Coates' Canons Blog: A Reasonable Search of Employee Records: City of Ontario v. Quon

By Frayda Bluestein

Article: https://canons.sog.unc.edu/a-reasonable-search-of-employee-records-city-of-ontario-v-quon/

This entry was posted on September 29, 2010 and is filed under Employment, Searches & Drug Testing

In this **post about access to emails**, I described three categories of public employee emails: 1)emails that are public records and subject to public access; 2) emails that are public records but an exception either prohibits disclosure or eliminates the right of public access; and 3) emails that are private (do not relate to the transaction of public business), and therefore are not subject to public access at all. I noted that private emails created on a public agency's email system may be subject to inspection by the public agency, depending upon the agency's policies. The **U.S. Constitution's Fourth Amendment** protection against unreasonable search and seizure limits the government's ability to view communications of its employee. A recent U.S. Supreme Court decision, ***City of Ontario, California, et al., v. Quon, et al .,*** held that the city's search of its employee's text messages did not violate the employee's constitutional rights because it was motivated by a legitimate work-related purpose and was reasonable in scope. The case didn't really create new law, and the Court decided not to establish any broad rules about what reasonable expectations of privacy public employees have in their electronic communications. The Court did address two important questions: 1) what should a court consider in determining whether an employee has a reasonable expectation of privacy in private on-the-job communications; and 2) when can the governmental employer review those communications even if a reasonable expectation of privacy exists.

Jeff Quon worked for the city police department. The department provided and paid for pagers that officers used for work-related text messaging. Arch Wireless provided the wireless service for the text messaging under contract with the city. The pagers had monthly limits on number of characters used, but Quon's and other officers' actual usage began to exceed those limits. At first, the officer responsible for overseeing the contract allowed the officers to pay for any overage attributable to personal use, and indicated that he had no intention of auditing the messages to confirm what proportion of messages were work related. When the overages continued, however, the police department sought access to the records of the text messages in order to determine whether the limit was too low, or whether the overage resulted from personal use of the pagers. Upon review of Quon's messages, the department learned that many of them were not work related and some were sexually explicit. Quon was disciplined for his excessive personal use of the pager during work hours. He (and others whose messages were viewed) then sued the city, claiming that the review of the text messages constituted an unreasonable search and seizure in violation of their Fourth Amendment rights. He also sued Arch Wireless, the company that provided the wireless service under contract with the city, for violating provisions of the federal **Stored Communications Act (SCA)** by releasing the messages. The SCA restricts access to wire or electronic communications that are stored with third party providers – that is, on systems other than the employer's own system. The lower court held that Arch Wireless violated the SCA when it gave the text messages to the police department, and held that the City's review of the text messages violated Quon's Fourth Amendment rights. The appeal to the Supreme Court, only addressed the Fourth Amendment claim.

The Supreme Court has previously made clear that individuals do not give up their right to be free from unreasonable searches when they take a job in government. In other words, a government agency must satisfy the same basic legal standard when it searches the workplace or records of one of its employees as it would when searching the property of any other person. *O'Connor v. Ortega,* 480 U.S. 709 (1987). The "search and seizure" analysis starts with the question of whether the person has a *reasonable expectation of privacy* in whatever is the subject of the search. In the *O'Connor* case, a majority of Justices couldn't agree on the standard that should be used to determine whether a governmental employee has a reasonable expectation of privacy. The disagreement was about whether the specific context and environment of the workplace in each case should be considered, or whether instead an employee should be assumed to have the expectation without considering the "operational realities" of the particular workplace involved. The *Quon* Court found it unnecessary to resolve the earlier conflict, concluding that under either approach, the city's search was reasonable.

Despite the majority's express declaration that it would not resolve which test applied, the Court's analysis involves significant discussion of the specific circumstances and their effect on Quon's expectation of privacy. The Court took note of the city's policy and the extent to which it was enforced. The city had a "Computer Usage, Internet and E-Mail Policy" that applied to all employees. The policy stated that the city "reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. " and warned that "(u)sers should have no expectation of privacy or confidentiality when using these resources." Quon signed a statement acknowledging that he had read and understood the computer policy. The city made clear to the employees that the policy would be applied to text messages as well as emails. The Court noted that a contextual analysis would require the justices to analyze whether the officer's statement that text messages would not be audited were sufficient to override the policy, and whether the general societal norms about electronic communication have an effect on a person's expectation of privacy in text messages. Instead of ruling one way or the other, the courts simply punted – saying that a broad ruling on these facts "might have implications for future cases that cannot be predicted." The court assumed for purposes of the case that the environment and context *did* create a reasonable expectation of privacy, and the Court then concluded that the search was reasonable in purpose and scope.

What makes a search reasonable? A warrantless search in the workplace does not violate the Fourth Amendment if it is conducted for a non-investigatory, work-related purpose or for the investigation of work-related misconduct, if it is justified at its inception, and if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search. *Quon*, slip. op., at 12, citing *O'Connor*, 480 U. S., at 725–726. Deferring to the findings of the jury at the trial, the *Quon* Court noted that the city ordered the search in order to determine whether the character limit on the City's contract with Arch Wireless was sufficient to meet the City's needs. The Court concluded that this was a "legitimate work-related rationale," and that "(t)he City and OPD had a legitimate interest in ensuring that employees were not being forced to pay out of their own pockets for work-related expenses, or on the other hand that the City was not paying for extensive personal communications." The court held that the scope of the search was also reasonable and not excessively intrusive because the review was of only two months of messages (just enough to provide a sufficient number of messages to fairly evaluate) and that messages sent when Quon was off-duty were redacted.

Even though it didn't explicitly endorse the consideration of operational context in evaluating whether Quon had a reasonable expectation of privacy, the Court did consider the context, including the larger social context and norms regarding electronic communication, in evaluating the reasonableness of the search. The Court found that the contextual background limited *the extent* of Quon's expectation of privacy, which supported the Court's conclusion the search was not unreasonably intrusive. The Court also rejected Quon's claim that the city could have used less intrusive methods to obtain the information it sought, holding that the Fourth Amendment standard does not require use of the least intrusive search.

The *Quon* decision certainly reaffirms the basic standard for what kinds of warrantless searches government employers can make. The case appears to provide support for the practice of enforcing email and other communication use policies that give the employer the right to assess compliance by reviewing employee communications. Even in the face of some mixed messages about the employer's intention to pursue such enforcement, it appears that a search may be conducted, as long as the purpose is work related (noninvestigatory), and the scope is reasonable in relation to that purpose.

Perhaps the larger issue this case raises, but does not resolve, is that the consideration of "context" has entered a new era. In *O'Connor* the issue had to do with physical spaces and environments – a search of open areas in an office, contrasted with a search of a desk and file drawers. It seems possible that "context" as applied to a search of electronic records poses a different set of factual and legal concerns. With the ever increasing use of electronic communication and social media, and the broad access to information previously considered private, it seems likely that reasonable expectations of privacy will be assumed to be diminished. The Court, in effect, considered these issues in concluding that even if there is a reasonable expectation of privacy, the realities of technology suggest that it should be limited in scope. On the other hand, the legal framework, including the federal protection of electronic communications under the SCA, may also affect one's expectation of privacy in certain circumstances. (The Court's conclusion that expectations of privacy in electronic communications should be limited is interesting in light of the fact that the service provider was held to have violated federal law in releasing the text messages to the city.) Other legal protections that apply to personal information in electronic form, though lagging behind the use of technology, will certainly evolve. It seems likely that courts will have to consider this context, as well as employer policies and their actual application, in determining whether and to what extent,

reasonable privacy expectations exist. With this in mind, the Court's reluctance to weigh in this time may simply put the matter off for another day and another case. (To quote Justice Scalia, whose concurring opinion in *Quon* criticized the majority for failing to adhere to a bright line test, "The-times-they-are-a-changin' is a feeble excuse for disregard of duty.")

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