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When Does an Employer's Search of Employee Work Areas Violate Privacy Rights?

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Government employers are sometimes faced with conducting searches of their employee's work areas. When doing so, they must understand the level of privacy public employees legitimately expect in those areas. Can employers search an employee's office, desk, locker, or assigned vehicle? When is it reasonable, if ever, to search an employee's purse or briefcase? In answering these questions, courts have established that an employer must first determine if the employee has a reasonable expectation of privacy in the property searched and then determine if the search's purpose outweighs any of the employee's Fourth Amendment privacy interests.

Constitutional Protections

Like any private citizens, public employees enjoy the Fourth Amendment's protections against unreasonable search and seizure of their private property by supervisors in the workplace. In many instances, this protection also extends to employee work areas. However, this protection is not unlimited. Due to certain "operational necessities" of the workplace, especially in public service, there are times when searches of employee work spaces by supervisors do not violate employees' expectations of privacy. It is important that employers understand when such searches are allowed and the standards required to support them.

The U.S. Supreme Court, in *O'Conner et al.* v. *Ortega*, addressed the question of when public agency employees have legitimate privacy interests in their work areas as well as the circumstances under which work place searches are reasonable. The Court also discussed the standard required

(that is, reasonable suspicion versus probable cause) to support a search.[1]

In its analysis, the Court stated that work place searches and "the question whether an employee has a reasonable expectation of privacy must be addressed on a case-by-case basis."[2] While it is clear that searches and seizures by government employers of their employees' private property is subject to the Fourth Amendment, less clear is when searches of work areas are subject to the same level of Fourth Amendment protection. The Court considered factors such as whether the work space is so open to the public or other employees that no expectation of privacy is reasonable, the context in which the search occurs, and the balance between employees' legitimate expectation of privacy and the government's need for supervision and control, as well as the efficient operation of the workplace.[3]

In *O'Conner*, the employer searched the employee's desk and file cabinets and seized his private property without a warrant during the course of an investigation into suspected work-related misconduct. Although the Court found that Ortega, the employee, had a protected privacy interest in these areas, it held that due to the employer's legitimate work-related purpose for the search, requiring the employer to develop probable cause and obtain a warrant would be unreasonable. In reaching this conclusion the Court held that the standard for such searches is reasonableness based on all of the underlying circumstances, rather than probable cause.

The Court pointed out that although Ortega's desk and file cabinet contents were protected by the Fourth Amendment, "government searches to retrieve work-related materials or to investigate violations of work-place rules—searches of a sort that are regarded as reasonable and normal in the private employer context—do not violate the Fourth Amendment" in the public agency environment. [4] When an employer conducts a warrantless search of a noncriminal nature, the Court will ask whether the search was justified at its inception; that is, whether the employer had a legitimate belief of employee misconduct, or whether the employer needed to retrieve a work-related file or report, and whether the search reasonably related to its objectives, and "not excessively intrusive in light of . . . the nature of the [misconduct]."[5]

It is important to note that employers who conduct a search based upon suspected employee misconduct must be able to point to specific, objective facts that support this suspicion. They must also limit their search to areas where they can reasonably expect to find evidence of misconduct and must end their search once this evidence is recovered.

The Court did not specifically address when employers may search employees' purses or briefcases during a misconduct investigation. Because employees have a heightened expectation of privacy in the contents of such containers, employers should use the probable cause standard and obtain a search warrant unless they obtain employee consent for a search.

Lower Court Rulings

There are a limited number of lower court cases applying the *O'Connor* standards, but those that have provide some helpful guidance for employers conducting work place searches.

In *Shields* v. *Burge*, supervisors searched a police officer's desk and department vehicle without a warrant or probable cause because they suspected him of violating department policy and procedure.[6] They also opened and searched the officer's locked briefcase, which was in his police car. In hearing the officer's appeal, the court applied *O'Conner's* reasonableness standard to the searches, even though the supervisors were police officers who understood probable cause. The court found the searches reasonable as part of an investigation into work-related misconduct (but note that the court did not directly state that the search of the briefcase was reasonable).

Gossmeyer v. *McDonald* involved a supervisor and law enforcement officers who conducted a warrantless search of a child protective investigator's desk, file cabinets, and storage unit based on a coworker's tip that she had child pornography in her office.[7] The court applied the *O'Conner* requirement that the government's purpose in investigating work-related misconduct outweigh the employee's Fourth Amendment privacy interests and held that the search was reasonable. The court said that the coworker's tip was sufficiently reliable because it alleged specifically where the employer would find the pictures and also stated that the search was reasonable in scope because the employer limited it to places where they would find the pictures.

In *Diaz Camacho* v. *Lopez Rivera*, the district court heard a dismissed fire chief's claim that his employer violated his Fourth Amendment rights when it searched his office.[8] Because town officials had reasonable grounds to suspect that the chief was guilty of work-related misconduct and that a search of his office could uncover evidence of the misconduct, the court upheld the search and the chief's dismissal (the court noted that the chief's office was also used to store the fire station's official records and maintenance equipment and that this created a lower expectation of privacy than might otherwise have been the case). In analyzing the balance between the employer's and the employee's privacy interests, the court held that the employer's interest outweighed the fire chief's.

In *Johnson* v. *City of Menlo Park*, the employer fired an employee after a coworker complained that he sexually harassed her.[9] The employee sued the City, claiming that his employer violated his Fourth Amendment rights by searching his desk. The City had a written policy stating that it reserved the right to open, inspect, and examine all equipment and work spaces at any time for legitimate business reasons, including investigating work-related misconduct. The court held that because the employee knew of the policy, he did not have a reasonable expectation of privacy in his desk, and it dismissed the case.

Practical Considerations

It is recommended that employers establish and post policies informing their employees that their work areas are subject to search. They should state clearly that employers have the right to search, for legitimate business purposes, county-, city-, or state-owned vehicles, equipment, desks, file cabinets, and so on; they should also encourage employees not to store personal items in these areas. Such policies will lessen employees' expectations of privacy.

Chiefs should remember that even if an employee can assert a reasonable expectation of privacy, a public employer can meet the burden of showing the search's reasonableness through a combination of factors. These include reasonable suspicion of misconduct, a lowered expectation of privacy because of accessibility, or a reliable coworker tip of misconduct.

The final lesson of these cases is that before conducting a workplace search of employee lockers, offices, files, or other areas where employees might have a legitimate expectation of privacy, employers should ask whether the need for such a search outweighs employees' privacy interests and if the search is related to an investigation into suspected employee misconduct and limited to those areas where they may find evidence. ■

Notes:

[1] *O'Conner et al.* v. *Ortega*, 480 U.S. 709 (1987).
[2] *Id.* at 709.
[3] *Id.* at 717.
[4] *Id.* at 711.
[5] *Id.* at 726, citing *New Jersey* v. *T.L.O.*, 469 U.S. 325 (1985).
[6] *Shields* v. *Burge*, 874 F.2d 1201 (7th Cir. 1989).
[7] *Gossmeyer* v. *McDonald*, 128 F.3d 481 (7th Cir. 1997).
[8] *Diaz Camacho* v. *Lopez Rivera*, 699 F. Supp. 1020 (DPR 1988).
[9] *Johnson* v. *City of Menlo Park*, 1999 WL 551241 (N.D.Cal. 1999).

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