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PUBLIC EMPLOYEES' EXPECTATIONS OF WORKPLACE COMPUTER PRIVACY

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In this month's column, we report on a recent decision by the United States Court of Appeals for the Second Circuit in which the court addressed, in the context of 42 U.S.C. § 1983, the scope of a public employee's expectation of privacy in the content of his workplace computer. The decision contains significant rulings, both as to substantive rights and civil procedure.

In *Leventhal* v. *Knapek*,[1] the plaintiff-appellant, a state employee, brought a § 1983 action claiming that state investigators violated his Fourth Amendment right against unreasonable searches when, without his permission, the investigators on several occasions examined the contents of his office computer. The Second Circuit, in an opinion authored by Judge Sonia Sotomayor and joined by Judges Pierre Nelson Leval and Robert David Sack, held that the state employee had, on the facts of the case, a cognizable expectation of privacy in the contents of his office computer. The court further held, however, that the searches did not violate the employee's Fourth Amendment rights because the searches were—again, on the facts of the case—reasonable under the balancing test mandated by the Supreme Court in *O'Connor* v. *Ortega*[2] and *New Jersey* v. *T.L.O.*[3]

Facts of 'Leventhal'

Plaintiff, Gary Leventhal, worked in the Accounting Bureau of the New York Department of Transportation (DOT). With the DOT's permission, Mr. Leventhal maintained a private tax practice in addition to his DOT employment. At the DOT, he had a private office with a door. Mr. Leventhal had exclusive use of his DOT computer, but DOT technicians did on occasion access the computer for technical and other purposes.

Published DOT policy prohibited theft, which was defined to include (among other things) "improper use of State equipment," "conducting personal business on State time," and "using State equipment . . . for personal business." Official DOT policy also provided that only original, licensed copies of software could be installed on DOT computers. Mr. Leventhal's supervisor, however, told him and his colleagues that they could continue to use unofficial software for departmental business.

In October 1996, the New York State Office of Inspector General received an anonymous letter concerning purported abuses within the DOT Accounting Bureau. Among other things, the letter alleged that a Grade 27 Accounting Bureau employee came to work late everyday and that "[t]he majority of his time is spent on non-DOT business related phone calls or talking to other personnel abut personal computers." The letter further alleged that the Grade 27 employee was "only in the office half the time" and that he was otherwise "either sick or on vacation." The letter also denounced various other Accounting Bureau employees, likewise identified by grade only, as incompetent and as spending the workday playing computer games.

In response to the letter, the DOT began an investigation of the Accounting Bureau. Because plaintiff Mr. Leventhal was the only Grade 27 employee within the bureau, Mr. Leventhal became a target of the investigation. In order to determine whether his DOT computer contained unauthorized software, the DOT investigators, without Mr. Leventhal's knowledge or consent, entered his office through an open door, turned on his computer and, then, copied all of the directories and file names located on the computer's hard drive.[4]

The investigators' search revealed various pieces of unauthorized software on Mr. Leventhal's DOT computer. The search also revealed the existence of certain "hidden" directories, which, in turn, contained "hidden" files. One of the hidden directories contained files with names such as "TAX.FNT" and "CUSTTAX.DBF." Investigators suspected that the directory contained tax preparation software and that such software was used by Mr. Leventhal in the course of his private practice. In order to confirm their suspicions, the investigators accessed his computer again, copying the directory and examining the contents of certain files contained therein. It was subsequently determined that the directory did, in fact, contain tax preparation software.

When confronted with the evidence collected by the investigators, Mr. Leventhal admitted having loaded the tax preparation software onto his DOT computer and further admitted having printed several personal income tax returns from the computer. As a result, the DOT brought six disciplinary charges against Mr. Leventhal under N.Y. Civ. Serv. Law § 75. The designated hearing officer, however, suppressed the evidence that had been obtained through the searches of Mr. Leventhal's computer on the ground that the searches violated his Fourth Amendment rights. The DOT Commissioner, who was to pass judgment after receiving the hearing officer's report and recommendation, directed the hearing officer to accept the evidence from the searches. The hearing officer refused but, before the evidentiary matter could be resolved, Mr. Leventhal reached a settlement with the DOT. Under the terms of the settlement, the DOT dropped all charges but one, to which he pleaded guilty.

Shortly after settling the DOT disciplinary charges, Mr. Leventhal brought a § 1983 action against those who authorized and conducted the DOT investigation, alleging that the searches of his workplace computer violated his Fourth Amendment rights.[5] In an unpublished opinion, the district court (N.D.N.Y., Mordue, J.) granted defendants' motion for summary judgment. Mr. Leventhal appealed to the Second Circuit, which affirmed.

Second Circuit Deliberation

The Second Circuit began by considering the procedural question of whether the hearing officer's previous finding of a Fourth Amendment violation had preclusive effect in federal court. Citing *University of Tennessee* v. *Elliott*,[6] the Second Circuit noted that, "absent specific statutory guidance from Congress, the preclusive effect of prior unreviewed state administrative determinations upon a subsequent suit in federal court is a matter of federal common law."[7] The Second Circuit further noted that "[w]hen federal common law gives preclusive effect in the federal court to a state administrative

determination, that prior determination has 'the same preclusive effect to which it would be entitled in the State's courts.'"[8] Then, without deciding whether federal common law gives preclusive effect to agency determinations concerning either purely legal issues or mixed questions of law and fact, the court held that the hearing officer's prior Fourth Amendment determination was not preclusive because it did not have preclusive effect under New York law.

The Second Circuit held that to have preclusive effect under New York law, an agency determination must actually "decide" the issue. The court further held that only the DOT Commissioner, and not the hearing officer, had the ultimate power to "decide" the Fourth Amendment issue (and all other issues) raised in the § 75 disciplinary hearing. Because the matter was settled before a final decision by the commissioner, there was, the Second Circuit held, no definitive agency determination with preclusive effect under New York law to be recognized in federal court.

Having so held, the Second Circuit then turned to the merits of Mr. Leventhal's Fourth Amendment claim. The court noted that "the Fourth Amendment protects individuals from unreasonable searches conducted by the Government, even when the Government acts as an employer." But "the 'special needs' of public employers may, however, allow them to dispense with the probable cause and warrant requirements when conducting workplace searches related to investigations of work-related misconduct." When a public employer does conduct such a search, "the Fourth Amendment's protection against 'unreasonable' searches is enforced by 'a careful balancing of governmental and private interests.'" According to the Second Circuit, "[a] public employer's search of an area in which an employee had a reasonable expectation of privacy is 'reasonable' when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of' its purpose."[9]

Expectation: 'Limited'

Significantly, after "considering what access other employees or the public had to Leventhal's office," the Second Circuit found that Mr. Leventhal had a reasonable but limited expectation of privacy in his DOT computer. Not only was the computer in a private office and reserved for his exclusive use, but the DOT neither had "a general practice of routinely conducting searches of office computers" nor did it place Mr. Leventhal on notice that he should have no expectation of privacy in the contents of his office computer. Moreover, as construed by the court, the DOT's antitheft policy did not prohibit the mere storage of personal materials on DOT computers. The fact that the DOT technical support staff had access to Mr. Leventhal's computer, and sometimes used that access for maintenance or other limited purposes, did not vitiate his expectation of privacy because the actual use of such access was infrequent and narrowly circumscribed.

Despite having found that Mr. Leventhal had a cognizable privacy interest in the contents of his DOT computer, the Second Circuit held that the searches of the computer did not violate his Fourth Amendment rights. According to the court, "[a]n investigatory search for evidence of suspected work-related employee misfeasance will be constitutionally 'reasonable' if it is 'justified at its inception' and of appropriate scope."[10]

The relevant constitutional inquiry begins by examining "whether 'there are reasonable grounds for suspecting that the employee is guilty of work-related misconduct.'"[11] Here, the anonymous letter that contained accusations of workplace misfeasance against a Grade 27 employee, reasonably assumed by investigators to be Mr. Leventhal, provided "reasonable grounds to believe that the searches would uncover evidence of misconduct." According to the court, "[p]robable cause is not necessary to conduct a search in this context . . . because 'public employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner.'" But even without probable cause, "[t]he individualized suspicion of misconduct in this case justified the DOT's decision to instigate some type of search."[12]

Related to Objectives

Having found sufficient grounds for some sort of search, the Second Circuit then examined whether the searches actually conducted by the DOT were "reasonably related" to the objectives of the investigation and not "excessively intrusive in light of the nature of the misconduct" alleged. As to the first prong, the court concluded that the searches were reasonably related to the DOT's investigation of Mr. Leventhal's alleged misfeasance. The court acknowledged that the letter that triggered the investigation did not accuse the unnamed Grade 27 employee (assumed to be Mr. Leventhal) of misusing DOT computers. But the letter "did allege the grade 27 employee was not attentive to his duties and spent a significant amount of work time discussing personal computers with other employees." Moreover, the accusatory letter alleged that other Accounting Bureau employees devoted their working hours to playing computer games and learning about non-DOT-related software. The Second Circuit found that, on these facts, the searches of Mr. Leventhal's computer were "reasonably related" to the investigation of his alleged workplace misconduct.

The court expressly rejected Mr. Leventhal's argument that "a search for non-standard software would be irrelevant to charges of misconduct because the DOT had, de facto, approved the use of nonstandard software needed to conduct DOT business." According to the court, the scope of the DOT investigation was not limited to the detection of "non-standard" software. Rather, "the investigation was more broadly aimed at uncovering evidence that Leventhal was using his office computer for non-DOT purposes."

Basis for Suspicion?

This assertion, while perhaps empirically true, begs an important question. What legal basis did the DOT have for suspecting Mr. Leventhal of using his office computer for personal business? As the court itself acknowledged, the letter that instigated the DOT investigation did not accuse the unnamed Grade 27 employee of misusing his DOT computer—the allegations of misuse of DOT computers were directed at other employees, not at the employee reasonably assumed to be Mr. Leventhal. Thus, when analyzing whether the search of his computer was "reasonably related" to investigation's objective, it would seem important to determine first whether there were "reasonable grounds for suspecting" that Mr. Leventhal in particular had misused his DOT computer.

Inasmuch as the court acknowledged that the accusatory letter did not allege computer misuse on his part, the court tacitly conceded that there were no grounds to suspect him in particular of misusing a DOT computer. Thus, the court was forced to rely, at least in part, on accusations against third parties (i.e., accusations against Mr. Leventhal's coworkers) to justify the search of Mr. Leventhal's computer. Although the court expressly declined to reach the issue of "whether a search would have been justified in the absence of individualized suspicion," the court's ruling in this case effectively minimizes the quantum of individualized suspicion necessary to conduct workplace searches.

As to the second prong of the *O'Connor* test, the Second Circuit found that both the initial and subsequent searches of Mr. Leventhal's computer were "not 'excessively intrusive in light of the nature of the misconduct.'" In this regard, the court noted that the DOT investigators, who entered Mr. Leventhal's office through an open door, limited their initial search to the viewing and printing of file names. It was only after the initial search had revealed the existence of suspicious files on Mr. Leventhal's hard drive that the investigators copied and opened certain files. This analysis, which justifies the subsequent searches on the basis of what was found during the initial search, makes clear that the critical threshold, in this case at least, is the underlying justification for the initial search.

Conclusion

Given the pervasiveness of computers in the workplace, and the scale of public-sector employment, *Leventhal* addresses important issues that are certain to arise again. In addition to clarifying the preclusive effect of a hearing officer's determination, the Second Circuit's opinion helps define the parameters for workplace computer searches. The decision is necessarily fact specific, and many issues remain to be resolved. This much is certain: a public employee may have a reasonable expectation of privacy in his workplace computer, but, after *Leventhal*, the public employer does not have to show much in order to justify a search of that computer.

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ENDNOTES

[1] F.3d, No. 00-9306, 2001 WL 1159812 (2d Cir. Sept. 26, 2001).

[2] 480 U.S. 709 (1987).

[3] 469 U.S. 325 (1985).

[4] The court's description of how the investigators gained access to Mr. Leventhal's hard drive is somewhat murky, but the decision can be read to suggest that the investigators may have bypassed some password protections.

[5] Mr. Leventhal also alleged a due process violation in connection with an alleged demotion and the withholding of a salary increase.

[6] 478 U.S. 788 (1986).

[7] 2001 WL 1159812, at 6.

[8] Id. (quoting *Elliott*, 498 U.S. at 799).

[9] Id. (quoting *O'Connor*, 480 U.S. at 726).

[10] Id. at 8 (quoting *O'Connor*, 480 U.S. at 726).

[11] Id. at 9 (quoting *O'Connor*, 480 U.S. at 726).

[12] Id. The court expressly declined to reach the issue of "whether a search would have been justified in the absence of individualized suspicion." Id. n.5