



Lessons Learned from *Quon*: Employee Monitoring and Expectations of Privacy in the Workplace

by Peggy Mattimoe Sturgeon and Carrie L. Sponseller

From e-mail, text message, telephone and computer monitoring to GPS and video surveillance, employer monitoring of employee conduct is at an all time high. On June 17, 2010, the United States Supreme Court issued a decision in *City of Ontario, California v. Quon*, a case many hoped would address broad issues of employee privacy rights in the workplace. While the Court unanimously held that a public employer's review of an employee's personal text messages sent on a government-issued pager did not violate the Fourth Amendment, the Court avoided an expansive discussion of workplace privacy issues, which pose challenges for public and private sector employers alike. Despite its narrow holding, employers can learn several valuable lessons from *Quon*.

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Facts of Quon

The City of Ontario, California, provided its police officers with two-way pagers to communicate with one another and assist in responding to emergencies. After several officers, including Quon, routinely exceeded their monthly text message limit, the city undertook an investigation to determine the adequacy of the text limit. As part of its investigation, the city obtained transcripts of Officer Quon's text messages. The transcripts revealed that most of Officer Quon's text messages were not work-related and that many were sexually explicit and were sent to coworkers during working hours. After Officer Quon was disciplined for violating the police department's rules, he sued the city, arguing that the city's actions constituted an unreasonable search and violated the Fourth Amendment. The Ninth Circuit Court of Appeals agreed, finding that Officer Quon had an absolute right of privacy in the text messages. When the Supreme Court accepted the case for review, expectations were high.

Supreme Court's Analysis

The Supreme Court vacated the Ninth Circuit's decision and held that the search of Officer Quon's text messages was reasonable and there was no violation of his Fourth Amendment rights because the city's examination of the text messages was undertaken for a work-related purpose and was not excessively intrusive. The Court also reasoned that any expectation of privacy Officer Quon may have had in the text messages was limited by the police department's "Computer Policy," which stated that users "should have no expectations of privacy or confidentiality" when using city computers or communication devices. The Court elected to dispose of the case on narrow grounds, noting that "[a] broad holding concerning employees' privacy expectations vis-à-vis employer-provided technological equipment might have implications for future cases that cannot be predicted."

Lessons Learned from *Quon*

Significantly, the *Quon* Court recognized 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." *Quon* reinforces the importance of adopting and enforcing strong electronic utilization policies for both public and private employers, who will be well-positioned to defend against invasion of privacy claims filed by employees if the following best practices are in place:

- Establishing and disseminating written electronic utilization policies, which are broad enough to encompass emerging technologies;
- Clearly advising employees that they have no expectation of privacy, confidentiality or ownership in data stored, sent or received on company systems or generated using company issued devices; and
- Clearly advising employees that communications and systems usage may be monitored and audited.

Feel free to contact Eastman & Smith for assistance drafting an effective and protective electronic utilization policy.



Ms. Sturgeon is a member of the Firm. She represents employers before federal and state courts, as well as federal and state administrative agencies. Her practice also includes counseling of employers regarding a wide variety of employment matters.



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