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Supreme Court Upholds Reasonable Searches of Employee Text Messages

By Steven M. Schneider and Matthew Beasley (summer associate)

The U.S. Supreme Court recently upheld a city police department's search of an officer's text messages sent and received on his department-issued pager because there was a legitimate reason for it, and the scope of the search was reasonable. In this unanimous decision, the Supreme Court overruled the Ninth Circuit, which had held that the search violated the officer's privacy because a supervisor has made an exception to the department's written policy.

Sexual Harassment Prevention Training

CALIFORNIA LAW REQUIRES EMPLOYERS WITH 50 OR MORE EMPLOYEES TO CONDUCT MANDATORY SEXUAL HARASSMENT AWARENESS TRAINING FOR SUPERVISORS WITHIN SIX MONTHS OF THEIR BEING HIRED OR PROMOTED INTO A SUPERVISORY POSITION AND AGAIN EVERY TWO YEARS THEREAFTER. MS&K IS PLEASED TO PERIODICALLY OFFER THIS TRAINING, LED BY LABOR & EMPLOYMENT PARTNER ANTHONY AMENDOLA. [CLICK HERE FOR MORE INFORMATION AND TO REGISTER.](#)

WHEN:
WEDNESDAY, JULY 28, 2010
WHERE:
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Jeffrey Quon was a SWAT officer with the City of Ontario, California, Police Department ("OPD"). Quon sued the City for allegedly violating his Fourth Amendment privacy rights by searching two months of his pager text messages after he had repeatedly exceeded his monthly characters limit. That search revealed that Quon had sent far more personal than work-related messages and that many of his personal messages were sexual in nature.

Quon had been briefed on the OPD's "computer policy," which stated that OPD "reserved the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." Shortly after receiving his pager, Quon was informed that messages sent on department-issued pagers were considered e-mail messages and could be monitored.

Quon's supervisor later informed Quon that his pager use had exceeded its monthly characters limit. However, Quon's supervisor also told Quon that he could pay for the overage instead of having his message usage audited. Quon accordingly reimbursed the OPD whenever he exceeded that limit.



Q: DOES THE CITY OF ONTARIO DECISION MEAN THAT EMPLOYERS ARE FREE TO SEARCH EMPLOYEE USE OF EMPLOYER EQUIPMENT AND COMPUTER SYSTEMS?

A: CARE IS STILL REQUIRED. FIRST, EMPLOYERS SHOULD ESTABLISH AND DISSEMINATE A WRITTEN POLICY, AS THE CITY DID, CLEARLY STATING THE LACK OF PRIVACY IN EMPLOYEE VOICE AND OTHER COMMUNICATIONS. SECOND, THE SUPREME COURT'S DECISION DID NOT GIVE EMPLOYERS CARTE BLANCHE SNOOPING AUTHORITY - THERE SHOULD BE A LEGITIMATE BUSINESS REASON TO MONITOR OR SEARCH EMPLOYEE COMMUNICATIONS. THIRD, EVEN IF A VALID REASON TO DO SO EXISTS, THE SEARCH ITSELF MUST BE CONDUCTED IN A REASONABLE MANNER NO BROADER THAN THE LEGITIMATE REASON FOR IT. AS ELECTRONIC COMMUNICATIONS CONTINUE TO EVOLVE, WE EXPECT LATER DECISIONS IN THIS AREA, AND THE CITY'S PRUDENCE IN THIS CASE PROBABLY WILL SERVE AS A MODEL FOR THE CONDUCT OF EMPLOYER SEARCHES.

Q: WHAT EXPECTATIONS

Unaware of the supervisor's statements, OPD decided to search Quon's messages to determine whether the City's pager contract characters limit was too low. Unlike the Ninth Circuit, the Supreme Court held that determining whether the pager contract was adequate for the OPD's needs was a reasonable justification for the search of Quon's messages.

That search consisted of reviewing transcripts of two months' worth of Quon's text messages, excluding messages he sent or received while off duty. The Supreme Court held that this limited search of only on-duty text messages for a limited time was "reasonably related to the objectives of the search, and not excessively intrusive in light of the circumstances giving rise to the search." The Supreme Court also held that the existence of less intrusive ways to perform the search did not make it unreasonable.

Note that the Supreme Court expressly assumed that Quon did have a reasonable expectation of privacy in the contents of his text messages. Unfortunately, that Court declined to delineate what that expectation meant in this context, other than that Quon's privacy expectation did not trump the department's reasonable search. The Supreme Court acknowledged that employer-issued communication devices have created new and rapidly evolving workplace norms and that the law's treatment of them will probably also evolve, leaving the judicial door open for later decisions in this privacy area.

This decision addressed a public sector employee, whose privacy rights are governed by the U.S. Constitution's Fourth Amendment. California extends the right to privacy to all employees in the Golden State.

This decision highlights the need for employers to prepare and disseminate written policies that clearly inform employees that they have no expectation of privacy concerning work-issued communication devices, computer systems (including e-mail), and telephones, which are subject to monitoring and searches by the employer. Also, employers should not allow supervisors informally to make exceptions to established policies. Finally, even when there is a reasonable basis to conduct a search of an employee's working-time computer, e-mail, or phone usage, the scope of that search should be carefully tailored to the reason for it.

Two-Member NLRB Could Not Decide Cases

In a 5-4 decision in *New Process Steel, L.P. v. National Labor Relations Board*, the U.S. Supreme Court held that the traditionally five-member National Labor Relations Board (NLRB) must have at least three sitting members to issue decisions. Due to political inaction, in December 2007, the NLRB had three sitting members. Before the third member's term expired at the end of that year, those three purported to delegate their authority to a two-member group, which continued to decide more than 600 cases in 2008 and early 2009.

Interpreting the Taft-Hartley Act that established the NLRB, the Supreme Court held that, while the NLRB is allowed to delegate powers to as few as two members, it must consist of at least three sitting members for any delegated two-member group to decide

OF PRIVACY SHOULD EMPLOYEES HAVE IN THEIR USE OF EMPLOYER EQUIPMENT AND COMPUTER SYSTEMS?

A: THE SUPREME COURT RECOGNIZED THAT PUBLIC SECTOR EMPLOYEES DO HAVE A PRIVACY EXPECTATION, BUT WITHOUT LETTING US KNOW THE BOUNDARY BETWEEN THAT EXPECTATION AND THE RIGHT TO PRIVACY. IN CALIFORNIA, ALL EMPLOYEES - PUBLIC SECTOR AND PRIVATE SECTOR - HAVE A RIGHT TO PRIVACY, WHICH IS ANOTHER REASON WHY EMPLOYERS SHOULD HAVE CLEARLY WRITTEN EMPLOYER POLICIES NOTIFYING EMPLOYEES THAT THEIR COMMUNICATIONS ON EMPLOYER-PROVIDED EQUIPMENT AND COMPUTER SYSTEMS ARE SUBJECT TO MONITORING AND SEARCHES. IN THE ABSENCE OF SUCH A POLICY, THE CALIFORNIA RIGHT TO PRIVACY IS LIKELY TO PREVAIL OVER THE EMPLOYER'S MONITORING OR SEARCHING.

Q: WHAT KIND OF EMPLOYER SEARCHES ARE NOW PERMISSIBLE?

A: ASSUMING THAT A WELL-DRAFTED EMPLOYER POLICY IS IN PLACE, THERE STILL NEEDS TO BE A LEGITIMATE BUSINESS REASON TO SEARCH EMPLOYEE COMMUNICATIONS ON EMPLOYER-PROVIDED EQUIPMENT OR COMPUTER SYSTEMS, SUCH AS REASONABLY SUSPECTED WRONGDOING, NOTED EXCESSIVE USE (ESPECIALLY IF IT HAS RESULTED IN ADDITIONAL COST TO THE EMPLOYER), OR A COMPLAINT OF HARASSMENT BY THE

cases.

Accordingly, all NLRB decisions made between January 1, 2008, when the Board fell to two members, and March 27, 2010, when President Obama appointed two additional members, are now invalid. During that 27-month period, the two-member NLRB decided almost 600 cases. Most of those decisions became final and probably will not be revisited. However, the recently reconstituted five-member NLRB is seeking remand to the full Board of 96 appellate cases decided by the two-member Board. Those remanded cases might create a backlog for the NLRB, which could delay hearings on new cases and new rulemaking.

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SUBJECT EMPLOYEE INVOLVING SUCH COMMUNICATIONS. EVEN IF A LEGITIMATE REASON TO SEARCH EXISTS, THE SCOPE OF THE SEARCH SHOULD BE LIMITED AND NOT OVERBROAD. FOR EXAMPLE, IF JANE HAS COMPLAINED ABOUT RECEIVING SEXUALLY SUGGESTIVE E-MAILS FROM DAVE FOR MORE THAN A MONTH AFTER TELLING DAVE TO STOP DOING SO, BUT SHE HAS NOT SAVED THOSE E-MAILS, A REASONABLE SEARCH OF DAVE'S INTERNALLY SENT E-MAILS TO JANE OVER A FOUR-TO SIX-WEEK PERIOD WOULD SEEM REASONABLE. HOWEVER, SEARCHING ALL OF DAVE'S INTERNALLY SENT OR RECEIVED E-MAIL, OR HIS EXTERNALLY SENT OR RECEIVED E-MAIL, IN THIS EXAMPLE PROBABLY WOULD BE OVERBROAD.

Q: CAN AN EMPLOYER SEARCH EMPLOYEE COMMUNICATIONS IF THE EMPLOYER HAS NOT PROVIDED THE EQUIPMENT OR COMPUTER SYSTEMS?

A: THE EMPLOYEE RIGHT TO PRIVACY WOULD BE HIGHEST CONCERNING MESSAGES SENT OR RECEIVED USING HIS OR HER OWN COMPUTER, PDA, OR OTHER EQUIPMENT, ASSUMING NO INVOLVEMENT OF ANY EMPLOYER-PROVIDED EQUIPMENT OR COMPUTER SYSTEMS. OUTSIDE OF A LAWSUIT, IN WHICH DISCOVERY REQUESTS CAN BE CHALLENGED AND DECIDED BY A JUDGE, THERE NORMALLY IS NO RIGHT FOR AN EMPLOYER TO CONDUCT SUCH A SEARCH. IN SOME CIRCUMSTANCES, SUCH AS IF AN EMPLOYEE OR FORMER EMPLOYEE IS REASONABLY BELIEVED TO HAVE COPIED WITHOUT AUTHORIZATION

EMPLOYER BUSINESS INFORMATION ONTO THE EMPLOYEE'S OWN COMPUTER, A THIRD-PARTY COMPUTER EXPERT'S CONFIDENTIAL EXAMINATION OF THE EMPLOYEE'S COMPUTER TO INSPECT AND RETRIEVE SUCH BUSINESS INFORMATION WITHOUT INFORMING THE EMPLOYER OF ANY PERSONAL INFORMATION MIGHT BE AGREEABLE TO ALL CONCERNED. THE EMPLOYER, OF COURSE, USUALLY WILL HAVE TO PAY FOR THAT THIRD-PARTY SEARCH.

Q: WHAT ABOUT EMPLOYER SEARCHES OF AN EMPLOYEE'S OFFICE, INCLUDING THE DESK AND FILE CABINETS?

A: AGAIN, A WRITTEN POLICY CLEARLY COVERING SUCH SEARCHES IS HIGHLY ADVISABLE, THERE SHOULD BE A LEGITIMATE BUSINESS REASON TO CONDUCT SUCH A SEARCH, AND THE SCOPE OF THE SEARCH SHOULD BE LIMITED TO THE REASON FOR IT. WE COVERED IN AN ALERT LAST YEAR THE CALIFORNIA SUPREME COURT DECISION THAT DECLARED THAT EMPLOYEES DO HAVE A RIGHT TO PRIVACY IN THEIR EMPLOYER-PROVIDED OFFICES. THE EMPLOYER IN THAT DECISION ESCAPED LIABILITY BECAUSE IT HAD A LEGITIMATE BUSINESS REASON TO CONDUCT ELECTRONIC SURVEILLANCE OF THE SUBJECT EMPLOYEES' SHARED OFFICE AND ENDED THAT SEARCH AS SOON AS IT BECAME CLEAR THAT IT WAS FRUITLESS. ACCORDINGLY, EMPLOYERS SHOULD EXERCISE THE SAME CAUTION IN CONDUCTING

PREMISES SEARCHES AS
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COMMUNICATIONS.

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