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Privacy Rights Being Tested in Digital Age

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You're a city employee. It's 7 p.m. on a Friday. You were supposed to be home for dinner hours ago. Your spouse sends you an angry text message on

your city-issued cell phone expressing frustration that you've missed dinner – again. You fire back with an equally angry and hurtful text message.

It turns out that this is one of many e-communication exchanges between you and others that you have sent on a city-issued cell phone. Under an informal policy, you paid all of the overage charges, and no one looked at the contents of your text messages.

After a while, however, your supervisor got tired of being a bill collector, and obtained the contents of your texts to determine whether they were work-related. Your supervisor was not pleased to see messages he felt were inappropriate. The supervisor brings this to your attention. You feel violated and humiliated for having your personal, dirty laundry now public. You sue the city for violating your constitutional rights. Do you win?

The United States Supreme Court is poised to issue a decision this spring in a California case on similar facts. The case, *City of Ontario v. Quon*, highlights the

tension between an individual's right to privacy and a municipality's right to access information on city-owned property such as cell phones.

The decision may have a far-reaching and profound effect on employee privacy rights in the Digital Age. With the explosion of texting, instant messaging, Facebook, Twitter and related "instamedia," something will have to give. The Supreme Court may struggle with balancing an employee's reasonable expectation of privacy and an employer's right to control the property it owns.

While *Quon* will be decided in the context of public employment, it is expected that this decision will reverberate throughout the public and private sectors.

It may also be a matter of time before the Supreme Court grapples with a dispute relating to an employee's use of Facebook or other social-media sites, such as Twitter and MySpace. Have you ever "unfriended" someone on Facebook? Even worse, has anyone ever "unfriended" you? Facebooking has become so popular that even the venerable Oxford Dictionary named "unfriend" as its Word of The Year for 2009.

Facebook – along with its friending, unfriending, status updating, and commenting – has created some potential legal problems for employers.

While Facebook can be an extraordinarily powerful and

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productive tool in certain businesses, it can pose a challenge for employers. How many times have you seen an employee lament on Facebook about how “boring” or “lame” his or her job or supervisors are? These types of expression, while not directly aimed at the organization, imply that the organization is not a good place to work.

Facebook can also be used to harass co-workers or to foster a hostile work environment.

Clearly, it is impossible for employers to try and prohibit or micromanage all online interactions among their employees.

What if an employee posts a derogatory or sexual joke on a Facebook page, knowing that co-workers would see it? If such comments would be utterly inappropriate during a work meeting, should they be treated any differently if they are communicated via Facebook?

There is no easy answer. Employers should consider adopting a written policy explaining what forms of social media are appropriate to use in the workplace and which should not be used.

In addition, employers need to exercise caution regarding how they obtain electronic information in the

workplace, particularly as the lines between “work” and “home” continue to blur due to technology. Various federal statutes prohibit access to password-protected information, and employers must understand where the line is between legitimate company interests and employee privacy. For example, are employers free to scroll through e-mails on an employee’s Blackberry, where the company paid for the Blackberry, but if the employee pays the monthly bill?

Quon and the explosion of Facebook underscore how rapidly instant communications and the use of social media in the workplace are becoming hot topics for employers and employees. Courts frequently find themselves in a position of playing “constitutional catch-up” to determine how much protection individuals should receive when communicating in the Digital Age.

Given this rapidly evolving (and dangerous) landscape, all employers are well-advised to consider how their current policies (or lack of any policies) might expose them to liability in the Digital Age.

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