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RUKM?--PRIVACY RIGHTS AND TEXT MESSAGING: NEW NINTH CIRCUIT OPINION EXPANDS PRIVACY RIGHTS OF PUBLIC EMPLOYEES,"

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Introduction

The Ninth Circuit has denied en banc review of an important privacy rights case involving text messaging and police use of cell phones and pagers. The case is *Quon v. Arch Wireless*, 529 F.3d 892 (9th Cir. 2009). This summary briefly reviews the opinion and its significance.

The Case

The Ontario, California Police Department ("OPD") issued pagers to SWAT team members. Each officer was allowed a certain amount of text message characters per month. OPD had an existing computer use and email policy under which emails and internet access were subject to monitoring. Pagers and text messages were not expressly covered under the policy. However, OPD advised all officers that pagers and text messages would be treated no differently than email communications. Although OPD notified its officers that text messages would be subject to monitoring to the same extent that emails were, in actuality OPD followed a practice by which text messages were not monitored. Instead, if an officer exceeded the allotted number of characters, he or she was charged for the excess use. Text messages would only be subject to review if the officer did not pay the overage fee.

Sergeant Jeff Quon regularly exceeded his allotted number of text message characters. He sent numerous personal messages. Many of those were sexually explicit. When confronted with his overages, Sergeant Quon paid the balance due under OPD's informal policy. He remembered that OPD conducted a meeting to discuss pager use, but he did not recall anyone specifically advising that pagers and text messages would be subject to the same monitoring as emails. OPD officials grew tired of administering the informal policy. They decided to audit text messages that exceeded authorized character use. OPD asked the wireless provider, Arch Wireless, to provide transcripts of the text

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messages. Arch Wireless complied with the request. OPD then discovered all of the personal messages with sexually explicit content that Sergeant Quon had sent using his official OPD pager. The Ninth Circuit's opinion does not address what, if anything, happened at that point, but it is implied that Sergeant Quon faced some level of discipline.

Proceedings in the District Court

Quon and others filed suit alleging numerous claims, chief of which were a section 1983 civil rights claim for violation of their Fourth Amendment rights against OPD officials and a statutory claim for violation of the Stored Communications Act against Arch Wireless.

With respect to the SCA claim, the district court concluded that Arch Wireless was a "remote computing service" under the Act, and therefore that it was permitted to release the requested transcripts to OPD. A remote computing service is a service providing "computer storage or processing services by means of an electronic communications system" to the public. An electronic communication service is a service that "provides to users . . . the ability to send or receive wire or electronic communications." Both an ECS and a RCS may release private information (including message content) to an addressee or intended recipient of a communication. However, only a RCS may release such information to a subscriber. Consequently, the district court's conclusion that Arch Wireless was a RCS resulted in summary judgment in its favor.

With respect to the civil rights claim, the district court concluded that Sergeant Quon had a reasonable expectation of privacy in his text messages because OPD had adopted an informal policy by which it only reviewed text messages if officers did not pay overage fees. However, the district court concluded that the search itself would have been reasonable if the purpose for the search was to audit text message use. The district court sent this issue to a jury for its determination. OPD officials confirmed that the purpose for searching the text messages was not to see if Quon or others were misusing their pagers, but instead to see if OPD needed to buy more character use (that is, whether the existing character limits were sufficient for work-related purposes). The jury accepted OPD's explanation and returned a finding in its favor. The district court therefore concluded that the search was reasonable.

The Ninth Circuit's opinion

Quon and most of the plaintiffs appealed. The Ninth Circuit reversed. The court held that Arch Wireless was an ECS, and not a RCS, because it provided OPD with the ability to send or receive wireless communications. On the civil rights claim, the court agreed with the district court that Quon had a reasonable expectation of privacy in the content of his text messages. However, the court disagreed that the search itself was reasonable. In particular, the court concluded that the search was not reasonable in scope

because OPD could have adopted other measures to determine whether or not the character limit was sufficient for work-related purposes. OPD did not have to review transcripts of all messages to determine if the character limit was adequate.

The Ninth Circuit denies en banc hearing

OPD asked the Ninth Circuit to review the case en banc. En banc review in the Ninth Circuit means that 11 judges analyze and decide the case. En banc review is discretionary (the court does not have to grant such review), and it is seldom granted. A majority of nonrecused active judges have to vote in favor of review before en banc review will be granted. The Ninth Circuit is authorized 28 active judges, and currently has 27 active judges (this does not include those judges on senior status). Judge Bybee recused himself, leaving 26 judges to decide whether or not to accept en banc review. The voting is never public, but the court denied en banc review with seven judges dissenting from the denial. Therefore, the vote was probably around 19-7 (assuming all of the remaining judges voted).

The seven dissenting judges found no fault with the SCA decision, but vigorously criticized the privacy rights analysis. The dissent determined that Quon could not have had a reasonable expectation of privacy because OPD advised all officers that emails could be monitored and that text messages would be treated the same as emails. The dissent further noted that as a SWAT team member, Quon had an even lower expectation of privacy since any SWAT team member could anticipate that text messages would be subject to review by investigating boards, "subjected to discovery in litigation arising from the incidents, or requested by the media." The dissent pointed out that text messages would be classified as public records under California law, meaning that such messages could be requested by members of the public. This would further weaken any contention that an officer had a reasonable expectation of privacy in the text messages. Finally, the dissent found significant fault in the court's analysis of the overall reasonableness of the search. The dissent construed the court's approach as being one that adopted a less intrusive means analysis, which is not consistent with Fourth Amendment doctrine. The fact that OPD could have adopted other means or methods to serve its declared purpose does not mean that the search that actually was conducted was unreasonable. The dissent determined that the search was reasonably related to the objectives of the search (to determine whether or not character limitations were sufficient for work-related purposes). Therefore, the dissent concluded that OPD's search should have been upheld.

Significance

Under the seminal case, *O'Connor v. Ortega*, 480 U.S. 709 (1987), public employees' privacy rights are subject to an overall general reasonableness test that tracks current Fourth Amendment doctrine. In order to pass constitutional scrutiny, a search need not employ the least intrusive or even less intrusive means or methods to

accomplish its goal. Instead, a search need only be reasonable under all of the circumstances.

I have been a strong proponent of privacy and Fourth Amendment rights, and have authored two law review articles urging courts to adopt more stringent protections to prevent further erosion of constitutional safeguards. Nevertheless, on balance, I believe that the dissent's analysis is sound and well-reasoned. It is difficult to see how a police officer on a SWAT team would have any reasonable expectation of privacy in text messages sent on a police-issued pager that was restricted to official use. It is even more difficult to explain why an audit of text messages would be unreasonable particularly when, as here, it was for administrative purposes (to determine if existing character limits were sufficient for work-related purposes). It is correct that OPD could have adopted a less intrusive means or method to accomplish the same goal. However, that is not required under current Fourth Amendment doctrine.

Lessons learned

There are a number of important lessons here for public and private employers:

- OPD never formalized its pager and text message policy. Instead, it only advised officers that it would treat pagers and text messages in a manner consistent with emails. OPD should have revised its policies. OPD should have taken steps to ensure that officers formally acknowledged the pager and text message policy.

- OPD did not consistently apply its own policies. Instead, it allowed an informal policy to develop and take root.

- Public employers should not assume that potential application of a public records act will undermine employees' reasonable expectations of privacy.

- Even if a monitoring policy is in place, employers should have counsel review the policy and its implementation.

- Public and private employers would probably be well-advised to have counsel analyze whether their wireless service providers are classified as a RCS or ECS as this would affect the extent to which employers may request and receive information related to electronic communications.

Conclusion

This legal summary is for informational purposes and is not intended as legal advice. Employers with questions or seeking additional information should confer with counsel.