

Supreme Court Clarifies Privacy in the Workplace

Our common advice to clients has long been to be specific in employment policies to make employees aware that they have no expectation of privacy in the workplace. However, there have been mixed signals from the courts about the legality of company access to personal information generated using employer technology. The United States Supreme Court took one more step to address certain of these issues and the scope of constitutional rights of an employee to privacy in the recent case of *City of Ontario v Quon*, decided June 17, 2010.¹

In *Quon*, a police sergeant was issued a text messaging device by his department. A dispute arose about the access of the police department to some of his personal text messages. The department policy was very similar to most company policies, making it clear that officers (or employees in general) had no expectation of privacy for any information generated using the employer's technology. Sergeant Quon sued the city of Ontario, California claiming that the department's access to the messages was an illegal search that violated his Fourth Amendment rights.

The Ninth Circuit Court of Appeals upheld the position of Sergeant Quon, but the Supreme Court unanimously reversed that decision. In its decision, the Supreme Court indicated that a governmental employee using government equipment who had been warned not to expect privacy had no legitimate expectation of privacy when a search is conducted for a legitimate work-related purpose.

How will this apply to private employers? The Supreme Court declined to rule on the specific application beyond a governmental employee, so that is yet to be determined. However, it is certainly a clear signal that the continued use of technology policies in employee manuals is worthwhile.

What should be included in a company policy? The following categories are fairly commonplace:

- Scope of authorized use of firm computers, phones, and other technologies, including internet usage.
- A clear statement that an employee has no expectation of privacy for any information stored on company computers or systems, or data transmitted through the use of company technology.

These issues are still developing and we may hear more from the courts. From a drafting standpoint, explicit policies are the employer's best bet.

If you, as an attorney, are communicating with an individual client, should you be concerned? Your individual client should not use the company's e-mail system or Internet for anything related to their own personal legal affairs. In addition to being accessible by the employer, you need to question whether any privilege can be maintained if your client understands that there is no expectation of privacy. While this issue has had alternative interpretations, the client's use of personal e-mail not accessed through the employer's technology is best.



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1. No 08-1332, 2010 US LEXIS 4972 (June 17, 2010).