

First Wednesday

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A Monthly Discussion of Employment Law Issues and Other Hot Topics for Management

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Hidden Cameras in the Workplace?

Imagine the surprise when two workers, Abigail and Maria, discovered their employer had installed a hidden camera and motion detector in their office. The women worked at Hillside Children Center, a nonprofit residential facility for neglected and abused children. The Facilities Director, John Hitchcock, believed that late at night, after the women had gone for the day, an unknown person was using the computer in their office to access the internet and view pornographic web sites. To try to catch the culprit, Hitchcock set up the surveillance equipment in their office without telling the employees. When Abigail and Maria discovered the intrusion, they sued Hitchcock and Hillside for violating their privacy rights under the Constitution and common law.

Abigail and Maria performed clerical work during the day. They shared an enclosed office with a locking door. Abigail testified that she periodically used the office to change into athletic clothes. Maria occasionally raised her shirt to show Abigail her post-pregnancy figure. One day in 2002 they spotted a flashing red light attached to a hot cord and camera in their office. They reported it to supervisors who went to Hitchcock. To alleviate their concerns, Hitchcock met with them to explain what he had done and why. He showed them the tape on his television set and all agreed there was “not much to see.”

After a lengthy “see-saw” litigation history, the case reached the California Supreme Court. In the trial court, the case had been dismissed on defendants’ successful motion for summary judgment. The Court of Appeal reversed, holding that Abigail and Maria had shown: (1) an unreasonable intrusion into a protected zone of privacy that (2) was so highly offensive as to constitute a privacy violation. The California Supreme Court then *reversed* the appellate court. Thus, the employer and Hitchcock won the case, known as *Hernandez v. Hillside, Inc.* (2009) 47 Cal.4th 272.

The case is notable for several reasons. First, the California Supreme Court rarely decides a workplace privacy case involving surveillance. Second, the Court upheld the employer’s actions at the summary judgment stage – meaning that a trial was not necessary. Third, the ruling gives employers some guidelines to help decide when an intrusion might be legally justified as opposed to constituting a privacy violation. **Employers need to tread lightly here.** Indeed, the court held that while there *may have been* an intrusion into a protected zone of privacy, there was no liability because the intrusion was not “highly offensive and sufficiently serious to constitute a privacy violation.” The Court noted the surveillance was drastically limited in nature and scope because filming did not occur during the daytime hours, and defendants were motivated by strong countervailing concerns, specifically the protection of the children.

The camera was aimed at the computer and not necessarily the two women using the office during daytime hours. While the camera could be activated at any time from a remote location, it was never used to view or videotape either plaintiff. Access to the controls was strictly limited. It was not Hitchcock's intent or expectation to catch plaintiffs on tape but instead to catch the unknown culprit at night, when Abigail and Maria would not be there.

So, what can employers take away from this case? The court warned that nothing in its ruling was meant to *encourage* employers to use surveillance measures, particularly without giving advance notice to the affected individuals. This case presented a unique set of facts, including the setting of a home for abused children. Done in the interest of protecting the children, the employer set up a system that was, in the words of the Court, "narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns." Finally, defendants had "legitimately tried to avoid invading plaintiffs' privacy."

If an employer is considering the use of any surveillance or similar activity, it should first consider any lesser intrusive solutions that are narrowly-tailored to achieve the goal. The issues and possibilities should be discussed in advance with a security expert and employment attorney. To lessen any privacy expectations, employers having a legitimate need to use surveillance or monitoring systems should try to provide advance notice to employees (and post notices to alert visitors and customers) that such systems are used on the property.

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