U.S. v. Jones
(9th Cir. April 18, 2002)

ISSUE

Was a warrantless search of the defendant's office lawful under the public workplace exception to the warrant requirement?

FACTS

In 1999, the San Francisco Human Rights Commission (HRC) became the focus of a federal criminal investigation into allegations that its employees were illegally certifying minority ownership of businesses that bid on public contracts. During the course of the investigation, a federal grand jury issued a subpoena for HRC documents. Before HRC complied, however, federal investigators received a tip from an HRC employee that relevant documents were being shredded.

Investigators immediately obtained a grand jury subpoena ordering the production of the documents "forthwith." The new subpoena was served later that day by FBI agents, an Assistant U.S. Attorney, a Deputy City Attorney, and two investigators for the City Attorney's Office. At about this time, a federal prosecutor also obtained consent from the Deputy City Attorney to search the offices for the records listed in the subpoena.

As the search proceeded, investigators came upon the locked office of Zula Jones, an HRC employee. Investigators wanted to look inside the office, so they asked another HRC employee to unlock the door. When agents entered, they found some relevant documents on the floor and others in a file cabinet.

It appears Jones was charged with a crime, although the court didn't say what. In any event, she filed a motion to suppress the documents discovered in her office.

DISCUSSION

The U.S. Supreme Court in *O'Connor* v. *Ortega*[1] ruled that if certain requirements are met public employers may search government facilities for evidence of work-related misconduct—including searches of areas and things over which an employee-suspect had a reasonable expectation of privacy. Those requirements are as follows:

(1) **Reasonable suspicion:** The employer must have been aware of facts constituting reasonable suspicion that evidence of work-related misconduct would be found in the place or thing that was searched.

(2) **Search of "workplace":** The place or thing that was searched must have been part of the "workplace"; meaning, "those areas and items that are related to work and are generally within the employer's control."

(3) **Search was reasonable in scope:** The search must not have been unduly intrusive.[2]

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[1] (1987) 480 US 709.

[2] See *O'Connor* v. *Ortega* (1987) 480 US 709, 716-16, 725-6.

The court in *Jones* did not say whether the agents had reasonable suspicion to search Jones' office. This was because it ruled that even if reasonable suspicion existed the search was not permitted under *O'Connor* for two reasons.

First, this was essentially a search by law-enforcement—not a public employer. Second, the documents that were sought were evidence in a criminal investigation, not work-related misconduct. Said the court:

> The search was carried out by federal agents to ensure that HRC employees were not violating the subpoena and destroying potential evidence necessary in a criminal investigation. The Supreme Court in *O'Connor* emphasized that there is a difference between a work-related search and a search conducted to investigate the violation of criminal laws.[3]

As noted, a deputy city attorney consented to the search. The court ruled, however, that the city attorney lacked the authority to consent because, "The HRC, while technically a part of the City government, is a separate agency with its own authority and director."

Consequently, the Ninth Circuit ruled the search did not meet the *O'Connor* requirements and was, therefore, unlawful.[4]

DA's COMMENT

Officers who are faced with a situation like the one the agents faced in *Jones* now have the option of sealing the premises pending issuance of a search warrant.

Last year, the U.S. Supreme Court in *Illinois* v. *McArthur*[5] ruled that officers may temporarily seal a building pending issuance of a warrant if the justification for sealing outweighed the intrusiveness of the action.

In *Jones*, it appears an HRC employee reported, based on personal knowledge, that evidence of a crime was presently being destroyed. This would have constituted probable cause for a warrant[6] and would have provided justification for sealing; e.g., requiring everyone to leave the office or position agents inside so as to prevent shredding or other destruction of the documents.

Even in the highly unlikely event that a court ruled there were insufficient grounds to seal the offices, the evidence would have been admissible under the Independent Source doctrine because the warrant would have completely independent of the seizure of the premises; i.e., the information needed to establish probable cause would have been acquired *before* the warrantless entry, and the decision to seek a warrant would have been made prior to the seizure.[7]

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[3] Also see *U.S.* v. *Taketa* (9th Cir. 1991) 923 F.2d 665, 675 [public employer "cannot cloak itself in its public employer robes in order to avoid the probable cause requirement when it is acquiring evidence for a criminal prosecution."].

[4] **NOTE:** Although Jones consented to a partial search of her office, the court ruled the consent was the fruit of the illegal search. ("Jones was not 'in the same posture for considering whether to consent to a search as a person not previously subject to an illegal entry.").

[5] (2001) 531 US __ [148 L.Ed.2d 838, 847].

[6] See *Illinois* v. *Gates* (1983) 462 US 213, 233-4; *Florida* v. *J.L.* (2000) 529 US __ [146 L.Ed.2d 254, 260]; *People* v. *Ramey* (1976) 16 Cal.3d 263, 269;

[7] See *Murray* v. *United States* (1988) 487 US 533; *Segura* v. *United States* (1984) 468 US 796.

Finally, an observation: It's ironic that authorities who want to search a government office for evidence of a non-criminal work-related offense need only reasonable suspicion, while they must have probable cause and a warrant if the offense is work-related *and* so serious it constitutes a felony. For example, a warrant would be required if the employee was reasonably believed to be embezzling thousands of dollars of public funds. But only reasonable suspicion would be required to conduct the same search if the employee was suspected of using an office computer to buy a CD on-line in violation of office policy.