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City of Ontario, California v Quon

No. 08-1332, US Supreme Court, 17 June 2010

The US Supreme Court permits a government employer to search through employee pager communications, because the search was 'not excessively intrusive' and was also justified by work-related considerations.

The United States Supreme Court ('the Court') issued a decision in June holding that a government employer's examination of an employee's pager messages did not violate the Fourth Amendment to the US Constitution. The justification behind this decision was that the examination was justified by a 'legitimate work-related rationale' and was 'not excessively intrusive'. The Court, in *City of Ontario v Quon*, purposely avoided deciding the question of whether the employee had a reasonable expectation of privacy in his messages since it concluded that, even if he did, the employer's search was reasonable and therefore permitted by the Fourth Amendment. Yet, even as it said it did not need to decide how much privacy employees reasonably can expect in their workplace communications, the Court ended up saying a good bit about that issue anyway.

Moreover, even though Quon involved a government employer, the Court's decision contains several passages that appear supportive of private employers who want to monitor their employees' communications on company equipment.

Sergeant Jeff Quon of the Ontario, California Police Department repeatedly exceeded the character limit for his Department-issued pager. On several such occasions, a Department Lieutenant informed Quon that he could either pay the overage fees for his excessive use, or have his messages audited to see which were personal and which were business-related. Sergeant Quon paid the fees and his messages were not audited. But when Quon again exceeded the character limit, the Police Chief authorized an audit of Quon's pager, which revealed that most of Quon's messages were personal -

and many were sexually explicit. Although the Department had no official policy explicitly covering the use of pagers for text-messaging, it had indicated in a meeting attended by Quon and in a memo from the Police Chief that its general 'Computer Usage, Internet and E-mail Policy' - which barred use 'for personal benefit' and stated that users 'should have no expectation of privacy or confidentiality' - also applied to the use of pagers.

Quon and several people with whom he exchanged pager messages (including his wife, his girlfriend, and a fellow-member of the department's Special Weapons and Tactics (SWAT) Team) sued Ontario, the Police Department, and the Police Chief for violations of their Fourth Amendment rights. The District Court for the Central District of California found that Quon and the recipients had a reasonable expectation of privacy in their messages, but that the search was a reasonable way to achieve the Department's purpose of determining the efficacy of the pager usage limit.

On appeal, the Court of Appeals for the Ninth Circuit reversed. It agreed with the district court that the Department's informal policy of not auditing Quon's text messages if he paid the overage fees 'rendered [his] expectation of privacy in those messages reasonable'. But it found that the Department's search of Quon's messages was not reasonable in scope, since there were other, less intrusive means of achieving the department's 'non-investigatory' purpose of determining the efficacy of the character limit. The Court of Appeals for the Ninth Circuit therefore concluded that the search violated the plaintiffs' Fourth Amendment rights.

The Court reversed 9-0, holding that even if Quon had a reasonable

expectation of privacy in his text messages, the Police Department's search of those messages was reasonable under the various analyses prescribed by the Court's decision in *O'Connor v Ortega*¹ for searches by government employers. The Court found that the Department's search was justified at its inception' by a 'non-investigatory, work-related purpose' - determining whether the pager character limit was meeting the City's needs. It also found that reviewing the transcripts of Quon's messages was reasonable in scope 'because it was an efficient and expedient way to determine whether Quon's overages were the result of work-related messaging or personal use'. In addition, the review was 'not "excessively intrusive"' since it was limited to just two months' worth of messages, and did not include messages sent while Quon was off duty. The Court also stated that, contrary to the Court of Appeals for the Ninth Circuit's ruling, a search need not be the 'least intrusive' method of serving the employer's interest in order to be reasonable.

Because the Court decided the case on the 'narrower' ground of the reasonableness of the search, it did not need to reach the more difficult question of whether Quon had, in fact, a reasonable expectation of privacy in his messages. Yet, in explaining why it wished to avoid that question, the Court actually ended up saying some important things about that very issue.

The Court's main reason for not deciding how much privacy Quon could reasonably expect in his messages was the rapidly evolving nature of communications technology and of conceptions of privacy. Because of this, the Court said, it 'would have difficulty predicting how employees' privacy

expectations will be shaped by those changes or the degree to which society will be prepared to recognize those expectations as reasonable.' But the Court then went on to speculate as to how technological developments could affect privacy jurisprudence: 'Cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self identification. That might strengthen the case for an expectation of privacy. On the other hand, the ubiquity of those devices has made them generally affordable, so one could counter that employees who need cell phones or similar devices for personal matters can purchase and pay for their own. And employer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.'

The Court's discussion of employees' privacy interests was not limited to this *obiter dictum*. The Court also ended up addressing the reasonableness of Quon's expectation of privacy in the course of deciding whether the Police Department's search was excessively intrusive. It found that even if Quon 'could assume some level of privacy would inhere in his messages, it would not have been reasonable for [him] to conclude that his messages were in all circumstances immune from scrutiny. Quon was told that his messages were subject to auditing. As a law enforcement officer, he would or should have known that his actions were likely to come under legal scrutiny, and that this might entail an analysis of his on-the-job communications. Under the circumstances, a reasonable employee would be aware that

sound management principles might require the audit of messages to determine whether the pager was being appropriately used. Given that the City issued the pagers to Quon and other SWAT Team members in order to help them more quickly respond to crises - and given that Quon had received no assurances of privacy - Quon could have anticipated that it might be necessary for the City to audit pager messages to assess the SWAT Team's performance in particular emergency situations.' Therefore, in light of the 'limited' nature of any privacy interest, the Court opined that the Department's review of Quon's messages on his 'employer-provided pager was not nearly as intrusive as a search of his personal e-mail account or pager, or a wiretap on his home phone line, would have been.'

Monitoring of communications by private employers obviously was not at issue in this case, and such monitoring may be subject to different legal standards - standards that may vary state-by-state. Nevertheless, the decision on the whole seems favorable to private employers who want to monitor their employees' communications on company equipment. When the Court stated 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,' it clearly suggested (albeit in *dictum*) that such monitoring may be permissible as long as a company clearly communicates its monitoring policy to employees. And, later in the opinion, the Court actually expressly stated that the review of Quon's messages would have been acceptable even if Quon had been the employee of a private company: 'Because the search was

motivated by a legitimate work-related purpose, and because it was not excessive in scope, the search was reasonable...For these same reasons...the Court also concludes that the search would be "regarded as reasonable and normal in the private-employer context"'.
Companies that want to preserve their ability to monitor employees' email, text messages, and other communications on company systems will therefore find the Quon decision rather reassuring, even if the decision is not directly on point. Quon underscores, however, the critical importance of a company's communicating its policy on monitoring clearly - in words (such as policy manuals, computer sign-in banners and employee handbooks) and through consistent enforcement.

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1. 480 U.S. 709 (1987), Certiorari to the United States Court of Appeals for the Ninth Circuit, No. 85-530, 31 March 1987.