Workplace Searches

Within the workplace context, this Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police.[1]

Evidence of many types of crimes will be found in the suspect's office, desk, file cabinet, computer, locker or elsewhere in the workplace. In the absence of a warrant, officers can ordinarily obtain this evidence if the employer consents. But, as we discuss, that can be tricky. We will then cover an even trickier situation: The suspect's employer brings the evidence to officers, but it is inside a container. Can they open the container without a warrant?

Employer Consents to Search

A private employer may consent to a police search of places and things in the workplace if the employer (1) controlled the place or thing, and (2) openly exercised the right of control.

RIGHT TO CONTROL: In addition to having the ability to consent to searches of whatever is under its exclusive control, an employer may consent to searches of places and things over which it shares control with the employee. The theory here is that an employee cannot reasonably expect privacy in places and things over which he and his employer both have control. As the Supreme Court explained in *Ortega v. O'Connor*,[2] "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." Taking note of this, the First Circuit observed, "Applying *O'Connor* in various work environments, lower federal courts have inquired into matters such as whether the work area in question was given over to an employee's exclusive use."[3]

An employer may also have joint control of a place or thing that was used primarily by an employee if the employee had been notified that, per company policy, the employer retained the right to search or inspect it. Thus, in ruling that an employer had the authority to consent, the courts have observed:

- The employee "was told that his [email] messages were subject to auditing."[4]
- The employee "was fully aware of the computer-use policy, as evidenced by his written acknowledgment of the limits imposed on his computer-access rights in 2000."[5]
- The employer "notified its work force in advance that video cameras would be installed and disclosed the cameras' field of vision. Hence, the affected workers were on clear notice from the outset that any movements they might make and any objects they might display within the work area would be exposed to the employer's sight."[6]
- The jail release office "was not exclusively assigned to [the employee] and had no lock on the door. The release office was accessible to any number of people, including other jail employees."[7]
- Although an employee had a reasonable expectation of privacy in his office (he had sole access and control), a search of his office computer at the request of an FBI agent did not violate the Fourth Amendment because IT-department employees "had complete administrative access to anybody's machine."[8]

Note that employees who had a right to exclusive use or control of a locked place or thing, may not

[1] *O'Connor v. Ortega* (1987) 480 U.S. 709.
[2] (1987) 480 U.S. 709, 715.
[3] *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 179-80.
[4] *City of Ontario v. Quon* (2010) 560 U.S. 746, 762.
[5] *U.S. v. Thorn* (8th Cir. 2004) 375 F.3d 679, 683.
[6] *Vega-Rodriguez v. Puerto Rico Telephone Co.* (1st Cir. 1997) 110 F.3d 174, 180.
[7] *Sacramento County Deputy Sheriff's Assn. v. County of Sacramento* (1996) 51 Cal.App.4th 1468, 1482.
[8] (9th Cir. 2007) 474 F.3d 1184, 1190.

lose such control merely because the employer had a master key or otherwise had the ability to access it.[9] Thus, the courts have ruled that a physician at a state hospital had standing to challenge a search by hospital officials of the desk and files in his office,[10] and that the employee had "exclusive right to use the desk assigned to her made the search of it unreasonable."[11]

EMPLOYER ACTUALLY EXERCISED THE RIGHT: As noted, even if the employer had joint control over a place or thing, it may not consent to a search of it unless it had openly exercised the right to joint access or control and did so on a regular basis so as to put the employee on notice that he had no exclusive right to privacy. Thus, the Ninth Circuit ruled in *U.S. v. Ziegler* that an employer could search an employee's computer because company employees "were apprised of the company's monitoring efforts through training and an employment manual, and they were told that the computers were company-owned and not to be used for activities of a personal nature."[12]

Private Employer Finds Evidence

Employers sometimes intentionally or inadvertently find evidence of a crime in the workplace and turn it over to investigators. If the evidence incriminates an employee who reasonably expected that the evidence would remain private, it will not be suppressed unless the employer was functioning as a police agent when he conducted the search or other intrusion. As the Supreme Court observed, the exclusionary rule "is 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 official."[13]

In most cases, an employer will be deemed a police agent only if an officer requested, encouraged, or assisted in the search. As the Ninth Circuit explained, "Police officers may not avoid the requirements of the Fourth Amendment by inducing, coercing, promoting, or encouraging private parties to perform searches they would not otherwise perform."[14]

What if the evidence was inside a container when the employer gave it to officers? May they open it without a warrant? The answer is no unless the officer's act of opening the container allowed them to see something that had not been observed previously by the employer or the person who found the container. For example, in *United States v. Jacobson*[15] a cardboard box that was being shipped by Federal Ex was accidently torn by a forklift driver. When workers opened it to examine its contents (to prepare an insurance report) they found a "tube" about ten inches long covered in duct tape. The workers cut open the tape and found four zip-lock plastic bags containing white powder. Suspecting drugs, they notified the DEA and agents opened the box and the tube, removed some of the powder and tested it. It was cocaine.

The Supreme Court ruled the agents acted lawfully when they reopened the tube and examined its contents because the contents had already been observed by FedEx employees. Said the Court, "The removal of the plastic bags from the tube and the agents' 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 officers do not need a warrant to conduct a field test on suspected drugs that they had obtained lawfully. This is because "a chemical test that merely discloses whether or not a particular substance is cocaine does not compromise any legitimate interest in privacy." POV

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[9] See *U.S. v. Taketa* (9th Cir. 1991) 923 F.2d 665, 673. Also see *U.S. v. Ziegler* (9th Cir. 2007) 474 F.3d 1184.
[10] See *O'Connor v. Ortega* (1987) 480 U.S. 709, 717.
[11] *U.S. v. Bilanzich* (7th Cir. 1985) 771 F.2d 292, 297; *U.S. v. Blok* (D.C. Cir. 1951) 188 F.2d 1019, 1021.
[12] (9th Cir. 2007) 474 F.3d 1184, 1192.
[13] See *O'Connor v. Ortega* (1987) 480 U.S. 709, 717.
[14] *George v. Edholm* (9th Cir. 2014) 752 F.3d 1206, 1215.
[15] (1984) 466 U.S. 113.
[16] *People v. Warren* (1990) 219 Cal.App.3d 619, 623-24.
[17] See *People v. Leichty* (1988) 205 Cal.App.3d 914, 923-24.