

Employment Edge 111th Edition—The Quon Decision: The Supreme Court Upholds a Government Employer’s Search of Text Messages and Discusses the Importance of Clearly Communicated Technology Policies

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The United States Supreme Court has issued its highly anticipated decision in *City of Ontario v. Quon*, unanimously upholding a government employer's search of employee text messages sent on employer-owned equipment as valid under the Fourth Amendment of the U.S. Constitution. The Court expressly declined, however, to issue any ruling clarifying public employees' privacy expectations in this increasingly electronic era, stating that it must proceed with care due to the rapid changes occurring in technology and the risk of judicial error created by elaborating too fully on the privacy implications of emerging technology before its role in society has become clear. The Supreme Court did, however, provide a helpful reminder on the importance of a well-drafted, clearly communicated electronic communications policy, stating that such policies shape the reasonable expectations of employees when clearly communicated.

In *Quon*, a police SWAT team member named Jeff Quon and individuals with whom he exchanged text messages sued the City of Ontario, California and various other defendants in connection with his public employer's audit of text messages sent on a City pager by Quon. The audit revealed that Quon had sent mostly personal texts and a number of sexually explicit texts on work time, and Quon was apparently disciplined. A City technology policy covered emails sent on City computers and made clear that such emails were not private and could be monitored. While this policy did not clearly apply to text messages that were not routed through the City's computer network, the City had issued a written employee memo that extended the policy to texts. Quon argued, however, that he nevertheless had a reasonable expectation of privacy in his texts, because a management-level police official had told Quon that his texts would not be audited if he paid the City for any charges incurred due to Quon exceeding the City's monthly limit on text characters. The police official later decided, however, to conduct a limited audit of Quon's texts to determine if the City's monthly text character limit was too low to ensure that officers were not wrongly forced to pay for work-related messages.

In upholding the City's search of Quon's text messages, the Supreme Court concluded that it did not need to decide whether Quon had a reasonable expectation of privacy in his texts, because even assuming he did, the Fourth Amendment permitted the City's limited audit of Quon's texts. Relying on past Supreme Court decisions and taking great care to rule narrowly, the Court found that the Fourth Amendment allows a public employer to search and review electronic communications sent on employer-owned equipment so long as the search is: (1) for a non-investigatory, work-related purpose or the investigation of work-related misconduct; (2) the measures adopted are reasonably related to the search's objectives; and (3) the search is not excessively intrusive in light of the circumstances. In Quon, the Supreme Court upheld the City's search as justified by work-related purposes and as reasonably limited, noting that the search was limited to only two months of texts and that the City's investigator redacted all texts sent by Quon outside of work hours. The Court also held that, while a public employer's search must not be excessively intrusive, it need not be the "least intrusive" search practicable. In addition, the Court noted that, to the extent a past Supreme Court decision had stated that the Court might also consider whether a public employer's search would have been reasonable and normal for a private employer, the City's search satisfied this standard.

Again, while the Quon decision did not directly rule on public or private employees' privacy expectations in electronic communications, the Supreme Court did note the importance of a clearly communicated workplace policy to establish employees' reasonable expectations. In addition, the Court noted that the privacy dispute in Quon stemmed primarily from a management employee's oral statements that were inconsistent with the City's official written policy. While it is clear from Quon that employee privacy rights are still evolving and are far from settled, the Quon decision does provide some helpful guidance, suggesting that both public and private employers might minimize legal risks through the following steps:

- Employers should develop and clearly communicate to employees a well-written policy that covers all forms of electronic communications and emerging technology. This policy should clearly state that employees do not have a reasonable expectation of privacy in, and that the employer may monitor and review, any electronic communications, even if personal, that are sent, received, accessed, or stored on equipment or other items owned by, provided by, or paid for by the employer.
- Management should be trained to follow the official electronic communications policy and not to make statements or engage in practices inconsistent with that policy.
- In addition to communicating its electronic communications policy, employers should train employees on the policy and the employer's expectations on appropriate usage of workplace technology.
- Employers should have legitimate business reasons for searching electronic communications of employees and should narrowly tailor such searches to the employer's objectives and the unique circumstances at hand.
- Due to the complicated and evolving legal landscape, employers should keep updated on new developments and consult with counsel, as appropriate, to try to minimize legal risks.



If you need assistance with issues related to employees' use of technology or other employment law matters, please contact Megan Anderson or another member of the Gray Plant Mooty Employment and Labor Law practice group.

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