

## **U.S. SUPREME COURT ISSUES GROUNDBREAKING DECISION ON EMPLOYEE TEXTING**

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On June 17, 2010, the U.S. Supreme Court issued its first ruling on workplace texting and unanimously held that a city audit of an employee's messages on a city-owned pager was a reasonable search under the Fourth Amendment.

The unanimous ruling in *City of Ontario, California v. Quon* sidestepped whether police Sergeant Jeff Quon, had a reasonable expectation of privacy in his text messages, some of which turned out to be sexually explicit in nature but upheld the search and the legitimacy of the same.

The City of Ontario provided pagers to police officers on the SWAT team for business use. The city required the officers, including Quon, sign a "Computer Usage, Internet and E-Mail Policy", which stated that the City "reserves the right to monitor and log all network activity...with or without notice". While the policy did not include text messages, the City announced to employees, both verbally and in writing that text messages would be treated the same way as e-mails, and that they too could be audited. Unfortunately, the city had an "informal policy" that it wouldn't audit text messages as long as the employees who went over their monthly text messaging limit reimbursed the City for overcharges. Quon proceeded to exceed his minutes on multiple occasions drawing the ire of fellow officers, who did not want to serve as collections agents, and the suspicion of supervisors. Consequently, after Sgt. Quon again exceeded his allotted usage limit, the City acquired transcripts from the provider and discovered that Quon had used the pager during working hours for personal texts, some of which were sexually explicit.

Quon sued the City for invasion of privacy under the Fourth Amendment and the Federal Stored Communications Act. During arguments, the City stated that the purpose of the audit was to determine if the character limit was too low and should be increased for employees' business needs. The trial court held that the officers had a reasonable expectation of privacy in the text messages, but that the search did not violate the 4th amendment. The 9th Circuit reversed, holding that the search was unreasonable as matter of law. *Quon v. Arch Wireless, U.S. Court of Appeals for the 9th Circuit, No. 07-55282 (6/18/08)*.

The US Supreme Court reversed, holding that the search of Quon's text messages was reasonable and did not violate the 4th amendment. The Court found that the search was motivated by a legitimate work-related purpose, and was not excessive in scope. The court further reasoned that the audit was an efficient way to determine if overages were work-related or personal in nature.

While this ruling is an affirmation of an employer's right to audit its employees it is also a warning that the failure to implement policies and procedures that clearly designate the parameters of electronic searches could create an expectation of privacy and an opposite result. As such, it is a perfect opportunity to review your electronic policies and procedures and ensure that you have the authority to review, audit and search electronic communications. In addition, employers should be sure that management and human resources personnel are highly trained in handling privacy issues because it is critically important that employers act in a "reasonable" fashion. For example, in the *Quon* case, the Court noted that the employer immediately redacted all messages that occurred when Quon was off-duty to limit any intrusion into Quon's private affairs.

Although this case dealt with privacy issues applicable only to the public sector (i.e. constitutional protections), the principles announced in *Quon* are instructive for all employers. Employers that issue or provide access to electronic communications devices (covering most employers in this day and age) must have policies and practices in place to clearly permit the employer to monitor and review communications made through such devices.

If you have any questions about this case, or your policies and procedures please contact SA Partner Julie A. Proscia, Esq. ([jproscia@salawus.com](mailto:jproscia@salawus.com)) or at (630) 587-7911.