LAW REVIEW 1040

Don't Use Your Employer's Equipment to Complain about your Employer

By Captain Samuel F. Wright, JAGC, USN (Ret.)

1.0--USERRA Generally

***City of Ontario, California v. Quon*, 560 U.S. 746 (June 17, 2010).**

The Supreme Court last week decided a case that provides at least indirect support for the wisdom of the advice I gave in Law Review 0702 (Jan. 2007). I invite your attention to www.roa.org/law_review. You will find more than 600 articles, mostly by me and mostly about the Uniformed Services Employment and Reemployment Rights Act (USERRA). Let me take this opportunity to reiterate my strong advice that you *not* use your employer's equipment (computer, e-mail system, telephone, etc.) to complain about your employer or to seek advice in dealing with your employer.

Under most circumstances, you have no reasonable expectation of privacy when you use your employer's equipment—you should proceed as if the employer is listening in on or reading your communications. If you need to communicate with the National Committee for Employer Support of the Guard and Reserve, the Department of Labor, the Service Members Law Center, your attorney, or anyone else concerning your employer, you should do so outside work hours and on equipment that does not belong to your employer. If you cannot afford a computer and Internet access at home, go to your local public library.

In order to promote efficiency and timely response to emergencies, the City of Ontario acquired alphanumeric pagers able to send and receive text messages and provided them to the city's police officers, including Jeff Quon, the plaintiff in this case. The city's contract with the service provider (Arch Wireless) provided for a monthly limit on the number of characters each pager could send or receive and provided for additional charges for usage beyond that limit. When the city distributed the pagers, it instructed Quon and the other officers that they were to be used for official police department communications only and that officers should not expect privacy when using the system. Quon's immediate supervisor, a police department lieutenant, told Quon and others that they could use the pagers for personal communications, so long as they reimbursed the city for any overages. It was not clear whether the lieutenant had the authority to vary or waive the city's "no personal use" policy.

When Quon and other officers exceeded their monthly character limits for several successive months, the police chief sought to determine if the monthly limits were too low—i.e., to determine whether individual officers were being charged for sending work messages or whether the overages were caused by personal messages. At the request of the police chief, Arch Wireless provided transcripts of Quon's text messages sent in August and September 2002. A review of the transcripts showed that Quon only occasionally sent work-related text messages and that the majority of his messages were personal, including sexually explicit messages to his wife and his mistress. The police department disciplined Quon, and he responded by suing the city, the police department, the chief of police, and Arch Wireless.

The District Court held that Quon had a reasonable expectation of privacy in the content of his text messages. The judge held that the reasonableness of the audit of the text messages depended upon the police chief's intent in directing the audit. If the audit was to determine if Quon was using the pager to "play games" and "waste time" then the audit was not constitutionally permissible under the Fourth Amendment of the United States Constitution. On the other hand, if the audit was to determine the sufficiency of the character limit, in order to ensure that police officers were not personally paying hidden work-related costs, then the audit was reasonable and permissible.

The court conducted a jury trial on the question of the police chief's intent, and the jury found that the intent was to determine the sufficiency of the character limit. Accordingly, the court found that the city, the police department, and the police chief did not violate the Fourth Amendment and entered judgment in their favor. The district court also found that Arch Wireless had not violated the Stored Communications Act (SCA) when it turned over a transcript of Quon's texts to the police department. *Quon v. Arch Wireless Operating Co.,* 445 F. Supp. 2d 1116 (C.D. Cal. 2006).

Quon appealed to the United States Court of Appeals for the 9th Circuit, which is generally considered to be

the most liberal federal appellate court and the one that is most frequently reversed by the Supreme Court. The 9th Circuit includes Alaska, Arizona, California, Guam, Hawaii, Idaho, Montana, Nevada, Oregon, and Washington. The 9th Circuit panel reversed in part. The 9th Circuit agreed with the district court that Quon had a reasonable expectation of privacy in the content of his text messages. The appellate court held that the audit was unreasonable and unlawful because there were other less intrusive ways that the police chief could have used to determine the sufficiency of the character limit. For example, the city could have warned Quon at the start of the month that his text messages would be audited, or the city could have invited Quon himself to redact the personal messages. The 9th Circuit also reversed the trial court on the liability of Arch Wireless, determining that the company had violated the SCA and awarding money damages against the company. 529 F.3d 892 (2008).

After the 9th Circuit turned down the defendants' motion for rehearing *en banc*, with 6 active 9th Circuit judges dissenting [554 F.3d 769 (2009)], the defendants applied to the Supreme Court for *certiorari* (discretionary review). The Court denied Arch Wireless Company's *certiorari* petition, and the judgment against the company became final. The Court granted the *certiorari* petition filed by the city, the police department, and the police chief. The Court conducted the oral argument on April 19 and released the decision on June 17.

It is the general policy and frequent practice of the Supreme Court to decide cases on as narrow a basis as possible. Accordingly, in deciding this case the Supreme Court assumed without deciding that Quon had a reasonable expectation of privacy in the content of his text messages, but the Court nonetheless reversed the 9th Circuit. The Court held that the possible availability of less intrusive means did not render the audit of the text messages unreasonable or unlawful. Employers and employer associations clearly hoped that the Supreme Court would hold explicitly that there can never be a reasonable expectation of privacy in communications sent on equipment belonging to the employer, and thus those employers and associations were no doubt disappointed by the narrowness of the Court's decision.

In an article on the Supreme Court decision, the *Washington Times* reported, "Bart Lazar, an intellectual-property lawyer whose expertise includes privacy and security involving electronic communications, said the narrowness of the ruling leaves open scenarios in which employees could keep private communications made on company equipment. Despite the decision leaving 'the door open for reasonable expectations of privacy,' he said employees, 'need to use discretion with how and what they do on employer-provided equipment.'"[1] I wholeheartedly endorse Mr. Lazar's advice to be very careful about communications that you make on employer-provided equipment.

Aside from privacy considerations, there is another good reason not to call from work or during work hours or use your employer's equipment (telephones, computers, pagers, e-mail systems, etc.) to complain about your employer or to seek advice and assistance in dealing with your employer. If your employer is annoyed with you about your absences from work for military service and training, as permitted by USERRA, and if the employer is looking for an excuse to fire you, the last thing that you want to do is to give the employer the excuse that he or she is looking for. Using employer time or equipment for communications not directly necessary for your work at least arguably violates some employer rule and could be grounds for discharge.

As the Director of the Service Members Law Center (SMLC), I am available at 800-809-9448, extension 730, or by e-mail at SWright@roa.org. I believe that it is most important to provide you the opportunity to contact me without calling me from work or during your work hours. Accordingly, I am willing to devote my own time to calling you or taking your call outside East Coast business hours—I am generally at work from 8 a.m. to 5 p.m. Eastern Time Monday through Friday. If you need to speak to me outside those hours, send me an e-mail and provide me an appropriate time and telephone number.

The National Committee for Employer Support of the Guard and Reserve (ESGR) is a Department of Defense organization with the mission of gaining and maintaining the support of civilian employers (federal, state, local, and private sector) for the men and women of the National Guard and Reserve. You can reach ESGR at 800-336-4590, between 8 a.m. and 6 p.m. Eastern Time Monday through Friday, except federal holidays. If you need to reach ESGR outside those hours, send an e-mail to USERRA@osd.mil and Curtis.Bell@osd.mil.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Service Members Law Center) at swright@roa.org or 800-809-9448, ext. 730.

[1] "Court Rejects Privacy of Texter in Narrow Ruling." *Washington Times* 18 June 2010: A1, A12. Print.