The Constitutional Infiltration of Public and Private Workplace Privacy Law

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Abstract

Recent U.S. Supreme Court cases have contained much legal discussion at the intersection of constitutional law concepts and the law of the workplace – both in the public-sector workplace where constitutional state action exists and in the private-sector workplace where it does not. One important recent case in this regard is the Fourth Amendment privacy case City of Ontario v. Quon (U.S. 2010). The case involves alleged Fourth Amendment violations in relation to a police department's review of text messages made by an employee on a city issued text-message pager. In a cryptic decision, Justice Kennedy writing for the Court held that assuming, without deciding, the employee has a reasonable expectation of privacy in the pager, the city's search of it was reasonable because it was motivated by a legitimate work-related purpose and was not excessive in scope. In concurring, Justice Stevens pointed out that the majority opinion had punted on the issue of the appropriate test for of reasonableness in the workplace context. Interestingly, the majority applied, among other tests, to the Quon facts the test outlined by Justice Scalia in his concurring opinion in Ortega v. O’Connor (U.S. 1989), which is based in part on a comparison of privacy interests in the private and public workplaces.

Through Quon and previous workplace privacy cases in the private and public sectors, this paper explores whether constitutional law concepts are infiltrating public and private workplace privacy law. Concluding that constitutional concepts are increasingly becoming part of the legal discussion surrounding these workplace issues, the paper then asks whether this development is beneficial or detrimental to the rights of workers. Because it appears that private sector notions of workplace privacy are becoming more ensconced in the public sector, versus the other way around, the conclusion is that the constitutional infiltration is counter-intuitively diminishing privacy rights for all workers in the United States.