ASAP™ A Littler Mendelson **Time Sensitive** Newsletter

in this issue:

JULY 2008

The Ninth Circuit's decision in *Quon v. Arch Wireless Operating Company* bars employers from accessing employees' text messages and e-mail stored at a third-party service provider, even when the employer pays for the service. Employers can, however, lawfully navigate this restriction.

Employee Text Messages Are Not Inviolate: Understanding and Navigating the Ninth Circuit's Decision in *Quon v. Arch Wireless Operating Company*

By Philip L. Gordon and Justin A. Morello

The headlines proclaiming the end of employer monitoring have vastly overstated the impact on the workplace of the Ninth Circuit's ruling in *Quon v. Arch Wireless Operating Company*. To be sure, the case holds that the Stored Communications Act prohibits third-party service providers, such as text message services and Internet service providers, from disclosing stored electronic communications without the consent of the employee who sends or receives the communication, *even if the employee is using employer-provided equipment and the employer pays for the service*. Nonetheless, and as explained more fully below, employers can easily and lawfully navigate this restriction.

Factual Background

In an effort to facilitate more rapid communication, the City of Ontario Police Department ("the City") issued two-way pagers to its SWAT team members and paid for the text message service through Arch Wireless Operating Company ("Arch"). Arch billed the City a fixed monthly charge for the first 25,000 characters per officer and an overage charge for each character exceeding the limit.

The City's "Computer Usage, Internet and E-mail Policy" contained the types of warnings frequently seen in such policies. The City reserved the right to monitor and log all network activity without notice. The City warned that employees "should have no expectation of privacy or confidentiality when using these resources." The City explained that all communications using the network were the City's property. The City admonished that its electronic resources should not be used for personal reasons. The City also banned communications containing "inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language" when using the City's electronic resources.

Because the City implemented this policy before purchasing the pagers, the policy did not explicitly reference "text messages." When the City first issued the pagers, Lieutenant Duke, who was responsible for overseeing the pager program, informed all SWAT team members that text messages would be treated like e-mail under the City's Computer Usage, Internet and E-Mail Policy. As a matter of practice, however, Lt. Duke did not routinely monitor text messages, or discipline employees for personal use, as permitted by the policy. Instead, he communicated and followed a practice that permitted officers to avoid scrutiny of their text messages for personal use if the officer paid any overage charge.

Sergeant Jeff Quon exceeded the 25,000-character limit on several occasions, in part, because he was using the City's two-way pager for salacious chats with his erstwhile wife and with his mistress. On each occasion, he paid the overage charge, and Lt. Duke refrained from auditing the content of his text messages.

In response to Lt. Duke's complaints about officers routinely exceeding the 25,000-character limit, Police Chief Scharf ordered Lt. Duke to audit some of the text messages to determine whether the officers were using the pagers for personal reasons. Lt. Duke obtained the transcripts of Sgt. Quon's text messages from Arch, but without Sgt. Quon's

consent. Word of the transcripts' sexually charged content filtered through the Police Department and ultimately made its way back to Sgt. Quon who, joined by his ex-wife and mistress, sued Arch for violating the Stored Communications Act (the "Act") and the City, for violating his right to privacy under the Fourth Amendment of the U.S. Constitution and the California Constitution.

The Ninth Circuit's Ruling

The Ninth Circuit reversed the district court's summary judgment for Arch on Sgt. Quon's claim under the Stored Communications Act. The court explained that the Act establishes different disclosure rules for an "electronic communications service" and a "remote computing service." The former cannot disclose the content of stored messages to a subscriber unless the subscriber also is a sender or intended recipient of the stored message; the latter can disclose stored information to the subscriber, regardless of whether the subscriber is a sender or intended recipient. The district court held that when Arch disclosed the text messages to the City, it was acting as a "remote computing service." The Ninth Circuit rejected that statutory construction, reasoning that a "remote computing service" is akin to an "electronic filing cabinet." The Ninth Circuit did not examine the specific function Arch performed when it transmitted the stored text messages and instead held that, on the whole, Arch was an "electronic communications service" because Arch served as a "conduit for the transmission" of communications, not mainly as a receptacle for them.

The Ninth Circuit also reversed the jury verdict in the City's favor on Sgt. Quon's claim that the City's review of the content of his text messages violated his right to privacy under the Fourth Amendment. The court first ruled that the City's conduct was a search subject to Fourth Amendment limitations because the City had reviewed the content of Sgt. Quon's text messages, not merely transactional data, such as the number of characters or the sender or recipient.

Next, the court held that Sgt. Quon had a reasonable expectation of privacy in the content of his text messages *notwithstanding the City's policy to the contrary*. The court found that Lt. Duke had orally modified the policy by telling Sgt. Quon that the City would review text messages only if he refused to pay the overage charges, and Sgt. Quon reasonably relied on that oral modification to expect that the City would not review his text messages because Lt. Duke had followed the unwritten policy in practice. The court also held that Sgt. Quon maintained a reasonable expectation of privacy even though the text messages may have been subject to disclosure under the California Public Records Act. The court reasoned that Sgt. Quon's reasonable expectation of privacy should be evaluated based on the practical realities of his workplace, not on a hypothetically possible record request given that there was no record of any relevant Public Records Act request.

The Ninth Circuit then held that the City's review of all of Sgt. Quon's text messages was unreasonable search. The court reasoned that there were many less intrusive means to accomplish the City's goal of determining whether the pagers were being used appropriately, such as asking the officers for their consent or warning them that their text messages would be monitored during certain months.

Understanding and Lawfully Navigating the Ninth Court's Ruling

The Ninth Circuit's decision is far narrower than the initial press coverage suggests. To begin with, the decision imposes no restrictions on an employer's enforcement of an electronic communications policy similar to the City's Computer Usage, Internet, and E-Mail Policy with respect to electronic communications stored on the corporate network. Thus, the decision does not restrict an employer's ability to monitor e-mail sent over the corporate network via a company-issued personal digital assistant, such as a Blackberry.

The Ninth Circuit's ruling is, however, a warning for employers. To ensure that an electronic resources policy can be enforced without creating exposure to privacy-based claims, employers should avoid making representations to employees, or following practices, that give rise to a reasonable expectation of privacy in employee communications transmitted through the corporate network. An employer should be able to avoid this adverse result by creating an express and fully integrated electronic resources usage policy that can be modified only in a writing signed by a senior executive and by training managers and information technology personnel to avoid making statements, or engaging in conduct, that countermands the policy. For employees who are or will be employed under contract, employers should consider adding an electronic resource usage section to the contract or incorporating the employer's existing policy by reference. This will ensure the electronic resource usage policy can only be modified according to the terms of the underlying contract.

The decision also does not create a dystopia of unfettered, nonbusiness communications using company-issued cell phones or company-provided, third-party communications services. To begin with employers should expressly impose all of the restrictions in their electronic resources policy on employee communications, during business hours, through third-party service providers. To enforce those restrictions, an employer need only condition receipt of company-issued communications devices and/or the company's payment for communications services on the employee's providing prior, written consent for disclosure by the third-party service provider of all stored communications for which the employee is the sender or the intended recipient. The Stored Communications Act expressly permits an electronic communications service, such as Arch, to make such disclosures with the consent of the sender or intended recipient.

Finally, nothing in the Ninth Circuit's decision restricts the right of employers to search any cell phones themselves — whether company-issued or not — for stored communications. To reduce the risk of privacy-based claims, employers who anticipate conducting such searches should unambiguously describe the search policy to their employees.

Philip L. Gordon is a Shareholder in Littler Mendelson's Denver office. Justin A. Morello is an Associate in Littler Mendelson's San Diego office. If you would like further information, please contact your Littler attorney at 1.888.Littler, info@littler.com, Mr. Gordon at pgordon@littler.com or Mr. Morello at jmorello@littler.com.
