Quon v. Arch Wireless Operating Co., No. 07-55282

WARDLAW, Circuit Judge, concurring in the denial of rehearing en banc:

No poet ever interpreted nature as freely as Judge Ikuta interprets the record on this appeal. The dissent is not bound by the facts, even those found by the jury; nor is it confined to the actual fact-driven Fourth Amendment holding. The dissent's lofty views of how the City of Ontario Police Department ("OPD") should have guided the use of its employees' pagers are far removed from the gritty operational reality at the OPD. I write only to correct the seriously flawed underpinnings of the dissent and to demonstrate that our opinion carefully and correctly applied the tests set forth in *O'Connor v. Ortega*, 480 U.S. 709 (1987). That our opinion follows Supreme Court precedent and accords with our sister circuits is obviously why this appeal failed to win the support of a majority of our active judges for rehearing en banc.

I.

The dissent selectively recites facts to support its disagreement with the outcome of our panel's Fourth Amendment analysis. For a full recitation of the record evidence, read the opinion. *See Quon v. Arch Wireless Operating Co*., 529 F.3d 892, 895–99 (9th Cir. 2008). Set forth below are the key factual findings that the dissent either mischaracterizes or overlooks entirely.

The record belies the dissent's assertion that the OPD officers were permitted to use the pagers only during SWAT emergencies. Dissent at 1. Sergeant Jeff Quon ("Quon") and other SWAT team members, who were required to be on call "24/7," had been issued the pagers pursuant to an agreement with the OPD. The agreement to provide the officers' pagers resulted from the OPD's "refusal to pay overtime or stand-by pay to officers who must be available for SWAT call-outs."

Moreover, the record is clear that the City had no official policy governing the use of the pagers. *Quon*, 529 F.3d at 896. At the time it contracted for the pagers, the City had in place a general "Computer Usage, Internet and E-mail Policy" (the "Policy"), which Quon had signed before the City even acquired the pagers. *Id.* However, the Policy does not expressly cover the pagers or text messaging. *Id.* According to Lieutenant Steve Duke ("Lt. Duke"), a Commander with the OPD Administration Bureau, Quon attended a 2002 meeting during which Lt. Duke allegedly informed those in attendance that the pager messages "were considered e-mail, and that those messages would fall under the City's policy as public information and eligible for auditing." *Id.* Quon "vaguely recalled attending" the meeting. *Id.* Yet, he did *not* recall Lt. Duke stating at the meeting

that the use of the pagers was governed by the Policy—a fact the dissent fails even to mention. *See id.*

More troubling still is the dissent's failure to consider the OPD's informal—but express and specific—policy and practices that did govern the use of the pagers, or Lt. Duke's role in effecting this policy. By burying these key facts, the dissent again misrepresents the record. *See* Dissent at 3–4. Lt. Duke, who was officially in charge of administering the use of the pagers and procuring payment of overage charges, explained the informal policy as follows:

> "[T]he practice was, if there was overage, that the employee would pay for the overage that the City had . . . . [W]e would usually call the employee and say, 'Hey, look, you're over X amount of characters. It comes out to X amount of dollars. Can you write me a check for your overage[?]'"

Id. at 897 (alterations in original). Lt. Duke told Quon that it was "not his intent to audit employee's [sic] text messages to see if the overage is due to work related transmissions." *Id.* at 897 (alteration in original). According to Quon, Lt. Duke stated that "'if you don't want us to read [your messages], pay the overage fee.'" *Id.* As a result of his official position, Lt. Duke's statements carried "a great deal of weight," as the district court found. *Quon v. Arch Wireless Operating Co.*, 445 F. Supp. 2d 1116, 1141 (C.D. Cal. 2006). Because the record evidence showed that Lt. Duke was in charge of the distribution and use of the pagers, the district

court and our panel concluded "it was reasonable for Quon to rely on the policy—formal or informal—that Lieutenant Duke established and enforced." *Quon*, 529 F.3d at 907.

The practices of the OPD were consistent with Quon's understanding of the informal policy. Quon exceeded the monthly character limit "three or four times" and paid the City for the overages. *Id.* at 897. Each time, "'Lieutenant Duke would come and tell [him] that [he] owed X amount of dollars because [he] went over [his] allotted characters,'" and Quon would pay the City for the overages. *Id.* (alterations in original). The City did not review any of Quon's messages in any of these instances. *Id.* The informal policy remained in place until Lt. Duke suddenly let it be known that he was "tired of being a bill collector with guys going over the allotted amount of characters on their text pagers." *Id.* In response, Chief of Police Lloyd Scharf ordered Lt. Duke to "'request the transcripts of those pagers for auditing purposes.'" *Id.* at 897–98. Lt. Duke obtained and reviewed the transcripts of the messages sent and received by Quon, which revealed that Quon "'had exceeded his monthly allotted characters by 15,158 characters,' and that many of [the] messages were personal in nature and were often sexually explicit." *Id.* at 898.

The dissent also oversimplifies and misstates the procedural posture of the case. The parties filed numerous rounds of motions for summary judgment. *Id.* Ultimately, as to the Fourth Amendment claims, the district court found that, in light of the OPD's informal policy that the text messages would not be audited, Quon had a reasonable expectation of privacy in his messages. *Quon*, 445 F. Supp. 2d at 1140–43. Our unanimous panel agreed. *Quon*, 529 F.3d at 906 ("We agree with the district court that the Department's informal policy that the text messages would not be audited if he paid the overages rendered Quon's expectation of privacy in those messages reasonable."). The dissent's suggestion that we reversed the district court's holding as to Quon's reasonable expectation of privacy is untrue. Dissent at 5.

The dissent incomprehensibly ignores the jury portion of the trial as to the purpose of Chief Scharf's search of the pager transmissions. Denying summary judgment, the district court had ruled that a jury would decide "the actual *purpose* or *objective* Chief Scharf sought to achieve in having Lieutenant Duke perform the audit of Quon's pager." *Quon*, 445 F. Supp. 2d at 1144. A jury trial was held, during which Chief Scharf testified that he asked Lt. Duke to audit "the top two [pagers] that were in excess of the 25,000 character[] [limit] to determine if [the OPD] needed to add more characters, or -- if it was occurring on duty time, were

the officers paying for the overages where the city should be, because it's certainly cheaper to add more characters than it is to pay for overages if it was occurring on duty time." By special verdict, the jury found that Chief Scharf's purpose was to "determine the efficacy of the existing character limits to ensure that officers were not being required to pay for work-related expenses." The jury expressly rejected the alternative possibility—that Chief Scharf's purpose was to uncover misconduct. *See Quon*, 529 F.3d at 899. The dissent's statement that Chief Scharf "sent the matter to internal affairs for an investigation 'to determine if someone was wasting . . . City time not doing work when they should be,'" Dissent at 5 (alteration in original), is directly contrary to Chief Scharf's testimony and the jury's factual finding, which was not even the subject of an appeal by the City. The City, for reasons of its own, was quite content to have the jury find a legitimate purpose for Chief Scharf's search, and, as any first-year lawyer would agree, we are bound on appeal by the jury's factual determination.

II.

The dissent incorrectly asserts that the opinion "departs" from *O'Connor*, 480 U.S. 709. *Id.* The opinion in fact adheres to *O'Connor*'s holding, explicitly acknowledging that "'[t]he operational realities of the workplace . . . may make *some* employees' expectations of privacy unreasonable,'" and that privacy "'may

be reduced by virtue of actual office practices and procedures, or by legitimate regulation,'" *Quon*, 529 F.3d at 903–04 (alterations in original) (quoting *O'Connor*, 480 U.S. at 717). However, our opinion—unlike the dissent—also recognizes that in *O'Connor*, the Supreme Court mandated a "'case-by-case'" approach to determining whether an employee has a reasonable expectation of privacy in the workplace. *Quon*, 529 F.3d at 904 (quoting *O'Connor*, 480 U.S. at 718). Further, our opinion follows the Supreme Court's instruction that "'public employer intrusions on the constitutionally protected privacy interests of government employees . . . should be judged by the standard of reasonableness *under all the circumstances*.'" *Quon*, 529 F.3d at 904 (emphasis added) (quoting *O'Connor*, 480 U.S. at 725–26). Thus, the analysis is necessarily fact-driven, and all the factual circumstances surrounding the search must be considered.

In affirming the district court's holding, we followed the Supreme Court's mandate to evaluate the "operational realities of the workplace." *O'Connor*, 480 U.S. at 717. The dissent's suggestion to the contrary is simply due to its flawed description of the realities of the OPD workplace. By failing to consider all the circumstances of the issuance and use of the pagers for text messaging, the dissent perceives a conflict with *O'Connor* where none in fact exists.

The dissent's concerns regarding the California Public Records Act ("CPRA") similarly lack merit. *See* Cal. Gov't Code § 6253(a). The existence of the CPRA as a consideration is offset by the existence of the informal but express policy and practices governing the use of the pagers by the OPD officers. Moreover, as our panel (and the district court) note, there was "no evidence before the [c]ourt suggesting that CPRA requests to the department are so widespread or frequent as to constitute an open atmosphere so open to fellow employees or the public that no expectation of privacy is reasonable." *Quon*, 529 F.3d at 907 (alteration in original) (internal quotation marks omitted); *see Zaffuto v. City of Hammond*, 308 F.3d 485, 489 (5th Cir. 2002) (holding that, notwithstanding the existence of the public records law, "[a] reasonable juror could conclude . . . that [the plaintiff] expected that his call to his wife would be private, and that that expectation was objectively reasonable"); *see also Yin v. State of Cal.*, 95 F.3d 864, 871 (9th Cir. 1996) ("Although there is little direct case law on point, obviously there are limitations on the state's ability to erode reasonable expectations of privacy by statutory enactments.").

III.

The dissent distorts our holding as to the scope of the search. We did not adopt a "less intrusive means" test. *See* Dissent at 1, 9–11. The "less intrusive

means" discussion relates to the jury's finding that Chief Scharf conducted the search for noninvestigatory purposes.

O'Connor provides the framework for evaluating the reasonableness of a search in this context, which the dissent does not dispute. *Id.* at 10. Applying this framework, we first held that the search was reasonable "at its inception" because the officers conducted the search for the work-related purpose of ensuring that "officers were not being required to pay for work-related expenses," as the jury had found below. *Quon*, 529 F.3d at 908. We then turned to the second prong of the *O'Connor* test: determining whether the measures adopted were "reasonably related to the objectives of the search and not excessively intrusive in light of . . . the nature of the [misconduct]." 480 U.S. at 726 (internal quotation marks omitted). Because "the Department opted to review the contents of all the messages, work-related and personal, without the consent of Quon," we held that the search "was excessively intrusive in light of the noninvestigatory object of the search." *Quon*, 529 F.3d at 909. This holding was also based on our conclusion that Quon's "reasonable expectation of privacy in those messages" was not outweighed by the government's interest—again, as found by the jury—in auditing the messages. *Id.*

The dissent incorrectly represents that we held that the search was

unreasonable "*because* the city could have used less intrusive means to accomplish the objectives of the search." Dissent at 9 (emphasis added). Although we cited *Schowengerdt v. General Dynamics Corp.*, 823 F.2d 1328, 1336 (9th Cir. 1987), we did not apply a "less intrusive means" test.[1] *Quon*, 529 F.3d at 908–09; *cf.* Dissent at 10 (conceding that "the panel does not explicitly state it is applying a least restrictive means test"). We mentioned other ways the OPD could have verified the efficacy of the 25,000-character limit merely to illustrate our conclusion that the search was "excessively intrusive" under *O'Connor*, when measured against the purpose of the search as found by the jury. *Quon*, 529 F.3d at 909. Moreover, the dissent's conclusion that we improperly analyzed the scope of the search is dependent upon its faulty conclusion that Quon had a diminished or nonexistent expectation of privacy in the messages. *See* Dissent at 6, 13–14.

Our analysis is in no way inconsistent with the cases cited by the dissent. *See* Dissent at 2, 9–10. The cases in which the Supreme Court has cautioned against employing a "least intrusive means" test have often involved circumstances in which the government had engaged in "years of investigation and study" that resulted in "reasonable conclusions" that the government conduct was necessary.

[1] In fact, we only considered *Schowengerdt* to the extent necessary to consider the district court's decision. *See Quon*, 445 F. Supp. 2d at 1145–46.

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602, 629 n.9 (1989). By contrast, Chief Scharf impulsively ordered the search of Quon's messages without so much as pausing to consider other ways to accomplish his stated goal of determining the efficacy of the numeric character limit. *See Quon*, 529 F.3d at 908–09. Moreover, unlike in the cases cited by the dissent, *see* Dissent at 2, 10–12, this case did *not* involve a "special needs" search. In any event, because we did not use a "least intrusive means" test, there is no conflict with either the Supreme Court or our sister circuits.

IV.

The dissent's conclusion that our panel's decision is "contrary to 'the dictates of reason and common sense' as well as the dictates of the Supreme Court," Dissent at 14, is based on its loose recitation of "facts," untethered from the record evidence or jury findings. It is the dissent—rather than our opinion—that is at odds with *O'Connor* and the "operational realities" of the OPD. By stripping public employees of all rights to privacy regardless of the *actual* operational realities of each workplace, the dissent would have us create a far broader rule than Supreme Court precedent allows. The majority of our court properly rejected the dissenting judges' efforts to do so.