

SOCIAL MEDIA UPDATE:

United States Supreme Court to Rule on Novel "Sexting" Privacy Case

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The United States Supreme Court has agreed to hear an appeal of a case in which a federal appeals court ruled that an employer violated an employee's right to privacy when it audited his text messages and found sexually explicit and otherwise personal messages. The implications of the Supreme Court's ruling will be significant.

THE CASE – CITY OF ONTARIO V. QUON, 529 F.3D 892 (9TH CIR. 2008), CERT. GRANTED, __ S.CT. __, 2009 WL 1146443 (U.S.)

The Police Department of Ontario, California contracted with a wireless company to enable each of the Department's employees to text up to 25,000 characters per month on Department-issued pagers. The Department had an official policy stating that the Department had the right to monitor network activity, including e-mail and the Internet, and further stating that, while incidental personal use was allowed, employees should have no expectation of privacy. Despite the Department's formal policy, a supervisory police lieutenant determined as a matter of practice that officers' messages would not be reviewed as long as the employees paid their own overage charges if they went beyond the 25,000-character limit.

The Plaintiff exceeded the character limit on several occasions, and paid the overage charges out of his personal funds. Subsequently, the police lieutenant changed his informal practice, and audited the text messages of employees, including Plaintiff. In the course of the audit, the police lieutenant found a significant number of sexually explicit, and otherwise, personal text messages sent to and from Plaintiff. Plaintiff and others sued the City of Ontario for violation of Plaintiffs' privacy rights under the United States Constitution and California law.

The District Court agreed that the Department's employees had a reasonable expectation of privacy, but that the Department had a legitimate basis to audit the officers' text messages. On appeal, the United States Court of Appeals for the 9th Circuit ruled in favor of the employees (in a split decision), finding that the Department's search was not reasonable in scope, and that there were less intrusive ways to ensure compliance with the maximum character limits. The Court also found that the Department's formal no privacy policy was trumped by the reality of the informal practice that heightened the employees' expectation of privacy.

THE IMPLICATIONS – SUPREME COURT REVIEW

Once the Supreme Court issues its decision in *Ontario v. Quon*, the ruling may be narrowly tailored to apply only to the slightly unusual factual circumstances of that case. Furthermore, the fact that the case arose in the public employer context means that certain key concepts (e.g., Constitutional protections afforded to public employees) might not apply equally to the private sector.

Nevertheless, it is likely that the Supreme Court's decision will provide at least some guidance to all employers, public and private, in two respects:

- 1. The Ever-Expanding Social Media Boundaries.** While privacy rights in the workplace are not necessarily novel and untested, the Supreme Court may take the opportunity to address the application of traditional privacy concepts to current and future technologies, and, specifically, how far privacy rights extend when we move away from the traditional immobile computer within the employer's four walls to mobile devices and social networking websites,

where the lines between workplace and personal space become blurred.

2. The Dichotomy Between Policy and Practice.

Employers are often advised to create employment policies that say what the company means, and to engage in practices that are consistent with those policies. In *Ontario v. Quon*, the Department has argued that the Court of Appeals erred in determining that a formal company policy was trumped by the informal practice of a lower level supervisor. The Supreme Court's decision in this case may

shed some new light on the interplay between policies and practices, and the effect of a stated company policy on a lower-level employee (supervisor or not) acting in a manner that is contrary to the stated policy.

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We will continue to monitor all subsequent developments in Ontario v. Quon, as well as future decisions that have implications for the use of social media in the employment setting.