

Employer Review of Text Messages Ok, Says Supreme Court

In a unanimous opinion authored by Justice Anthony Kennedy, the United States Supreme Court held that a city employer can review text messages on an employer-provided pager without running afoul of the Fourth Amendment. The opinion clarifies the law surrounding the use of employer-provided devices but is limited by the Court's narrow opinion.

Declining to issue a sweeping rule concerning the use of electronic devices, Justice Kennedy wrote, "At present, it is uncertain how workplace norms, and the law's treatment of them, will evolve." The Court's narrow opinion held that City of Ontario SWAT officer, Jeff Quon, had a reasonable expectation of privacy in the text messages but that the search did not violate the Fourth Amendment because it was reasonable.

The City of Ontario, California has a written "Computer Usage, Internet and E-Mail Policy" reserving the right to monitor all activity with or without notice and informing users that they should have no expectation of privacy or confidentiality when using these resources. The policy was extended to paging devices through a meeting and a written memorandum.

Ontario's policies are in line with many other public employers' policies. In a recent survey conducted by the International Public Management Association for Human Resources (IPMA-HR), nearly 90 percent of members, most from local government, said that they have a written policy on the personal use of electronic communication. Slightly more than two-thirds of those policies allow for personal use but specify that communications are not private. Twenty-two percent of policies prohibit personal use.

Having such policies and communicating them are even more important after the Court's opinion. In the opinion, Kennedy wrote, "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."

Quon's superior, Lieutenant Steven Duke, told officers that he did not intend to review their messages and that if they went over the allotted number of characters for the messages in a month that they could simply reimburse the city for the extra cost. Over the next several months, Quon did go over the allotted number of characters and reimbursed the city for the overage fee.

Despite his earlier statement, Duke told the Chief of Police, Lloyd Scharf, that he was tired of being a bill collector. Scharf decided to audit the use of the pagers for the purpose of determining whether or not the city needed to increase the monthly character limit to avoid the overages. Scharf and Duke reviewed the messages and found that most of them were not work related. Several of them were sexually explicit and sent to Quon's wife and girlfriend.

The matter was referred to internal affairs and the officer in charge of the review redacted all messages that were sent while Quon was off duty. The investigator discovered that Quon sent or received 456 messages in August of which no more than 57 were work-related. He sent as many as 80 messages in

one day at work, with the average of 28, only 3 of which were work related. The investigation concluded that Quon violated workplace rules. Quon was allegedly disciplined.

Quon argues that this review violated his Fourth Amendment right to privacy. The Supreme Court assumed without deciding that Quon had a right to privacy in the text messages but went on to say that the Fourth Amendment was not violated because the search was reasonable. Justice Kennedy said that reviewing the transcripts was an efficient and expedient way to determine if the overages were the result of personal or work use. The search was not overly intrusive because it was limited to a two-month time period and the investigating officer removed all messages sent outside work hours.

Further, the Court said that Quon's expectation of privacy would be limited by the fact that his actions could easily come under legal scrutiny. A reasonable employee might assume that during a law enforcement action, the use of the pagers might be investigated since they were provided to help officers respond quickly to emergency situations. Further, the Court said that the city should not be required to use a less intrusive means because the chief and lieutenant could not be expected to know that the messages would reveal intimate details of Quon's personal life.

The IPMA-HR survey mentioned above was conducted in May 2010. Three hundred and thirteen members completed the survey. Fifty-four percent of respondents were from localities/cities, 14 percent from counties, 16 percent from states, and the remainder from federal government, school districts, special districts and towns. In addition to the above information, about half of respondents said they actively monitor employees' internet use through monitoring software and 23 percent said that they actively monitor the content of employees' email messages.