

SCA and 4th Amendment Trump Employer's "Computer Usage, Internet and E-mail Policy"

By Alan S. Wernick

In *Quon vs. Arch Wireless Operating Company, Inc., et al.*, (June, 2008), the United States Court of Appeals, 9th Circuit, sounds another warning to employers and highlights the risks of a disconnect between conditions stated in an employer's "Computer usage, Internet and E-mail policy" (the "Policy") and the actual practices of the employer.

The *Quon* case involved several police officers (the Appellants) who were issued pagers by their employer, the Ontario (California) Police Department ("OPD"), and who used the pagers for personal text message communications. OPD had contracted with Arch Wireless Operating Company, Inc. ("Arch Wireless") to provide text messaging service. As part of OPD's auditing of the bills for the text messaging service, OPD requested that Arch Wireless provide OPD copies of the text messages sent by the Appellants, some of which messages were "personal in nature and often sexually explicit." The Court first addressed whether Arch Wireless violated the Stored Communications Act ("SCA"), 18 U.S.C. §§ 2701-2711 (1986), and concluded Arch Wireless did violate the SCA, and then addressed whether the Appellants' rights under the 4th Amendment were violated, and concluded that the employer did violate the employees' 4th Amendment rights.

The 9th Circuit held that Arch Wireless is an "electronic communication service" ("ECS") under the SCA, §§ 2701-2711 and liable to Appellants for violating the SCA. The Court stated that "An ECS is defined as 'any service which provides to users thereof the ability to send or receive wire or electronic communications.' 18 U.S.C. §2510(15). On its face, this describes the text-messaging pager services that Arch Wireless provided. Arch Wireless provided a 'service' that enabled Quon and the other Appellants to 'send or receive ... electronic communications,' i.e., text messages." After further analysis of the

SCA the Court concludes: “When Arch Wireless knowingly turned over the text-messaging transcripts to the City, which was a ‘subscriber,’ not ‘an addressee or intended recipient of such communication,’ it violated the SCA, 18 U.S.C. §2702(a)(1). Accordingly, judgment in Appellants’ favor on their claims against Arch Wireless is appropriate as a matter of law, and we remand to the district court for proceedings consistent with this holding.”

In determining the 4th Amendment issue, the Court focused on the facts (a) that OPD had a written Policy, in which it did not specifically address pagers; and (b) that the policy stated that OPD had the right to monitor, but in fact the Appellants were told (the “informal policy”) that as long as they paid the cost for extra messages over a stated amount in OPD’s agreement with Arch Wireless, OPD would not audit their usage.

In finding that OPD’s search of the pager records was unreasonable as a matter of law, the Court states that “The Fourth Amendment protects the ‘right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures.’ U.S. CONST. amend. IV. ... [T]he touchstone of the Fourth Amendment is reasonableness.’ ... ‘The reasonableness of a search is determined by assessing, on the one hand, the degree to which it intrudes upon an individual’s privacy and, on the other, the degree to which it is needed for the promotion of legitimate governmental interests.’” The Court noted that just because Appellants worked for the government, they did not lose their 4th Amendment rights.

In examining the Appellant’s reasonable expectation of privacy, the Court states “The recently minted standard of electronic communication via e-mails, text messages, and other means opens a new frontier in Fourth Amendment jurisprudence that has been little explored.” In finding that users of text messaging services have a reasonable expectation of privacy in messages stored on their service provider’s network, the Court analogized the privacy of the text messages to the privacy expectations of a person who

enters a phone booth and closes the door behind him, and the privacy expectations that someone has against the warrantless opening of sealed letters and packages addressed to her in order to examine the contents. The 9th Circuit found support for its finding of a reasonable expectation of privacy in all of these media of communications (i.e., the phone booth and the sealed letter), and thus in the application of the 4th Amendment's reasonable expectation of privacy in text messaging services.

Most companies today have (or should have) policies with appropriate terms and conditions concerning data privacy and security issues involving computer usage, Internet, e-mails, and other corporate communications systems on or in which the company's business data travels or is stored for archival or backup purposes. Not uncommon to these policies is a right of inspection by the employer. Indeed, Judge Posner in *Muick v. Glenayre Electronics*, (United States Court of Appeal, 7th Circuit, 2002), states "The laptops were Glenayre's [the employer's] property and it could attach whatever conditions to their use it wanted to. They didn't have to be reasonable conditions; but the abuse of access to workplace computers is so common (workers being prone to use them as media of gossip, titillation, and other entertainment and distraction) that reserving a right of inspection is so far from being unreasonable that the failure to do so might well be thought irresponsible."

Now, before you find yourself having to defend the policy, is a good time to review your organization's policies concerning employees' use of computers, Internet, e-mail and other communications technologies, the periodic training that should go along with those policies, and the periodic legal audit to check for compliance.

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