

March 29, 2010

## Labor & Employment: Privacy Rights Commentary

### Court to decide if there is right to privacy on company cells, pagers

“What are the legal boundaries of an employee’s privacy in this interconnected, electronic-communication age, one in which thoughts and ideas that would have been spoken personally and privately in ages past are now instantly text-messaged to friends and family via hand-held, computer-assisted electronic devices? It is precisely this question that is before the court.”

A U.S. district judge began his opinion with this question in a case that will be decided this year by the U.S. Supreme Court. The question arises as boundaries between work time and personal time continue to blur. Employers are increasingly distributing hand-held devices with the expectation that employees will use them to perform job responsibilities. Employees are increasingly using such devices outside the workplace, even while on vacation, to meet employer and customer expectations of accessibility.

Researchers estimate fully one-half of the work force in mid-sized and large organizations carries employer-supplied mobile devices, and they predict usage trends will surge sharply upward.

Many employers with Internet, e-mail and computer utilization policies created them to govern use in a world of desktop computers and desktop telephones, not for the updated technology. Many existing policies still declare employees “should have no expectation of privacy or confidentiality” when using employer-owned equipment, restrict usage to company business only, broadly prohibit personal use and warn unauthorized use may lead to disciplinary action. In reality, many such policies, though written on paper, are not enforced in practice. That is what the employees suing in *Quon vs. City of Ontario* contend.

The California city contracted with a wireless service provider to obtain alpha-numeric hand-held pagers for use by employees, budgeting for 25,000 characters per month per device. When employees began to exceed the benchmark, the employer collected excess usage fees absent an employee demonstration that the excess usage was for work purposes. Once the officer reviewing utilization and collecting payments from employees grew weary of those tasks, he conferred with his boss, who eventually authorized a review to determine the extent of personal use of the devices.

The review led to the retrieval of text message transcripts from the wireless service provider revealing police Sgt. Jeffery Quon extensively used his wireless pager to exchange sexually explicit messages with his mistress and his wife, who both worked for the city. When Quon’s wife applied for a job with another employer, she did not receive the employment offer she expected based on an encouraging interview. She concluded the denial of employment was as a result of the intervention of and retaliation by her employer. The Quons and the mistress sued the

employer for violating their privacy. They also sued the wireless service provider for violating the federal Stored Communications Act by disclosing the text message transcripts without their consent.

The privacy issues are drawn in sharp relief because the employer is a municipality subject to the constitutional prohibitions of unreasonable searches and seizures applied by the 4th and 14th amendments.

If the Supreme Court were to frame the issue as broadly as did the district court, its decision could establish principles for use by employers in the public sector and private sector on the extent to which they may scrutinize and disclose nonwork-related communications through use of employer-owned hand-held electronic devices.

Whatever its ultimate basis of decision, the Supreme Court seems likely to discuss an employer's potential risks when it has written policies proclaiming personal communications on company-owned equipment are not private but an informal practice of tolerating or encouraging such communications.

This is a familiar and recurring inquiry in employment law cases: Do employer's policies exist merely on paper and not in practice — or in operational reality? Employer readiness to withstand this inquiry will be increasingly important in the world of electronic communications that the district court in the Quon case described so well.

**Frank Scruggs** is a partner and **Andrew Hinkes** an associate at **Berger Singerman**. Scruggs advises employers and litigates employment and commercial cases. Hinkes, a commercial litigator, advises clients on document retention policies and discovery of electronically stored information.