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WHEN DOES AN EMPLOYER VIOLATE AN EMPLOYEE'S FOURTH AMENDMENT RIGHTS? CASE LAW AND APPLICATIONS

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ABSTRACT

This article will attempt to provide answers about the extent of an employee's 4th Amendment rights. The first section will provide an overview of the requirements of the 4th Amendment. The following sections will explore specific issues including urinalysis, the privacy of an employee's desk, video surveillance, and lockers.

Joe, a truck driver for Trucking Inc., arrives at work to begin his shift. Following normal protocol, he places his jacket and other personal belongings in his locker in the employees' locker room in the Trucking Inc. terminal. Joe talks with the other employees in the locker room who are changing their clothes as their shift has ended. Unbeknownst to Joe and his fellow employees, Trucking Inc. is watching. Placed in the smoke alarm above their lockers is a minuscule video camera which records the employees' every move. Has Joe's 4th Amendment right to be secure in his person and free from unreasonable search and seizures been violated? It depends.

THE FUNDAMENTAL CASE LAW

The 4th Amendment to the United State Constitution provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

There is a limit to the application of the 4th Amendment. The U.S. Supreme Court has "recognized that the principal object of the Amendment is the protection of privacy rather than property. . ." [1]. To violate the 4th Amendment, there needs to be: 1) state action; 2) search and/or seizure; and 3) a reasonable expectation of privacy. If any of these elements is absent there is no violation.

STATE ACTION

Initially the court must determine whether or not there has been state action. Fourth Amendment protection is only applicable when there has been state action, no matter how unreasonable and intrusive the search may have been. In determining whether a private party is acting as an agent for the state, the court will consider "1) the government's knowledge and acquiescence, and 2) the intent of the party performing the search" [2].

In *U.S. v. Williams,* the defendant took his automobile to the shop to be repaired because the engine was frozen. The owner of the repair shop allowed him to leave his vehicle at the shop. After the defendant's visit, the owner discovered money to be missing. The owner contacted the police and notified the police officer that he suspected the defendant stole the money. The police officer, without a warrant, searched the defendant's vehicle and seized a number of items in an effort to ascertain the defendant's identity. The officer left the items on the floor of the repair shop and departed. In an effort to clear the floor of the shop, the owner picked up the items and in doing so, looked through a sack which belonged to the defendant. The owner discovered contraband and notified the police. The *Williams* court held the owner's search was conducted by his own choice and therefore was not acting as an agent for the state. However, the evidence was suppressed because the initial search conducted by the police which led the owner to discover the contraband was illegal.

Whether a private company was acting for the state was the core issue in *Jackson v. Metropolitan Edison Co.* [3]. In *Jackson,* the United States Supreme Court was asked to determine whether a customer of a private utility company should be afforded constitutional protection because a utility company is heavily regulated by the state and held a partial monopoly in the area. In analyzing the extent of state involvement, the Court determined that "acts of a heavily regulated utility with at least something of a governmentally protected monopoly will more readily be found to be "state" acts than will acts of an entity lacking these characteristics. But the inquiry must be whether there is a sufficiently close nexus between the State and the challenged action of the regulated entity so that the action of the latter may be fairly treated as that of the State itself" [3, at 352].

In determining whether there was a sufficient nexus, the Court reviewed the state regulation which governed the utility company. The Court pointed out that where a private entity had been vested with the performance of a duty or action that

is normally reserved to the state, the Court will find state action. However, the Supreme Court held that: 1) utility service is generally not the responsibility of the state; 2) there is no sufficient nexus between the utility company and the state; 3) the state did not lease any property or facilities to the company; and 4) the company and state were not connected by any joint ventures [4]. The Court ruled that the action of the utility company was not state action and therefore no constitutional protection was provided to the customer.

In contrast to *Jackson,* state action has been found where the federal government has enacted extensive regulations which private companies are statutorily obligated to comply with such regulations. In *Skinner v. Railway Labor Executives' Association,* the Federal Railroad Administration promulgated regulations requiring drug and alcohol testing for any railroad employee involved in an accident. Although railroad companies are private companies, they must abide by the regulations of the Federal Railroad Administration. After reviewing the government's participation, the Supreme Court held that the railroad companies were obligated to comply with the regulations and there "are clear indices of the Government's encouragement, endorsement, and participation, and suffice to implicate the Fourth Amendment" [5, at 615-616]. But in *Kipp v. LTV Aerospace and Defense,* no state action was found where a private employer had a contract with the federal government and that contract required the company to implement a drug testing program for its employees [6]. The *Kipp* Court distinguished *Skinner* by the fact that the "federal government did not require them to bid for defense contracts; they freely entered into these defense contracts."

One could question the validity of the outcome of the *Kipp* case. The company was not forced into the contract, but an aerospace and defense company is undoubtedly limited in the number of customers they can attract. Additionally, the defense work contracted to Kidd was undoubtedly the domain of the government, and if the company did not implement the drug testing policy, it would not get the contract. In short, this could be considered a joint venture between the company and the government, thereby extending the concept of state action to the private company.

State action has been found where a regional transportation authority acquired a private mass transit system, and then contracted with a private firm to manage that transit system [7]. The regional transportation authority, despite relinquishing day-to-day control to a private entity, retained actual ownership of the assets of the transit system. Therefore, any action of the transit system would be considered state action even though the private entity would carry out the action.

HAS A SEARCH OR SEIZURE OCCURRED?

Upon finding state action, the court will determine whether or not a search has in fact occurred. "A search implies an examination of one's premises or person

with a view to the discovery of contraband or evidence of guilt to be used in prosecution of a criminal action. The term implies exploratory investigation or quest" [8]. If there is no search, the 4th Amendment does not come into play.

There is no search when someone simply looks into a car or home if they have a lawful right to be in that particular area. If someone allows an object to be subject to a public audience, then they cannot complain when someone in the public actually views that object. In *Haerr v. United States,* the defendants were in an automobile that was stopped by Immigration Patrol Inspectors at the border [8]. When one of the inspectors shined his light in the area of the backseat, the defendant leaned forward to hide boxes that were placed on the floor. Upon noticing the boxes, the inspector questioned the contents of the boxes. The defendants immediately drove away and threw the boxes out the window of the vehicle. The inspectors picked up the boxes and discovered contraband. The *Haerr* court held that there was no search because the inspectors are permitted to stop and question those who cross the border. Looking into a vehicle does not constitute a search and there is no seizure of the boxes because the inspectors were permitted to retrieve the boxes.

Additionally, in *Vega-Rodriguez v. Puerto Rico Telephone Co,* a public employer subjected the employees to video surveillance [9]. The court stated that "the mere fact that the observation by a video camera rather than the naked eye, and recorded on film rather than in a supervisor's memory, does not transmogrify a constitutionally innocent act into a constitutionally forbidden one" [9, at 181]. The employer was permitted to videotape the employees' activities because the same conduct could have been observed through the hiring of a monitor to observe the employees. Therefore, no search had taken place because the activities were in plain view of the camera or a supervisor.

"A 'seizure' of property occurs when there is some meaningful interference with an individual's possessory interests in that property" [10]. There need not be a search for a seizure to occur [11]. In *Lesher v. Reed,* Lesher was a police officer who was assigned a dog which was to be part of the canine squad. The police department owned the dog; however, pursuant to an agreement with the Department, Lesher was responsible for its care and custody. In accordance with the agreement, if the dog was not accepted as part of the canine squad, Lesher could have custody of the dog or the police department could dispose of it. After the dog bit a child, the police department determined that the dog was not fit for the canine squad and planned to have it killed. Fellow police officers arrived at Lesher's home to retrieve the dog. Lesher informed the police department that he wanted custody of the dog, and he released the dog only after being told he would be terminated if he did not do so. Subsequent to Lesher's release of the dog, he was demoted. The *Lesher* Court held that there was a seizure of the animal and although Lesher was a public employee, he should have been afforded the same constitutional protection at his home as a private citizen.

EXPECTATION OF PRIVACY

Once it is determined that a search and/or seizure has occurred the next inquiry is as to the reasonableness of one's expectation of privacy. The United States Supreme Court has held that a person needs to have a reasonable expectation of privacy [10, at 114]. An expectation is reasonable if it is an expectation that society will recognize as reasonable. If someone has an unreasonable expectation of privacy, even though there may be a search and state action, there is no violation. It is only after an expectation is deemed reasonable that a court will determine whether a person's rights have been infringed.

APPLICATION OF THE CASE LAW

Urinalysis

Many employers have implemented urine testing of their employees to test for drugs and alcohol. Private employers have been permitted to engage in virtually unlimited testing of their employees as a means of an employee obtaining or retaining a job. A private employer was permitted to require applicants who were offered a position to partake in urine testing for drugs and alcohol. In *Wilkinson, et al. v. Times Mirror Corp.,* two applicants were offered the position of legal writer on the condition that they pass a medical examination and a urine test for drugs and alcohol [12]. The tests were performed at a medical clinic. The clinic would, after testing, give each applicant a numerical rating from one to five designating his or her suitability for employment. A rating of five indicated a failure of the drug and alcohol test or it could mean that the applicant failed due to a disqualifying medical condition. If an applicant received a five, they were permitted to reapply for employment in six months. The details of the medical testing were not released to the company. Because there was no state action, the company was free to implement this policy and have it validated by the courts.

In contrast, the legislature in Georgia enacted the Applicant Drug Screening Act which required all applicants for employment with the state to undergo urine testing to detect illegal drugs. In *Georgia Association of Educators v. Harris,* the court found that the state had "failed to specifically identify any governmental interest that is sufficiently compelling to justify testing *all* job applicants" [13]. The state's only justification was a "generalized governmental interest in maintaining a drug-free workplace" [13]. The court held that this generalized justification was not sufficient and found the Applicant Drug Screening Act violated the 4th Amendment of the United States Constitution.

Employees can be terminated by a private employer if they refuse to submit to a urine test. In *Kelly v. Mercoid Corporation* [14], the company manufactured and handled mercury. In order to determine whether any employees have been exposed

to the toxic mercury, all employees were required to take a urine test. The plaintiff employee was required to take the urine test, even though her position never required her to come in contact with mercury. The company fired the plaintiff employee when she refused to take the urine test. The court found no 4th Amendment violation because of the lack of state action.

If private employees are forced to undergo drug/alcohol testing pursuant to federal regulations, the 4th Amendment is applicable. In *Skinner,* discussed above, the Federal Railroad Administration promulgated regulations to address a drug/alcohol problem among railroad employees [5]. The rules required that in the event of an accident that involves a fatality, the release of hazardous material accompanied by an evacuation or a reportable injury, or damage to railroad property of $500,000 or more, the employee is to undergo a urine test to detect the presence of drugs and alcohol [5, at 609]. The Supreme Court concluded that society does recognize that such testing intrudes upon a person's expectation of privacy and is to be considered a search and quite possibly a seizure within the parameters of the 4th Amendment, since a person would have a possessory interest in their bodily fluids [5, at 617].

In analyzing the constitutionality of the regulations, the Skinner Court held that the tests were reasonable because the government has a compelling interest in the health and safety of the public and the railroad employees; there was no need to obtain a warrant because the regulations defined when the testing was to occur; and because this was a special need beyond law enforcement, no warrant was needed prior to testing an individual. Perhaps most importantly, there was no need to have individualized suspicion prior to the testing because the government's interests were compelling and outweighed the employees' privacy expectations.

The leading case for urinalysis for public employers is *National Treasury Employees Union v. Von Raab* [15]. In this case, the U.S. Supreme Court reviewed the drug-testing program adopted by the Commissioner of the United States Customs Service. This program required all employees who sought a promotion to positions that required the employee to be in direct involvement in drug interdiction or carry firearms or handle "classified" material, to submit to a urine test to detect the presence of various illegal drugs. Any results were not to be used in a criminal prosecution without the consent of the employee.

The Supreme Court determined that since the employee is only tested when seeking a promotion into one of the specified positions, the drug test was automatic. The Service would not make a discretionary determination to search based on a judgment that certain conditions were present. Furthermore, there was no need for the search to be based on the criminal standard of probable cause because that standard is not used in administrative searches. The Court pronounced that "the Government's need to conduct the suspicionless searches required by the Customs program outweighs the privacy interests of employees engaged directly in drug interdiction, and of those who otherwise are required to carry firearms" [15, at 668]. The Court also recognized that the employees would also have a

diminished expectation of privacy because of the nature of the positions covered by the regulations.

The Customs Service employees who sought a promotion into a position which would cause the employee to come in contact with classified information were also required to undergo urine testing. The Court concluded that the Customs Service failed to provide evidence as to why employees who had access to classified material were to be tested. The Court remanded to the Court of Appeals to determine "what materials are classified and in deciding whom to test under this rubric. . . . [t]he court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject" [15, at 678].

The Supreme Court held that "the suspicionless testing of employees who apply for promotion to positions directly involving the interdiction of illegal drugs, or to positions that require the incumbent to carry a firearm, is reasonable. The Government's compelling interest in preventing the promotion of drug users to positions where they might endanger the integrity of our Nation's borders or the life of the citizenry outweigh the privacy interests of those who seek promotion to these positions, who enjoy a diminished expectation of privacy by virtue of the special, and obvious, physical and ethical demands of those positions" [15, at 679].

In *American Federation of Government Employee, Local 1533 v. Cheney,* the *Von Raab* holding was applied to the U.S. Navy [16]. In *Cheney,* the court analyzed the Navy's automatic drug testing program. The testing program required the Navy to test 80,000 civilian employees randomly in over 100 different jobs and test over 300,000 civilian Navy employees worldwide after an accident or based on reasonable suspicion.

In reviewing the random testing, the *Cheney* court held that the automatic testing of employees who hold top secret clearances is constitutional because these employees have access to information which pertains to national security and disclosure of this information poses a risk to the nation. Additionally, these employees are required to undergo extensive background checks in regular intervals and therefore these employees have a diminished expectation of privacy.

However, the Navy also would randomly test employees based on their job function. The court held that this type of testing was unconstitutional because the Navy failed to demonstrate any compelling government interest for testing employees holding the designated positions and the program allowed officials to have broad discretion in choosing employees for the testing.

The Navy had designated for testing a number of positions involving maintenance and operation of equipment, national security, protection of life and property, drug/alcohol rehabilitation, and law enforcement. The court found that the only category in which random testing is permitted would be law enforcement. The other categories were not so designated, particularly since the Navy failed to show a nexus between the dangers of intoxicated employees and a threat to the safety of the public as well as a compelling government interest.

The Navy regulations also required testing for any employee involved in an accident on the job or when the employee's supervisor had reasonable suspicion. The court held that the Navy failed to demonstrate a nexus between the post accident testing and public safety. However, the court also found that the Navy was permitted to test an employee where an employee's supervisor had a reasonable suspicion that the employee was either intoxicated or drug impaired.

In a similar vein, in *Taylor v. O'Grady,* the Seventh Circuit examined the urine testing requirements of the Department of Corrections employees. The court upheld the testing program, but not for employees who have: 1) no regular access to inmate population; 2) no reasonable opportunity to smuggle drugs into the inmate population; and 3) no access to firearms" [17].

In summary, a public employer may conduct suspicionless urinalysis testing for any one of three reasons: 1) maintaining the integrity of workers in executing their essential mission; 2) enhancing public safety; and 3) protecting truly sensitive information [16, at 1419]. The courts will look closely for a nexus between the testing and the purpose. There must be some connection between the purpose of the test and the harm that the test is to prevent.

Search of Desks

A public employee has a reasonable expectation of privacy in the contents of his/her desk or contents thereof. In *O'Conner v. Ortega,* Dr. Ortega, a psychiatrist employed by a state hospital, was placed on administrative leave while being investigated for a number of infractions [18]. The hospital's policy permitted an inventory search for terminated employees. An official of the hospital conducted a search of Ortega's desk, even though Ortega was only on leave and had not been terminated. Ortega was later terminated, partially because of some of the items found in his desk during the search, and the seized items were used against him at an administrative hearing.

The Supreme Court stated that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer. . . . The employee's expectation of privacy must be assessed in the context of the employment relation" [18, at 733]. The Court determined that even though the office staff of the hospital may have had access to the office, Ortega had a reasonable expectation of privacy in his file cabinets as well as his desk. But the Court also stated that the employee's expectation of privacy does not require an employer to obtain a warrant whenever it wants to enter an employee's office or desk for work related purposes. Public employers have an interest in workplace efficiency and the employer is not in the business of seeking out criminal activity. Thus, it would be impractical to require the employer to articulate the probable cause standard required to obtain a warrant. The Supreme Court ultimately remanded the case to the District Court to "determine the justification for the

search and seizure, and evaluate the reasonableness of both the inception of the search and its scope" [18, at 729].

The Supreme Court of Louisiana was later required to apply the law of *Ortega* in *State v. Ziegler* [19]. In *Zeigler,* supervisors from the State Bureau of Vital Statistics conducted a search of forty workstations after business hours after receiving evidence that fraudulent birth certificates had been issued from their office. The supervisors did not have any warrants or reasonable suspicion of any particular employee. The supervisors searched desks, drawers and shelves, but not personal items such as purses or briefcases. No desks or drawers were equipped with locks. The search located evidence which incriminated an employee.

In reviewing the constitutionality of the search, the Louisiana Supreme Court utilized the two-prong test laid out in *O'Conner v. Ortega*: 1) "the employee must have a reasonable expectation of privacy in the area searched, or in the item seized; and 2) if a reasonable expectation of privacy exists, the search should be reasonable under all the circumstances. 'Under this reasonableness standard, both the inception and the scope of the intrusion must be reasonable.'"

The *Zeigler* court determined that the openness of the office space and lack of locking mechanisms limited the defendant's reasonable expectation of privacy. The search was also deemed to be justified at its inception because the evidence indicated clearly that the fraudulent birth certificates came from this office. Moreover, the scope of the search was permissible because: 1) it was conducted after work when employees would have taken home any personal items; 2) no purses or briefcases that remained in the office were searched; and 3) the search was limited to a particular department. The Court held that the search was "reasonable despite the absence of individualized suspicion."

In summary, public employees should be aware that their employer may search the contents of their desks and workspace. If the employee is the only person to have access to the desk or particular property, this would demonstrate evidence that the employee would have an expectation of privacy in that particular property. Once an employee has an expectation of privacy, the search that is conducted must be reasonable under the circumstances. An employer does not need to obtain a warrant to search the employee's workspace if the search is for a work related purpose.

Video Surveillance

Since employers cannot personally monitor every move of the employees, some have opted to employ the use of video surveillance. In *Thompson v. Johnson County Community College* [20], the employer installed a video surveillance camera in an employee locker area. The locker area was also a storage area, was not locked, and many employees of the college had access to the area. The camera was installed because of allegations of theft and of employees bringing weapons onto campus. During the period of time the surveillance camera was in operation, the college did not uncover any evidence of theft or any violations of the college's weapon policy.

After noting that silent video surveillance is subject to 4th Amendment prohibitions against unreasonable searches, the court addressed two questions: 1) whether the plaintiffs had a reasonable expectation of privacy, and 2) whether the search was reasonable [20, at 507]. The *Thompson* Court concluded that the plaintiffs could not have a reasonable expectation of privacy because the area was not enclosed, not locked, and many people had access to the area. In addition, the Court concluded the college's purpose for video surveillance was work related and reasonable.

In contrast, in *State of Hawaii v. Bonnell,* the post office received anonymous information that employees were gambling on the premises [21]. Working with local police, the postal officials had video surveillance cameras installed in smoke detectors and a burglar alarm in the employee break room. Over 1200 hours of footage was taken during the workday over the course of a year. As a result of the surveillance, six employees were charged with gambling, promoting gambling, and possession of gambling records, all misdemeanor charges.

The Court concluded that there was "no special or exigent circumstances that would have justified a warrantless search in this case; it can hardly be said that the [police department] was faced with any sort of 'emergency'" [21, at 1273]. The Court also concluded that the employees had a reasonable expectation of privacy in their break room. Only postal employees and invited guests were allowed in the room. Accordingly, the defendants were in a position to regulate their conduct. "When seated in the break room, the defendants could see anyone approaching and could avoid being surprised by an untrusted intruder" [21, at 1276]. The Court suppressed the video surveillance at the defendants' criminal trial.

The analysis that the Court used in the *Bonnell* case differs from that used in *Thompson.* In *Thompson,* other employees could enter the locker area and the employees did not have a reasonable expectation of privacy. The *Bonnell* Court pointed out that only employees or their guests were permitted in the break room. When someone the employees were not familiar with entered the break room, they could change their actions and speech. Therefore, the employees had a reasonable expectation of privacy. Of note, the employees in *Thompson* changed their clothes in the locker area and they still did not have a reasonable expectation of privacy, yet the employees in *Bonnell* were in a break room which was not an area where the employees changed their clothes or stored personal belongings, and these employees had a reasonable expectation of privacy.

In summary, if an employer has a work related justification for the video surveillance, the employer will generally be allowed to do so. However, it would be best to avoid areas were the employees have an obvious expectation of privacy. Despite the outcome in *Thompson,* an employer should be extremely hesitant about installing video surveillance in a locker area or restroom where the employees could be in various stages of undressing or engaging in extremely private acts.

Lockers

Since many employees lead hectic lives, at times they are required to bring personal items to work in order to run errands or go directly to a personal appointment. And, of course, many employees have lockers where they can place these personal belongings. In *Dawson v. State of Texas,* the defendant was an exotic dancer who worked at the Showtime Club [22]. The police received an anonymous tip that someone had stored illegal drugs in the locker room of the club. The police went to the club and informed the club's manager of the allegation, and the club's manager conducted a search of the lockers. Since the defendant's locker was locked, the manager, with the police present, requested that the defendant remove the lock. The manager searched the locker as well as the defendant's purse and found drugs in her purse. The manager later testified that he had worked at many clubs and the dancers were all aware that their lockers were subject to be searched, however, he had not told the same to the defendant.

The Court determined that the manager of the club was working as an agent of the police and therefore the 4th Amendment was applicable. Initially, the Court had to determine whether the defendant had a reasonable expectation of privacy in her locker. Even though the defendant did not own the locker, the Court ruled that she had a reasonable expectation of privacy because she had a possessory interest and had a legal right to be on the premises. In addition, the Court held that "where an employee who is hired to dance or perform has been issued a private locker by her employer on which she has placed a lock, it is reasonable to expect that her belongings will be stored without being subject to search unless she has been placed on notice of the possibility of such a search" [22, at 370].

Next, the Court analyzed whether the defendant consented to the search and whether the manager could provide the requisite consent for a warrantless search. The Court determined that the defendant's submission to authority did not amount to voluntary consent. In addition, "one who has an equal right of control or possession of premises generally does not thereby have authority to consent to a search of an area on the premises which is set aside for the exclusive use of the other." The manager "did not have common authority over appellant's locker and could not validly consent to the search." Therefore, the search of the defendant's locker violated the defendant's 4th Amendment rights [22, at 368, 372].

However, where rules are promulgated which authorize random locker searches, the employees' expectation of privacy is reduced. In *Chicago Fire Fighters, Local 2 v. Chicago,* the Chicago Fire Department announced to the firefighters that semi-annual locker inspections would be conducted [23]. Because the working conditions at the fire houses were strictly regulated and controlled, the individual fire fighter's expectation of privacy was diminished. Accordingly, the locker searches did not infringe on a valid expectation of privacy." The court dismissed the plaintiffs' claim they had no knowledge of the regulation. The Court acknowledged that the fact that even though they may not have been aware of the

regulation, they were "charged with constructive knowledge of the rules and orders . . ." [23, at 974]. In assessing the reasonableness of the search, the Court held that the search was lawful and that "[t]he substantial interest of the CFD, on behalf of the public . . . in assuring that all fire fighters are able to perform their jobs safely and effectively greatly outweighs the fire fighters' expectation of privacy in their station house wall lockers" [23, at 976].

In summary, an employee has a reasonable expectation of privacy in their locker. Some factors which help to establish that there is a reasonable expectation of privacy are the employee has exclusive possession or control of the locker; the employee has the only key or combination; and the employer does not have a locker search policy. If the employer wants to be able to search the employees' lockers, there should be a policy to inform the employees the lockers could be searched at any time.

CONCLUSION

The courts are gradually cutting away employees' 4th Amendment rights. As a private employer, it is important to notify all employees that the desks, lockers and other company issued property are subject to search at any time and for any reason or no reason at all. The courts also have allowed private employers much discretion in the use of urine testing, but some protection may be afforded employees through state legislation. (Please see discussion of this topic by Kovatch in this volume.)

However, public employers are controlled by the Constitution. As the questions arise as to the reasonableness of the searches conducted by the employer, the courts are finding the government's interests to be more compelling than the privacy interests of the employees. This is quite disturbing because the U.S. Supreme Court clearly expressed concern that the government must have a compelling reason and not an arbitrary or generalized interest reason.

Of additional concern is when the employer, private or public, conducts a search and uses the information found in the search for a subsequent criminal prosecution. This is important because when an employer conducts a search it should be out of work related concerns, not to seek out criminal activity. If an employer believes criminal activity is afoot, then the proper authorities should be contacted, especially if the employer is the government. The employer's job is to maintain efficient operations of their companies, not to deputize themselves as crime fighters.

The best advice for employees is to not take anything into the work place that they are not willing to have the employer see. Even if the search is found to be unlawful, thereby violating the 4th Amendment, the chances are good that the employee will be without a job.

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ENDNOTES

1. *Warden, Maryland Penitentiary v. Hayden,* 387 U.S. 294, 304 (1967).
2. *U.S. v. Williams,* 827 F.Supp. 641, 645 (D. Org. 1993).
3. 419 U.S. 345, at 351 (1974).
4. In *Burton v. Wilmington Parking Authority,* 365 U.S. 715 (1961), the Court found sufficient nexus where a restaurant, accused of racial discrimination, leased parking space from the state.
5. 489 U.S. 602.
6. 838 F.Supp. 289, 8 IER 1565 (N.D. Tex. 1993).
7. *Craft v. Pace of South Holland,* 803 F.Supp. 1349 (N.D. Ill. 1992).
8. *Haerr v. U.S.,* 240 F.2d 533, 535 (5th Cir. 1957).
9. 110 F.3d 174 (1st Cir. 1997).
10. *U.S. v. Jacobsen,* 466 U.S. 109, 113 (1984).
11. *Lesher v. Reed,* 12 F.3d 148 (8th Cir. 1994).
12. 4 IER 1579 (1st Cir. 1989).
13. 5 IER 1377, 1380 (N.D. Ga. 1990) (emphasis in the original).
14. 776 F.Supp. 1246 (N.D.Ill. 1991).
15. 489 U.S. 656.
16. 754 F.Supp. 1409 (N.D. Cal. 1990).
17. 888 F.2d 1189 (7th Cir. 1989).
18. 480 U.S. 709.
19. 637 So.2d 109 (1994).
20. *Thompson v. Johnson County Community College,* 930 F.Supp. 501 (D. Kan. 1996) (*affirmed* 108 F.3d 1388).
21. 856 P.2d 1265 (Hawaii 1993).
22. 868 S.W.2d 363 (Tex. App. 1993). Petition for discretionary review denied.
23. 717 F.Supp. 1314 (N.D. Ill. 1989), 4 IER 970.

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