THE ADMINISTRATIVE WARRANT: FOURTH AMENDMENT KEY TO THE WORKPLACE

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Abstract

The Fourth Amendment Requirement of a warrant applies to searches of commercial establishments by OSHA inspectors. Cases interpreting concerns about the administrative warrant needed for these show that it is easy to obtain. The probable cause and particularly describing element of the Amendment are attenuated in the commercial search area.

Introduction

The two hundredth birthday of the Constitution of the United States is a time for reflection on the precious freedoms which the document and the 1791 additions of the Bill of Rights grants. It is interesting to speculate whether the Founding Fathers and those who ratified those first ten amendments intended them to apply to business as well as to individuals. In this highly industrialized nation, it is difficult to imagine operating in the twentieth century without them. Regardless of the intentions of the drafters, cases interpreting the Bill of Rights and the Fourteenth Amendment have held that those protections do apply to business. As examples, commercial speech is entitled to First Amendment protection, and corporations are persons entitled to the due process and equal protection guarantees.

Businessmen need to keep abreast of legislative and jurisprudential changes in tax, anti-trust, and employment discrimination as well as of changes in basic contract, property, and tort law which affect them. Jurisprudence interpreting the United States Constitution may seem esoteric to the mundane legal problems of the marketplace, but constitutional decisions can have an

important influence on business.

The decisions applying to business are a mixed bag. In *Atlas Roofing Company, Inc. v. Occupational Safety, Etc.* [1] the Supreme Court held that the Seventh Amendment did not require a jury trial when the government sues in its sovereign capacity to enforce public rights. The right to a jury decision on disputed facts in a civil trial is not available to business when the government is enforcing such new public rights as the safe working place at issue there. Of course, an individual is treated the same. There is no jury trial when a dispute over the amount of overtime due an employee is decided at an administrative hearing. Or consider the recent case, *Estate of Thornton v. Caldor, Inc.* [2] where the Court held that a Connecticut statute which provides Sabbath observers with an absolute and unqualified right not to work on their Sabbath violates the establishment of religion clause in the First Amendment. But, presumably, decisions interpreting the statutes which outlaw religious discrimination and which hold that managers need only make reasonable accommodation to the religious practices of their employees are still good. [3] And, recent-

ly, in *Garcia v. San Antonio Metro. Transit Authority*, [4] the Court held that metropolitan transit workers could be covered under the Fair Labor Standards Act in spite of the Tenth Amendment's reservation to the states of all powers not delegated to the federal government.

One constitutional decision, *Marshall v. Barlow's Inc.*, [5] interpreting the Fourth Amendment, was a landmark for the business community as it seemed to protect employers from unbridled governmental intrusion into the workplace. In that case, a businessman refused to permit the unannounced inspection mandated by the Occupational Health and Safety Act [6] without a warrant. In the challenge to that provision of the law, the Court held that warrantless searches of commercial buildings as well as homes are generally unreasonable under the Fourth Amendment. In the absence of consent, the government inspector must have a warrant.

The Court held that the warrant could be an administrative one, which does not need the same showing of probable cause required to search for evidence of crime. When dismayed officials asserted that the element of surprise was a most effective part of the safety inspection, the Court said that the warrants may be issued *ex parte* and executed without delay or prior notice, which does preserve that element. Moreover, the Court recognized that there are exceptions, closely regulated industries such as liquor and firearms, which can be inspected without a warrant. This is analogous to the hot pursuit and destruction of evidence exceptions which permit search and arrest without a warrant in the criminal law. If a crime is being committed before his eyes a policeman can pursue the alleged criminal into a dwelling in order to prevent the destruction of evidence, by throwing drugs into the fire or flushing them down a toilet, for instance. The Court added

that, for an administrative search, probable cause justifying the issuance of a warrant may be based on a showing that reasonable legislative or administrative standards for conducting an inspection are satisfied.

The Fourth Amendment

During the period between the bicentennial of the Constitution and of the Bill of Rights in 1991 it may be beneficial to remember the historical background of the Fourth Amendment. It reflects the concern of those who remembered the abusive practices of British officials. General warrants, a source of discontent in Great Britain as well as in the Colonies, were used as authorization for broad sweeping searches of private premises. When the English Parliament met to discuss resolutions condemning them, William Pitt asked his famous question of why a man's house is called his castle. The answer was because the poorest man in his cottage could defy the King, whose forces dared not cross the threshold of the ruined tenement. In the Colonies, these general warrants or writs of assistance were ostensibly used to enforce custom laws, allowing searches for smuggled goods on which duty may not have been paid. As in Britain earlier, they could be used to search for libelous and revolutionary publications. [7] The memory of these abuses led to the inclusion of the prohibition against them, when ratification of the Constitution was dependent on its subsequent amendment in order to make specific the particular rights and liberties found in the Bill of Rights.

Over the years cases interpreting the Fourth Amendment have emphasized the protection of privacy interests, but in a narrow sense. That is, the right to be free from governmental intrusion can only exist where there is a reasonable expectation of privacy. A search of a place where there is such a privacy interest is presumably not unreasonable if con-

ducted under a warrant issued upon probable cause.

As the courts have applied the Fourth Amendment to particular cases, it has developed that probable cause exists if the facts and circumstances would lead a reasonable person to conclude that a crime has been committed or evidence of a crime is located at the place to be searched. The "particularly describing" element prevents a situation where the warrant can be filled out as the search is being conducted. In 1978 when the Court held the Fourth Amendment applied to the OSHA inspections, it did note that the administrative warrant did not need the same showing of probable cause as required for a warrant to search for evidence of crime but did not spell out the exact showing needed. In the decade since the lower federal courts have fleshed out the requirements.

A sampling of cases which contain a Fourth Amendment argument to a request for a warrant for an OSHA inspection follow. Although only binding in the particular circuit where decided, well reasoned decisions in one circuit are often followed in another if a similar question arises. So these cases can be valuable indications of the current state of the law.

Probable Cause

Jurisprudence has established that probable cause exists if the facts and circumstance would lead a reasonable person to conclude that a crime has been committed or evidence of a crime is located at the place to be searched. This would not seem appropriate in the context of inspection of a workplace for safety violations. But probable cause in the criminal sense is not required for the issuance of an OSHA inspection warrant. [8]

In determining what probable cause is in this context courts have looked at various elements of the con-

cept. For instance probable cause exists if specific evidence of an existing violation is presented. [9] However, the occurrence of an industrial accident is not proof of a violation and does not in itself establish probable cause. In *Marshall v. Milwaukee Boiler Mfg. Co., Inc.* [10] the court said that when the application for a warrant is relying upon reasonable legislative or administrative standards for conducting an inspection factual matters which are susceptible of being supported should be presented to the magistrate. Other cases have held the same.

In many instances the justification for issuance of a warrant is a tip from a reliable informant. In the criminal law cases the magistrate issuing the warrant makes a subjective judgement about the informant after considering the totality of the circumstances. In OSHA cases, an employee complaint is adequate to establish probable cause. [11] In addition, there is no requirement that the warrant application set forth the underlying circumstance which demonstrate reason to believe the complainant is a credible persons. [12] Therefore, the employer who questions whether the complaint was spurious or simply initiated by union functionaries to harass cannot discover that fact by checking on the informant.

Probable cause will not exist if information is so old as to be considered stale. A warrant based on four year old OSHA citation is without probable cause. [13] Otherwise, the existence of an earlier citation would grant the agency a perpetual right of reinspection, contrary to the intent of the Fourth Amendment. But the employer is not entitled to prevent inspection by litigating at every turn and when the warrant is upheld maintain that it is stale. [14] The employer is in a Catch-22 situation. He has to make a snap decision when the warrant is presented whether it is invalid because based on stale information or for some other reason. Yet, he can still be held

in contempt for refusing admission since "good faith is not a defense to civil contempt." [15]

The Court held in *Marshall v. Barlow's Inc.* [16] that the warrant could be based on a showing that reasonable legislative or administrative standards are satisfied, respecting the agency's need for routine examination of certain industries. Factual matters which are susceptible of being supported should be presented to the magistrate. The Tenth Circuit held that "administrative probable cause" was satisfied where the employer was randomly selected for inspection pursuant to a neutral inspection plan, even in the absence of an employee complaint. [17] The plant was selected for inspection pursuant to a national plan designed by agency officials for the purpose of reducing the high incidence of occupational injuries and illnesses found in the metalworking and foundry industry. The requirement of a plan particularly protects the employer from the unbridled discretion of a field agent. For employers in "high hazard" industries, the warrant can issue when the establishment is chosen in accordance with an OSHA Scheduling System. [18]

Particularly Describing

The Fourth Amendment required that the warrant particularly describe the place to be searched. This provides little comfort to the modern businessman since one court has said frankly, "... where probable cause to conduct an OSHA inspection is established on the basis of employee complaints, the inspection need not be limited in scope to the substance of those complaints." [19] As the court noted, "...if OSHA compliance officers were prevented from conducting comprehensive inspection, employers could easily present special 'sanitized' areas to them while concealing real violations." [20] In fact, the court there held that a general inspection is per-

missible in response to employee complaints and even when there is no specific reason to suspect that a particular facility may contain violations. Thus, the traditional specific evidence standards of criminal cases is not required. The inspection warrants is not invalid even though not tailored to the inspection program. [21] One court held that the warrant was not overboard even though it authorized inspection of an area exceeding that specified in the employee complaint. [22] These decisions seem to write out the particularly describing constitutional protection, but the warrant is administrative not criminal.

Conclusion

Fourth Amendment elements are clearly attenuated in the administrative warrant situation. There should be presented to the magistrate factual matters with regard to the particular establishment which are susceptible of being supported, although the supporting documents need not accompany the application. In fact, even if the application is materially incorrect or misleading, the warrant would be invalid only if the misrepresentations were intentional or reckless. [23] And the inspection can be a general one even though an employee complaint is about a limited area. [24]

Strict constructionists may wonder. But, as one court said: "We note that the intrusion here is relatively minimal; this is an inspection of a workplace where employees freely enter, not a search of a private residence." [25] And since a safe working environment cuts down on worker's compensation and insurance costs, most employers will permit the inspection without a warrant and will work with the inspector to find possible hazards and correct them.

As the Seventh Circuit stated: "The administrative probable cause standard requires that any inspection be

reasonable; the public interest in the inspection must outweigh the invasion of privacy which the inspection entails... Where a warrant application is based upon an employee complaint, it is not absolutely necessary that the complaint itself be provided to the Magistrate ... The application must at least inform the Magistrate of the substance of the employee complaints..." [26] This summary is disconcerting, but a recent decision somewhat blunts the effect of that broad statement. There the court held that the Administrative Law Judge has discretion to probe alleged falsehoods brought to his attention. If the application for an administrative warrant presents no details from which a magistrate could determine that administrative program of inspection exists, it will not establish probable cause. [27]

In 1987, in a case concerning the warrantless search of the "closely regulated" industry of automobile junkyards, the Court again recognized that the Fourth Amendment's prohibition of unreasonable searches and seizures applies to commercial premises as well as to private homes. [28] But the Court said, "An expectation of privacy in commercial premises, however, is different from, and indeed less than, a similar expectation in an individual's

home"... adding that it is "particularly attenuated in commercial property employed in 'closely regulated' industries." [29] Justice Brennan dissenting there said, "... the Court renders virtually meaningless the general rule that a warrant is required for administrative searches of commercial property." [30]

A lower court said recently, "Finally, we wish to emphasize that we do not view lightly any company's efforts to evade remedial action for continuing OSHA violations which put employees at risk, and we would hope that the Secretary would aggressively pursue such violators. At the same time, however, we believe that it is important to retain the protection afforded Fourth Amendment rights by a properly operating warrant procedure." [31]

That sounds like trying to have it both ways. The businessman who wishes to demand a warrant before inspection, either because he feels it is maliciously motivated or because he is working to correct a known safety hazard, must acknowledge that a properly operating warrant procedure need not have rigorous requirements of probable cause and particularly describing. The best advice probably is, "Don't fight it."

Footnotes

1. 430 U.S. 442 (1977).
2. 105 S. Ct. 2914 (1985).
3. See, i.e., *Trans World Airlines, Inc. v. Hardison*, 432 U.S. 63 (1977).
4. *Garcia v. San Antonio Metro-Transit Authority*, 105 S. Ct. 1005 (1985)
5. 436 U.S. 307 (1978).
6. 29 U.S.C. 651 et seq.
7. For a brief review of events leading to adoption of the Fourth Amendment see Justice Douglas' dissent in *Warden v. Hayden*, 387 U.S. 294 (1967).
8. *Op. cit.* n. 5.
9. *Marshall v. Barlow's Inc.* 436 U.S. 307 at 320-321. For general discussion, see Rothstein, "OSHA Inspections After *Marshall v. Barlow's, Inc.*", 1979 *Duke Law Journal* 64.
10. 626 F.2d 1339 (7th Cir. 1980).
11. *Matter of Establishment Inspection, Etc.*, 589 F. 2d 1335 (7th Cir. 1981).

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