

## CLIENT ALERT

### Supreme Court Rules that Government Search of Employee's Text Messages Was Reasonable

Jun.19.2010

On Thursday the Supreme Court took a first step towards defining the rights of public employees in the digital age when it unanimously held that a police department's review of an employee's on-the-job text messages was "reasonable" within the scope of the Fourth Amendment. This decision has implications for practitioners across a range of substantive areas of practice, from privacy and e-discovery to employment law.

In *Ontario v. Quon*, No. 08-1332, Quon, a Ontario, California police officer, used a pager issued to him by the police department to send and receive text messages, some of which were sexually explicit, during his work hours. Quon routinely exceeded the allocated minutes of usage under the department's plan with its wireless carrier, and the department undertook an audit of Quon's text messages to determine the cause and whether the department or Quon should pay for the overages. Quon sued the department alleging that the department's audit of his messages violated his Fourth Amendment privacy rights. The U.S. Court of Appeals for the Ninth Circuit held that Quon had a reasonable expectation of privacy in his text messages, and that the police department's audit of those messages was not reasonable in scope because there were less intrusive means of accomplishing the department's objective.

The Supreme Court first addressed whether Quon had a reasonable expectation of privacy regarding his text messages and determined that it need not resolve that issue to reach the result in the case -- *i.e.*, the Court assumed, *arguendo*, that Quon had at least a limited expectation of privacy. The Court then went on to explain why it must "proceed with care" in resolving issues of privacy expectations with respect to electronic communications:

"The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear.... Rapid changes in the dynamics of communication and information transmission are evident not just in the technology itself but in what society accepts as proper behavior.... [I]t is uncertain how workplace norms, and the law's treatment of them, will evolve."

Turning to the reasonableness of the department's review of Quon's text messages, the Court found that the department had a legitimate interest in ensuring that its employees were not being forced to pay out of their own pockets for work-related expenses, or that the City was not paying for extensive personal communications. Further, the Court held that the scope of the "search" was reasonable under the circumstances and not "excessively" intrusive.

Notably, although it was not necessary to the holding, **"the Court also concludes that the search would be 'regarded as reasonable and normal in the private-employer context.'"**

Although the Court made clear that its holding was limited to the "reasonableness" inquiry under the Fourth Amendment, this case likely will be relied on for its commentary regarding employees' expectation of privacy in workplace electronic communications. For example, the Court noted that "employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated." Both private

and government employers can assume that having clearly articulated and well communicated policies about employees' privacy expectations regarding their electronic messages will continue to be a focus for lower courts that are left to resolve these issues after *Quon*.

For more information, please contact the professional(s) listed below, or your regular Crowell & Moring contact.

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