WORKPLACE SEARCHES

"Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police."

The United States Supreme Court(1)

Evidence of a crime will sometimes be located in a suspect's office, desk, file cabinet, computer, locker or other area at his or her workplace. In such cases, officers need to know how they can legally obtain the evidence. Do they need a warrant? Can the suspect's employer consent to the search? If so, what is the permissible scope of the search? Is the evidence admissible if the employer comes in on his own and turns it over to officers? These are some of the issues we will discuss in this article.

As we will explain, the rules regarding the admissibility of evidence obtained in the workplace depend mainly on who conducted the search. Was it a private employer, a governmental agency, or a law enforcement officer?

SEARCHES BY PRIVATE EMPLOYERS

In some cases an employer will discover evidence of a crime in an employee's desk, computer, or other location in the workplace. This may occur inadvertently or as the intentional result of a search. In any event, if the employer seizes the evidence and turns it over to police, the question arises: Is the evidence admissible in court?

The answer is as follows: The evidence will be admissible if, (1) the suspect's employer was a private company or individual, not a governmental agency; and (2) the employee who conducted the search did so on his own initiative with absolutely no police involvement. As the United States Supreme Court pointed out, the exclusionary rule Ais wholly inapplicable to a search or seizure, even an unreasonable one, effected by a private individual not acting as an agent of the Government or with the participation or knowledge of any governmental official."(2)

On the other hand, the evidence will be suppressed if an officer or other government employee requested, planned, or facilitated the search.(3)

Re-opening closed containers

If a private employer discovers evidence and turns it over to police, another legal issue may arise: If the evidence is in a container or is otherwise not in plain view when it was handed to officers, is a warrant required before officers may open the container?

The answer is that a warrant is required if the officers' act of opening the container permits them to see something that had not been observed previously by the employer. But a warrant is not required if the evidence, although not in plain view when it was received by officers, had been observed previously by the employer.(4)

For example, in United States v. Jacobsen(5) a cardboard box that was being shipped by Federal Express was accidentally torn by a forklift. When workers opened the package to examine its contents to prepare an insurance report they found a "tube" about ten inches long covered by duct tape. The workers cut open the tape and found four zip-lock plastic bags containing white powder. Suspecting drugs, the workers notified the DEA. Before the agents arrived, however, the FedEx workers put the plastic bags back in the tube and re-packaged the tube in the cardboard box. When agents arrived, they opened the box and the tube, then extracted some of the powder to conduct a field test which came back positive for cocaine.

The United States Supreme Court ruled the agents acted lawfully when they re-opened the tube and examined the powder because it had already been observed by FedEx workers. Said the Court, "[T]he removal of the plastic bags from the tube and the agent's visual inspection of their contents enabled the agent to learn nothing that had not previously been learned during the private search. It infringed no legitimate expectation of privacy and hence was not a >search' within the meaning of the Fourth Amendment."

The Court also ruled that agents did not need a warrant to conduct a field test of suspected drugs that are in their lawful possession because, "A chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy."

Later, the California Court of Appeal ruled that if the field test confirms the substance was an illegal drug, a warrant would not be required to test the substance in a laboratory.(6) If, however, the field test was negative or inconclusive, laboratory testing is permitted only if officers obtain a warrant.(7)

SEARCHES BY GOVERNMENT EMPLOYERS

Special rules apply to searches that were made by government employers, such as a city, county, or state. This is because the Fourth Amendment governs searches made by public employees.(8) Consequently, evidence obtained as the result of a warrantless search will usually be suppressed, except in three situations:

(1) No reasonable expectation of privacy: The employee did not have a reasonable expectation of privacy in the place or thing that was searched.

(2) Reasonable suspicion: There was reasonable suspicion that evidence of work-related misconduct would be found in the place or thing that was searched; the place or thing that was searched was part of the "workplace"; and the search was reasonable in scope.

(3) Consent: The employee consented to the search.

No reasonable expectation of privacy

Evidence discovered by a government employee will not be suppressed if the suspect-employee did not have a reasonable expectation of privacy in the place or thing that was searched.(9) In determining whether a reasonable expectation of privacy existed in the workplace, the following principles apply:

Personal items: Employees will generally have a reasonable expectation of privacy in their personal effects in the workplace, such as purses, luggage and briefcases.(10) As the United States Supreme Court observed, "Not everything that passes through the confines of the business address can be considered part of the workplace context. An employee may bring closed luggage to the office prior to leaving on a trip, or a handbag or briefcase each workday. While whatever expectation of privacy the employee has in the existence and the outward appearance of the luggage is affected by its presence in the workplace, the employee's expectation of privacy in the contents of the luggage is not affected in the same way."(11) Thus, evidence obtained as the result of a public employer's warrantless search of such items will almost always be suppressed.

Property owned by the employer: An employee may also have a reasonable expectation of privacy as to some non-personal effects in the workplace, such as the employee's office, file cabinet, desk, and computer. There are, however, circumstances in which an employee could not reasonably expect privacy in such an area or thing, in which case the evidence would be admissible. Those circumstances are as follows:

Usual practices and procedures: An employee's expectation that items in the workplace would not be searched or observed may be unreasonable as the result of office practices and procedures. As the United States Supreme Court observed, "The operational realities of the workplace may make some employees' expectations of privacy unreasonable . . . Public employees' expectations of privacy in their offices, desks, and file cabinets . . . may be reduced by virtue of actual office practices and procedures. . . ."(12) For example, if workers or supervisors regularly enter the employee's office to retrieve files from a file cabinet, it would probably be unreasonable for the employee to expect that items in the file cabinet would remain private.(13)

Plain view: It would usually be unreasonable for an employee to expect privacy as to items out in the open in his office, especially if such items were observed by a supervisor or fellow employee. This is because, as the United States Supreme Court noted, "An office is seldom a private enclave free from entry by supervisors, other employees, and business and personal invitees. Instead, in many cases offices are continually entered by fellow employees and other visitors during the workday for conferences, consultations, and other work-related visits."(14)

Reasonable suspicion

A warrantless search of a public employee's workplace, including areas in which the employee had a reasonable expectation of privacy, is permitted if the following three requirements are met:

(1) Reasonable suspicion: There was reasonable suspicion to believe the search would result in the discovery of evidence pertaining to work-related misconduct.(15) Under such circumstances, probable cause is not required because, as the United States Supreme Court explained, "Public employers have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related malfeasance of its employees."(16)

Consequently, the court ruled that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness."

(2) Search of "workplace": A warrantless search based on reasonable suspicion is permitted only if the area or thing that was searched was located on the "workplace." Otherwise, a search warrant based on probable cause will be required. What does the term "workplace" mean in this context? According to the United States Supreme Court, the workplace "includes those areas and items that are related to work and are generally within the employer's control. At a hospital, for example, the hallways, cafeteria, offices, desks, and file cabinets, among other areas, are all part of the workplace."(17) On the other hand, an employee's personal effects, such as a purse, briefcase, or luggage, are not part of the workplace merely because they were on the premises when the search was conducted.(18)

(3) Search was reasonable in scope: The search must not have been unduly intrusive.(19) Or, in the words of the U.S. Court of Appeals, "The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct."(20)

POLICE SEARCHES

Law enforcement officers may conduct a search of a suspect's workplace if the search was authorized by a warrant based on probable cause or the search was authorized by the terms of the employee's parole or probation.(21) As we will now discuss, a police search may also be based on two other legal theories:

(1) The employee had no reasonable expectation that officers would not see or discover the evidence.

(2) Officers obtained consent to search from the employee or the employer.

No reasonable expectation of privacy

An employee cannot challenge the search of a place or thing in which he has no reasonable expectation that law enforcement officers would not see or discover the item seized.

Note, however, there is a significant difference between an employee's reasonable expectation that his employer would not invade a certain area versus the employee's reasonable expectation that the area would not be invaded by law enforcement officers.(22)Thus, while it might be unreasonable for an employee to expect that his employer would not look through his desk or files, it might be entirely reasonable for the employee to expect that such things would not be searched by law enforcement officers without a warrant.

Employee consents to search

The suspect may consent to a police search of those places and things in the workplace over which he has joint access or control.(23) The suspect may not, however, authorize a search of any other places or things in the workplace. Like any consent search, the following requirements must be met:

(1) Express or implied consent: The employee expressly or impliedly consented to the search.(24)

(2) Voluntary consent: The consent was voluntary, not the result of coercion.(25)

(3) Search within scope of consent: Officers searched only those places and things they reasonably believed the employee authorized them to search.(26)

Employer consents to search

An employer may voluntarily give officers consent to search places and things in the workplace over which the employer has joint access or control for most purposes.(27) Areas and things over which such access and control usually exist include common areas that are generally used by, or accessible to, some or all employees. This would include conference rooms, file rooms, libraries, kitchens, and rest rooms.(28)

It would also include places and things that are used primarily by the employee if the employer, as a matter of actual practice, retained and exercised the right to access or control the place or thing.(29) In other words, joint access or control may exist when the employer has sufficient mutual use of the property for most purposes so that it reasonably appears the employer had the authority to permit the search in his own right.(30)

Note that an employer does not have "joint access or control" merely because he owns or is able to access the area or thing that was searched.(31) Nor does common authority exist merely because the employer has a key or master key that allows him access.(32)

Instead, what counts is whether the employee had exclusive access or control, or whether the employer regularly or at least occasionally used or accessed the place or thing so that it can be fairly said that the employee lacked exclusive control. For example, an employer will probably not have joint access or control over a desk or file cabinet in the employee's office which is used exclusively by the employee.(33)

In some cases, officers have obtained consent to search from an employer who they believed could consent to the search, but they later learn that the employer did not, in fact, have joint access or control over the place or thing that was searched. Does this invalidate the search? It depends on whether the employer was a private employer or government agency.

Private employers: If the employer was a private individual or company, a consent search will be upheld if the officers reasonably believed the employer had joint access or control for most purposes (also known as "common authority") over the place or thing that was searched.(34) In other words, the issue here is not whether the employer actually had such authority but whether the officers reasonably believed he did.(35)

Governmental agencies: Because governmental agencies are subject to Fourth Amendment restraints, consent from a public employer will be valid only if the public employer did, in fact, have joint access and control over the area or thing searched.(36) In other words, an officer's reasonable but mistaken belief that the employer could consent to the search would be insufficient.

1. O'Connor v. Ortega (1987) 480 US 709, 716.

2. United States v. Jacobsen (1984) 466 US 109, 113 ALSO SEE People v. Baker (1970) 12 Cal.App.3d 826, 834 ["The protection against unlawful searches and seizures applies to governmental action and does not prevent the use as evidence of that which was observed or taken as the result of a search or seizure by a private citizen without governmental complicity."]; People v. Wharton (1991) 53 Cal.3d 522, 579; People v. De Juan (1985) 171 Cal.App.3d 1110, 1120; People v. Leighton (1981) 124 Cal.App.3d 497, 501 ["(T)he exclusionary rule continues to be inapplicable to searches and seizures conducted by private parties."]; In re William G. (1985) 40 Cal.3d 550, 558.

3. See Lugar v. Edmondson Oil Co. (1982) 457 US 922, 937; United States v. Jacobsen (1984) 466 US 109, 113; Jones v. Kmart Corp. (1998) 17 Cal.4th 329, 333; California v. Greenwood (1988) 486 US 35, 39; People v. De Juan (1985) 171 Cal.App.3d 1110, 1120; People v. Leighton (1981) 124 Cal.App.3d 497, 501; People v. Mangiefico (1972) 25 Cal.App.3d 1041, 1047; People v. Superior Court (Evans) (1970) 11 Cal.App.3d 887, 892; Tucker v. Superior Court (1978) 84 Cal.App.3d 43, 48; People v. McKinnon (1972) 7 Cal.3d 899, 912; People v. Baker (1970) 12 Cal.App.3d 826, 837; People v. Bennett (1998) 17 Cal.4th 373, 383, fn.2; People v. Tarantino (1955) 45 Cal.2d 590; Raymond v. Superior Court (1971) 19 Cal.App.3d 321; People v. Fierro (1965) 236 Cal.App.2d 344; Stapleton v. Superior Court (1968) 70 Cal.2d 97, 103; People v. Scott (1974) 43 Cal.App.3d 723, 726; People v. North (1981) 29 Cal.3d 509, 515.

4. See United States v. Jacobson (1984) 466 US 109, 115 ["The additional invasions of respondents' privacy by the Government agent must be tested by the degree to which they exceeded the scope of the private search."].

5. (1984) 466 US 109.

6. See People v. Warren (1990) 219 Cal.App.3d 619, 623-4.

7. See People v. Leichty (1988) 205 Cal.App.3d 914, 923-4.

8. See United States v. Jacobsen (1984) 466 US 109, 113.

9. See O'Connor v. Ortega (1987) 480 US 709, 715 ["Our cases establish that [the public employee's] Fourth Amendment rights are implicated only if the conduct of the [public employer] infringed an expectation of privacy that society is prepared to consider reasonable."].

10. See O'Connor v. Ortega (1987) 480 US 709, 716.

11. O'Connor v. Ortega (1987) 480 US 709, 716.

12. See O'Connor v. Ortega (1987) 480 US 709, 717. ALSO SEE U.S. v. Speights (3rd Cir. 1977) 557 F.2d 362, 363; Gillard v. Schmidt (3rd Cir. 1978) 579 F.2d 825, 829 ["The cases indicate that an employer may conduct a search in accordance with a regulation or practice that would dispel in advance any expectations of privacy."].

13. See Schowengerdt v. General Dynamics (9th Cir. 1987) 823 F.2d 1328, 1335-6 ["Ordinarily, a search of an employee's office by a supervisor will be justified at its inception when . . .the search is necessary for a noninvestigatory work-related purpose such as to retrieve a needed file."].

14. O'Connor v. Ortega (1987) 480 US 709, 717.

15. See O'Connor v. Ortega (1987) 480 US 709, 726; United States v. Bunkers (9th Cir. 1975) 521 F.2d 1217, 1220.

16. O'Connor v. Ortega (1987) 480 US 709, 725. ALSO SEE United States v. Taketa (9th Cir. 1988) 923 F.2d 665, 674; Schowengerdt v. General Dynamics (9th Cir. 1987) 823 F.2d 1328, 1335-6 ["Ordinarily, a search of an employee's office by a supervisor will be justified at its inception when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct . . ."].

17. See O'Connor v. Ortega(1987) 480 US 709, 715-6.

18. See O'Connor v. Ortega(1987) 480 US 709, 716.

19. See O'Connor v. Ortega (1987) 480 US 709, 726 ["The search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct."].

20. See Schowengerdt v. General Dynamics (9th Cir. 1987) 823 F.2d 1328, 1336.

21. NOTE: Most probation and parole search conditions permit a search of areas and things under the suspect's control. Thus, officers would be permitted to search those places and things in the workplace over which the suspect has control.

22. See Mancusi v. DeForte (1968) 392 US 364, 369; O'Connor v. Ortega (1987) 480 US 709, 717.

23. See Illinois v. Rodriguez (1990) 497 US 177, 181-2; United States v. Matlock (1974) 415 US 164, 171, fn.7; People v. Escudero (1979) 23 Cal.3d 800, 806; People v. Wolder (1970) 4 Cal.App.3d 984, 994.

24. See People v. James (1977) 19 Cal.3d 99, 113; People v. Engel (1980) 105 Cal.App.3d 489, 504; People v. Carvajal (1988) 202 Cal.App.3d 487, 497; In re D.M.G. (1981) 120 Cal.App.3d 218, 224-5; Estes v. Rowland (1993) 14 Cal.App.4th 508, 522; People v. Ramirez (1997) 59 Cal.App.4th 1548, 1559; People v. Frye (1998) 18 Cal.4th 894, 990.

25. See Bumper v. North Carolina (1968) 391 US 543, 548-549; United States v. Mendenhall (1980) 446 US 544, 557; People v. Llamas (1991) 235 Cal.App.3d 441, 446-7.

(26. See Florida v. Jimeno (1991) 500 US 248, 251; People v. Crenshaw (1992) 9 Cal.App.4th 1403, 1408-9; People v. Clark (1993) 5 Cal.4th 950, 980.

27. NOTE: There is nothing in the opinions of the United States Supreme Court that would indicate a public employer could not consent to a search of those places over which the employer has joint access or control. See United States v. Matlock (1974) 415 US 164, 171, fn.7 [Court says the test regarding third party consent is based on "mutual use of the property by persons generally having joint access or control for most purposes, so that it is reasonable to recognize that any of the cohabitants has the right to permit the inspection in his own right and that the others have assumed the risk that one of their number might permit the common area to be searched."].

28. See People v. Shields (1988) 205 Cal.App.3d 1065, 1071. NOTE: The theory here is that an employee cannot reasonably expect privacy in places and things over which he and his employer share access or control. See United States v. Matlock (1974) 415 US 164, 171, fn.7; O'Connor v. Ortega (1987) 480 US 709, 715 ["Our cases establish that (the employee's) Fourth Amendment rights are implicated only if the conduct of the (consenting employer) infringed an expectation of privacy that society is prepared to consider reasonable."]; United States v. Blok (D.C. Cir. 1951) 188 F.2d 1019, 1020-1 ["Men who merely work in a place no part of which is devoted to their exclusive use have been held to have no standing to complain of a search."].

29. See Illinois v. Rodriguez (1990) 497 US 177, 181 ["(C)ommon authority rests on mutual use of the property by persons generally having joint access or control for most purposes, "quoting from United States v. Matlock (1974) 415 US 164, 171, fn.7]; Mancusi v. DeForte (1968) 392 US 364,369-70.

30. See United States v. Matlock (1974) 415 US 164, 171, fn.7.

31. See United States v. Matlock (1974) 415 US 164, 171, fn.7 ["Common authority is, of course, not to be implied from the mere property interest a third party has in the property. The authority which justifies the third-party consent does not rest upon the law of property . . ."]; Gillard v. Schmidt (3rd Cir. 1978) 579 F.2d 825, 829 ["Applicability of the fourth amendment does not turn on the nature of the property interest in the searched premises . . ."]; United States v. Bilanzich (7th Cir. 1985) 771 F.2d 292, 297; Schowengerdt v. General Dynamics (9th Cir. 1987) 823 F.2d 1328, 1333.

32. See United States v. Taketa (9th Cir. 1991) 923 F.2d 665, 673; United States v. Speights (3rd Cir. 1977) 557 F.2d 362, 364 ["The fact that the police officers, including Speights, knew that most of the lockers could be opened with a master key does not make an expectation of privacy unreasonable."].

33. See O'Connor v. Ortega (1987) 480 US 709, 718.

34. See United States v. Matlock (1974) 415 US 164, 171, fn.7; People v. Roman (1991) 227 Cal.App.3d 674, 679.

35. See Illinois v. Rodriguez (1990) 497 US 177, 188 ["(C)onsent to enter must be judged against an objective standard: would the facts available to the officer at the moment warrant a man of reasonable caution in the belief that the consenting party had authority over the premises?"].

36. See United States v. Jacobsen (1984) 466 US 109, 113.