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U.S. Supreme Court Holds State Employee Texts Can be Seized

***City of Ontario, Cal. v. Quon*, 08-1332 (U.S. June 17, 2010)**

The United States Supreme Court (USSC) recently held that an employer's search of employee text messages was reasonable and did not violate the Fourth Amendment.

In order to help the unit mobilize in emergency situations, the City of Ontario, California Police Department (OPD) issued pagers to SWAT team members that could send and receive text message. The pagers had a monthly character limit and OPD incurred extra charges when officers exceeded the limit. The OPD's computer, Internet and E-mail policy, reserving the right to monitor and audit emails and activity, allegedly applied to the pagers as well.

For several months, Quon and other officers exceeded their texting limit. An arrangement was established where officers paid OPD for the extra charges. As a result of many overcharges, OPD requested transcripts of text messages for two months in an attempt to re-evaluate the adequacy of the limit.

When OPD reviewed Quon's texts, they redacted those sent or received outside of work hours. OPD found that the majority of Quon's texts during work hours were not work related and some were sexually explicit. Quon averaged 28 messages per shift, 3 of which were work-related. OPD determined that Quon had violated department rules.

Quon then brought suit alleging that OPD had violated his right to privacy. A jury found that the department's audit was proper as it was implemented to determine the efficacy of the text character limit. The District Court and Ninth Circuit found Quon had a privacy interest in his texts.
However, the Ninth Circuit reversed the District Court's decision that OPD did not violate Plaintiff's right to privacy.

The United States Supreme Court (USSC) used a test created in *O'Connor v. Ortega* to evaluate whether Quon's Fourth Amendment rights had been violated. First, the Court considered operational realities in the workplace to determine whether a Fourth Amendment right was implicated. This means that the question whether there is a reasonable expectation of privacy is addressed on a case-by-case basis. Second, if an employee has a legitimate expectation of privacy, the intrusion for noninvestigatory, work-related purposes, or for investigations on work misconduct, should be judged by the standard of reasonableness.

Scalia's test, also discussed in *O'Connor,* was slightly different, but also acknowledged by the Court. Scalia would not evaluate 'operational realities' and would conclude that government offices are generally covered by Fourth Amendment protections. He also would have held that government searches to retrieve work-related materials or to investigate work-place violations do not violate the Fourth Amendment since they are reasonable and normal in the private-employer context.

The USSC was not sure the *O'Connor* test was the correct one, so it modified it by incorporating Scalia's. In applying the new test, the Supreme Court first assumed Quon did have a privacy interest in his text messages. This narrowed the issue the USSC needed to decide. The Court was not ready to decide how much privacy can be expected in this situation as it was "uncertain how workplace norms and the law's treatment of them, will evolve." A 'special needs' of the workplace exception may also have applied.

Using the *O'Connor* Test, the USSC first determined that the search was reasonable. A search is reasonable if it is justified at inception and if measures were reasonably related to the objective and the search was not exces-

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sively intrusive considering the situation.
OPD's search was justified at inception since the jury found the search was to determine whether the character limit was sufficient. This satisfied *O'Connor's* first prong.

The scope of the search was also adequately limited. Only two months of transcript were requested and off-duty texts were redacted. USSC disagreed with the Ninth Circuit that least intrusive means was necessary.
Quon's privacy interest was also diminished since he was told the texts could be audited. He did not have an unlimited expectation of privacy. This diminished expectation minimized the chance OPD would intrude on Quon's personal life. The Supreme Court did not discuss the boundaries of the limited expectation of privacy, but this helped make the search reasonable.

Finally, the Court addressed other Plaintiffs who had sent Quon texts and asserted their rights were also violated. These Plaintiffs argued the search of Quon was unreasonable, thus it was unreasonable in their cases as well. The Court used that logic to hold that since the search was reasonable as to Quon, it was reasonable as applied to the other plaintiffs. This meant their claims could not prevail.

How This Effects Your District:

This holding is somewhat limited in scope as the Supreme Court simply decided whether one particular search was constitutional. Still, all searches similar to this will likely be bound by this holding. It is unknown whether other types of telecommunication will also be subject to this analysis.

As employers, school districts may view transcripts of employee text messages on devices provided by the District in limited circumstances. However, Districts must follow specific guidelines.

If Districts can foresee a need to order transcripts of employee texts sent and received on phones provided by the District, or they would like to reserve this right, they should create and notify employees of a policy stating applicable communication is subject to monitoring and review.

Schools must have a reasonable motive for searching the text messages and the search must invade employee privacy as little as possible. OPD's search was conducted to evaluate the adequacy of their service plan. This addressed department efficiency. Districts must have a similarly neutral reason for searching transcripts. Any search of employee text messages must be as minimal as possible. If a District has any questions regarding similar searches, it should contact an attorney at Ennis, Roberts & Fischer for consultation.

Districts May Implement Policies Limiting Speech at Board Meetings

Fairchild v. Liberty Independent School District, 08-40833 (U.S. 5th Cir. 2010)

The Fifth Circuit recently held that a School District employee's rights were not violated when she was not permitted to air a personnel grievance publicly. Board policy limiting public comment during meetings was constitutional.

Fairchild was a special needs teacher's aide in Ms. Barrier Lanier's classroom. The women did not get along and Fairchild accused Barrier Lanier of mistreating both students and work time. Eventually, the District fired Fairchild.

Fairchild filed a grievance alleging that District fired her because she exposed Barrier Lanier. Fairchild requested her grievance be heard publicly by the School Board. However, Board policy did not allow personnel grievances to be heard publicly unless the accused requested it. Ms. Barrier Lanier did not make such a request. The grievance was heard privately at the August 16, 2005 Board meeting.

Fairchild also tried to speak about her grievance during a time designated for public comment. During this comment time, no disputes are resolved. The Board is only able to respond with facts or policy. It also does not allow commentary about teachers or employees of the District during that time. Ms. Fairchild commented on her grievance without providing identifying information and thus she was never interrupted. Fairchild then filed a lawsuit against the District alleging the Board violated her free speech rights when they restricted her speech as the Board meeting.

The Board had followed two policies in regard to Fairchild's complaint. The BED (local) policy stated the Board will allot time to hear public comments. The comments will not be decided or deliberated upon unless they are in in the agenda. If need be, the speaker will be referred to policy that provides a resolution process.

The Fifth Circuit found that BED (local) policy was not unconstitutional. It determined Board meetings are limited public forums which provide expression for particular subjects or by particular groups. Speech may be restricted if the government does not discriminate against the viewpoint of the speech and the restriction is reasonable in light of the purpose of the forum.

The Board's policies were both viewpoint neutral and reasonable. There was no evidence that the Board permitted only certain viewpoints. The comment period was utilized as a routing and learning mechanism. Restrictions on speech served to preserve the efficiency of meetings and to prevent unnecessary disclosure of students' or employees' private information. Since the Court determined these restrictions are reasonable, they were thus constitutional restrictions of speech. The policy also did not restrict a substantial amount of speech and was not overbroad.

The Fifth Circuit used the same

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steps to hold that the policy requiring Fairchild's hearing be closed is also constitutional. This restriction was also viewpoint neutral and reasonable since it preserved the Board's interest in maintaining its agenda and ensuring student and employee privacy. The policy was applied mechanically and fairly to Fairchild. Her grievance would not be public unless the subject of the matter, Barrier Lanier, requested it be public.

How this Affects your District:

School Districts should remember that while they can restrict speech in Board meetings, the restrictions must be viewpoint neutral and reasonable. Policies restricting speech should serve some governmental interest. They should also be applied the same to all individuals or groups.

Districts carefully draft policies to be specific and clear. This case may have been decided very differently had Liberty Independent School District's policies been very broad or vague.

This case may serve as encouragement to Districts to implement policies that will streamline meetings, making them more efficient. In addition, policies may serve to provide some speakers with quick answers to their questions, while others may then be made aware of alternative, in depth grievance procedures.

School Security Policies Can and Should be Strictly Enforced

Meadows v. Braxdale, A-08-CA-819-SS (W.D. Texas, Jan. 4, 2010)

The Western District of Texas recently held that a school district did not violate parents' constitutional rights when it denyed them access to their children's schools or classroom. It concluded that while parents do have a right to guide their child's education, that does not always include access to the classroom.

In *Meadows*, Lake Travis Independent School District implemented a policy where all visitors had to provide government identification. The identification information was scanned into a computer with special software that would compare the information against an established list of sex offender databases. If a visitor did not have identification, their name and information could be entered manually into the system. The policy requiring the process was developed in response to an incident where an unidentified male came onto a school campus and exposed himself to a fifth grader.

Mrs. Meadows, whose three children attended a District elementary school, refused to provide identification or relevant information other than her name. As a result, a meeting she had come to attend was held in the school office. On two other occasions, she was escorted to events when she visited. School officials warned Mrs. Meadows she could not be escorted a third time. When Mrs. Meadows again failed to provide photo identification to be scanned, she was denied access to the school.

The Meadows filed a claim arguing that the District had violated numerous constitutional rights including their right to bring their children up as they please and guide their education. The Court strongly disagreed with the Meadows. While it acknowledged that a parent has a "right in the care, custody, and control of their children," and even to direct their children's education, it stated that there is no right to access a child's school or classes.

While this case is not controlling in Ohio, it supports the idea that school security can be strictly enforced, even against students' parents. In fact, allowing exceptions to security systems can undermine the strength of district security.

Security starts to fail when it is not uniformly applied throughout the district. Districts should establish and enforce procedures that are to be followed in circumstances where a visitor cannot or refuses to comply with security policy. Ensuring procedures are consistent will also help parents and other visitors become accustomed to the security system. Of course, sending information to parents putting them on notice of the presence of the security system, how it works, and what will be required from visitors, also helps parents come prepared not only with the right identification, but with the right attitude.

To make security effective and efficient schools can follow simple steps.

- **Visitors should only enter at check-in points.**

Have a short conversation with visitors and ask why they are at school. If a visitor's reason seems suspicious, it is appropriate to question him or her further. If it is called for by the security system, scan guests' identification picture and issue an identification badge with the guest's name, photo, date, and arrival time.

- **All staff should be knowledgeable about the check-in policy.**

Staff should be aware of when a stranger in the hallways is violating security policy, such as when they are not wearing an identification badge. Staff should also know what to do or who to contact when the situation arises.

- **Policy should be standardized to limit exceptions.**

The policy should also discuss procedure for cases where a visitor forgets his or her identification or refuses to give it. Perhaps the person should be allowed one entrance and put on notice that next time they must bring identification.

- **Bring staff to the visitor in the office if necessary.**

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If the guest forgets identification and is meeting with a staff member, the appointment may be held in the office instead of in the classroom. This accommodates the guest but still puts security first.

- **One-time escorts can be permitted.**

A policy that allows a guest to be escorted to and from his or her destination once before identification is absolutely required may be a reasonable accommodation.

- **Limit access to areas where children are.**

Do not let anyone in areas where students are without identification and security clearance. Even if that person has an escort

- **Explain to the community that check-in measures are for a safer school.**

The school or district should notify its community of changes in security policy. Most parents will be pleased their children's school verifies the identification of all guests.

Following these or similar safety guidelines will make school security more efficient and safer. Uniformity is key. Office staff also should not make exceptions for parents they know. Others may see this, or become aware of it and demand the same treatment, even if they do not have business at the school. Staff may become unsure of what situations security must actually be enforced when there should not be any exceptions.

District Regulation of Political Expression Survives First Amendment Challenge

Weingarten v. Board of Education of City School District of New York, 08 Civ. 8702(LAK) (S.D.N.Y. 2010).

The Southern District of New York recently upheld a New York City Department of Education (Department) regulation restricting political activism by teachers in schools. The regulation was related to a legitimate pedagogical concern and Plaintiffs failed to show there was any factual issue to be resolved, thereby losing on summary judgment.

A New York City teacher's union claimed the Department regulation violated their First Amendment rights and the New York Constitution. The regulation stated that staff should "maintain a posture of complete neutrality with respect to all candidates." Another section prohibited material supporting political organizations or committees, candidates, or slates of candidates, from being posted, distributed, or displayed in school buildings including areas that are closed to students.

After the District Court granted a partial injunction, the Department revised the regulation. It more specifically lists what employees are prohibited from wearing and retains the section prohibiting staff from expressing anything but political neutrality.

The Department relaxed other terms however. The revisions allow materials advocating political ideas to be distributed in staff mailboxes or hung on union bulletin boards in areas closed to students.

The Department then filed a motion for summary judgment, asking the Court to decide the case before trial. The issues the judge considered were, 1) whether students would misperceive teachers' expression as an endorsement by the school, and 2) whether the political paraphernalia would entangle the District's educational mission with politics.

Plaintiffs argued that high school students are sophisticated enough to realize that a teacher's political expression is his or her own and it is not supported by the school. The Court found that argument was somewhat irrelevant to the case. It stressed a previous case, *Hazelwood v. Kuhlmeier,* which showed that schools can regulate teachers' speech in the classroom if they have legitimate pedagogical reasons. The District simply had to act in good faith and show that the regulation reasonably advanced a legitimate pedagogical concern.

The Court went on to state that School District opinions are granted deference. Plaintiff's expert could not overcome this deference on his testimony. Further, the Court held that the expert's testimony was not supported by adequate science and was inadmissible. His testimony, therefore, could not be used.

Finally, the Court held that the regulation banning teachers from political activism was consistent with a legitimate pedagogical concern. The Judge agreed with the Department's opinion that "displays of political partisanship by teachers in the schools, particularly in the classroom to a captive audience...are inconsistent with our educational mission." Since Plaintiffs failed to dispute the argument, summary judgment was granted to Defendants.

How This Effects Your District:

Districts should be aware that they can regulate staff's political speech in schools in certain circumstances. To regulate political speech, a District must have a legitimate pedagogical reason. The regulation should further this educational interest. A District should regulate speech only in good faith and must have a reason the regulation is consistent with pedagogical concerns.

Though *Weingarten* is not controlling law in Ohio's Federal courts, the standard it utilized from *Hazelwood v. Kuhlmeier* is applicable. *Weingarten* serves as a valuable example of how *Hazelwood's* can be interpreted, and how it's test is applied, in lower Federal courts.

Policy Prohibiting Discrimination Found Constitutional

***Christian Legal Society v. Hastings College of Law*, 08-1371 (S.Ct. June 28, 2010)**

The U.S. Supreme Court held very recently that Hastings College of Law's Nondiscrimination Policy, which requires all recognized student groups to admit any other student, was Constitutional. It did not violate freedom of association or freedom of speech.

Hastings College of Law is a public school in California. Student groups may become Registered Student Organizations (RSO's) by abiding by certain conditions, including the school's Nondiscrimination Policy. In return, the groups are allowed to use school funds, facilities, channels of communication, and the Hastings name and logo. The Nondiscrimination Policy requires these student groups to welcome anyone who would like to be a member or seek leadership positions regardless of the person's status or beliefs.

In 2004 a Christian RSO became a chapter of the national Christian Legal Society (CLS). CLS chapters must adopt bylaws that require members to sign a "Statement of Faith". Members must conduct their lives per this statement which prohibits sexual activity outside of marriage in addition to "unrepentant homosexual conduct". Group members, per the Statement of Faith, must also proscribe to the Christian religion. Hastings would not allow CLS to become an RSO because it excluded students of certain religions and sexual orientation which did not comply with the Nondiscrimination Policy.

CLS then filed suit seeking an injunction allowing it to become an RSO. The group alleged Hastings violated its rights to free speech, expressive association, and free exercise of religion. The Federal District Court ruled for Hastings on summary judgment and the Ninth Circuit Court of Appeals affirmed the decision. The United States Supreme Court then reviewed the case.

Justice Ginsburg wrote the plurality opinion for the Supreme Court and first narrowed the question the Court would address to "whether a public institution's conditioning access to a student-organization forum on compliance with an all-comers policy violates the Constitution. It then addressed CLS's allegation that the Nondiscrimination Policy targets groups who wish to express religious beliefs and social opinions and allows other groups to associate freely. CLE, however, had already agreed to a factual statement that specified that Hastings requires RSO's to allow all students to participate in their groups. The Court would not address this allegation as the contrary had already been stipulated to.

The Court identified Hastings as a limited public forum, where some speech restrictions are allowed. However, any restrictions in a limited public forum must be both reasonable considering the purpose of the forum, and viewpoint neutral. The Court applied this test both to the speech issue, and the free association issue since the same considerations apply to both; the other test, strict scrutiny, is not appropriate for limited public forums; and the case fit into the limited public forum category since CLS may exclude anyone for any reason if it is not officially recognized by the school.

Ginsburg then held that Hastings Nondiscrimination Policy was reasonable. The educational context was important and reasonableness had to be considered with special characteristic of educational environments. Schools have significant authority over officially recognized activities in which students participate and schools are granted substantial deference in their decisions. The Court then noted all the reasons for the policy Hastings asserted made it reasonable.

First the policy ensured the opportunities RSO's provide are available to all students. Since students pay a mandatory student-activity fee which is disbursed to RSOs, it would be unfair that a student would help fund a group he or she could not join. Second, the policy helps Hastings police the Policy without asking RSOs why they restrict membership. Third, Hastings would like to bring diverse groups together and support tolerance, cooperation, and learning among different students. Fourth, state law against discrimination is incorporated into the Policy which shows Hastings will not subsidize illegal activity.

The Court also found it persuasive that CLS had other ways to communicate and reach out to members or potential members even though it could not use all communication available to RSOs. Indeed, CLS had hosted many events during the school year and had even grown. Ginsburg then noted that CLS had no persuasive arguments against the policy's reasonableness.

The Supreme Court finally found the Policy was viewpoint neutral. It affected all groups the same no matter their message and all groups were required to comply. The fact that some groups were burdened more than others by the Policy is incidental and is unrelated to viewpoint neutrality.

How This Affects Your District:

Though this opinion regards student organizations in the university setting it is still instructive to public K-12 school districts. In fact, school districts are usually granted even more authority to restrict speech than universities since students are less sophisticated. School districts should know that they are allowed to utilize regulations that may restrict student speech or even association if the policies are reasonable and viewpoint neutral.

In order to ensure that regulations are reasonable, districts should consider how the regulation furthers any district goals. This is very similar to the pedagogical concerns discussed in *Fairchild* and *Weingarten*.

Regulations or policies are viewpoint neutral when they treat all views and beliefs equally. Districts should carefully assess whether this is true of any of their policies. On the other hand, if one viewpoint is affected more than another, that does not mean the regulation is not neutral.

Education Law Speeches/Seminars

Ennis, Roberts & Fischer regularly conducts seminars concerning education law topics of interest to school administrators and staff. Popular topics covered include:

Cyber law
School sports law
IDEA and Special Education Issues
HB 190 and Professional Misconduct

To schedule a speech or seminar for your district, contact us today!

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