

## California Supreme Court Issues Guidance On Workplace Video Surveillance

On August 3, 2009, the California Supreme Court issued a decision regarding the limited circumstances under which private California employers may lawfully engage in video surveillance of their employees.

*Hernandez, et al. v. Hillside, Inc., et al.*, No. S147552, 2009 Cal. LEXIS 5565 (August 3, 2009). The court held that an employee may have a reasonable expectation of privacy in an enclosed office; however, no invasion of an employee's privacy will be actionable unless the employer's intrusion is "highly offensive" to a reasonable person, and "sufficiently serious" and unwarranted as to constitute an "egregious breach of the social norms."

In *Hernandez*, the plaintiffs, two employees of a private nonprofit residential facility for neglected and abused children, discovered that their employer had installed a hidden camera in their shared enclosed office for the purpose of identifying who had repeatedly used a computer after business hours to view pornography online. The employer had discovered the unauthorized access to pornographic web sites through monitoring of computer usage under a policy that had been provided to its employees. Such use violated the employer's policy and its goal of providing a safe haven for the children residing at its facility.

Because the unauthorized use had occurred late at night and long after the end of the plaintiffs' shifts, the employer did not suspect plaintiffs, who performed clerical duties only during daytime business hours. Instead, the employer suspected that the pornography was accessed by an administrator or a program director, who worked outside daytime business hours and had keys both to plaintiffs' office and to the administration building where that office was located. The employer did not have a policy regarding video surveillance in employee work areas. The camera

operated only outside of daytime business hours when plaintiffs were not in their office. Additionally, plaintiffs were never recorded, and the surveillance did not succeed in disclosing the culprit.

After plaintiffs discovered the surveillance equipment they brought claims against the employer and the facility director who had conducted the surveillance (collectively, "the employer") for invasion of privacy under both the common law and the privacy clause of the California Constitution, as well as claims for intentional and negligent infliction of emotional distress. The trial court granted summary judgment in favor of the employer on all of plaintiffs' claims, but the Court of Appeal reversed as to the privacy claims. The California Supreme Court reversed and found for the employer. The California Supreme Court held that, in analyzing privacy claims under the common law or the California Constitution, it would consider the following elements: (i) the nature of the intrusion upon reasonable expectations of privacy, and (ii) the offensiveness or seriousness of the intrusion, including any justification or other relevant interests.

Regarding the first element of plaintiffs' privacy claims, the California Supreme Court rejected the employer's argument that there had been no intrusion upon plaintiffs' reasonable expectation of privacy. The court explained that its analysis started from the premise that, "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether." The court noted that the employer provided plaintiffs with an enclosed office with a door that could be shut and locked and window blinds that could be drawn, and found that "[s]uch a protective setting generates expectations that not all activities performed behind closed doors would be clerical and work related." For example, employees

who share an office, and who have an office that shields them from outside view, might perform grooming or hygiene activities, or conduct personal conversations, during the workday. The court held that “privacy is not wholly lacking because the occupants of an office can see one another, or because colleagues, supervisors, visitors, and security and maintenance personnel have varying degrees of access.”

With respect to the nature of the intrusion upon plaintiffs’ privacy, the California Supreme Court held that “employees who retreat into a shared or solo office, and who perform work and personal activities in relative seclusion there, would not reasonably expect to be the subject of televised spying and secret filming by their employer.” The court noted that, while the employer had issued and disseminated a policy that computer use would be monitored through the computer system, it had not issued a policy on video surveillance in the workplace, and had not otherwise given notice to its employees that it would engage in such surveillance. The court concluded that “[p]laintiffs had no reasonable expectation that their employer would intrude so tangibly in their semi-private office.”

However, the California Supreme Court held that plaintiffs had failed to establish the second element of their privacy claims. The court explained that a plaintiff must show more than the intrusion of a reasonable privacy interest. Actionable invasions of privacy also must be “highly offensive” to a reasonable person and “sufficiently serious” and unwarranted as to constitute an “egregious breach of the social norms.”

The California Supreme Court noted that the employer had limited the location of its surveillance to the area where the unauthorized computer activity had occurred. The court also noted that the timing of the surveillance had been limited to outside business hours (i.e., when the unauthorized computer activity had occurred). Further, the court found that the employer had been successful in its efforts not to record plaintiffs, who were not suspected of the wrongdoing. The court held that the case “[did] not involve surveillance measures conducted for repugnant or unprotected reasons.” Instead, the evidence was undisputed that the employer installed the video surveillance equipment to confirm its strong

suspicion, based on information obtained through its publicized network tracking measures, that an unknown staff member was engaging in unauthorized and inappropriate computer use. The court concluded that, “given the apparent risks under existing law of doing nothing to avert the problem, and the limited range of available solutions, defendant’s conduct was not highly offensive for purposes of establishing a tortious intrusion into private matters.” The court also noted that the employer’s assurances that it installed the surveillance equipment solely for the legitimate purpose of catching the culprits, and not to invade plaintiffs’ privacy, was corroborated by its actions after plaintiffs discovered the surveillance equipment: the employer explained why the camera had been installed, tried to assuage plaintiffs’ concerns about being suspected of wrong doing and secretly videotaped, and, upon demand, showed plaintiffs the surveillance tape without delay.

The California Supreme Court also rejected plaintiffs’ argument that, even assuming that the employer’s objectives were legitimate, the employer was required and had failed to prove that there were no less intrusive means of accomplishing those objectives. The court stated that it had in the past declined to impose on a private organization, acting in a situation involving decreased expectations of privacy, the burden of justifying its conduct as the “least offensive alternative” possible under the circumstances. The court added that the plaintiffs’ argument also lacked merit because the alternatives they had suggested (i.e., better enforcement of the employer’s log-on/password policy, installation of software monitoring programs, closer nighttime monitoring of the surveillance camera outside the administration building, increased nighttime security patrols, and receipt of employees’ consent to video surveillance) would not necessarily have achieved the employer’s goals of discovering the identity of the culprit.

California employers should not interpret the *Hernandez* decision as a wide-ranging authorization to videotape their employees in the workplace, and should seek legal advice before engaging in such surveillance. The employer in *Hernandez* engaged in video surveillance that was very limited in place, time and scope, and took extensive precautions to avoid invading plaintiffs’ privacy. In its conclusion, the

California Supreme Court cautioned that “[n]othing we say here is meant to encourage such surveillance measures, particularly in the absence of adequate notice to persons within camera range that their actions may be viewed and taped.” Accordingly, California employers who want to engage in video surveillance of employees also should consider issuing and disseminating a policy on video surveillance, or using other effective methods of informing employees that they may be subjected to such surveillance.

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