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Employment

Employee Privacy is No LOL Matter

By Tanya Forsheit and Cliff Davidson

The 9th Circuit decision in *Quon et al. v. Arch Wireless et al.*, 07-55282 (9th Cir. June 18, 2008) has sparked a flurry of news reports and speculation regarding the ability of private sector employers to monitor employees' e-mails and text messages. Despite the hype, *Quon's* impact is minimal for any employer that carefully drafts computer and electronic communications use policies and enforces those policies consistently. It was the failure of the employer-defendants in *Quon* to do so that virtually invited this litigation.

The significant development in *Quon* is this: Providers of text messaging and other electronic communications services may not simply turn over stored transcripts of text or e-mail messages to their employer customers. Thus, to the extent *Quon* limits the right of an employer to monitor text and e-mail, it is because of the restrictions placed on those service providers — Arch Wireless, in this case.

Quon's Factual Context

Quon is a police officer for the city of Ontario, Calif. He was issued a pager active on the Arch Wireless network. The Ontario Police Department subscribed to an Arch plan whereby each officer received a quota of 25,000 text characters per month. The informal policy of the department was to make officers pay for overages.

Although the Ontario Police Department disseminated to employees a computer-use policy that included text message and e-mail auditing, thereby disclaiming any reasonable expectation of privacy in such communications, officers were informed by supervisors that text messages sent from police-issued pagers would not be audited so long as they paid the overage fees.

Nonetheless, when Quon and other officers exceeded their quotas several months in a row, the police department requested that Arch provide transcripts of those messages. The department reviewed the transcripts and discovered that many of Quon's messages consisted of personal and sensitive messages unrelated to work, contrary to Ontario Police Department policy.

Quon and others whose text messages were audited — including Quon's wife — sued Arch,

based on violation of the Stored Communications Act, and Ontario, the Ontario Police Department and various department officials for violation of the Fourth Amendment to the U.S. Constitution and the Privacy Clause contained in Article I, Section 1 of the California Constitution.

Electronic Communications Services

In a reversal of the trial court, the 9th Circuit panel held that Arch violated the Stored Communications Act, 18 U.S.C. Sections 2701-2711, by turning over the contents of text messages in the absence of a court order or consent of addressees or intended recipients — in this case, Quon and third parties, including his co-plaintiffs. This determination turned on whether Arch was a "remote computing service" or an "electronic communication service" under the act. A remote computing service may disclose the contents of communications with the consent of the "subscriber," who in this case was the Ontario Police Department. However, an electronic communication service may only disclose the contents of communications with the consent of "an addressee or intended recipient."

The court found that Arch was an electronic communication service and therefore had improperly surrendered the contents of the plaintiff-appellants' text messages without consent or court order. This holding applied to Arch as the service provider, not to Ontario or the police department as employers.

Reasonable Expectation of Privacy

Further, the court held that as a public employer, the Fourth Amendment and California's Privacy Clause applied to the Ontario Police Department's review of the text messages. The court engaged in the typical two-pronged Fourth Amendment analysis, under which a plaintiff must establish: a reasonable expectation of privacy; and an unreasonable search by a government actor.

The court squarely held that in the absence of other circumstances, users of text messaging "have a reasonable expectation of privacy in the content of their text messages vis-à-vis the service provider." However, the court noted that it "does not endorse a monolithic view of

text message users' reasonable expectation of privacy, as this is necessarily a context-sensitive inquiry." In *Quon's* particular context, the court found that even though the Ontario Police Department's acceptable use policy covered text messages and disclaimed any reasonable expectation of employee privacy, the "operational reality" of the department was that officers were told their texts would not be audited so long as they paid text message overage fees. That operational reality distinguished *Quon* from other employment cases in which employees were informed that their communications were not private; in such cases, the court refused to find a reasonable expectation of privacy.

Further, the court found that the search was unreasonable because it was overbroad; the Ontario Police Department need not have reviewed the contents of the text messages in order to assess whether its text-messaging quota was too restrictive. Although Quon had a reasonable expectation of privacy, the third-party co-plaintiffs with whom he communicated did not. The court analogized to *Hoffa v. United States*, in which the Supreme Court noted that a telephone conversation "is held with the risk that one of the participants may reveal what is said to others." It noted that if Quon voluntarily consented to a search of his text messages, the co-plaintiffs would have no claim.

Lessons for Employers

Nothing in the case appears to restrict the ability of private employers with clear computer use policies disclaiming employee privacy to monitor employees' e-mails and text messages (sent through the employers' system), though outside service providers may be restricted from providing such information to employers. However, *Quon* is an important reminder that employers should ensure their electronic communications policies and practices and statements to employees are consistent with formal employer policies.

Further, employers should bear in mind that while the Fourth Amendment applies only to public employers, the California Constitution's Privacy Clause applies to both public and private employers. An employee at a private company with a reasonable expectation of privacy in his or her electronic communications therefore may bring an action in tort for invasion of privacy.

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