



CALIFORNIA EMPLOYMENT LAW UPDATE

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California Supreme Court Identifies Guidelines For Surveillance In The Workplace

The California Supreme Court held in *Hernandez v. Hillsides* that the defendant employer did not violate employee privacy rights by installing a hidden camera aimed at catching a person viewing online pornography in the workplace after business hours. The Court found that while employees have a reasonable expectation of privacy in the workplace, that right has limits and it does not prevent employers from conducting covert video surveillance in the workplace under certain limited circumstances.

Background

Plaintiffs Abigail Hernandez and Maria-Jose Lopez were employed by Defendant Hillsides, Inc., a private, non-profit residential facility for neglected and abused children. Hernandez and Lopez shared an enclosed office where they worked on computers during the day. The director of the facility discovered that someone was using one of the computers after hours to view pornographic web sites. Concerned that the culprit might be a staff member, the director installed a hidden, remote camera to monitor the office. The camera was never operated during daytime business hours and never taped the plaintiffs. Nonetheless, after the plaintiffs discovered the camera, they filed suit alleging invasion of privacy and intentional and negligent infliction of emotional distress.

The trial court granted the defendant's motion for summary judgment on the basis that there could be no "intrusion" where the plaintiffs were never actually video taped. The California Court of Appeal reversed as to the invasion of privacy claim, holding that the plaintiffs met the elements of an invasion of privacy claim because (1) they suffered an intrusion into a zone of privacy; and (2) the intrusion was so unjustified and offensive as to constitute a privacy violation.

Supreme Court Decision

The California Supreme Court reversed the judgment of the Court of Appeal and reinstated summary judgment for the defendant. The Supreme Court held that while the plaintiffs had suffered an intrusion into a zone of privacy, no reasonable jury could find that the intrusion was unjustified or offensive.

The Supreme Court focused on two separate issues: first, the nature of any intrusion upon the plaintiffs' privacy, and second, the offensiveness or seriousness of the intrusion. As to the first issue, the Court observed 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 pointed out that the plaintiffs had never received any warning that they might be subject to video surveillance and that they had not consented to it in advance. The Court also noted that the means of intrusion, surreptitious video tape, was subject to a high standard because it was so invasive.

As to the degree of offensiveness or seriousness of the intrusion, the Court found that the surveillance was limited in both time and scope, and that Hillsides had taken care not to videotape the plaintiffs. Further, the defendant had legitimate business reasons to try to determine who was accessing the pornographic web sites, including protecting children in its care.

While the Court emphasized that its decision was not meant to encourage workplace surveillance, the Court nonetheless concluded that such measures may be permissible if narrowly tailored in place, time, and scope, and prompted by legitimate business concerns.

Practical Implications for California Employers

While the Court’s ruling was favorable to the employer, the Court’s decision confirmed that privacy interests of employees do exist in the workplace, and that employers should be extremely cautious about intruding into such privacy. The Court pointed out that workplace privacy inquiries are fact-specific, and that the circumstances of each case must be taken into account. California employers should take the following precautions:

- Employers should review their policies regarding employee privacy. Providing employees with notice of such a policy can reduce a reasonable expectation of privacy in the workplace. If employers disclose that a certain area or system (computer, voice mail, etc.) is being monitored, then it is much less likely that employees could prove that they did not expect the intrusion.
- Privacy is heightened in enclosed offices where employees do not expect to be overheard or observed. However, employees have a reasonable expectation of privacy even in a semi-private office to which several employees have access.
- Employers who use video surveillance should make sure they have a legitimate business purpose for the surveillance, and that the surveillance is as limited in scope as possible to accomplish the objective. Employers who use video surveillance should disclose its existence in writing to employees, and require employees to sign a receipt of notice. Employers should keep in mind that surreptitious video surveillance will be held in high standard because it is considered very invasive.

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