



There Is No Expectation Of Privacy In Work Emails



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In *Walker v. Coffey*, ___ F.3d ___, 2018 WL 4496344 (3d Cir. Sept. 20, 2018), the United States Court of Appeals for the Third Circuit affirmed the United States District Court for the Eastern District of Pennsylvania's dismissal of Plaintiff Carol Lee Walker's claim under 42 U.S.C. § 1983 that a prosecutor and a special agent employed by the Pennsylvania Office of the Attorney General ("OAG") performed an unreasonable search in violation of her Fourth Amendment rights when they used an invalid subpoena to induce Walker's employer, Pennsylvania State University, to produce her work emails. In affirming the District Court's finding that the Defendants were entitled to protection from Walker's suit based upon the doctrine of qualified immunity, the Third Circuit explained that Walker did not have a clearly established right to privacy in the content of her work emails. The relevant facts are as follows.

This case stems from a criminal prosecution brought against Walker by the OAG. In July 2015, the OAG filed criminal charges against Walker in state court, which included numerous counts of forgery and various computer crime offenses. These charges were joined with prior charges that had been filed against Walker's husband, Ray Allen Walker, Jr., and his trucking company. Defendant/Appellee Brian Coffey, a senior deputy attorney general, was the prosecutor assigned to the case, and Defendant/Appellee Paul Zimmerer, an OAG special agent, served as the lead investigator. Following a preliminary hearing in August 2015, some of the charges against Walker were dismissed, but four counts of conspiracy to commit forgery remained pending.

In October 2015, before her trial had been scheduled, Coffey and Zimmerer sought to obtain Walker's work emails from her employer, Penn State, as part of their investigation. Coffey and Zimmerer initially asked Penn State to produce Walker's work emails voluntarily, but Penn State officials requested formal documentation saying: "We just need something formal, a subpoena." Coffey and Zimmerer then obtained a blank subpoena form from the Centre County Court of Common Pleas, which they filled out in part. The subpoena included the case caption, was addressed to "John Corro, PSU General Counsel & Senior Security/Systems Analyst," and requested production of "any & all emails/computer files/documents/attachments to or from Carol Lee Walker at her email address, to or from the following email addresses:" The seven listed email addresses appeared to belong either to Walker's husband or to his business. The subpoena was blank as to the date, time, and place of production and the party on behalf of whom testimony was required. As such, Defendants conceded that the subpoena was, on its face, incomplete and unenforceable. On October 21, 2015, Zimmerer presented the unenforceable subpoena to Katherine Allen, Assistant General Counsel at Penn State. Under Allen's direction, Penn State employees searched for the requested emails and turned them over to Zimmerer. At some point after Penn State produced the emails, the remaining criminal charges against Walker were dismissed with prejudice.

Thereafter, Walker filed a civil rights suit under 42 U.S.C. § 1983 against Zimmerer and Coffey, alleging that their use of an invalid subpoena to obtain Walker's work emails violated her right to be free from an unreasonable search under the Fourth Amendment of the United States Constitution. Zimmerer and Coffey both moved to dismiss, arguing (in part) that they were entitled to qualified immunity because Walker did not

have a reasonable expectation of privacy in her work emails or, if she did, that right was not clearly established at the relevant time.

The District Court granted Zimmerer and Coffey's motion to dismiss, agreeing that they were entitled to qualified immunity. The District Court concluded that Walker could not show a clearly established right to privacy in the content of her work emails. Accordingly, Walker filed a timely notice of appeal with the Third Circuit challenging the District Court's dismissal of her complaint on qualified immunity grounds.

The Third Circuit began its consideration of Walker's appeal by noting that qualified immunity shields government officials from civil damages liability unless the official violated a statutory or constitutional right that was clearly established at the time of the challenged conduct. Qualified immunity is a strong shield and protects all but the plainly incompetent or those who knowingly violate the law. To resolve a claim of qualified immunity, federal courts must engage in a two-pronged inquiry: (1) whether the plaintiff sufficiently alleged the violation of a constitutional right and (2) whether the right was "clearly established" at the time of the official's conduct.

When considering whether a right is "clearly established" for purposes of qualified immunity, a federal court must, as a threshold matter, identify the scope of the right at issue. The United States Supreme Court has emphasized that, for purposes of this inquiry, a court must define or identify the right at a particularized level. A government official's conduct violates clearly established law when, at the time of the challenged conduct, the contours of a right are sufficiently clear that every reasonable official would have understood that what he is doing violates that right. Although the Supreme Court does not require a case directly on point, existing precedent must have placed the statutory or constitutional question beyond debate. A plaintiff must identify either controlling authority in the jurisdiction or a consensus of cases of persuasive authority.

In this case, the Third Circuit explained that, for purposes of qualified immunity, it must consider whether it was clearly established at the relevant time that the Fourth Amendment affords an employee—such as Walker—the right to have the contents of her work emails remain free from a law enforcement search absent a warrant or a valid exception to the warrant requirement. The Third Circuit concluded that no such privacy interest existed.

The Third Circuit stated that the touchstone of the Fourth Amendment is whether a person has a constitutionally protected reasonable expectation of privacy. To answer this question requires a two-part test. First, a court must consider whether an individual has manifested a subjective expectation of privacy in the object of the challenged search. Second, a court must consider whether society is willing to recognize that expectation of privacy as being reasonable. Before the District Court and on appeal, the Defendants/Appellees did not challenge Walker's subjective expectation of privacy in her work email. Therefore, the Third Circuit focused its analysis on whether Walker enjoyed an objectively reasonable expectation of privacy in the content of her work emails.

The Third Circuit proceeded to discuss several cases from the United States Supreme Court and from various circuit courts across the nation dealing with the Fourth Amendment's application to various and ever-changing technology. In the end, the Third Circuit rested its affirmance of the District Court's dismissal of Walker's case on qualified immunity grounds on the fact that Walker had failed to identify (nor could the Third Circuit find) a consensus of cases that supported her assertion of an objectively reasonable expectation of privacy in the content of her work emails.

Towards that end, the Third Circuit relied heavily upon the fact that the emails in question were Walker's work emails. The Third Circuit held that there was no dispute that the emails in question were sent or received via Walker's work email address as part of an email system controlled and operated by Penn State. Therefore, for

purposes of the Fourth Amendment, the emails were subject to the common authority of Walker's employer. Walker did not enjoy any reasonable expectation of privacy vis-à-vis Penn State, and Penn State could independently consent to a search of Walker's work emails. Upon receipt of the subpoena, Penn State exercised its independent authority to consent to a search and produced Walker's work emails. So, despite the fact that the subpoena was facially invalid, the Third Circuit determined that Penn State's Assistant General Counsel could and did act within the scope of his authority to direct a search of Walker's work emails.

Despite its holding, the Third Circuit expressed its displeasure with Appellees/Defendants' actions in this case. Specifically, the Third Circuit opined: "We emphasize that nothing in this opinion should be taken as condoning the actions of Appellees in this case. On the contrary we are dismayed by their reliance on an invalid subpoena to procure the documents that they sought. And we add a note of caution that, under slightly difference circumstances, similar actions might well lead us to a conclusion opposite from the one we reach today. But improper conduct alone does not result in a forfeiture of qualified immunity. Rather, the relevant question is whether, under the particular circumstances of this case, Appellees' conduct violated Walker's clearly established constitutional rights. Because we conclude that it did not, Appellees are entitled to qualified immunity. We will therefore affirm the District Court's dismissal of Walker's § 1983 claim." Id.