EMPLOYMENT PRIVACY UNDER THE STORED COMMUNICATIONS ACT
The approaching nightmare for employers

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In City of Ontario v. Quon,¹ the Supreme Court unanimously held that a public employee has no reasonable expectation of privacy in text mail messages sent via an employer issued device when the employee has been informed that the employer has a policy disclaiming a right to privacy. This is true even when the employee’s superiors have informed him that his text messages were private.

Employee advocates are deeply disappointed by Quon. Under this decision, an employer can orally tell employees that their communications are private, have employees rely upon these statements, and then ignore them if company policy contains a written privacy disclaimer. In effect, employers can deliberately mislead employees with the Supreme Court’s blessing. Instead of a legal paradigm that looks at the actual communications between employer and employee and the inferences a reasonable person would make from these communications, we have a paradigm under which the existence of a written policy automatically trumps all other communication.

But employer rejoicing over Quon is short-sighted. To begin with, it rests upon a finding by the jury that the employer reviewed the employee’s text messages in order to “determine the efficacy of the character limits”, not to investigate suspected employee abuse of the system. But investigating suspected misconduct is precisely what most employers want to do. Quon will be of little help in these situations.

Stored Communications Act

Even more important, the case also contained a claim under the Stored Communications Act.² The 9th circuit found that Arch Wireless had violated Quon’s rights under the SCA by disclosing the content of his messages to his employer without his consent.³ This decision was not appealed to the Supreme Court.

The Stored Communications Act is going to be a nightmare for employers. Employers who have reason to believe that an employee is using a company issued cell phone or Blackberry to disclose trade secrets to a competitor, sexually harass a fellow employee, or commit other serious misconduct will be unable to investigate. With the Quon decision standing, wireless carriers will turn down employer requests to see the content of employee communications, no matter how legitimate the employer’s concern.

¹ No 08-1332 October Term 2009
³ 529 F.3d 892 (9th Cir. 2008)
Employers won’t even be able to investigate by getting a court order. The SCA has no exception to the requirement that the recipient of a message must consent to the disclosure. Even in the absence of the SCA, employers have generally failed when seeking court orders giving them access to computers owned by employees. For example, in *Sabin v. Miller*\(^4\) the court refused to give the employer access to the employee’s personal computer even though there was evidence of misconduct and it was undisputed that the employee had frequently downloaded employer records onto her personal computer.

In *Wyatt Technology v. Smithson*\(^5\), instead of seeking a court order when it had evidence that a former employee was misusing its trade secrets in his work for a competitor, the employer accessed the employee’s computer remotely. The employee sued and the court found that the employer had violated the Computer Fraud and Abuse Act.\(^6\)

If the misconduct is serious enough, law enforcement could obtain the records. But if you’ve ever had the experience of trying to get a police department with murders and rapes to solve to investigate employee misconduct, you know it’s almost always a waste of time. In many cases, law enforcement doesn’t even have jurisdiction because the misconduct is purely civil.

Employers will naturally litigate this issue in other circuits. This wouldn’t be the first issue where the 9th circuit issued a ruling on employment rights that was out of step with the other circuits.

Such attempts are unlikely to succeed. To prevail in cases like *Quon*, the employer must convince the court that the wireless carrier is a not an “electronic communication service” (ECS) but a “remote computing service” (RCS).

An ECS is “any service which provides to users the ability to send and receive wire or electronic communications”. This is exactly what a wireless company does; it sends and receives communications.

An RCS is defined as “the provision to the public of computer storage or processing services”. A wireless provider doesn’t do computer processing; it just sends messages. One could argue that a wireless company provides computer storage because it stores the records it transmits. But the SCA specifically provides that this type of storage does not make what would otherwise have been an ECS into an RCS.

In short, it is very difficult to read the SCA in a manner differently than the 9th Circuit. Perhaps this is why the employer in *Quon* did not include the SCA in its petition for certiorari. It will be very difficult for employers to get a different result in other circuits.

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\(^4\) 423 F. Supp. 2d 943 (2006)
\(^5\) 2006 WL 5668246 (C.D. Cal.)
\(^6\) 18 U.S.C. 1030
This leaves employers in an impossible position. There are many situations in which an employer has a legitimate need to review the content of employees’ electronic communications. They may even have a legal obligation to investigate. Employers need to be able to investigate complaints of sexual harassment. They also need to investigate indications that employees are disclosing trade secrets to competitors. But under the Stored Communications Act, employers will generally be helpless in dealing with employees who are smart enough to conduct their misconduct via wireless communication.7

What is to be done?

The obvious answer to this dilemma is to amend the SCA to allow employer access when there is legitimate reason. Achieving this objective, however, is probably impossible. Congress has not passed an employment privacy law since 1986, when it adopted the Electronic Communications Privacy Act. All attempts to update ECPA to include e-mail and other forms of communication that didn’t exist in 1986 have failed because of opposition from the business community. But, just as employee advocates and Democrats cannot enact legislation in the face of determined opposition by the business community, Republicans and employers will be unable to enact legislation that is opposed by employee advocates and Democrats. To amend SCA, Republicans would need a majority in the House of Representatives, a supermajority of 60 Senate seats, and control of the administration. Even then, changing the SCA would require a very high Congressional priority which it is unlikely to have.

The only solution is a compromise. Fortunately, one is available. Employee advocates are as unhappy about ECPA as employers will be about the SCA. Under ECPA (and common law privacy), access to information is determined by ownership. This allows employers to read any and all employee communications that pass through the company server, even when the company has no legitimate interest in the message. IT employees can and do read other employee’s personal e-mail for amusement.

The current legal paradigm has never made sense. The fact that someone owns a communications system should not give it a right to read another person’s sensitive personal communications in which it has no legitimate interest. Nor should people be denied access to information in which they have a legitimate interest because it is contained in a system that belongs to someone else.

What is needed is to create a new law of privacy based upon legitimate interest rather than ownership. Both employers and employees would be far better off under such a legal regime than they are today.

7 Employees who have complained of sexual harassment will consent to the disclosure of the offending messages. Employees who have not filed a complaint may not agree. In cases where the recipient of the message is not harmed, they have no reason to consent. They may well be involved with the employee’s illegal conduct.