

Ninth Circuit Ruling: Employee Text Messages Shielded from Employer Review

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On June 18, the Court of Appeals for the Ninth Circuit held in *Quon v. Arch Wireless Operating Co.*, No. 07-55282 (9th Cir.), that employee text messages are subject to the Stored Communications Act of 1986, and that employees have an expectation of privacy in such messages under certain circumstances pursuant to the Fourth Amendment. This case is of particular interest in that it highlights the traps that can ensnare employers that monitor such communications, but also suggests ways that employers can protect themselves from stumbling into similar situations.

In *Quon*, the City of Ontario, California (the City) acquired 20 two-way pagers for use by its police force from Arch Wireless (Arch) in 2000. Pursuant to the subscriber agreement between Arch and the City, each pager was allotted 25,000 characters per month, after which the City was required to pay overage fees. At the time it took possession of the pagers, the City did not have a formal pager-user policy in place, although it did have policies pertaining to employee Internet and email usage. Once the pagers were in use, the City held meetings with its employees to explain that pagers would be subject to the existing computer policy, which included a notice that the City had the right to inspect the content of messages. The City also developed an informal policy concerning overage fees for usage that exceeded 25,000 characters, which called for individual users to reimburse the City for the overage charges.

In 2003, the Police Department opened an internal investigation into pager usage and overage charges. As part of this investigation, the department obtained transcripts of the text messages from Arch, the service provider. Prior to releasing the transcripts, Arch made no effort to assess the personal or private nature of any of the communications contained in the transcripts. A review of those transcripts revealed that Sergeant Jeff Quon, a member of the City's SWAT team, had exceeded the 25,000 character limit by 15,158 characters and that he had been transmitting sexually explicit messages to others within the department.

Officer Quon and others implicated by the transcripts, including Quon's wife, sued Arch and the City in 2003, claiming the department's review of their messages violated their privacy rights.

Specifically, the officers alleged that Arch had violated the Stored Communications Act, 18 U.S.C. §§ 2701-2711 (SCA), and that the City had violated their Fourth Amendment rights. On motion for summary judgment, the lower court held that Arch had not violated the SCA because the company was a "remote computer service" (RCS) under Section 2702(a) of the SCA and that it had committed no harm when it released text messaging transcripts to its subscriber, the City. The District Court also

held that the City and the Police Department had not violated the Fourth Amendment because the plaintiffs could not show that they had a reasonable expectation of privacy in the text messages.

The appellate court began its analysis by first ascertaining the proper characterization of Arch in these circumstances. Moreover, Arch's culpability hinged on whether it was a "remote computer service" or an "electronic communication service" (ECS), as defined by the SCA. If found to be the former, Arch could provide the transcripts to the City because Section 2702(b)(3) of the SCA permits the release of private information after the lawful consent of the subscriber, in this case, the City. On the other hand, if found to be an ECS, Arch could not release the messages without the lawful consent of "an addressee or intended recipient of such communication." 18 U.S.C. § 2702(b)(1).

Under Section 2510(15) of the SCA, an ECS is "any service which provides to users thereof the ability to send or receive wire or electronic communications." In Section 2711(2), an RCS is defined as "the provision to the public of computer storage or processing services by means of an electronic communications system. According to the Ninth Circuit, the "plain language of the SCA" and the legislative history to that act dictated that Arch was an ECS and that as such, Arch acted unlawfully when it released the transcripts of the messages with only the consent of the subscriber, and not that of an addressee or intended recipient of the communication.

The court next determined that the plaintiffs had a reasonable expectation of privacy in the messages, and that the police department's review of the messages violated their Fourth Amendment rights. In arriving at this conclusion, the court first turned to whether the recipients of Quon's messages had a reasonable expectation of privacy in the messages being sent. In answering this question in the affirmative, the court found that the content of text messages was analogous to the text found in a letter that had been placed in a sealed envelopment, and that the contents of such text had long been found to enjoy Fourth Amendment protection. With respect to Sergeant Quon himself, the court noted that in spite of the City's attempt to fold pager usage into its more general computer usage policy, the police department had developed an informal custom regarding pager usage, and that that custom had reasonably led Quon to believe that so long as he paid the overage fees, his messages would not be audited. The court noted that Quon had exceeded the character cap "three or four times," but that in each of those instances, he had simply been asked to pay the extra charges and that his messages had not been reviewed.

Having found that the plaintiffs had a reasonable expectation of privacy with respect to the content of the text messages, the court next examined whether the search had been reasonable. In concluding that it had not been reasonable, the appellate court observed that a number of less intrusive options were available to the department. For example, the court observed that the department could have placed Quon on notice that he was not to use his pager for personal communications and that his messages would be reviewed to check compliance. Or, Quon could have been asked to collect his past messages, redact those of a personal nature, and then submit the redacted transcript to the department for examination with a count of the characters used.

What This Means

The Ninth Circuit's opinion is a warning about the dangers of allowing informal customs to trump established policies and the consequences of lax enforcement of existing policies. The case also suggests some straightforward steps that employers can take to avoid being placed in a position similar to that of the City of Ontario. For example, company-issued computer usage policies should

be crafted broadly enough to include all technology being used by company employees. Similarly, companies should avoid the creation or evolution of “informal” processes for dealing with the use of company-issued technology devices, and instead establish formal policies and procedures that it uses on a consistent basis.

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