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Employee Privacy: When Are Employee Text Messages On Government-Issued Devices Protected?

Just two weeks ago, the United States Supreme Court agreed to review whether governmental employees have a reasonable expectation of privacy when texting on government-issued pagers. The Court's decision could likely set the tone for future texting/invasion of privacy cases against both public and private employers.

The suit arose after police department officials for the City of Ontario, California obtained transcripts of text messages between two police officers and another government employee while investigating whether department-issued pagers were being used for non-work purposes. The information was obtained without the employees' specific consent and revealed personal text messages, many of which were sexually explicit.

These employees had previously agreed to the City's "Computer Usage, Internet and E-mail" policy, which read, in part:

> The use of City-owned computers and all associated equipment, software, programs, networks, Internet, e-mail and other systems operating on these computers is limited to City of Ontario related business. The use of these tools for personal benefit is a significant violation of City of Ontario Policy.

The policy further stated the City could record, monitor, and review any of the information with or without notice and that employees should have no expectation of privacy.

The policy did not, however, specifically address text messaging. Moreover, another Ontario police official had informally told the employees that no one would review their text messages so long as the employees personally paid for charges above a monthly allowance.

The employees subsequently sued the City, the wireless communications company, the police department, and others for alleged violations of the search and seizure

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protections of the Fourth Amendment to the U.S. Constitution as well as the Stored Communications Act ("SCA").[1] The SCA generally prevents providers of communication services from divulging private communications to certain entities and individuals. The U.S. District Court in California denied the employees' motion for summary judgment and granted in part the City's and the wireless communication company's summary judgment motions holding that the SCA had not been violated and the police chief was entitled to qualified immunity.

On appeal, the Ninth Circuit reversed in part and determined that the wireless phone service company was an electronic communication service ("ECS") for the City, as defined under the SCA. Accordingly, the company was liable as a matter of law to the employees for turning over their text messages without obtaining their consent.

As to the search and seizure claims, the Ninth Circuit noted that the extent to which the Fourth Amendment provides "protection for the contents of electronic communications in the Internet Age is an open question" that requires a case-by-case analysis as to whether an employee has a "reasonable" expectation of privacy. In this case, the City's review of the messages without the employees' consent was excessively intrusive, given the department's informal policy that it would not audit the employees' texts. According to the Ninth Circuit, the City could have conducted a reasonable search by warning employees on a going-forward basis that personal use of pagers was prohibited and that the department would be reviewing messages to ensure compliance. Alternatively, the department could also have requested the employees' permission to review their past text message transcripts with personal information redacted.

Whether employers must heed the Ninth Circuit's views and admonitions will be determined by the Supreme Court later in 2010. Considering the applicability of the SCA and the scant guidance for courts in this area of law, as well as the presence of the "informal policy" in this case, the Court's decision will likely have an impact on private employers.

Strasburger will update this article once the Supreme Court renders its decision. Please contact one of Strasburger's labor and employment attorneys[2] with questions concerning any workplace privacy issues.

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[1] *Quon v. Arch Wireless Operating Co.*, 529 F.3d 892 (9th Cir. 2008).

[2] http://www.strasburger.com/directory/dir_practicearea.asp?paid=20

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