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## **Ninth Circuit Court of Appeals Affirms That Employers May Consent to Government Search and Seizure of Employee's Private Office and Workplace Computer**

### **Breaking Developments In Labor and Employment Law 2/9/07**

In a unanimous decision, a three judge panel of the United States Court of Appeals for the Ninth Circuit affirmed that an employer has the ability to give valid third party consent for a government search of an employee's private office and workplace computer located on the company premises.

In *United States v. Ziegler*, the defendant, Brian Ziegler, was convicted by a lower court of various criminal charges arising from his use of his workplace computer to view and download child pornography. Ziegler's Internet activity aroused the suspicion of his employer's Internet service provider, who discovered that he had been downloading child pornography. The Internet service provider informed the FBI. During the investigation, Ziegler's employer turned over to the FBI the hard drive from the company-owned computer used exclusively by Ziegler. Ziegler was eventually arrested, charged and convicted. Following his conviction, Ziegler appealed the trial court's denial of his motion to suppress the evidence from "his" computer's hard drive, claiming that the search and seizure violated the Fourth Amendment to the United States Constitution.

At issue on Ziegler's appeal were (1) whether an employee has an objectively reasonable expectation of privacy in his workplace office, and computer sufficient to implicate the constitutional protections of the Fourth Amendment; and (2) if such expectation of privacy from governmental intrusion exists, whether the employer can give "valid consent" to a government search of an employee's office and workplace computer.

The court held that employees can retain an expectation of privacy from government intrusion in their workplace offices. In Ziegler's case, the court found his expectation of privacy in his office was reasonable because he kept his office locked and did not share it with coworkers. The court therefore concluded that any governmental search of Ziegler's office space and the items located therein (including Ziegler's workplace computer) had to comply with the Fourth Amendment. The court then relied on a longstanding exception to the Fourth Amendment's prohibition against warrantless searches, and held that the searches of his office and computer were reasonable because the government had obtained a "valid consent" for the searches from his employer. A third party's consent to search premises or property may be a "valid consent," where the third

party possesses "common authority over or other sufficient relationship to the premises or effects sought to be inspected."

The Ninth Circuit ultimately concluded that Ziegler's employer exercised common authority over "his" office and workplace computer, such that it could validly consent to a governmental search under the Fourth Amendment. In reaching this conclusion, the court placed importance on three factors:

- Although the computer was subject to individual log-in, the employer's information technology department employees had complete administrative access to all computers used by employees.
- The employer had installed a firewall, which monitored Internet traffic to and from the company. The monitoring was routine, and the employer's information technology department reviewed the log created by the firewall on a regular basis.
- Upon hiring, the employer apprised its employees of the company's monitoring efforts through training and an employment manual. Employees were told that the computers were company-owned and not to be used for activities of a personal nature.

Based on these factors, the court concluded: "In this context, Ziegler could not reasonably have expected that the computer was his personal property, free from any type of control by his employer." The court further noted that Ziegler's placing of "personal items" on the computer did not change his employer's ability to give valid consent to a government search of his private office or the hard drive of his workplace computer.

### **What *Ziegler* Means for Employers**

*Ziegler* stands for the proposition that although employees retain at least some expectation of privacy from the government when using company-owned offices and computers, employers retain their authority over office premises and company-owned computer equipment. Employers should ensure that their computer use policies are up-to-date, and that employees are given ample notice of the company's right to monitor all activities on company-owned computer systems.

Employers should be aware that Ziegler's appeal arose under the Fourth Amendment to the United States Constitution and did not address analogous state laws. For example, Article I, Section 7, of the Washington State Constitution provides that "No person shall be disturbed in his private affairs, or his home invaded, without authority of law." As with the Fourth Amendment, Article I, Section 7, is a restraint on government and not a restraint on private individuals. However, there is no caselaw under Article I, Section 7, which Washington courts have interpreted to provide broader protection than the Fourth Amendment, that addresses the precise issue of whether an employer may provide valid consent for a government search of an employee's private office or workplace computer.

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