FOURTH AMENDMENT AND WORKPLACE PRIVACY

Reluctant Supreme Court nonetheless guides employers grappling with the electronic media revolution

With the breakneck pace of innovation in electronic media, not even the Supreme Court is ready to map out the boundaries of employees’ reasonable expectations of privacy in employer-provided equipment such as pagers and other mobile devices: “The judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear,” wrote Justice Kennedy, authoring the unanimous judgment of the Court in City of Ontario v Quon (Dkt No 08-1332, June 17, 2010). Nonetheless, there is much to be gleaned by public and private employers alike from the decision, which was made on the narrower grounds of the reasonableness of a public employer’s search of an employee’s text messages.

Justices wrestle with Fourth Amendment issues

The High Court was asked to decide whether a Special Weapons and Tactics (SWAT) officer had a reasonable expectation of privacy in text messages sent to and from his work pager that were stored in the server system of a third-party service provider. The City of Ontario, California, and its police department and chief (collectively, the city) asked the Court to overturn the Ninth Circuit Court of Appeals’ June 2008 decision holding that the city violated the SWAT officer’s Fourth Amendment and California constitutional privacy rights, as well as those of the officers he texted when, as part of an overage audit, the city read transcripts of the messages he sent.

What did the High Court rule? Even if the SWAT officer had a reasonable expectation of privacy in the text messages he sent from his work pager, ruled the Court, the city did not violate the officer’s Fourth Amendment rights by obtaining and reviewing transcripts of his text messages because the search was reasonable. Justice Stevens concurred in a separate opinion and Justice Scalia concurred in all but part of the Court’s opinion. As such, the Court reversed the contrary holding of the Ninth Circuit.

Private employer implications

Will Quon impact private employers? The case involved a public employer’s search of a public employee’s work-issued pager, but the Court’s holding may have implications that extend beyond public employment. “The Fourth Amendment only applies against the state or state actions, like those of government employers, under the ‘state action’ doctrine,” explained Professor Paul Secunda, Marquette University School of Law. “So the holding of Quon does not apply directly to the private workplace,” he stressed, “yet, a chance exists that the Quon decision could very much still impact private employers.”

Analysis links reasonableness of search with private sector context. Even though Quon “punts” on the SWAT officer’s privacy expectation in his pager, the Court applies both the plurality’s test from O’Connor v Ortega, 480 US 709 (1987), as well as the concurring opinion from that same case by Justice Scalia, Secunda noted. “As parts of this analysis, the Quon Court determined, under Justice Scalia’s test from O’Connor, that the City had a legitimate reason for the search of Quon’s pager, and it was not excessively intrusive in light of the justification because the search would be ‘regarded as reasonable and normal in the private-employer context,’” Secunda explained. “So because Justice Scalia’s approach explicitly connects the reasonableness of the Quon search as also being reasonable in the private sector, look for private sector employers to contend...
that Quon supports expansive private employer searches to retrieve work-related materials or to investigate violations of workplace rules by employees,” he predicted.

Privacy expectation is relied on in both Fourth Amendment and expectation of privacy tort analysis. Moreover, Secunda pointed out, Justice Kennedy’s majority opinion in Quon provides some insight into the nature of privacy expectations—a part of the opinion that Justice Scalia emphatically does not join in his concurrence. Notably, Secunda said, “Justice Kennedy applies the ‘operational realities’ test from the O’Connor plurality decision and discusses what factors might impact an employee’s expectation of privacy, including a company’s later statements, whether such messages could be used as part of performance evaluations, or whether such text messages need to be disclosed under a state’s open record laws.”

On the other hand, Secunda observed that Kennedy states in dictum that “cell phone and text message communications are so pervasive that some persons may consider them to be essential means or necessary instruments for self-expression, even self-identification. That might strengthen the case for an expectation of privacy.” Finally, “Kennedy points out that because the technology is generally affordable, privacy expectations might be lessened since most employees can purchase their own personal devices,” Secunda continued.

Pulling it altogether, Secunda explained: “The reason Kennedy’s language in Quon also impacts private employers is that both the Fourth Amendment and the invasion of privacy tort rely on this ‘privacy expectation’ concept. So, if the concept could be potentially expanded in the Fourth Amendment context, it could be similarly expanded in the private-sector context.”

Applying the analysis to state law claims. Attorney Christine Lyon, partner in the Palo Alto, California, office of Morrison & Foerster LLP, expressed a similar view: “While the Supreme Court’s decision in Quon will have greatest impact on government employers, it also may help to shape state-law claims that can be raised against private-sector employers as well,” she advised, for two reasons.

California constitutional privacy claim. First, Lyon suggested that California employers keep in mind that the SWAT officer also raised a privacy claim under the California Constitution. “This type of claim is similar to a Fourth Amendment claim but can be asserted against private-sector employers as well,” Lyon explained, citing the recent example of the California Supreme Court’s decision last summer in Hernandez v Hillsides, Inc, a workplace video surveillance case (47 Cal 4th 272 (2009)).

“Courts have interpreted this California constitutional privacy right as being similar in scope to the privacy right under the Fourth Amendment,” Lyon pointed out. In fact, she noted, the Ninth Circuit analyzed under the Fourth Amendment framework the SWAT officer’s California constitutional privacy claim together with his Fourth Amendment claim. “Given these similarities, it is possible that California courts may consider the Supreme Court’s analysis in Quon in assessing privacy claims under the California Constitution, including claims against private-sector employers,” she predicted.

State common-law claims. Second, Lyon observed that some states, including California, recognize common-law privacy rights that can be asserted against private-sector or public-sector employers. “These common-law claims arise under a different legal framework but tend to involve similar core issues, such as whether the employee has a reasonable expectation of privacy and whether the employer has unreasonably intruded upon that expectation of privacy,” Lyon advised. “State courts may also consider the Supreme Court’s analysis in Quon, when interpreting these similar elements under state law,” she said.

Applying Quon to the workplace
Perhaps the most important question is what Quon means for employers and employees trying to negotiate on a daily basis the confusing legal milieu of rapidly developing electronic media in the workplace. What can be gleaned from the High Court’s holding?

Favorable holding for employers. According to Lyon, the decision is favorable to employers “because it confirms that, regardless of whether an employee has a reasonable expectation of privacy, the employer can lawfully conduct a search as long as it is reasonable in the circumstances.” The Quon decision is also important “because it clarifies that an employer does not need to use the least intrusive means to conduct the search, as the Ninth Circuit had suggested,” she said.

Secunda views Quon as “most likely” favorable to employers because, “even though there is some ambiguity with respect to the nature of an employee’s expectation of privacy, all Justices believe that the circumstances of this case amount to a reasonable search.” Moreover, the opinion assumes arguendo that the SWAT officer has a reasonable expectation of privacy, that the review of the text message transcript constituted a “search,” and that the same legal principles apply to both physical searches and electronic ones. “Given that baseline,” Secunda opined, “all employers have been given expansive authority to conduct ‘legitimate work-related’ searches involving gathering of workplace materials and for conducting workplace investigations.”

As for as the scope of such searches, Secunda noted that the Court “clearly rejected the Ninth Circuit approach that would have required public employers to consider less intrusive means before delving into their employees’ text messaging records, even when such searches turn up the intimate details of an employee’s life.” Citing his earlier discussion of the opinion, Secunda said “private employers may also benefit from a more generous understanding of what types of searches are regarded as reasonable and normal.”
Should employers view privacy policies differently?
According to Lyon, *Quon* validates existing best practices for monitoring employee communications using employer-issued equipment. The opinion “acknowledges that employer policies are important in shaping employee expectations about workplace privacy,” she said. But at same time, the High Court indicated that the existence of a written policy does not necessarily answer the question of whether an employee has a reasonable expectation of privacy. “While employers should ensure that they have clear policies about monitoring, *Quon* shows the importance of ensuring that the policy is communicated consistently to employees,” Lyon advised.

Lyon also noted that the Court’s analysis focused on the reasonableness of the search, rather than on whether the employee had a reasonable expectation of privacy. “In that respect, the Court’s decision illustrates that employers should look beyond the issue of whether an employee has a reasonable expectation of privacy, and conduct searches in a manner that would be considered reasonable even if a reasonable expectation of privacy is found to exist,” Lyon urged.

“Employers should continue to place broad electronic communication and Internet policies in their handbooks and other policy documents that make abundantly clear that employees have no right to privacy in their employer-owned devices — whether pager, telephone, computer, smart telephone, etc.,” suggested Secunda. “Justice Kennedy says as much in his majority opinion when he states: ‘[E]mployer policies concerning communications will of course shape the reasonable expectations of their employees, especially to the extent that such policies are clearly communicated.’”

Secunda observed that one of the things the city did well was that it both disseminated its policy and required employees to acknowledge in writing that they had read the policy. Not so well done was the fact that the city sought to change its policy to include text messages through separate oral and written communications. “Employers should seek to maintain an up-to-date policy on electronic communications that is fully integrated (meaning not supplemented by later writings or statements),” Secunda advised.

He also underscored Justice Kennedy’s statement that “the extent of an [employee privacy] expectation is relevant to assessing whether the search was too intrusive.” Thus, “the fact that Quon was a law enforcement officer suggests that he had not only less of a privacy expectation, but that it was less likely the search was too intrusive,” Secunda said. “On the other hand, Kennedy suggests that a similar type of search of a ‘personal e-mail account or pager, or a wiretap on his home phone line,’ would have been more intrusive and perhaps, impermissible under the applicable legal test,” Secunda pointed out.

What are the best practices for employers in light of *Quon*? In addition to his earlier suggestions, Secunda urged that “employers should state specifically that employees have no right of privacy in their electronic communications at work and also make clear that performance evaluations, pending litigation, and open records law, diminish whatever privacy expectation the employee would otherwise have.”

“Employers should make sure that they have clear and up-to-date policies informing employees about monitoring of their use of employer-provided equipment, including computers and mobile devices,” according to Lyon. She explained that “older policies tended to address only monitoring of Internet or work e-mail use, but did not address mobile devices, use of web-based personal e-mail accounts, or instant messaging.”

Now is a good time for employers to review policies and bring them up to date with 2010 practices, she said.

In addition, Lyon suggested that employers can reduce their legal risks by conducting searches in a reasonable manner. “Typically, this involves identifying the purpose of the search and establishing the scope of the search to be consistent with that purpose,” she explained, pointing out that “even if the employee is found to have a reasonable expectation of privacy, the employer may defeat a privacy claim if the search was reasonable.”

Best practices for employees. In light of *Quon*, “employees need to understand that any message they write, or communication they make, on a company-provided pager, smart phone, text device, computer, etc., is simply not private,” Secunda said. The way he puts it to his students: “Do not write anything on Facebook, Twitter, in text messages, while IMing, etc., that you would not want to see on the front of a newspaper or have to testify about in court. Keep private communications on employer-owned devices and try to keep your workplace equipment separate from what you use at home for personal reasons.” Secunda acknowledged that it may be impossible not to make personal calls at work or send private electronic messages, but to the extent practicable, he recommended keeping such private communications very limited — never discuss intimate or personal details on employer-provided devices, he urged.

Similarly, Lyon advised that for employees who wish to keep the contents of their personal communications private, the best practice is to use a personally owned device and account to send and receive those messages. “While e-mail, text messages, or instant messages may seem transient, they are often stored and backed up along with other company data, and may be subject to review and disclosure long after the user has deleted them,” she explained. “Even if the employer has no desire to review the messages, it may be required to review and disclose electronic communications and data in connection with litigation or other legal proceedings,” she noted. “As a result, employees should avoid sending any communications using employer-provided equipment that they would not want management or others to see,” she said.

Impact on litigation
How will the *Quon* decision impact employment litigation?
Secunda suggested, contrary to Justice Scalia’s prognosis in his concurrence, that there will be fewer privacy suits filed by public and private employees. “The *Quon* decision provides broad cover against employee privacy complaints for legitimate work-related searches, potentially in the private-sector workplace,” he said.
“Remember that employers need not consider any less intrusive means for conducting the search,” he added. Secunda believes that “Quon is part of an increasing anti-litigation trend of the Supreme Court against all forms of civil rights litigation by public employees.” Before Quon, public employee free speech rights were “cut drastically” in Garcetti v Ceballos, and their equal protection rights were “chopped” in Engquist v Oregon Dept of Agric, Secunda pointed out. “In short, civil rights litigation in the public workplace has become exceedingly difficult for public employees to be successful in, and plaintiff’s lawyers are going to be less willing to take these cases,” Secunda predicted.

Employers will also have more grounds for defending against such claims as a result of Quon, according to Secunda. “Not only will employees have no such claim where employers have adequately guarded against them having an expectation of privacy with their workplace devices, but even when such privacy expectations can be claimed (as in Quon), employees will find it hard to overcome the deference that courts now appear to be willing to give to employers when ‘reasonable and normal’ searches are done in the workplace—whether electronic or non-electronic—for a legitimate business reason,” Secunda explained. “In fact, this all reminds me of the way that courts defer to corporations under the highly-deferential business judgment rule,” he remarked.

As a result, Secunda does not envision, as Justice Scalia does, “employees ‘bombarding lower courts with arguments about employer policies, how they were communicated, and whether they were authorized, as well as the latest trends in employees’ use of electronic media.’” Secunda’s forecast: “No such litigation apocalypse is on the horizon simply based on how difficult the Court has made it for employees to win such claims.”

Nor does Lyon expect the Quon decision to result in any significant increase in the number of privacy claims. “By rejecting the ‘least intrusive means’ standard suggested by the Ninth Circuit, the Court’s decision may tend to discourage potential claimants,” Lyon predicted. Moreover, “employers are better able to defend against privacy claims now that the Supreme Court has rejected the Ninth Circuit’s view that the employer must use the least intrusive means to conduct such a search or inspection of employee messages,” she pointed out. Lyon noted that the Ninth Circuit’s standard “would have been considerably more burdensome for employers.”

Will lower courts have difficulty applying Quon? Lyon observed that the Quon decision “provides clear guidance for lower courts that a search does not need to be conducted using the least intrusive means in order to be reasonable.” As to whether lower courts will have difficulty applying Quon, Lyon noted the Court’s emphasis on the narrow and fact-intensive nature of its decision. “In fact, the Court cautions against trying to infer broad principles from its decision in this case,” Lyon explained. “As a result, while the holding in Quon appears straightforward, it may be challenging for lower courts to apply the analysis in different scenarios,” she said.

There are two areas that might be difficult still after Quon, according to Secunda: (1) When does an employee have a reasonable expectation of privacy? The Supreme Court did not provide a decision on this issue, although it did explain what considerations might be relevant under the various O’Connor tests, Secunda noted. “The difficulty, as Justice Scalia pointed out in his concurrence, is figuring out which factors that Kennedy discusses are determinative,” Secunda explained.

(2) If there is an expectation of privacy, what O’Connor test applies? Secunda believes that Justice Stevens in concurrence is correct that the Court punted on this issue as well because it was unnecessary to decide it to resolve the case, since Quon lost under either test. “The Court just concluded that the city wins under either test without attempting to pick one of them or harmonize them,” Secunda observed. “I do not see what lower courts are going to do when one test gives them one result and the other test provides a different answer,” he said.

The two O’Connor tests are the products of differing analyses applied by the plurality and Scalia concurrence. A four-Justice plurality concluded that a two-step analysis should be used. First, the “operational realities” in the workplace should be considered to determine whether Fourth Amendment rights are implicated and whether an employee has a reasonable expectation of privacy. Next, if an employee has a legitimate privacy expectation, then an employer’s intrusion on that expectation for noninvestigatory, work-related purposes, or for investigations of work-related misconduct, is judged against the standard of reasonableness under all of the circumstances.

However, Justice Scalia, concurring, outlined a different analysis. He would forego the “operational realities” analysis and hold that offices of government employees are generally protected by the Fourth Amendment, and that “government searches to retrieve work-related materials or to investigate violations of workplace rules,” such as those regarded as “reasonable and normal in the private-employer context,” do not violate the Fourth Amendment.

In the wake of Quon

What trends may develop in workplace privacy or other law as a result of Quon? Lyon predicts that the Quon decision “will focus greater attention on the second step of the privacy analysis: the reasonableness of the search.” Lyon also suggested that more states may consider legislation that would require employers to notify employees about monitoring of electronic communications.

As to workplace practices, “employers will pay greater attention to developing a reasonable scope for their searches, rather than relying solely on the proposition that employees would not have a reasonable expectation of privacy,” Lyon anticipates.

Secunda’s forecast includes more extensive employer electronic communication policies and procedural devices being put into place to make sure that such policies are effectively communicated and that employees acknowledge in writing that they have read and understood such policies.