit their internal practices to ensure that this policy is implemented properly (and has not been "overridden" by some informal arrangement). Third, employers should undertake searches of employee communications solely for legitimate, work-related purposes. Finally, employers should ensure that any such search is reasonably tailored to its purpose in order to limit the possibility of unnecessary intrusion into the employee's private life.

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