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I. Introduction

Cell phones, pagers, and PDAs have tremendously improved worker productivity in an era where time is money. Often, employers provide these devices to employees free of charge. If a government employer provides one of these devices to an employee, does the employer violate an employee's Fourth Amendment right against an unreasonable search and seizure when the employer reads text messages sent and received by the employee using the device? Justice Kennedy, writing for a unanimous Supreme Court, answered no, reversing the Ninth Circuit and affirming the district court's holding that the government's search was reasonable under the circumstances.[1] The search was reasonable because: (1) it was motivated by the legitimate work-related purpose of not wanting government employees to be forced to pay for text message overages; and (2) the search was not excessive in scope because it was an efficient way of determining whether the overages were due to work-related or personal use.[2] The Court applied valid law in reaching its decision, but glossed over important facts that proved the search was illegitimate and excessive in scope.[3]

II. Factual Background

Respondent Jeff Quon was a member of the Ontario, California Police Department (OPD) SWAT Team.[4] In 2001, the City of Ontario (City) acquired twenty pagers with text-messaging capabilities.[5] As part of its service contract with wireless-provider Arch Wireless Operating Company (Arch Wireless), the City agreed to pay an additional fee for any excess messages over the pagers' allotment.[6] The City provided the pagers to SWAT "in order to help the SWAT Team mobilize and respond to emergency situations."[7] Prior to acquiring the pagers, the City instituted a "Computer Usage, Internet and E-mail Policy" (Computer Policy).[8] The policy applied to all City employees and provided that "[u]sers should have no expectation of privacy or confidentiality when using [City computer] resources" and that the City "re-

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1. City of Ontario v. Quon, 130 S. Ct. 2619, 2632 (2010).
2. *Id.* at 2631.
3. *See id.* at 2626.
4. *Id.* at 2624.
5. *Id.* at 2625.
6. *Quon*, 130 S. Ct. at 2625.
7. *Id.*
8. *Id.*

serve[d] the right to monitor and log all network activity including e-mail and Internet use, with or without notice."[9] Quon acknowledged that he had read and understood the Computer Policy by signing a statement.[10]

Although the Computer Policy did not apply to the pagers *per se*, Lieutenant Stephen Duke, who was in charge of procuring the contract with Arch Wireless, told the officers at a staff meeting that the City considered the text messages equivalent to e-mails, which were subject to auditing.[11] The officers received these comments in a memo from OPD Chief Lloyd Scharf on April 29, 2002.[12] Quon quickly exceeded his text message character allotment, but Duke implied that Quon and other officers could avoid having messages audited by directly reimbursing the City for overages.[13] Quon wrote a check to the City as reimbursement for the overages and subsequently wrote three to four additional checks to cover overages.[14] Duke told Scharf about the paid overages at a meeting in October 2002.[15] As a result of the meeting, Scharf decided he wanted to determine whether: (1) the existing service plan with Arch Wireless provided insufficient character limits, forcing his officers to pay for overages that were a result of work-related messages; or (2) whether the overages were due to personal messages being sent by the officers.[16] Duke, at Scharf's request, contacted Arch Wireless and requested Quon's message transcripts for August and September 2002.[17] Scharf reviewed the transcripts with Quon's supervisor after Duke discovered that many messages were not work-related, and some were sexually explicit in nature.[18] Scharf then referred the matter to OPD's internal affairs division to determine "whether Quon was violating OPD rules by pursuing personal matters while on duty."[19] The internal affairs investigator redacted all messages made by Quon while off duty by cross-referencing Quon's work schedule.[20] The internal affairs investigator discovered that "Quon sent or received 456 messages" in the month of August, of which "no more than 57

9. *Id.*

10. *Id.*

11. *Quon*, 130 S. Ct. at 2625.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 2626.

16. *Quon*, 130 S. Ct. at 2626.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

were work related."[21] Internal affairs found Quon had violated OPD rules, and allegedly disciplined him.[22]

III. Description of Plaintiff's Claim

Quon filed suit against the City, the OPD, Scharf, and Arch Wireless in the United States District Court for the Central District of California.[23] Quon's ex-wife and mistress joined the suit, since both had exchanged messages with Quon during August and September 2002.[24] Quon brought claims under 42 U.S.C. § 1983,[25] the Stored Communications Act (SCA),[26] and California law.[27] Quon's claims were predicated on the notion that: (1) the petitioners violated Quon's Fourth Amendment right against an unreasonable search and seizure; (2) the petitioners violated the SCA by reviewing the message transcripts; and (3) Arch Wireless violated the SCA by providing the transcripts to the petitioners.[28]

IV. Procedural and Substantive History

All parties in the case filed cross-motions for summary judgment.[29] The District Court granted summary judgment in favor of Arch Wireless on the SCA claim but denied the petitioners' summary judgment motion on Quon's Fourth Amendment claims.[30] The District Court found "Quon had a reasona-

21. *Quon*, 130 S. Ct. at 2626 (noting that Quon sent up to 80 messages during a single work day, and that he sent or received an average of 28 messages per work day, with only 3 being work related).

22. *Id.* (the case does not indicate Quon's punishment).

23. *Id.*

24. *Id.*

25. *See* 42 U.S.C. § 1983 (1996) ("Every person who, under color of any statute, ordinance, regulation, custom, or usage . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress").

26. *See* Unlawful Access to Stored Communications Act (SCA), 18 U.S.C § 2701 (2002) ("whoever intentionally accesses without authorization a facility through which an electronic communication service is provided; or intentionally exceeds an authorization to access that facility thereby obtains, alters, or prevents authorized access to a wire or electronic communication while it is in electronic storage in such system shall be punished").

27. *Quon*, 130 S. Ct. at 2626.

28. *Id.*

29. *Id.*

30. *Id.* (citing Quon v. Arch Wireless Operating Co., 445 F. Supp. 2d 1116, 1149 (C.D. Cal. 2006)).

ble expectation of privacy in the content of his text messages."[31] The District Court left the jury to determine whether the purpose of the text-message audit was to see whether Quon was using his pager to waste time and play games, making for an unconstitutional search, or whether the purpose was for the constitutionally permissible reason of verifying if the service plan was insufficient in meeting the officers' needs by unfairly forcing them to pay for work-related costs.[32] The jury found that the search was for the reasonable purpose of verifying if the service plan was sufficient, so the District Court held that the petitioners did not violate Quon's Fourth Amendment right.[33]

The Ninth Circuit affirmed in part and reversed in part.[34] The Ninth Circuit affirmed the District Court's ruling that Quon had a reasonable expectation of privacy and the search was conducted as part of "a legitimate work-related rationale."[35] The Ninth Circuit, however, found that the search "was not reasonable in scope" and was therefore unconstitutional because there were multiple ways in which the petitioners could have avoided violating Quon's Fourth Amendment rights.[36] For example, the petitioners could have warned Quon that the contents of the messages would be reviewed or asked Quon to redact the messages himself.[37] Finally, the Ninth Circuit found that Arch Wireless had violated the SCA and remanded to the District Court.[38]

V. Supreme Court's Holding and Overview of Rationale

The Supreme Court held that the City's review of the text messages was reasonable and did not violate Quon's Fourth Amendment rights.[39] The Court agreed with both the District Court and the Ninth Circuit that the search was primarily motivated by a legitimate work-related purpose, which was to determine whether the service plan allowed for a sufficient number of work-related text messages to be sent and received without the officers having to unfairly pay for overages, or, alternatively, whether the officers were sending personal messages.[40] The Court disagreed with the Ninth Circuit and held that the search was reasonable in scope "because it was an efficient and expe-

31. *Id.*

32. *Quon*, 130 S. Ct. at 2626–27.

33. *Id.* at 2627.

34. *Id.* (citing Quon v. Arch Wireless Operating Co., 529 F.3d 892, 910 (9th Cir. 2008)).

35. *Quon v. Arch Wireless Operating Co.*, 529 F.3d at 908.

36. *Id.* at 908–09.

37. *Id.* at 909.

38. *Id.* at 903.

39. *Quon*, 130 S. Ct. at 2632.

40. *Id.* at 2631.

dient way to determine whether Quon's overages were the result of work-related messaging or personal use."[41] In reaching its decision, the Court applied the reasoning from *O'Connor v. Ortega*.[42] The *O'Connor* plurality used a different approach than Justice Scalia did in his concurrence.[43] But the Court in *City of Ontario v. Quon* noted that the result would be the same under either the *O'Connor* plurality approach or the approach promulgated by Justice Scalia in his concurrence.[44] Even though the Court stated that the result would be the same regardless of the approach, the Court focused its analysis more on the *O'Connor* plurality approach since both the petitioners and respondents agreed that the *O'Connor* plurality controlled.[45]

VI. Court's Rationale

The Court began its analysis by clarifying the scope of the Fourth Amendment as it is relevant to the case: "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer."[46] Next, the Court noted that the probable cause requirement for the issuance of warrants was impracticable for government employers due to heightened requirements beyond that of law enforcement.[47] The Court pointed out that in the *O'Connor* decision there was a disagreement about the proper framework for analyzing Fourth Amendment claims against government employers.[48] But the Court refused to acknowledge whether the plurality approach or Justice Scalia's approach was better.[49]

The plurality approach in *O'Connor* consists of two steps.[50] First, a court must consider "the operational realities of the workplace" using a case-by-case analysis, because the openness of some government offices lends no reasonable expectation of privacy.[51] In a later decision, *Treasury Employees v. Von Raab*, the Supreme Court opined that an employee's privacy expectations could be diminished by "operational realities," and the "diminution could be taken into consideration when assessing the reasonableness of a workplace search."[52] Second, "where an employee has a legitimate privacy

41. *Id.*

42. *Id.* (citing O'Connor v. Ortega, 480 U.S. 709 (1987) (plurality opinion)).

43. *O'Connor*, 480 U.S. at 726, 732 (Scalia, J., concurring).

44. *Quon*, 130 S. Ct. at 2628–629.

45. *Id.*

46. *Id.* at 2628 (quoting *O'Connor*, 480 U.S. at 725).

47. *Id.*

48. *Id.*

49. *Quon*, 130 S. Ct. at 2628–29.

50. *Id.* (citing *O'Connor*, 490 U.S. at 726).

51. *Id.* (citing *O'Connor*, 490 U.S. at 726).

52. *Id.* (quoting Treasury Employees v. Von Raab, 489 U.S. 656, 671 (1989)).

expectation, an employer's intrusion on that expectation" for investigations regarding work-related misconduct or non-investigatory work-related purposes should be governed by a reasonableness standard.[53] The search is reasonable if it is "justified at its inception" and "the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of 'the circumstances.'"[54]

Contrary to the plurality view in *O'Connor*, Justice Scalia's concurring approach disregards the "operational realities" and instead concludes that the offices of government employees are "covered by Fourth Amendment protections as a general matter."[55] Justice Scalia believed that if the government's searches were to retrieve work-related materials or to investigate workplace violations, similar to the sort of searches that are considered reasonable in the private-employer context, then there would be no violation of the Fourth Amendment.[56]

The Court assumed three propositions *arguendo* before it analyzed the case under the plurality approach and Justice Scalia's approach: (1) Quon had a reasonable expectation of privacy; (2) the petitioners' review of the message transcripts qualified as a search under the Fourth Amendment; and (3) a government-employer's search of an employee's electronic records is equivalent to the search of a physical office.[57] The Court stated that "the search was justified at its inception because there were 'reasonable grounds for suspecting that the search [was] necessary for a non-investigatory work-related purpose.'"[58] The Court pointed out that a jury determined that the search was instigated by Scharf for the legitimate work-related purpose of ensuring that the limits of the service contract with Arch Wireless were sufficient to meet the OPD's needs, that his employees were not unfairly paying for work-related expenses, or in the alternative, that the City was not paying for his employees' personal communications.[59]

The Court next looked at the scope of the search and determined that it was reasonable.[60] The Court stated that reviewing the transcripts was both efficient and expedient in determining whether the messages were work or personal-related.[61] The Court particularly focused on the fact that the review

53. *Id.* at 2628 (citing *O'Connor*, 480 U.S. at 725–26).

54. *Quon*, 130 S. Ct. at 2630 (quoting *O'Connor*, 480 U.S. at 725–26).

55. *Id.* at 2628 (quoting *O'Connor*, 480 U.S. at 731 (Scalia, J. concurring)).

56. *Id.* (citing *O'Connor*, 480 U.S. at 732 (Scalia, J. concurring)).

57. *Id.* at 2630.

58. *Id.* at 2631 (quoting *O'Connor*, 480 U.S. at 726).

59. *Quon*, 130 S. Ct. at 2631.

60. *Id.*

61. *Id.*

of the transcripts was not "excessively intrusive" because there were a number of ways the City could have done an even more intrusive search.[62]

First, the City's search could have been more intrusive, but the City reviewed only two months of transcripts, rather than reviewing every month Quon had exceeded his allotment.[63] Second, the Supreme Court stated that the City's search was less intrusive than a search of Quon's personal e-mail or a wiretap on his home phone.[64] The Court also pointed out that the internal-affairs investigator attempted to protect Quon's privacy by redacting all of the text messages that Quon sent while he was off-duty.[65] The Court then noted that Quon, a police officer, could reasonably assume his messages were subject to auditing since "sound management principles might require the audit of messages to determine whether the pager was being appropriately used."[66]

In addition, the Count again pointed out that Quon had been told his messages were subject to being audited.[67] The Supreme Court stated that the Ninth Circuit's approach, that there were other less intrusive means of providing the search, was inconsistent with controlling precedents because courts have refused to state that only the "least intrusive" search was permissible under the Fourth Amendment.[68] Finally, the Court addressed Justice Scalia's approach by stating that the City's legitimate reasons for the search—coupled with the fact that the search was not excessively intrusive—would be "regarded as reasonable and normal in the private-employer context."[69]

VII. Critique of Court's Approach

There are three problems with the Supreme Court's approach in this case: (1) the Court only reluctantly considered the "privacy expectations in communications made on electronic equipment owned by a government em-

62. *Id.* (quoting *O'Connor*, 480 U.S. at 726).

63. *Id.*

64. *Quon*, 130 S. Ct. at 2631.

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 2632 (quoting Vernonia Sch. Dist. 47J v. Acton, 515 U.S. at 663 (1995)); *see also, e.g.*, Board of Ed. of Indep. Sch. Dist. No. 92 of Pottawatomie Cty. v. Earls, 536 U.S. 822, 837 (2002); Illinois v. Lafayette, 462 U.S. 640, 647 (1983).

69. *Quon*, 130 S. Ct. at 2633 (quoting *O'Connor*, 480 U.S. at 732 (Scalia, J. concurring)).

ployer;"[70] (2) the Court glossed over facts marring its decision; and (3) the Court continued to rely on both the *O'Connor* plurality and Scalia approaches.

First, the Supreme Court refused to seriously consider Quon's privacy expectations. Specifically, the Court stated that it would assume *arguendo* that Quon had a reasonable expectation of privacy in his text messages.[71] This reluctance is not surprising considering the facts that the Court laid out earlier in the decision. For example, the Court stated that Duke told Quon about his first overage and then implied he could avoid having his messages audited by paying out-of-pocket for any overages.[72] It is reasonable to assume that Quon would have had more than a reasonable expectation of privacy; rather, he probably felt that he had an absolute expectation of privacy since he was paying for overages. While the Court focused on the purported legitimate work-related interests that Scharf stated he was concerned about, it pushed aside Quon's expectation of privacy.

Second, the Court glossed over facts in the case. The Court repeatedly noted that Scharf was concerned about his employees having to pay fees for sending work-related messages.[73] Interestingly, the opinion is devoid of any mention of whether there was any policy or other memorandum that stated that employees were required to pay for text message overages out of their own pocket. This supposed legitimate work-related consideration was not supported by the facts of the case and should not have been taken into account by the Court. The Court simply "assumes" facts in favor of the government which "makes reasonable almost any workplace search by a public employer."[74]

Finally, the Court erred in relying on the *O'Connor* approaches: that of the plurality and Justice Scalia's approach in the concurrence. As the Ninth Circuit correctly pointed out, there were less-intrusive alternatives that the City could have employed to make the search more reasonable in scope.[75] The Ninth Circuit never stated that the least intrusive measure would be needed in order to avoid interfering with the Fourth Amendment. Instead, the Ninth Circuit opined that *lesser* alternatives were available. This Court's misguided belief that the search would be acceptable for work-related misconduct or non-investigatory, work-related purposes is "illusory."[76] This broad

70. *Id.* at 2629 (further showing its reluctance by stating that "the judiciary risks error by elaborating too fully on the Fourth Amendment implications of emerging technology before its role in society has become clear").

71. *Id.* at 2630.

72. *Id.* at 2625.

73. *Id.* at 2625–26.

74. *O'Connor*, 480 U.S. at 734 (Blackmun, J., dissenting).

75. *See Quon*, 130 S. Ct. at 2632.

76. *O'Connor*, 480 U.S. at 746 (Blackmun, J., dissenting).

and very low threshold makes it "difficult to imagine a search that would not *fit* into one or the other of the categories."[77] Accordingly, the government need only recite the magic words that the search was "work-related" in order to overcome Fourth Amendment concerns. The government must realize that employee misconduct that merely "disrupts the workplace but does not break the law" should be handled differently than misconduct that has criminal implications.[78]

VIII. CONCLUSION

This case presents several long-term issues. Most notably, in today's era of BlackBerrys and other smart phones provided by employers, what happens when an employer pays for only a portion of the device, while the device is used for both personal and work-related matters? Under these facts, will government-employer searches continue to be found reasonable?

> [W]henever, as here, courts fail to concentrate on the facts of a case . . . predilections inevitably surface, no longer held in check by the 'discipline' of the facts, and shape, more than they ever should and even to an extent unknown to the judges themselves, any legal standard that is then articulated.[79]

Even though the government has an inescapable role as a "purveyor of morality," this Court has shown that it protects the government rather than the individual.[80] Only time will tell if the Court will address the reasonableness threshold.

77. *Id.*

78. Michelle Hess, *What's Left of the Fourth Amendment in the Workplace: Is the Standard of Reasonable Suspicion Sufficiently Protecting Your Rights?*, 15 FED. CIR. B.J. 255, 277 (2005).

79. *O'Connor*, 480 U.S. at 734 n.3 (Blackmun, J., dissenting).

80. Phyllis T. Bookspan, *Jar Wars: Employee Drug Testing, The Constitution, and the American Drug Problem*, 26 AM. CRIM. L. REV. 359, 385 (1988).