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Ninth Circuit Discusses Routine Security Screens For Employee Who Made A Threat

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On October 24, 2018, the Ninth Circuit Court of Appeals decided *Nickler v. County of Clark et al.,*[1] in which the court examined whether the county or its employees violated the constitution by requiring an employee to undergo a daily security screen search.

In this case, Nickler was employed as a clerk at the Clark County (Nevada) District Attorney's Office. In December of 2012, she was temporarily removed from work after making a comment that her supervisor considered to be threatening. After being allowed to return to her position and obtaining a "Certificate of Fitness," she was required daily, to go through security screening just as if she were a member of the public; particularly, she had to have her belongs screened and her person was screened with a hand-held metal detector. Other employees were not required to undergo such screening.

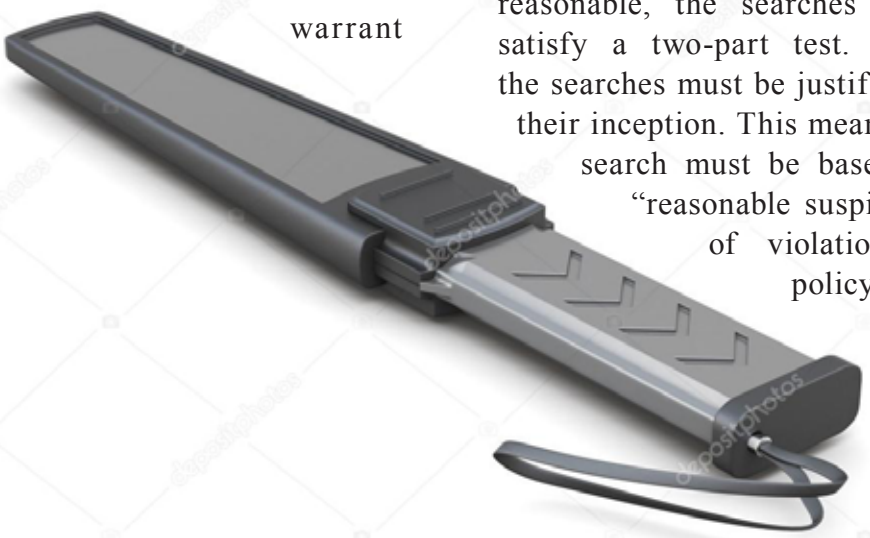
She subsequently file suit in federal court. The district court dismissed her claims in favor of the defendants and she appealed to the Ninth Circuit Court of Appeals. This article will discuss only the Fourth Amendment

claim because the court ruled that her other claims were dismissed because she failed to allege sufficient facts to support the required elements of her other claims under the First and Fourteenth Amendments.

Regarding the Fourth Amendment claim, Nickler claimed that she was being searched unlawfully because she was issued a "Certificate of Fitness" with no restrictions and no other employees were required to submit to this search.

The court of appeals first noted the legal principles that are relevant to Nickler's case. The court stated:

> It is axiomatic that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." *O'Connor v. Ortega,* 480 U.S. 709, 717 (1987) (plurality opinion) . . . In certain limited circumstances, however, neither probable cause nor a warrant is required. See *New Jersey v. T. L. O.,* 469 U.S. 325, 340-41 (1985).
>
> [P]ublic employer intrusions on the constitutionally protected privacy interests of government employees for non-investigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances." *O'Connor,* 480 U.S. at 725-26. The search is reasonable if it is [1] "justified at its inception and [2] if the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the circumstances giving rise to the search." *City of Ontario v. Quon,* 560 U.S. 746, 761 (2010). [ii]



Thus, in order for the continued searches of Nickler to be reasonable, the searches must satisfy a two-part test. First, the searches must be justified at their inception. This means the search must be based on "reasonable suspicion" of violation of policy or law. Second, the search method must be "reasonably related to the objectives of the search" and not overly intrusive.

The defendant's in Nickler's case rely upon the "administrative search" exception to the warrant requirement. This is the exception that allows the government to conduct security screens of persons entering the courthouse. However, the court of appeals stated:

> Although the defendants could conduct "blanket suspicionless searches calibrated to the risk" posed by the public entering the courthouse, *United States v. Aukai,* 497 F.3d 955, 958 (9th Cir. 2007) (en banc), Nickler was not a member of the public, but rather an employee who had (like other employees) been previously allowed to enter the courthouse without undergoing such a search. In order to single Nickler out for treatment different than her peers, the defendants had to make an individualized determination that Nickler merited a more intrusive search. [iii] [emphasis added]

Thus, the court of appeals held that, after Nickler obtained the "Certificate of Fitness" to return to work, in order to subject her to routine security screen searches, the defendants would have to show specific facts that merited a determination that Nickler

required a more intrusive search than other employees. The court further held that at this time, the defendant lacked the required individualized suspicion to justify the searches. However, the court also held that the law was not "clearly established" such that a reasonable government official in the same situation would have known the searches were unreasonable; therefore, the defendants were entitled to qualified immunity from suit.

The court did state that, while the defendants are entitled to qualified immunity from the civil suit, at this stage of the litigation, Nickler is entitled to injunctive relief to stop the searches. The case was then remanded back to the district court further proceedings consistent with this opinion.

Citations

i. No. 16-17211 (9th Cir. Decided October 24, 2018 Unpublished).
ii. Id. at 6-7.
iii. Id. at 7.

First and Fourth Amendment Issues and Law Enforcement

GMA and ACCG through LGRMS have been working on helping our local government law enforcement agencies cope with what is becoming a significant issue. This is in reference to what are often called First Amendment Auditors, who purposely film interactions with Law Enforcement, often using baiting tactics, in hope of an overreaction which could lead to a lawsuit. We will be sponsoring training on this subject in September with Attorney Scott Maclatchie, and expert in this field. (See the LGRMS training calendar at www.lgrms.com for date and locations, and registration information.) We have also published several articles by Attorney James Westbury.

And last, Jack Ryan of the Legal and Liability Risk Management Institute, who has been a good friend to Georgia law enforcement, has produced a video on this subject. The link is below.

Jack's message to us:

> Folks, I have worked with a bunch of you who have had cases where the plaintiff was filming officers was subsequently arrested and then brought a First Amendment Retaliation Claim. I have put together a video – It's longer than my rule of 10 minutes or less due to the complexity of the subject, but it only runs 30 minutes. Jim and I are making this available to all agencies nationwide because we think officers are getting baited into these arrests and do not have the training to recognize the enforcement and constitutional issues that are implicated.
>
> This is one of the hottest topics of protest right now – if you go on YouTube you will find hundreds, if not thousands, of videos of officers being baited into violating constitutional rights. Some do well; some not so much.
>
> Feel free to share this with all of the agencies you represent if you feel it is worthwhile.
>
> For those of you who are on on-line training, this session will be put up on the Bridge system shortly. I have also shared it with PowerDMS and asked that they disseminate it to their clients nationwide.
>
> As always, any feedback would be great.
>
> Jack Ryan

https://www.dropbox.com/s/154pa34brrrxvgz/2019%20Constitutional%20Audit.mp4?dl=0

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Employee Security Screening

First Amendment Auditors

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