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THE UNITED STATES SUPREME COURT IS ABOUT TO DELIVER A NON-TEXT MESSAGE ABOUT TEXT MESSAGING: QUON V. ARCH WIRELESS

What an employer can reasonably expect when allowing an employee to use a messaging device supplied by the employer when the employee is "sexting."

Millions of Americans have used them to vote for their favorite "American Idol" candidate. Colleges and universities use them to inform students of security alerts or weather warnings. Barack Obama even used one to announce his vice-presidential candidate selection. Almost overnight, text messaging has become the preferred medium of communication for millions of people. For instance, in the United States alone, an astonishing 189 billion text messages were sent in 2007. When expanded to major markets worldwide, the number balloons to 2.3 trillion messages. Undoubtedly, this in one medium that presently has no limits.

With this new and pervasive technology new legal issues have emerged and our legal system is in a position of having to decide new case law in order to meet the changes in modern technology. For example, just how much privacy do government employees have when they send a personal text message over a phone issued to them by an employer under the Stored Communications Act? In the case of Quon v. Arch Wireless, the Supreme Court will be sending its own message when it hears a Ninth Circuit case of whether employees have a right to privacy when they send text messages on electronic devises supplied by their employers. The facts of Quon are as follows: Jeff Quon was a sergeant on the Ontario, California SWAT team. He was given a pager with wireless text-messaging capability for work and he was specifically put on notice about the department's email policy (that incorporated texting) which policy explicitly gave the City of Ontario the right to monitor and prohibit the messenger for personal use. For eight months, the department did not audit anyone's page messages. During this time, Quon exceeded the coverage limit several times and paid for his extra usage. When Quon and another officer again exceeded their limit, the police chief decided to audit the use of certain pagers, including Quon's, to figure out whether the city should increase its 25,000 character allotment and whether the officers were using their pagers for personal reasons. The City asked its carrier, Arch Wireless, to provide transcripts of the messages on the selected pagers and later found that many of Quon's messages were personal and some were sexually explicit. Quon, his wife, and two others with whom he exchanged text messages then sued for a violation of their privacy rights. Quon said he believed that hundreds of personal text messages he had sent, including sexually explicit notes to his mistress, were private.

The Ninth Circuit decided against the City. Despite the existence of the written policy, the Ninth Circuit found that the department's practice of not reading such messages gave Quon a reasonable expectation of privacy in their messages. The Court also found that alternatives existed for the City wherein the department could have sent out a warning letting officers know in advance that they would be audited. Additionally, the Court concluded that Arch Wireless was an electronic computing service and, as a result, it could not disclose the content to a subscriber without the consent of a recipient. Thus, any such disclosure to the department as the subscriber, according to the court, violated the Stored Communications Act and Quon's right to privacy.

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The importance of this case so far is mainly fourfold and these key takeaways should be considered by all employers:

1. Quon makes clear the importance of having clear and precise monitoring policies in place.

2. It makes clear that courts will go behind these policies and look at the "operational reality" of monitoring to see if the review of electronic communications is appropriate. It is incumbent, then, that if a policy is enacted by an employer that the policy is applied on a consistent basis.

3. Quon also makes clear that even if an employer owns the device, has a monitoring policy, and pays for the service, monitoring of the content of the communications may not always be appropriate and

4. The case clarifies any doubt that text messaging must be included in monitoring policies and that the policies that exist in connection with monitoring e-mail be covered by traditional e-mail monitoring policies.

Although, the Quon Case is a public sector employment matter, the private sector will be watching very carefully to see how this case will impact privacy standards applicable to public sector and private employers alike. The real challenge for the Supreme Court, however, will be to reach a decision that balances the convergence of a new explosive technology with the emerging erosion of the boundaries between personal and work life.