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U.S. SUPREME COURT RULES ON TEXT MESSAGE PRIVACY CASE

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On June 17, 2010, the United States Supreme Court issued its long-awaited decision in *City of Ontario v. Quon*, a case that raised what the Court deemed “issues of far-reaching significance” about an employee’s expectation of privacy when using electronic communication devices provided by an employer. Although the case involved a public employer, it has significant implications for all employers.

FACTS OF THE CASE

The case centered on the employer’s discipline of a police officer, Jeff Quon (Quon), for sending personal text messages using a device that had been provided to him by his employer, a city police department. Through an express policy, the City of Ontario reserved the right to monitor employee e-mail and Internet usage. The City distributed pagers to its officers and informed them that pager texts were “considered e-mail” and “could be audited.” After Quon and other officers repeatedly exceeded allotted text message quotas, the City decided to determine if the quotas were too low (*i.e.* if officers were paying fees for work-related messages) or if the overages related to personal texts. The City audited Quon’s text messages sent and received during work hours over a monthlong period. The City determined that most of Quon’s text messages were personal and not work related, and several were sexually explicit. The City disciplined Quon for violation of department policy. Quon sued the City for violation of his Fourth Amendment right to privacy.

THE COURT’S RULING

The Court initially declined to resolve the issue of whether Quon maintained a reasonable expectation of privacy in the messages. Noting the “rapid changes in the dynamics of communication and information transmission,” the Court found that prudence dictated that it not elaborate “too fully on the Fourth Amendment implications of emerging technology.” Instead, the Court presumed, for the limited purpose of resolving another constitutional issue, that Quon had a reasonable expectation of privacy in the messages. The Court then found that the City had a legitimate, work-related rationale for searching Quon’s messages, *i.e.* to ensure that employees were not being unnecessarily charged for work-related texts, and that the City was not paying for personal texts. Based on this legitimate interest, the Court held that the City could lawfully search the messages.

APPLICABILITY TO PRIVATE ENTITIES

While the Court’s ruling primarily addresses legal standards applicable to government employees (*i.e.* the freedom to be free from unreasonable searches and seizures), it also provides guidance for private employers, where common law rights of privacy can exist. Of particular importance, the Court expressly stated that “employer policies concerning communication will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.”

RECOMMENDATIONS

The *Quon* opinion reminds all employers, both public and private, of the importance of maintaining up-to-date personnel policies which convey a clear message that employees have no expectation of privacy in their use of company communication systems. Employers should review and/or develop their electronic use policies to confirm that they expressly address the privacy expectation, the acceptable use of electronic transmissions, and the various types of electronic communications, including blogging, “tweeting,” email, texting, and other social media, such as MySpace and Facebook. Employers should likewise conduct training seminars with managers and supervisors on the scope, supervision and enforcement of the company policy.

CONCLUSION

We will continue to update our current and prospective clients of further developments. Please contact **Nancy Conrad** (610.782.4909; conradn@whiteandwilliams.com), **George Morrison** (610.782.4911; morrisong@whiteandwilliams.com) or any member of our Employment Law Group for assistance with the review, development or revision of an electronic communications policy for your company.

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