Does the Fourth Amendment's Right to Privacy Protect Personal Communications over a Government-Issued Pager?

CASE AT A GLANCE

Jeff Quon, a sergeant on the SWAT team of the Ontario Police Department, was issued a pager which could send and receive text messages. The department told officers that pagers were to be used for work purposes only, though "light personal use" was permitted. The policy was clear that there was to be no expectation of privacy when using government-issued machines for electronic communications, but the policy did not expressly mention pagers. Also, a lieutenant told Quon and other officers that their messages would not be read if they paid for additional use. In light of this, did the lieutenant's reading of Quon's messages violate the Fourth Amendment right to privacy of Quon or of those he was communicating with?

City of Ontario et al. v. Quon et al.
Docket No. 08-1332

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From: The Ninth Circuit

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ISSUE

Was there a reasonable expectation of privacy under the Fourth Amendment for communications between a police sergeant and others over a pager issued by the Ontario, California, police department?

FACTS

Jeff Quon is a sergeant on the SWAT team of the Ontario, California, Police Department. In October 2001, the City of Ontario entered into a contract with Arch Wireless Operating Company, Inc., which included providing alphanumeric pagers to officers. These allowed text messaging. Under the city's contract with Arch Wireless, each pager had a monthly character limit of 25,000, above which the city had to pay extra.

The details of the city's policy and the instructions given to the officers are likely to be very important in the Supreme Court's analysis of whether there was a reasonable expectation of privacy for text messages sent over the pagers by the officers. In December 1999, the City of Ontario had a written "Communication Usage, Internet and E-Mail Policy," which applied to "City-owned computers and all associated equipment." The policy provided that "[t]he use of these tools for personal benefit is a significant violation of City of Ontario Policy." The policy did allow, however, for "[s]ome incidental and occasional personal use of the e-mail system if limited to 'light personal communications'" which "may consist of personal greetings or personal meeting arrangements." The policy did not expressly refer to pagers.

The city's policy also was explicit that users of its computers should have no expectation of privacy. The policy stated: "The City of Ontario reserves the right to monitor and log all network activity including e-mail and Internet use, with or without notice. Users should have no expectation of privacy or confidentiality when using these resources." The policy reminded officers that e-mail "messages are also subject to 'access and disclosure' in the legal system and the media."

Plaintiffs Jeff Quon and Steve Trujillo, sergeants in the Ontario Police Department, signed an employee acknowledgment of the policy in 2000. The acknowledgment included the statement that employees "should have no expectation of privacy or confidentiality when using these resources."

In April 2002, about six months after receiving the pagers, there was a meeting of officers and Lieutenant Steve Duke of the Department's Administrative Bureau. Lieutenant Duke told all present (which included Quon) that the pager messages "were considered e-mail messages" that "would fall under the City's policy as public information and eligible for auditing." Subsequently, Chief Lloyd Scharf, who attended the meeting, sent a memorandum to all supervisory staff, including Sergeant Quon, repeating what Lieutenant Duke had said.

After Sergeant Quon exceeded the character allotment in the first or second billing cycle, he was contacted by Lieutenant Duke, who was in charge of administering the contract with Arch Wireless. Lieutenant Duke told Sergeant Quon that his messages "were considered e-mail and could be audited" but also said "that it was not his intent … to audit employees' text messages to see if the overage was due to work-related transmissions." Lieutenant Duke told Sergeant Quon that he "could reimburse the City for overage" and that if Quon did not pay for this it would be necessary to "audit the transmission and

see how many messages were work-related." Sergeant Quon went over the limit three or four times and paid the city for the additional costs.

In August 2002, two officers, including Sergeant Quon, went over the character limit. Chief Scharf asked Lieutenant Duke to order transcripts for those two pagers for review. The department then obtained the transcripts from Arch Wireless. A review of the messages discovered that some were to or from Quon's wife, "while others were directed to or from his mistress." Some of these were sexually explicit. The department's policy expressly precluded "[t]he use of inappropriate, derogatory, obscene, suggestive, defamatory, or harassing language in the e-mail system."

Sergeant Quon and those with whom he exchanged messages sued the chief of police, the city, the police department, and others under 42 U.S.C. §1983. The district court found that Sergeant Quon had a reasonable expectation of privacy in his pager transcripts as a matter of law, but whether the search was carried out in a reasonable manner was a question of fact for the jury that depended on the purpose of the search. The jury found that Chief Scharf's purpose in reviewing the transcripts was to implement the limit on characters on pagers. Based on this, the district court concluded that there was no Fourth Amendment violation.

The plaintiffs appealed, arguing that the district court erred in denying their motion for summary judgment. The Ninth Circuit agreed with the plaintiffs and reversed the district court in an opinion by Judge Kim Wardlaw. The court of appeals concluded that the plaintiffs should have been granted summary judgment. It emphasized that Sergeant Quon had a reasonable expectation of privacy in light of the representations by Lieutenant Duke that there would be no monitoring of the messages as long as the officers paid for any overuse. The court also noted that there were "a host of simple ways" the department could have conducted an investigation without intruding on the plaintiffs' Fourth Amendment rights.

The defendants sought rehearing and rehearing en banc before a randomly selected panel of eleven Ninth Circuit judges. Both motions were denied, but seven judges dissented from the denial of en banc review. Judge Susan Ikuta wrote for the dissenters and objected to the finding of a reasonable expectation of privacy in the text messages and also to the court's considering other less intrusive ways of accomplishing the department's objectives.

CASE ANALYSIS

The leading Supreme Court case concerning government employees' reasonable expectation of privacy is *O'Connor v. Ortega,* 480 U.S. 709 (1987). Like this case, *O'Connor v. Ortega* arose in the context of a civil suit brought under §1983 by a government employee. A doctor sued his supervisors for searching his desk and his filing cabinets at the state hospital were he was employed.

There was no majority opinion in *O'Connor v. Ortega.* It was a 5-4 decision and Justice O'Connor wrote for a plurality of four. At least eight of the justices, though, agreed with the plurality's statement that "[s]earches and seizures by government employees or supervisors of the private property of their employees … are subject to the restraints of the Fourth Amendment."

The plurality opinion stressed that the reasonableness of the search would depend on the context, including the area searched and the employee's expectation of privacy. Justice O'Connor wrote: "The operational realities of the workplace, however, may make some employees' expectations of privacy unreasonable when an intrusion is by a supervisor rather than a law enforcement official. Public employees' expectations of privacy in their offices, desks, and file cabinets, like similar expectations of employees in the private sector, may be reduced by virtue of actual office practices and procedures, or by legitimate regulation."

The plurality said that even if the employee had a reasonable expectation of privacy, there had to be a balancing of this privacy interest with the government's interests. The plurality stated: "In the case of searches conducted by a public employer, we must balance the invasion of the employees' legitimate expectations of privacy against the government's need for supervision, control, and the efficient operation of the workplace."

The plurality expressly rejected a probable cause requirement for searches by employers and instead adopted a "reasonableness" approach. The plurality explained: "Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable." Quoting earlier cases, the plurality stated this as a two-part test: "Determining the reasonableness of any search involves a twofold inquiry: first, one must consider 'whether the … action was justified at its inception'; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first place.'"

Both sides in the current matter before the Supreme Court invoke *O'Connor v. Ortega* as support for their position. The City of Ontario and the other defendants (who are petitioners before the Supreme Court) argue that Quon had no reasonable expectation of privacy. They contend that the city had an explicit policy which said that employees should have no expectation of privacy when using city equipment for electronic communications. The defendants stress that the equipment at issue in this case was a pager issued by the police department to a SWAT team member for official communications and that this negates any reasonable expectation of privacy.

The defendants also argue that the discoverability of such communications, such as in requests under the California Public Records Act, prevents any expectation of privacy. The argument is that officers know that such communications are not treated as confidential under the law and can be requested via a Public Records Act request or through discovery in litigation.

Plaintiff (and respondent) Sergeant Quon argues, though, that in the facts of this case there was a reasonable expectation of privacy. The department's "no privacy" policy did not mention pagers and text messaging. Moreover, it did not strictly prohibit personal use of electronic equipment but allowed "light personal use." Most importantly, Sergeant Quon argues that Lieutenant Duke's statements created a reasonable expectation of privacy. Lieutenant Duke told the officers that their messages would not be monitored as long as they paid for the overuse. Despite this assurance, the overuse is exactly what led to the messages being read.

The two sides also disagree as to whether the search was carried out in a reasonable fashion. The defendants argue that the Ninth Circuit erred in considering whether less intrusive means could have been used to achieve the department's goals. The defendants maintain that the review was reasonable in that it was intended for the noninvestigatory purpose of determining the efficacy of the monthly character limit on the department pagers. Besides, the defendants say that it was permissible for the department to review the transcripts to see if its policy allowing no more than light personal use had been violated.

The plaintiffs, by contrast, predictably agree with the Ninth Circuit that the scope of the search was excessive relative to the department's objectives. The plaintiffs maintain that the existence of other ways to achieve the department's purposes relates to the reasonableness of the execution of the search.

Finally, there is the issue of the individuals whose communications with Sergeant Quon were intercepted. On the one hand, it can be argued that a person loses an expectation of privacy in communications when they are sent. A person who sends me a letter or an e-mail message to my office has no reason to believe that it will not be read by an assistant or others who have access to my office. On the other hand, text messages between two people, like telephone conversations, seem private. The participants in the conversation do not expect that the government will be intercepting and monitoring the communications.

Complicating this analysis in this case is that two of the other plaintiffs worked for the Ontario Police Department and one (Quon's wife) used to work there. They had knowledge of the department's policy which may be deemed relevant to their reasonable expectation of privacy.

SIGNIFICANCE

Obviously, the significance of the case will turn on how broadly or how narrowly the Court writes the opinion. There are surprisingly few Supreme Court decisions concerning the Fourth Amendment rights of government employees. The leading case concerning searches in the government workplace, *O'Connor v. Ortega,* is a plurality opinion. The Court also has considered searches of government employees in the context of drug testing of customs workers. *National Treasury Employees Union v. Von Raab,* 489 U.S. 656 (1989). The Court upheld such searches but emphasized the context and said that the "Government's compelling interests in preventing the promotion of drug users to positions were they might endanger the integrity of our Nation's borders or the life of citizenry."

This case likely will be important in clarifying whether the plurality's approach from *O'Connor v. Ortega* will be adopted by a majority of the Court. Also, the decision likely will give some guidance as to how the Court believes that the reasonable expectation of privacy should be determined in the context of the government workplace.

The case focuses attention on an aspect of Fourth Amendment jurisprudence that long has troubled commentators. In the foundational case of *Katz v. United States,* 389 U.S. 347 (1967), the Supreme Court broadened the scope of the Fourth Amendment by holding that it applies when there is a reasonable expectation of privacy. But does that mean that the government can negate all Fourth Amendment protections by saying, as the department policy does here, that employees should have no expectation of privacy?

Of course, this case is particularly significant because it is the first time that the Court will have considered these issues in the specific area of electronic communications by government employees. The Ninth Circuit noted that the case provided an opportunity to examine "a new frontier in Fourth Amendment jurisprudence that has been little explored." It is possible that the Supreme Court will rule broadly about the reasonable expectation of privacy of government employees in electronic communication like text messaging. Alternatively, its decision might be very fact specific, focusing on factors such as the department's express statement that employees should have no expectation of privacy when using the government's electronic equipment or the assurance of Lieutenant Duke that the content of text messages would not be reviewed as long as officers paid for overuse.

Finally, the case has significance in light of recent decisions by the Roberts Court limiting the rights of government employees. In *Garcetti v. Ceballos,* 547 U.S. 410 (2006), the Court ruled that there is no First Amendment protection for the speech of government employees on the job in the scope of their duties. More recently, in *Engquist v. Oregon Department of Agriculture,* 553 U.S. 591 (2008), the Court held that government employees cannot bring "class of one" claims under equal protection. Both decisions stressed the need for deference to the government as employer. This case could continue this trend or it could show that there are limits to the Roberts Court's deference to government employers.

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PREVIEW of United States Supreme Court Cases, pages 309–312.

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