Coates' Canons Blog: Secretly Putting a GPS Tracker on Your Employee's Car: Can You Do That?

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Fred uses a county truck to go from inspection site to inspection site. The truck is for work use only. The inspections make up most of Fred's work day. His supervisor suspects that Fred is goofing off at times he should be working. To make sure, the supervisor attaches a global positioning system (GPS) tracking device to the truck. For three weeks, the GPS reports exactly where the truck is at all times—out and about during the day and parked at the county offices at night. It turns out Fred really is shirking his duties and the county starts the dismissal process. Fred resigns.

Tom works mainly in a state government office, but his job duties take him on the road sometimes. When he goes out on a work assignment, he uses his own car. Tom's supervisor suspects that Tom is misrepresenting his time away from the office. He attaches a GPS to Tom's car. For a month the GPS reports exactly where Tom's car is at all times, including weekends and several days when Tom is off on vacation. It turns out Tom also was shirking his duties—including visits to his secretary's home when they were both supposed to be working—and the state fires him.

Is it lawful for the county government employer to secretly track its employee Fred that way? Is it lawful for the state government employer to secretly track its employee Tom that way? According to two recent cases—Fred's in 2012 and Tom's in 2013—the answer is Yes and No.

Why might it be a problem at all? The courts uniformly hold when a government employer tracks an employee's whereabouts with a GPS device, it is conducting a "search" of that employee within the meaning of the Fourth Amendment to the United States Constitution, which provides, in part, that "[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizure, shall not be violated."

That is, if the government as an employer conducts a "search" of an employee, that search must be "reasonable." Did the county act reasonably when it used the GPS on Fred's truck? The court said Yes. Did the state act reasonably when it used the GPS on Tom's car? The court said No.

In the context of public employment, this constitutional protection against unreasonable searches comes up regularly in the context of drug testing (collecting urine samples for analysis is a search) and in the context of examining the contents of an employee's work computer for pornography or other illicit material. But where the law developed earliest was in connection with a more convention kind of workplace search—looking through an employee's desk drawers or file cabinets for illicit materials or evidence of wrongdoing.

In that context—looking through file cabinets—what makes a search reasonable?

Here's the first step. Did the employee have a reasonable expectation of privacy in the space that got searched? If the answer is no, then the search was reasonable, period. There are work spaces that are clearly not private—maybe lots of people use that space, or people are in and out of that file cabinet, or the employer has explicitly told employees that the space is not private and the employer might look at it any time the employer wants. In those cases, there is no expectation of privacy and a search is simply not unreasonable, not a violation of the Fourth Amendment.

But there are workplace spaces in which an employee may have a reasonable expectation of privacy. The employee is given the only set of keys to the file cabinet and told that no one else will have access. The employee brings a suit case packed for work trip into the office. The employee puts her purse in her desk drawer. In those cases, an employee has a reasonable expectation of privacy in the file cabinet, in the suit case, and in the purse. (In the drug testing context, the employee surely has a reasonable expectation of privacy in his urine. In the computer context, the employee may or may not have a reasonable expectation of privacy, depending largely on the employer's rules.)

Where the employee does have a reasonable expectation of privacy, a search, to be lawful, must be reasonable in its inception (that is, there must be a reasonable suspicion of employee misconduct to justify the search in the first place) and reasonable in its scope (that is, it must not be "excessively intrusive"). That was the ruling of the United States Supreme Court in *O'Conner v. Ortega*, 480 U.S. 709, in 1981, and it remains the central statement of the law of workplace searches today.

So what about Fred and his county-owned truck? That is an actual case from a federal district court in North Carolina (though the employee was not named Fred), *Brookshire v. Buncombe County*, 2012 WL 136899 (W.D.N.C.). The court held that there was no problem under the Fourth Amendment in putting the GPS tracker on the truck. Fred had no reasonable expectation in taking a county-owned truck out on the public roadways. Without a reasonable expectation of privacy, Fred had no grounds to complain that the search was unreasonable, either in its inception or in its scope.

Tom's case is a little different. Tom's is also an actual case, this one from the highest court in the state of New York. *Cunningham v. New York State Department of Labor*, 21 N.Y.3rd 515 (2013). The vehicle in question was his personal car. The court was of the opinion that Tom did in fact have a reasonable expectation of privacy in his car. That means, unlike Fred's case, that for the search to be constitutional, it must be reasonable in its inception and reasonable in its scope. Here, the court said, it was clearly reasonable in its inception—there was plenty of reason to suspect that Tom was falsifying his time, and that suspicion justified the search in the first place.

But, the court said, the search was not reasonable in its scope—it was "excessively intrusive." It tracked Fred on all evenings and weekends and on vacation. "Where an employer conducts a GPS search without making a reasonable effort to avoid tracking an employee outside business hours," the court said, "the search as a whole must be considered unreasonable."

A concurring opinion in Tom's case cited the "indisputably private" information that an excessive GPS search could reveal: "trips to the psychiatrist, the plastic surgeon, the abortion clinic, the AIDS treatment center, the strip club, the criminal defense attorney, the by-the-hour motel, the union meeting, the mosque, synagogue or church, the gay bar, and on and on."

From these two cases alone, it appears that secretly tagging a government-owned work vehicle with a GPS device may constitutionally less risky than taking the same step with an employee's private car.