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EMPLOYEE PRIVACY IN THE WORKPLACE: EMERGING ISSUES

Overview

It is a basic principle of education law that individuals who accept employment in public school systems do not automatically relinquish their rights and protections as citizens. Pickering v Board of Education (1968) To paraphrase the United States Supreme Court in Tinker (1969), students and teachers do not “shed their rights at the schoolhouse gate.” However, one emerging area of public school law raising complex constitutional and legal issues involves employee *privacy* in the workplace.

Privacy: What Does It Mean? In our nation’s system of jurisprudence *privacy* is a bedrock constitutional concept. Griswold v Connecticut (1965) Ironically, however, the word itself is not specifically contained in our constitution. (Vacca and Bosher, 2003)

Black’s defines privacy as “[t]he right to personal autonomy....The right of a person and a person’s property to be free from unwarranted public scrutiny or exposure.” (Black’s Law Dictionary, 1999) Simply stated, *privacy* creates an *expectation* that an individual’s person, his/her intimate affairs, and his/her property will be free from unwarranted interference and intrusion by others, including government. In other words, individuals expect to be “let alone.”(Vacca and Bosher, 2003)

Employee Privacy Expectations. As a general rule, public school system employees do not relinquish their personal privacy expectations when they enter their workplace. Employees can expect that their private lives (*i.e.*, their “personal business outside the workplace”) will remain that way while on the job. Ponton v Newport News Board of Education (1985) However, because school administrators, teachers, and other employees work a special environment where direct contact with children is a central function, courts have, at the same time, consistently opined that the rights and protections of school employees are conditioned and in some ways narrowed by on-the-job expectations. As one court stated more than thirty-years ago, “A teacher’s fitness may not be measured ‘solely by his or her ability to perform the teaching function and ignore the fact that the teacher’s presence in the classroom might, nevertheless, pose a danger of harm to the students for a reason not related to academic proficiency.’” Gish v Board of Education (1976)

In Virginia, for example, teacher competence is not limited to classroom performance only. By law, local school boards have wide discretion in deciding whether or not to continue the employment of all school system personnel, so long as each decision is based on fact and supported by reasoned analysis. (*Code of Virginia, 2003*)

In recent years courts of law have insisted that a *balance* must be struck between the *privacy expectations* of school system employees in the workplace (e.g., in their office spaces, lockers, desks, file cabinets, e-mails, personal property) and the *prerogatives of school officials* to maintain a safe and secure learning environment. (Bosher, Kaminski, and Vacca, 2004) For example, the *Code of Virginia (22.1-307)* provides that no teacher shall be dismissed or placed on probation solely on the basis of a refusal to submit to a polygraph examination. As this commentary will demonstrate, however, recent court decisions tend to deviate from the traditional view and tip this *balance* in favor of school officials.

Emerging Issues

Use of Workplace Technologies. One emerging set of issues involves the impact of technology in the workplace. More specifically, a growing number of employers are monitoring their employees' use of computers and other technologies. Writing in the March (2004) *New Jersey Law Journal*, Del Duca and Kelly report the results of a recent survey conducted by the American Management Association showing that "one out of every 5 companies reported that they terminated an employee for an e-mail related infraction" At the same time, the authors state that "one out of 20 companies reported that they had been subjected to a work place lawsuit triggered by e-mail."

The authors emphasize the importance of applying appropriate state law to work place privacy issues. For example, in their jurisdiction (New Jersey), while employees have a right to privacy in the workplace, employers have a valid interest in monitoring both e-mail and internet use. It therefore follows that an employee's right to privacy is not absolute, and "...monitoring employees' use of workplace technologies can greatly reduce the risks that come with doing business in the modern electronic workplace." (Del Duca and Kelly, 2004)

Based on their research, Del Duca and Kelly recommend that employers make it clear that: (1) workplace computers and workplace e-mails are not the "private property" of employees, and (2) the employer reserves the right to "routinely inspect them." Finally, where an employer "reasonably suspects misuse" by an employee an employer has a "duty to inspect."

Christopher Borreca, an attorney with one of our nation's top education law firms, reminds public school officials and administrators that federal law also comes into play when employers monitor employee e-mail correspondence, or control computer usage. For example, he cites the *Electronic Communications Privacy Act* (18 U.S.C. 2510, *et seq.*) which "criminalizes the interception of electronic messages, such as e-mail, while in transit...." However, he does not see the ECPA as "a significant obstacle to school district monitoring of employee e-mail communications." Similarly, while the *Communications Decency Act* (47 U.S.C. 230 [b] [4]) also applies, it does not preclude "blocking and filtering software to restrict a student's and employee's access to inappropriate on-line material at school." (Borreca, 2004)

Employee Drug Testing. A second area of employment law producing controversy

involves public school systems establishing and implementing employee drug testing (screening) policies and procedures. As a general rule, persons applying for or who are already employed as administrators, teachers, and other staff in public school systems may be subject to random, blanket or suspicionless drug or alcohol tests. As Alexander and Alexander opine, recent courts have permitted testing public school employees for drugs and alcohol “without a showing of individualized suspicion.” (Alexander and Alexander, 2004)

In some school positions drug testing is required by statute. For example, the Omnibus Transportation Employee Testing Act of 1991 requires bus drivers and other employees to be subject to pre-employment, random, post-accident, and reasonable suspicion drug tests. (49 U.S.C. 2717)

Last spring, an article in the Baltimore Sun offered an excellent example of a newly revised public school system employee drug/alcohol-testing program. In what the newspaper described as “one of the toughest employee drug testing programs in the state,” the Carroll County, Maryland, public school system announced that it will immediately test all teachers and other staff “where reasonable suspicion exists of substance (drug/alcohol) abuse.” If a teacher or other staff member tests positively he/she will be prohibited from returning to work until evidence is shown that a treatment program has been successfully completed. And, the employee must agree to six months of unannounced drug tests over a twelve months period. (Baltimore Sun, March 7, 2004)

The Carroll County program (drafted with the help of the employees union) is not intended as punitive. School officials characterize the policy as providing: (1) a layer of protection for staff and students, and (2) help for staff members having trouble or difficulty with drugs or alcohol. (Baltimore Sun, March 7, 2004)

Case Law

At this point in time, few court decisions related to public school employee privacy involve issues of workplace technology. As the examples below demonstrate, most cases involve issues of employer searches of employee offices, desks, and file cabinets, and policies calling for drug testing of employees.

O’Connor v Ortega (1987) involved a doctor employed in a state hospital where he managed the psychiatric residency program. Concerned about possible improprieties in the residency program, officials placed the doctor on paid administrative leave while an investigation was conducted. As a part of the investigation hospital officials on several occasions searched the doctor’s office. They seized his personal property as well as property belonging to the state as evidence of wrongdoing and terminated the doctor’s employment. Subsequently he filed suit in a federal district court claiming Fourth Amendment violations. In his opinion, he had reasonable expectations of privacy in his office (an office that he had occupied for 17 years).

Ultimately the United States Supreme Court upheld the warrantless searches by hospital officials. In an opinion written by Justice O’Connor, the Court made it clear that public employees have a reasonable expectation of privacy in their desks and file cabinets, but where and employer’s search of employees’ offices, desks, and file cabinets are: (1) pursuant to work-related reasons, (2) in search of work-related misconduct, (3) to retrieve work-related materials, and (4) used in administrative proceedings they are permissible.

In Knox County Education Association v Knox County Board of Education (1998) a school board policy required all individuals applying for or seeking transfer or promotion to safety sensitive positions to submit to a suspicionless drug test. Under the policy all administrative and teaching positions, teacher aides, substitute teachers, bus drivers were designated as safety sensitive. In upholding the policy the court balanced the school

board's interests against employee privacy interests and held that employee privacy interests are diminished in an environment where school safety and security are of paramount importance. In the court's view, teachers, for example, are on the "front line of school safety and security."

Aubrey v School Board (1998) involved a custodian's challenge to a school board policy intended to eliminate drug use in the workplace. According to the school board, the policy and procedures were "designed to prevent drug users from obtaining a safety sensitive position and to aid in detecting those employees in such positions who use drugs so that they may undergo treatment as a prerequisite to keeping their jobs." In ruling for the school board the court applied a "special needs" analysis and said that school officials as "guardians" must protect children from other children and adults who may cause harm.

Public employer control of work place computer use by employees was taken to court in a Virginia case, Urofsky v Gilmore (2000). The United States Court of Appeals for the Fourth Circuit heard a challenge to a state law that forbade state employees from accessing "sexually explicit" materials on state owned computers. The college and university teaching faculty plaintiffs argued that the law was too broad and unreasonably limited their research and academic freedom. In upholding the state statute the Court held that since the computers are the property of the employer and not the employee, it is reasonable for the employer to control and limit computer use in the work place.

Crager v Board Of Education (2004) a public school board's random drug testing policy covering all principals, assistant principals, teachers, teacher aides, substitute teachers, school secretaries, and bus drivers. Employees covered by the policy were subject to random drug tests regardless of whether or not suspicion of drug use existed. An elementary school teacher challenged the policy in a federal district court on Fourth Amendment grounds. The school board's position was that the drug-testing requirement was established to promote school safety and not to punish employees.

Relying on the Supreme Court's rationale in Vernonia v Acton (1995), the district court utilized a "special needs analysis" to balance the privacy expectations of employees with the prerogatives of a public school board to maintain school safety. In the court's view, special needs arise in safety sensitive positions where an employee's job involves "the discharge of duties fraught with risks of injury to others...." The court stressed the need to: (1) utilize valid and reliable drug tests, (2) protect access to test results and the chain of custody of all test samples, and (3) maintain confidentiality.

Shaul v Cherry Valley-Springfield School District (2004) involved the suspension with pay (pending an investigation) of a high school teacher who had been accused of inappropriate conduct and sexual harassment of female students. As a part of his leaving his work place the employee surrendered his keys and other school system property. However, even though he had been asked to remove personal items he failed to do so. Subsequently, school administrators collected the personal items and placed them in boxes for storage. They had to break into a classroom cabinet to secure some of the personal items.

The teacher filed suit in federal district court alleging that his constitutional right to privacy had been violated. More specifically he claimed that his personal items were seized in an illegal search of his classroom. The trial court disagreed and the United States Court of Appeals for the Second Circuit affirmed. In the appellate court's view the teacher did not have a privacy expectation of the personal items kept in the classroom cabinet because (1) he had surrendered his keys, (2) he had been suspended from his job at the school, and (3) he did not take advantage of the opportunity to remove his personal items from the classroom. Moreover, allegations of sexual

improprieties with students gave school officials sufficient reasonable cause to break into the classroom cabinet in search of workplace misconduct.

Implications for Policy

As the above case law examples demonstrate, the implications for local school system policy are several. What follow are some suggestions to consider as efforts are made to balance the prerogative of school officials to maintain a safe and secure learning environment in every school with the privacy expectations of all employees. School boards must make it clear that:

- The authority to make all employment policies legally vests with the school board.
- All employees will be fully and regularly informed of each school board policy governing employee conduct in the workplace, including expectations for employee work performance, and will be fully informed of permitted and expected use of all school system owned property and equipment.
- All employees are legally bound by and are required to comply with school board policies.
- All school board policies are intended to be in compliance with appropriate federal and state law.
- All employment policies are intended to foster a safe, disruption-free, and positive learning environment in every school.
- All school system office spaces, storage cabinets, desks, school system owned computers, telephones, other technologies, mail service, and school equipment are to be used for work-related purposes only.
- School officials reserve the right to regularly monitor, examine, and otherwise inspect employee use of school system office spaces, storage cabinets, desks, school system owned computers, telephones, other technologies, mail service, and school equipment.
- School officials will take immediate steps to thoroughly investigate all allegations of employee work place misconduct and wrongdoing.
- Immediate disciplinary action will be taken in all cases where employee work place misconduct and wrongdoing are established.
- Confidentiality and security of all information relevant to each investigation and resulting administrative action taken will be strictly enforced

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Note: The views expressed in this commentary are those of the author.