

## 74U: R UR HR POL N PRAC GR8

### Lessons from the Texting World

A recent U.S. Court of Appeals case had a little something for everyone. It included elements of sex, the police, charges of illegal searches, privacy, new and old fashioned technology, and garden variety HR practices. While it's not likely that it will soon become a movie of the week, it does provide a lot of lessons.

The case, *Quon v. Arch Wireless Operating Co. Inc.*, involved a California police officer who used a city owned pager to text both business and personal messages. The city contracted with a 3rd party for a certain number of characters per pager per month and beyond that, would have to pay overage charges.

While the city didn't have a policy that specifically addressed texting with pagers, it did have a general "Computer Usage, Internet, and Email Policy." The policy stated that those communication tools were for city business and that employees should have no privacy expectations when using them. It also required that employees sign an "Employee Acknowledgement" stating that the city reserved the right to "monitor and log all network activity including e-mail and Internet use, with or without notice," and that "users should have no expectation of privacy or confidentiality." A meeting was also held at which employees were told that pager messages "were considered email...and were eligible for auditing."

It seems like the city did everything right? A policy, an acknowledgement, and a meeting to explain the policy seems like solid HR. But *WAM*. (i.e., wait a minute). The plot thickened when there seemed to be an increasing number of months with overage charges assessed to the city. The Police Chief (as police chiefs do) ordered an investigation and in plaintiff Quon's case, an audit found that many of his messages were personal. It seems that Officer Quon had both a wife and a mistress who apparently had received many of his messages. Quon, upset that his messages were read, sued alleging violations of his right to privacy under the 4th Amendment and the California Constitution.

The Court ruled for the plaintiff finding that he had a reasonable expectation of privacy in the text messages. Y? While it seems as though the City did a lot right, practice overrode policy, acknowledgements, and statements. In past instances of overages, the City had a practice of not reviewing messages if the employee paid the difference. Quon had done this several times. In fact, he had been told at least once that his messages wouldn't be reviewed if he paid the overages.

The Court also found the scope of the search to be too broad. Employees could have been warned about personal usage and possible monitoring or personal message characters could have been counted but messages themselves blocked out. o one would claim that posting required workplace notices does anything to beautify your surroundings. However, various State and Federal legislations require numerous posters involving employee rights be displayed in order to comply with legal regulations.

### **A casual observer may jump to a couple of false conclusions about this case.**

1. That employer's rights to monitor emails and text messages are now significantly limited.
2. That this case only applies to the public sector since the 4th Amendment only applies to public sector employees

### Lessons to Be Learned

1. As with all things HR, make sure that your practices support your policies. Otherwise your practices quickly become your policies.
2. Review your policies regularly. Communications policies probably need an annual review to ensure that they address emerging technology issues. (e.g., Do your policies address blogging, IM, cell phones and driving?)
3. Consider adding in your communication policy that it can only be modified in writing, by a senior manager.
4. Employee acknowledgements should also be review, updated, reissued, and re-signed as necessary.
5. Train your managers. The remarks made by a supervisor in this case effectively overrode City policy adding ammunition for the plaintiff. Supervisors shouldn't make personal promises or representations to employees.
6. This case involved a 3rd party pager provider which complicated things. To ensure that your policies extend to these situations make sure that you have an employee's consent for disclosure before providing company issued or paid for communication devices.
7. Get help. Unfortunately technology and the related legal issues have brought a lot of complications to the workplace. It makes sense to have your communications policies and related acknowledgements reviewed by your attorney to ensure compliance with federal and your specific state law. It also makes sense to involve your legal counsel before getting involved in workplace searches.

CYAL8R!

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