Employee Privacy and Workplace Searches

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Public employers routinely furnish employees with offices, desks, file cabinets, lockers, computers, and other items with which to perform their jobs. Even though the employer pays for these items, the employees who use them take on a sense of ownership —and privacy—in their workspaces. Indeed, given the amount of time people spend at the workplace these days, the office often becomes a home away from home, complete with pictures of the family, souvenirs from trips, and a large collection of coffee cups.

But what happens when a public employer has reason to suspect that an employee has engaged in inappropriate activity, and the employer wants to search the employee's workplace? May a supervisor root around in an employee's desk in hopes of finding proof of misconduct? May an employer search an employee's computer, even if it is password protected? Many do so, according to a recent survey conducted by the Society for Human Resource Management.[1] Sixty-two percent of responding employers said that they sometimes monitored Internet use, 58 percent e-mail, and 42 percent telephone calls. This article explores the current state of the law on employee privacy and workplace searches. The discussion pertains strictly to public employers and employees. Generally the law does not protect private-sector employees from workplace searches by their employers.

High Court Recognition of Public Employee Privacy Interest

For the Fourth Amendment to protect any individual from government searches, the government must cross a judicially constructed threshold. In *Katz v. United States*, the U.S. Supreme Court held that Fourth Amendment protections are triggered only if a person has a reasonable expectation of privacy.[2]

For this standard to be met, the person must have "an actual or subjective expectation of privacy" in the area or the things to be searched and this expectation must "be one that society is prepared to recognize as 'reasonable.'"[3] If a person does not have an expectation of privacy that is recognized as reasonable, the Fourth Amendment is not triggered, and the government may search at will. It may search without a warrant and even without the most rudimentary showing of "reasonable suspicion"—that is, grounds to believe that the person has engaged in illegal or inappropriate conduct. (For a fuller discussion of *Katz* and the requirements of the Fourth Amendment, see the article on page 13.)

The notion that public employees may have a protected privacy interest in their workplace is a relatively recent development in the law. In 1987, for the first time, the U.S. Supreme Court

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considered whether the Fourth Amendment protected public employees from searches of their workplaces. In *O'Connor v. Ortega*, a physician who worked in a state hospital was suspected of various acts of misconduct, including theft of hospital property and sexual harassment.[4] The executive director of the hospital suspended the physician pending completion of an investigation into the alleged misconduct. As part of that investigation, the executive director and other management officials entered the physician's office and searched his file cabinets and desk. Certain materials found in that search were used in the subsequent administrative proceeding to remove the physician.

The physician maintained that the search of his office by hospital officials violated the Fourth Amendment's prohibition against unreasonable searches. The Court, in a 5-4 ruling, held that searches of government offices by government employers are subject to Fourth Amendment constraints.

The Court first held that the physician had a reasonable expectation of privacy in his office, including his desk and file cabinets. The Court then considered the standard for judging whether a search of the physician's office was reasonable, holding that "the invasion of the employee's legitimate expectations of privacy" must be balanced against "the government's need for supervision, control, and the efficient operation of the workplace."[5] The Court held that the reasonableness of a search had to be determined on a case-by-case basis. In the *O'Connor* case, the Court declined to rule on whether the search of the physician's office had been reasonable because there were unresolved issues of fact for the lower court to consider.

O'Connor thus established that if a public employee has a reasonable expectation of privacy in the area or the things to be searched, a search by an employer is constitutional only if the interests of the employer in maintaining a safe and efficient workplace override the privacy interests of the employee. (This standard is less onerous than that applied to searches by law enforcement officers, discussed in the article on page 13.) *O'Connor* left to the lower courts the task of striking the appropriate balance in each case by assessing the reasonableness of the employee's expectation of privacy and the reasonableness of the employer's search in light of the employee's privacy interest. The courts' application of this standard in different situations is reviewed in the following sections.

Lower Court Rulings

There have been surprisingly few cases in which the lower courts have applied the *O'Connor* standard, but there have been a sufficient number for a pattern to emerge.

In *Showengerdt v. General Dynamics Corporation*, the court reviewed the dismissal of a federal employee for possession of pornographic materials at the workplace.[6] The materials in question were kept in the employee's locked desk in his locked office but were seized by his supervisor and a security officer. The court found that the employee had a reasonable expectation of privacy in his locked desk and office —the first inquiry required under *O'Connor*—but remanded the case for a determination of whether the government's purpose in investigating work-related misconduct outweighed the employee's Fourth Amendment privacy interest—the second *O'Connor* inquiry.

In a similar case, *Gossmeyer v. McDonald*, a child protective investigator's rights were held not to have been violated when her employer, with the assistance of law enforcement officials, conducted a warrantless search of her desk, file cabinet, and storage unit based on a co-worker's tip that she had pornographic pictures of children in her office.[7] Assessing the second *O'Connor* requirement, the court held that the search was reasonable. It found that the search was based on a tip by a co-worker, which was sufficiently reliable in that it specifically alleged where the pictures would be found; and that the search was reasonable in scope in that it was limited to places where the pictures were stored.

In *Diaz Camacho v. Lopez Rivera*, the court considered a claim by a dismissed fire chief that his Fourth Amendment rights had been violated when his employer had conducted a search of his office.[8] The court upheld the search and sustained the employee's dismissal, finding that the town officials had reasonable grounds to suspect that the fire chief was guilty of work-related misconduct and that a search of his office might turn up evidence of such misconduct. In so ruling, the court noted that the chief's office also was used to store the fire station's official records and maintenance equipment, thus creating a lower expectation of privacy than might otherwise have been the case and affecting the balance to be struck in weighing the employer's interests against the employee's.

In *Williams v. Philadelphia Housing Authority*, a supervisor's removal of her subordinate employee's computer disk from his desk was upheld.[9] The employee was on a leave of absence and had been asked to clear his desk. Because the supervisor initiated the search to look for work-related material, the court found her search to be reasonable. By contrast, in *Rossi v. Town of Pelham*, the court held that a town police officer's search of the town clerk's office for certain municipal records was unreasonable.[10] The court held that the clerk enjoyed an expectation of privacy in her office because she had exclusive access to and use of the area and the town had not placed her on notice that the office was subject to intrusions by other town officials.

In *Johnson v. City of Menlo Park*, a municipal employee was fired after a co-worker complained that he had sexually harassed her.[11] Eventually, an arbitrator ordered the employee reinstated and awarded back pay. The employee also sued the city, claiming that his Fourth Amendment rights were violated when his employer searched his desk in investigating the sexual harassment charge. The city had a written policy stating that the city reserved the right to open, inspect, and examine all equipment and workspaces at any time for legitimate business reasons, including investigating work-related misconduct. The court held that because the policy was known to the employee and made it clear that the city had the right to search the workplace, the employee did not have a reasonable

expectation of privacy in his desk. The court therefore granted summary judgment for the employer.

In *United States v. Chandler*, in which a municipal police officer left his duty bag in his locker after he was suspended, the court found that he had no reasonable expectation of privacy.[12] The internal affairs division retrieved the bag and conducted a warrantless search that yielded crack cocaine and heroin. The court held that the search did not violate the employee's Fourth Amendment rights because the bag was abandoned property. Thus any expectation of privacy was forfeited.

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In *United States v. Simons*, the court considered a computer case in which the plaintiff worked for the Central Intelligence Agency (CIA).[13] He had his own computer in his office, which he did not share with anyone. The CIA had a policy authorizing electronic audits to ensure that unlawful material was not downloaded onto government computers. The policy explained, in detail, how the auditing program worked. The program included looking at sent and received e-mails, Web-site visits, and the like. The policy also stated that the agency would periodically audit, inspect, and monitor the employee's Internet access.

One of the employer's computer programmers entered the word "sex" in a search and found that the plaintiff had a large number of hits. From his own computer, the programmer examined the hard drive of the employee's computer and found more than 1,000 pornographic images, some of minors. Subsequently a manager physically entered the employee's office and removed the hard drive. Later searches, with warrants, were conducted, and other evidence was found. The Fourth Circuit Court of Appeals held that the remote searches of the employee's computer did not violate his Fourth Amendment rights because, in light of the policy, he lacked a legitimate expectation of privacy in the files downloaded from the Internet. For the same reasons, the employee's Fourth Amendment rights were not violated by the retrieval of his hard drive from his office. In addressing the actual entry into the employee's office, the court held that the employee did have a reasonable expectation of privacy, but the entry was lawful because the CIA had reasonable grounds for suspecting that the entry would yield evidence of misconduct.

Finally, in *Leventhal v. Knapek*, the court heard a claim by an accountant in a state department of transportation.[14] His supervisors received an anonymous letter that did not name him but gave his pay grade, gender, and job title. He was the only one at his pay grade in his office. The letter accused him of being late, being gone from the office half the time, doing primarily nonoffice work when he was there, and always talking to co-workers about personal computers. As a result of the letter, the supervisors conducted a computer review without his knowledge and found tax preparation programs that the employee was using for his private tax business. The employee was suspended without pay for thirty days but then challenged the right of the employer to search his computer.

The Second Circuit Court of Appeals ruled that the search did not violate the employee's Fourth Amendment rights. The employee had a reasonable expectation of privacy in the contents of his computer, the court held, but the search was reasonably related to the department's investigation into allegations of the employee's workplace misconduct.

Lessons Learned

One lesson that emerges from these cases is that it may be difficult for a public employee to assert an overriding privacy interest if his or her employer has developed and posted a policy informing employees that the workplace is subject to periodic searches.

A second lesson, though, is that even if the employee can assert a reasonable expectation of privacy, the public employer can meet the burden of showing the reasonableness of the search on the basis of a combination of factors—for example, (1) a tip by a credible co-worker of misconduct (*Gossmeyer* and *Leventhal*); (2) the limited scope of the search (*Gossmeyer*); (3) a lowered expectation of privacy because of accessibility (*Diaz Camacho*); and (4) the limited purpose of the search (*Williams*).

The final lesson of these cases is that before conducting a workplace search of employees' lockers, offices, files, or other areas in which employees may fairly be said to have a legitimate expectation of privacy, employers should consider whether the need for supervision, control, and efficient operation of the facility outweighs the employees' privacy interest.

Notes

1. 17 Individual Employment Rights Reporter (Washington, D.C.: BNA Publications), May 1, 2001, at 33.
2. Katz v. United States, 389 U.S. 347 (1967).
3. *Id.* at 361.
4. O'Connor v. Ortega, 480 U.S. 709 (1987).
5. *Id.* at 719–20.
6. Showengerdt v. General Dynamics Corp., 823 F.2d 1328 (9th Cir. 1987).
7. Gossmeyer v. McDonald, 128 F.3d 481 (7th Cir. 1997).
8. Diaz Camacho v. Lopez Rivera, 699 F. Supp. 1020 (D.P.R. 1988).
9. Williams v. Philadelphia Hous. Auth., 826 F. Supp. 952 (E.D. Penn. 1993).
10. Rossi v. Town of Pelham, 13 Individual Employment Rights Cases (BNA) 1021 (D.N.H. 1997).
11. Johnson v. City of Menlo Park, 1999 WL 551241 (N.D. Cal. 1999).
12. United States v. Chandler, 197 F.3d 1198 (8th Cir. 1999).
13. United States v. Simons, 206 F.3d 392 (4th Cir. 2000).
14. Leventhal v. Knapek, 266 F.3d 64 (2nd Cir. 2001).