

California Supreme Court: Limited Office Surveillance Is Not An Invasion of Privacy

by **David Jacobs**

August 2009

On August 3, 2009, in a long-awaited decision, the California Supreme Court, in *Hernandez v. Hillside, Inc.*, C.D.O.S. 9763, reversed a ruling of the California Court of Appeal and held that an employer's limited video surveillance of an employee office when the employees were not present did not create a cause of action for invasion of privacy. In reaching its conclusion, the court considered the nature of any intrusion upon reasonable expectations of privacy and the offensiveness or seriousness of the intrusion, including any justification for the intrusion and other relevant interests.

Defendant Hillside, Inc. operated a residential facility for abused and neglected children. When suspicion arose that someone might be accessing pornographic material at night on some of the company's computers, including a computer in the office of employees Abigail Hernandez and Maria-Jose Lopez, the defendant conducted video surveillance which included the installation of a motion-activated video surveillance system in the office which the plaintiffs shared. Although the camera and motion detector in the employees' office were always plugged in and capable of operation at any time the plaintiffs were in the office, the defendant took steps to activate the system in off-hours and sporadically, so that the plaintiffs were never actually viewed or recorded inside their office.

The California Supreme Court stated that it could not conclude as a matter of law that the Court of Appeal erred in finding a prima facie case on the threshold question of whether defendant's video surveillance intruded upon plaintiffs' reasonable expectations of privacy. In doing so, the court considered that the office in question was enclosed, had a door that could be shut and blinds that could be drawn to permit the plaintiffs to obtain some measure of privacy in their office. Because of these factors, the court found that the employees had a legitimate belief that some measure of privacy could be expected, and placing a camera in such an environment could be intrusive. However, the court also found that even if there had been intrusion on plaintiffs' reasonable expectation of privacy, there was insufficient evidence of

offensiveness since, under California law, any such intrusion must reach the level of being “highly offensive” to a reasonable person and “sufficiently serious” to constitute an “egregious breach of social norms.” The court went to great lengths to discuss the context of the intrusion, the reasons for the intrusion (to prevent someone from accessing pornographic material in a facility that dealt with abused and neglected children), that plaintiffs were in fact not actually photographed, that accessing pornographic materials was in violation of any workplace policies and that the activation of the surveillance system was narrowly tailored in place, time and scope and prompted by legitimate business concerns. Taking into account the motives for setting up the surveillance the court found that the conduct could not reasonably be found to be highly offensive for the purposes of establishing an invasion of privacy.

This case underscores the need for consultation with counsel prior to the installation of any kind of surveillance equipment in the workplace. The court stated that this was a very fact-specific determination, although it did ultimately conclude that the trial court’s dismissal of the action on summary judgment was correct.

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