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*In Brief*

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## SEARCH OF CITY EMPLOYEE'S TEXT MESSAGES ON EMPLOYER PROVIDED PAGER DID NOT VIOLATE THE FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The United States' Supreme Court addressed the ever-changing character of the public workplace in *City of Ontario v. Quon*, 130 S. Ct. 2619, when it decided that a government employer has a right to read text messages sent and received by employees on employer-owned pagers. In so ruling, the Court found that a public employer did not violate their employees' Fourth Amendment rights when they read text messages sent and received on employer-owned pagers.

The City of Ontario, California (the "City"), had a "Computer Usage, Internet and E-Mail Policy." Pursuant to this policy, the City reserved the right "to monitor and log all network activity including e-mail and Internet use, with or without notice." The policy further stated that "users should have no expectation of privacy or confidentiality when using these resources." In March of 2000 the employee at issue, police officer Jeff Quon ("Quon"), signed a statement acknowledging that he read and understood this policy. Seven months later the City bought pagers capable of sending and receiving text messages and issued these pagers to certain police officers, including Quon. The City's Computer Usage policy, however, did not specifically apply to text messages, and the pagers' text messages were routed through a wireless service provider's computer network, not the City's network. Importantly, the City explicitly informed its employees that it would treat text messages the same way it treated e-mails under the Computer Usage policy.

After a few billing cycles, Quon exceeded his monthly text message character allotment. The City's Lieutenant in charge of the text messaging contract, Steven Duke ("Duke"), told Quon about his overage and reminded Quon that text messages were considered e-mail messages and could be audited like e-mail messages. Duke also told Quon that he did not intend to audit him, and that Quon could instead reimburse the City for the overage fee he incurred. Duke offered the same arrangement to other employees who exceeded their character limit. Over the next few months Quon continued to exceed his character limit and he reimbursed the City each time. At some point, Duke became tired of collecting reimbursement on behalf of the City and the City decided to investigate whether the character limit imposed by their wireless contract was too low. In particular, the City wanted to determine whether officers like Quon had to pay overages for work-related messages. Duke was ordered to obtain transcripts of text messages sent by Quon and other employees over a two month period, and the transcripts were turned over to an internal affairs officer for review. Before the transcripts were reviewed, however, any messages sent or received while the officers were off duty were redacted from consideration. The review revealed that Quon sent 456 messages during work hours in August, and only 57 of these messages were work-related. "On an average workday, Quon sent or received 28 messages, of which only 3 were related to police business." The internal affairs report concluded that Quon had violated police department rules, and Quon was disciplined accordingly. Quon filed suit against the City alleging that his Fourth Amendment rights to be free from unreasonable searches were violated.

In reviewing the validity of the City's actions, the Court did not decide whether public employees do or do not generally have an expectation of privacy in electronic communications when acceptable use policies are in place, as was urged in an *amicus* brief filed by the National School Board Association. Instead, the Court assumed, for argument's sake, that Quon *did* have a reasonable expectation of privacy in

electronic communications. The Court also assumed that a review of text messages constituted a search, and that the principles applicable to the search of an employee's office apply to a search of the employee's electronic sphere as well.

After making these assumptions, the Court applied the test it developed in *O'Connor v. Ortega*, 107 S. Ct. 1492 (1987). Pursuant to its *O'Connor* decision, a warrantless search is considered reasonable if it is justified at its inception *and* is conducted for non-investigatory, work-related purposes or for the investigation of work-related misconduct. In addition, the search measures employed must be reasonably related to the search objectives and must not be excessively intrusive. To assess whether the search is excessively intrusive, one must consider the person's expectation of privacy. Though excess intrusivity is not acceptable, the search measures used do not need to be the least intrusive available.

Applying *O'Connor* to this case, the Court found that the City's search was reasonable because it was justified at its inception and was conducted for a non-investigatory, work-related purpose – to determine if the City needed to change the character limit imposed by their wireless contract. Key to this determination was the fact that the City limited their investigation to text messages sent or received only while Quon was on duty, and that the search was limited to a two month time period. Moreover, the Court held that Computer Usage policy put Quon on notice of the fact that text messages were not private.

Importantly, although the City's search was deemed reasonable, the Court declined to extend their decision to all employer-provided technological equipment because such a holding "might have implications for future cases that cannot be predicted."

The Court's decision provides important guidance regarding public employee searches: (1) employers should ensure that sound computer/technology use policies are in place; (2) the policy should fore-warn employees that communications on employer-owned electronic devices are not considered private and are subject to review for non-investigatory, work-related purposes or for the investigation of work-related misconduct; (3) whenever new electronic devices are issued to employees, provide the employee with a copy of the computer/technology use policy and have the employee sign an acknowledgement form that they have read and understand the policy; and (4) if an employer must investigate electronic communications between employees, limit the scope of your search as much as possible to the purpose of your search to avoid employee claims of Fourth Amendment violations.

*This Client In Brief was prepared by Maryam T. Brotine of the firm's Chicago office.*

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