

<http://www.laboremploymentlawblog.com/>

SHEPPARD MULLIN
SHEPPARD MULLIN RICHTER & HAMPTON LLP

Labor & Employment Law BLOG
Up-to-date Information on Labor and Employment

08 | 6 | 2009 Posted By

Hernandez v. Hillsides: The California Supreme Court Identifies Guidelines for Workplace Surveillance

In *Hernandez v. Hillsides*, the California Supreme Court provided guidance to employers about the reasonable scope, purpose, and methods of conducting employee surveillance in the workplace. In essence, the Court confirmed a sliding scale for employee expectations of privacy in the workplace based on the office environment. But it allowed employers considerable flexibility to monitor employees for legitimate business reasons so long as the surveillance is properly limited in scope and intrusiveness. Finally, the Court suggested that employers should give notice to employees that monitoring might be used.

Defendant Hillsides is a private, non-profit residential facility for neglected and abused children. The Plaintiffs in this case worked in a clerical capacity at Hillsides. They shared an enclosed office where they worked on computers during the day. It came to the Defendant's attention that someone was logging on to one of the computers late at night to look at pornographic websites. Hillsides did not suspect the Plaintiffs, who were usually gone for the day by the time of the suspect activity. Without their knowledge, Hillsides installed a hidden, remote operated camera in Plaintiffs' office. The facility never used the camera during the day or to tape the Plaintiffs. Nonetheless, after discovering the camera, the Plaintiffs sued for invasion of privacy and intentional and negligent infliction of emotional distress.

The trial court granted summary judgment to the defendants on the basis that there could be no "intrusion" where the plaintiffs were never actually video taped. The Court of Appeals overturned, holding that the plaintiffs met the elements of an invasion of privacy claim: (1) they suffered an intrusion into a zone of privacy and (2) it was so unjustified and offensive as to constitute a privacy violation. The California Supreme Court disagreed and reinstated summary judgment for the defendants. It 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 Court began by stating the basic principle of workplace privacy; it noted that "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether." However, before examining whether the plaintiffs had a reasonable expectation of privacy, the Court suggested that a private employer may have a higher responsibility to avoid invasions of privacy than an individual. The Court compared the Hillsdale employer to a prior case involving a reporter and noted that Hillsdale had a greater responsibility to respect the privacy of its employees.

The Court went on to examine the question of whether the Plaintiffs had an expectation of

privacy. It reviewed the broad spectrum of potential "private" spaces in the workplace. Essentially, the Court held that privacy is heightened in enclosed offices where an employee does not expect to be overheard or observed. The Court set up a spectrum of privacy, with a large cubicle environment on one end providing very low expectations of privacy, and private environments like bathrooms on the other, providing a high expectation of privacy. Plaintiffs' office was somewhere in the middle because the door could be shut and locked, the blinds could be drawn, and the Plaintiffs could have some expectation of conducting personal activities (such as changing into athletic clothes or adjusting clothing) without being observed. The Court noted that the means of intrusion, surreptitious video tape, was subject to a high standard because it is so invasive.

Perhaps most importantly for employers, the Court made a specific point of the fact that the Plaintiffs had no notice that they might be subject to surveillance. Hillsides had a computer policy that noted that internet activity might be monitored, but it said nothing about surveillance. The Court's reasoning suggests that any employer who wants the ability to monitor and record the activities of its employees through surveillance should explicitly state that possibility in its handbook and policies.

Finally, the Court noted that although the Defendant's intent was proper, that was a question of the offensiveness of the conduct, and had no bearing on whether an intrusion occurred. It held that because there was a heightened expectation of privacy, and because the method of intrusion was so invasive, Defendant had intruded on a zone of privacy.

The Court then moved on to whether Defendant's conduct in this case met the standards for a claim of invasion of privacy, ultimately answering the question "no." To make out a claim, a plaintiff must show that the intrusion is "highly offensive to a reasonable person" or an "egregious breach of social norms." Courts should consider the place, time, and scope of the intrusion. Given those standards, the Court noted that the surveillance was limited in scope; a camera pointed at the specific computer in question. It was limited in time; surveillance was conducted only after hours when the Plaintiffs were gone. It was conducted for a legitimate purpose; protecting the children. Safeguards were in place to protect the information; there was limited access to the equipment. Finally, the intrusion itself was limited; while the camera was present, it never actually recorded the Plaintiffs.

The Court also rejected Plaintiffs argument that Defendant had to prove there was no less important means of accomplishing its goals to make out a defense of justification. No such requirement exists.

The lessons for employers here are simple, if important. First, employers should build the possibility of surveillance into their privacy policies if there is any chance it will be required. Second, employers conducting surveillance should make sure they have a legitimate purpose for the surveillance, and that it is as limited in scope as possible to accomplish the objective. Finally, employers should recognize that any employee environment that can be closed off comes with a higher expectation of privacy.