Privacy and Governmental Workplace Monitoring

Caution! Emerging and Evolving Doctrine Ahead

by Daniel D. Crean

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A recent Internet search using the key words "workplace privacy" took only .35 seconds and returned 3,180,000 hits. Of course, not all of these hits were useful or relevant, and many were duplications. However, one might well ask how many hits would have been returned if that inquiry had been made just 20 years ago. Local government employers need to understand the limits on workplace monitoring established by common law rights of privacy and constitutional and statutory protections for municipal employee privacy.

The Evolution of Privacy Protection

> *An American has no sense of privacy. He does not know what it means. There is no such thing in this country.*
>
> — George Bernard Shaw (1933)[1]

Before examining workplace privacy, a brief review of the development of the law of privacy is helpful. Notwithstanding George Bernard Shaw's notions about American concepts of privacy in the early twentieth century, the concept of individual rights of privacy has had a part in our legal traditions and foundations. However, individual privacy's early formulations were premised on concepts such as protection of property rights, rather than the right to be "left alone" (premised upon a separate notion of "inviolate personality").[2] Judicial recognition of individual privacy as a separate and distinct individual right was slow in coming.[3] After the Georgia Supreme Court recognized the right of privacy,[4] the majority of jurisdictions in this country eventually followed suit, usually without benefit of statutory or constitutional enactments enunciating the right,[5] and often premised upon the *Restatement of Torts* formulation of invasion of privacy:

(1) Intrusion upon an individual's physical and mental solitude or seclusion;
(2) Public disclosure of private facts;
(3) Publicity which places an individual in a false light in the public eye;
(4) Appropriation, for another's benefit or advantage, of an individual's name or likeness.[6]

These four elements, encompassed within the common law right to be protected from an invasion of privacy, have traditionally constituted the notion of a right to privacy. However, Justice Brandeis may have best summarized the notion of individual privacy as a constitutional protection as "the right to be let alone — the most comprehensive of rights and the right most valued by civilized men."[7]

Extension of Individual Privacy into the Workplace

While individual privacy became ingrained in common law jurisprudence during the twentieth century, its extension to the workplace, and public employment in particular, has been, and remains, an evolving development.[8] While workplace privacy protections may not be so widespread as to be commonplace, some protection of employee privacy does exist under common law rights of privacy, at least where an employee may assert a reasonable expectation of privacy.[9]

As might be expected, the common law privacy elements most at issue in the workplace are those pertaining to intrusion on physical and mental solitude and public disclosure of private facts, though false light depiction can certainly arise, as illustrated by cases requiring an opportunity for a name — or reputation-clearing hearing.[10] In addition to protection of privacy arising through common law protection, a number of states and the federal government have enacted statutory protections for employee privacy in some form or another (e.g., protection for employee records, and regulation or limitation of electronic surveillance or monitoring).[11] In some cases, workplace protection may not be the main focus of a statute, but such protection may result from the application of statutory privacy protection in other contexts.[12] The Americans with Disabilities Act[13] exemplifies a form of protective labor legislation which has a "spillover" effect into employee privacy, as employers struggle to provide "reasonable accommodation" while protecting the confidentiality of employee medical information. Most recently, the privacy rule adopted under the Health Insurance Portability and Accountability Act (HIPAA) potentially restricts an employer's use and disclosure of protected health information about employees—not because of the employment relationship, but where the employer may be a "covered entity" or "business associate" under the HIPAA privacy rule.[14]

Public employment workplace privacy is also subject to additional protection merely because the employer is the government. Because state and federal constitutions generally protect civil rights and freedoms from interference by government, government employees have additional protections beyond those available to private employees.[15] These additional rights include constitutional rights of privacy, either express or implied, and protections from unreasonable searches and seizures provided by, for example, the Fourth Amendment to the U.S. Constitution.[16] In cases where employment can equate to state action, these constitutional considerations will come into play.

Thus, from somewhat humble beginnings, privacy has assumed a primary role in American life today with concerns about medical records, identity theft, "do not call" lists, and email spam, just to name a few. Those concerns are reflected in today's workplace, and particularly, in the municipal workplace.

Areas of Concern

> *The makers of our Constitution…conferred, as against the government, the right to be let alone—the most comprehensive of rights and the right most valued by civilized men.*
>
> —Justice Louis Brandeis[17]

Though by no means the only concerns, employee monitoring, workplace and personal searches, and employee selection procedures exemplify issues encountered when employee privacy meets employer control of the workplace.

Telephone Monitoring. Justice Brandeis' eloquent dissent in *Olmstead*[18] stated:

> The evil incident to invasion of the privacy of the telephone is far greater than that involved in tampering with the mails. Whenever a telephone line is tapped, the privacy of the persons at both ends of the line is invaded, and all conversations between them upon any subject,…may be overheard. Moreover, the tapping of one man's telephone line involves the tapping of the telephone of every other person whom he may call, or who may call him. As a means of espionage,…general warrants are but puny instruments of tyranny and oppression when compared with wire tapping.[19]

The protections afforded to privacy of telecommunications are carried forward in modern wiretapping laws such as the one in New Hampshire, which protects, from interception, an oral communication "by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation."[20] Therefore, in states where an individual's telecommunication rights are protected on the basis of expectation of privacy, and where there exists no statutory exception for workplace monitoring, employers may justify legitimate monitoring of employee telephone usage by promulgating a clear policy reserving the right to monitor such usage and stating that employees do not have an expectation of privacy in usage of the employer's telephone system. Of course, implementation of the policy should pass a reasonable use test.[21]

In addition to state statutes, courts have established workplace privacy protection by holding that employer telephone monitoring may constitute a tortious invasion of privacy.[22] The Privacy Rights Clearinghouse asserts that, in the absence of specific state prohibitions or regulations, workplace telephonic monitoring is permissible, particularly if the employer has notified employees of monitoring procedures.[23] If personal calls are permitted in the workplace, an employer should cease monitoring a call once its personal nature has been ascertained.[24] However, an employee who makes personal calls on business phones not designated for personal use makes those calls at the risk of relatively unrestrained monitoring.

Computer Monitoring. Although computers are now widely used in workplaces, few, if any, states have enacted statutes governing employer monitoring of employee computers and computer usage. However, some state wiretapping laws are potentially broad enough to encompass electronic communication by computer, while the federal statute known as the Electronic Communications Protection Act (ECPA)[25] may also come into play. ECPA's precise scope and effect remain undetermined, as it was enacted prior to widespread employee use of e-mail. However, employer monitoring is not expressly exempted. An employer wishing to retain the authority to monitor employee e-mail should use exceptions such as consensual monitoring, monitoring by the service provider, and monitoring done in the ordinary course of business. To do so, an employer should adopt computer use policies defining computer system ownership (both hardware and software), employee usage as permissive only and not by right, and employee usage as constituting agreement to monitoring, so that there is no expectation of privacy.[26] As with all personnel policies, employers should retain documentary evidence that each employee has received and acknowledged the policy.

Employee, Personal Effects and Workplace Searches. Limitations on searches of an employee's body, personal effects, or workplace arise at least in part due to local government's status as an arm of the state and the protections against unreasonable searches and seizures contained in state and federal constitutions. Because of these express constitutional limits, a government employer is less likely to prevail in a physical search based solely on a policy statement minimizing expectations of privacy than would be the case in computer searches. While policy statements and practices consistent with such policies are not to be ignored, these physical searches may be subject to more stringent review.[27] Accordingly, if doubt exists as to whether a search is reasonable, employers should be advised to seek administrative warrants or some other judicially approved means of conducting an appropriate search.

Employee Selection and Privacy. An in-depth examination of privacy issues which may arise in employee hiring practices is beyond the scope of this article. Testing, physical examinations, background checks, and other types of selection tools each present their own set of privacy concerns, including, for example, the protections provided by restrictions on the use of credit reports.[28]

Looking Ahead

A crystal ball is not needed to predict that employee privacy protections, whether created judicially, legislatively, or administratively, will continue to grow and evolve as to both the nature of protections for existing privacy rights, and in the types of privacy concerns which receive protection. Two examples sufficiently demonstrate this development.

Privacy in Trash. Though raised in the context of a search associated with law enforcement, the New Hampshire Supreme Court recently found an expectation of privacy in trash that had been placed out at the curb for collection.[29] The decision is based on Part I, Article 19 of the New Hampshire Constitution, but the court analyzed decisions from a number of jurisdictions (including the expectation of privacy analysis under the Fourth Amendment first articulated in *Katz v. United States*[30]) before concluding:

> Clues to people's most private traits and affairs can be found in their garbage. Almost every human activity ultimately manifests itself in waste products and any individual may understandably wish to maintain the confidentiality of hisrefuse.…Personal letters, bills, receipts, prescription bottles and similar items that are regularly disposed of in household trash disclose information about the resident that few people would want to be made public.[31]

The New Hampshire Supreme Court acknowledged that the U. S. Supreme Court has held, to the contrary, that "society would not accept as reasonable [a] claim to an expectation of privacy in trash left for collection in an area accessible to the public,"[32] but, nonetheless, construed the State Constitution to provide greater protection. Can this reasoning extend to privacy in the local government workplace? This expansion of protection with regard to law enforcement searches is premised upon constitutional rights, so there may be reason to believe that government will not be exempt from similarly protecting those rights in a non-criminal, public workplace context.

Interplay of Free Speech, Political Correctness and Individual Privacy.

Contests have already been waged on how far the frontier of workplace privacy may extend when privacy interests conflict with policies restricting individual behavior, like those to eliminate sexually hostile environments. As women have appeared in formerly male workplaces—fire stations, for example—sexual harassment policies have been adopted to prohibit activities such as the display of objectionable pictures and the reading of sexually-oriented magazines.

Such policies may create friction by their interplay with what employees perceive as free speech.[33] Federal courts have reached seemingly contradictory results in determining whether these policies unduly restricted individual freedom and privacy in the workplace.[34] The U.S. Court of Appeals for the Fifth Circuit summarized its concern by stating:

> [w]here pure expression is involved, Title VII steers into the territory of the First Amendment. It is no use to deny or minimize this problem because, when Title VII is applied to sexual harassment claims founded solely on verbal insults, pictorial, or literary matter, the statute imposes content-based, viewpoint-discriminatory restrictions on speech.[35]

Continued promulgation and expansion of policies imposing standards of workplace conduct and speech will generate similar controversies and litigation.

Practice Pointers

Is there anything which local government may do to address and accommodate the evolving concept of protected privacy in the workplace, while maintaining control and direction and while achieving other goals, such as freedom from sexual harassment? The following suggestions identify areas where policies might be adopted to clarify employee standards and employer expectations of conduct:

- Review all existing personnel policies and, even more importantly, personnel practices, to identify privacy concerns.
- Establish telephone use policies to define organizational policy on personal telephone use and to identify and clarify monitoring authority and practices.
- Adopt a computer use policy which (1) defines municipal ownership and control of hardware and software, (2) establishes monitoring authority and practices, and (3) regulates and controls personal use, including downloading and Internet use.
- Provide policy guidance and training in state and federal privacy requirements and standards for employees involved in personnel recruitment and hiring.

Conclusion

In summary, municipal law practitioners should encourage their clients to become aware of workplace privacy by observation of current practices and expectations. Based on those observations, employers may then develop and implement guidelines that accommodate reasonable expectations of privacy while maintaining appropriate efficiency and control of the workplace.

Notes

1. Bartlett's Familiar Quotations 571 (16th Ed. 1992).
2. Warren and Brandeis, *The Right to Privacy,* 4 Harv. L. Rev. 193 (1890), discusses the early roots of privacy doctrine while suggesting that individual privacy be accorded its own status independent of property, contractual, or other protected individual rights.
3. *See, e.g.,* Robertson v. Rochester Folding Box Co., 171 N.Y. 538, 556 (N.Y. Sup. Ct.

1902) (where the court decided, early in the last century, that the right of privacy did not have “an abiding place in our jurisprudence”).
4. Pavesich v. New England Life Ins. Co., 122 Ga. 190 (Ga. 1905).
5. See Hamberger v. Eastman, 206 A.2d 239 (N.H. 1964).
6. RESTATEMENT (SECOND) TORTS, § 652.
7. Olmstead v. U.S., 277 U.S. 438 (1928) (Brandeis, J. dissenting).
8. It readily appears that most judicial public employment privacy decisions have been issued within the last thirty years or so, and legislative protections are also of that vintage.
9. See the landmark case of O’Connor v. Ortega, 480 U.S. 709 (1987), which extended Fourth Amendment privacy protection to the public workplace and allowed for a reasonable expectation of privacy in the governmental workplace. However, that expectation of privacy is limited, as governmental employers may search or monitor to promote efficient operation and by adoption and implementation of policies and practices. The First Circuit upheld a verdict for invasion of privacy even where wrongful discharge was not found, based on an employer’s highly offensive investigative techniques. O’Brien v. Papa Gino’s of America, Inc., 780 F.2d 1067 (1st Cir. 1986).
10. *See e.g.,* Board of Regents of State Colleges v. Roth, 408 U.S. 564 (1972).
11. Eavesdropping and wiretapping are two common subjects: MICH. STAT. ANN § 28.807(1)(2) (1967); CONN. GEN. STAT. § 31- 48d (2003) (notice of electronic monitoring); and California Public Utilities Commission General Order 107-B. *See also* the Electronic Communications Protection Act, 18 U.S.C. § 2511, *et seq.* (2003).
12. E.g., N.H. REV. STAT. ANN. § 644:9 (2003 Supp.) (New Hampshire’s Violation of Privacy statute).
13. 42 U.S.C. § 12101, *et seq.* (2003).
14. 45 C.F.R. Part 160, 164 (2004); Health Insurance Portability and Accountability Act of 1996, Pub. L. No.104-191 (1996).
15. In much the same way, employee free speech in the public sector is protected by the First Amendment where private employees are not generally protected from employer regulation and control.
16. O’Connor v. Ortega, 480 U.S. 709 (1987).
17. Olmstead v. United States, 277 U.S. 438, 478 (1928).
18. *Id.* at 478 (Brandeis dissent).
19. *Id.* at 475-76.
20. N.H. REV. STAT. ANN. § 570-A:1, II (2002).
21. Thus, even if monitoring can be defended generally by a properly promulgated policy, monitoring conducted in such a way as to be “highly offensive to a reasonable person” may constitute an unreasonable invasion of privacy. O’Brien v. Papa Gino’s of Am., Inc., 780 F.2d 1067 (1st Cir. 1986); Rossi v. Town of Pelham, 35 F. Supp.2d 58 (D.N.H. 1997) (police officer being detailed to monitor town clerk on last day in office constituted an unreasonable search of what had been maintained as a private office).
22. Though theoretically possible, employee suits appear to have had little success, though exceptions do occur, e.g., *O’Brien,* 780 F.2d 1067 (1st Cir. 1986).
23. Privacy Rights Clearinghouse, Fact Sheet 7, *Workplace Privacy,* available at www.privacyrights.org (last accessed on Feb. 12, 2004)
24. Watkins v. L.M. Berry & Co., 704 F.2d 577, 583 (11th Cir. 1983).
25. See *supra* note 11.
26. A policy, of course, may and likely should, state the nature and extent of personal use which is allowed, but it should continue to state that even these personal uses are subject to monitoring.
27. The distinguishing characteristic is the search of an employer-controlled workplace or employer facility versus the personal effects of an individual employee, *see, e.g.,* Rossi v. Town of Pelham, 35 F. Supp.2d 58 (D.N.H. 1997).
28. Fair Credit Reporting Act, 15 U.S.C. § 1681, *et seq.* (2003).
29. State v. Goss, 834 A.2d 316 (N.H. 2003).
30. 389 U.S. 347 (1967).
31. *Goss,* 834 A. 2d at 319.
32. California v. Greenwood, 486 U.S. 35, 41 (1988).
33. R.A.V. v. City of St. Paul, Minn., 505 U.S. 377 (1992) invalidated, on First Amendment grounds, a city ordinance regulating conduct which aroused anger, alarm or resentment in others based on race, color, creed, religion or gender. In *dicta,* the Court noted that sexually discriminatory speech may be regulated consistent with the First Amendment based on secondary effects analysis. However, four justices dissented, noting that recent First Amendment decisions could lead to Title VII, as applied to sexually discriminatory speech, being held invalid for reaching beyond any incidental effect on speech.

34. *See, e.g.,* Johnson v. County of Los Angeles Fire Dept., 865 F. Supp. 1430 (C.D. Cal.1994); Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486 (M.D. Fla. 1991); Berman v. Washington Times Corp., NO. CIV.A. 92-2738 (WBB), 1994 WL 750274, 1994 U.S. Dist. LEXIS 16476 (D.D.C. Sept. 23, 1994).
35. DeAngelis v. El Paso Mun. Police Officers Ass'n, 51 F.3d 591 (5th Cir. 1995).

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