

Legal Updates & News

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California Supreme Court Clarifies Standards for Workplace Video Surveillance

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Could the mere placement of a hidden video camera in an employee's office constitute an invasion of privacy, if the camera is never used to watch or record that employee? According to the California Supreme Court, the answer is yes. On August 3rd, the California Supreme Court issued its long-awaited decision in *Hernandez v. Hillside, Inc.*, a workplace video surveillance case with significant implications for California employers.^[1]

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Background

Defendant Hillside operates a private, nonprofit residential facility for abused and neglected children, including children who have been victims of sexual abuse. When Hillside's director learned that office computers were being used at night to access child pornography websites, he was concerned that the culprit might be an employee who worked with children. He secretly set up a video camera to try to identify this person. The camera happened to be installed in an office shared by the plaintiffs, Abigail Hernandez and Maria Jose-Lopez, who performed clerical work during the day. The director did not suspect either of the plaintiffs but chose not to tell them about the video camera, in order to maintain the secrecy of the investigation.

The Placement of the Hidden Camera

The office shared by the plaintiffs featured a locking door and window shades which could be raised or lowered. An area within the lower portion of the door had been cut away, like a "doggie door" for which the flap was missing. At a minimum, eleven employees had keys to this particular office.

Hernandez and Jose-Lopez tended to keep their office shades drawn, and persons needing access during normal business hours would customarily knock before entering. Hernandez would occasionally change into her gym clothes in the office. Several times while in the office, Jose-Lopez had lifted her shirt to show Hernandez how her body was recovering from childbirth.

The video camera was hidden in a bookshelf and left plugged in at all times. It could be activated from a nearby storage room, but was operated only during non-business hours. A few weeks after the camera was installed, the plaintiffs noticed a red motion-sensor light on one of their office shelves, which led to their discovery of the camera. Despite the director's assurances that the camera had not been installed

to observe them, they were very upset by this discovery.

Discovery of the Hidden Camera and Resulting Litigation

The following week, the plaintiffs were shown the surveillance tape, which featured only a few minutes of actual footage, specifically of the director setting up the camera and of the empty office. As the director later testified, he only activated the recording during non-business hours when the plaintiffs were not in the office, and on just three separate occasions.

The plaintiffs brought three causes of action for invasion of privacy, intentional infliction of emotional distress, and negligent infliction of emotional distress, all arising from their discovery of the surveillance equipment.

Trial and Appellate Court Proceedings

In their motion for summary judgment, the defendants argued that the invasion of privacy claim must fail: that the plaintiffs' privacy was never invaded because they had never actually been viewed or recorded with the camera. The defendants also argued that any reasonable expectation of privacy on the plaintiffs' part had been diminished because the office was a shared space which was not only accessible to many employees, but also could be seen from the outside through its windows and doggie door. Moreover, the defendants asserted that its compelling need to protect the resident children from abuse or exposure to the pornographic websites outweighed any expectation of privacy which the plaintiffs may have held. The Superior Court agreed, granting the defendants' motion on all three causes of action. The plaintiffs timely appealed.

The Court of Appeal disagreed with the trial court, reversing the grant of summary judgment on the plaintiffs' privacy claim. Drawing from a range of authority, the Court of Appeal reasoned that the placement of the video camera could give rise to an invasion of privacy claim, even if the camera was not actually used to view or record the plaintiffs. While the extent to which images of the plaintiffs had been "captured" or "observed" was relevant to the amount of damages that could be recovered, it was not a threshold requirement for liability.^[2] The defendants appealed the Court of Appeal's decision to the California Supreme Court.

The California Supreme Court's Ruling

The California Supreme Court agreed to hear the case, to determine whether the trial court properly dismissed the privacy claim. Consolidating the two standards for establishing a privacy violation under common law and the state Constitution, the Court considered "(1) the nature of any intrusion upon reasonable expectations of privacy, and (2) the offensiveness or seriousness of the intrusion, including any justification and other relevant interests."^[3] The Court concluded that the employer had intruded into an area where the plaintiffs had a reasonable expectation of privacy, but that the facts of this case prevented this intrusion from rising to the level of an actionable privacy claim.

In reaching this conclusion, the Court explained that employees may have a reasonable expectation of privacy in a non-public area like an office, even if others may have access to that area as well. For example, while a number of employees had access to the plaintiffs' shared office, the mostly-enclosed office space still afforded its occupants "some measure of refuge" from being viewed without their knowledge, which supported a legitimate expectation of privacy.^[4] The Court also noted that the plaintiffs had not been informed of the placement of a video camera in their office, and that such notification could have reduced the expectation of privacy.^[5] Accordingly, the Court concluded that the plaintiffs had established a reasonable expectation of privacy in their office and that the employer violated that expectation of privacy by placing a hidden video camera in their office.

The Court found that the plaintiffs had not established the second element of their privacy claim, however. Based on the facts in this case, the Court determined that the intrusion was not sufficiently offensive to warrant liability. The Court emphasized the employer's efforts to minimize the intrusiveness of the video surveillance, such as the narrow confinement of the surveillance to the plaintiffs' office, the short window of time during which the surveillance equipment was both installed and activated, and the limited number of people having access to the surveillance equipment.^[6] Additionally, the Court explained that the defendants' compelling reason for conducting the surveillance also prevented the intrusion from being highly offensive.^[7]

While the Court ultimately decided in the employer's favor, this decision was based on a fact-intensive analysis and a unique set of facts. Employers with less compelling reasons for covert video surveillance, and less careful methods of conducting the surveillance, may face different outcomes.

Practical Guidance for California Employers

In *Hernandez*, the California Supreme Court cautions that, "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether."^[8] California employers should consider a number of practical measures when conducting workplace video surveillance, such as:

- Notifying employees and others in the workplace about areas under video surveillance, in order to reduce any expectation of privacy;
- Avoiding the placement of video cameras in locations where video surveillance is prohibited by law (e.g., restrooms, locker rooms, or rooms designated for the changing of clothes);^[9]
- Exercising particular caution when installing video cameras in non-public areas of the workplace, such as offices, and consulting with legal counsel;
- Remembering that audio surveillance is subject to different and often greater restrictions than video surveillance, including laws prohibiting the use of electronic amplifying or recording devices to eavesdrop or record a confidential communication.^[10]
- Recognizing that the laws governing video surveillance vary significantly by jurisdiction.^[11] In many countries, employees have greater privacy rights in the workplace, and local laws must be considered prior to implementing any workplace video surveillance program.

Footnotes

^[1] *Hernandez v. Hillside, Inc.*, S147552 (August 3, 2009).

^[2] *Hernandez v. Hillside, Inc.*, 142 Cal. App. 4th 1377, 1389 (2006).

^[3] *Hernandez v. Hillside, Inc.*, S147552 at 17 (citing *Hill v. National Collegiate Athletic Assn.*, 7 Cal.4th 1, 27, 24 (1994)).

^[4] *Hernandez v. Hillside, Inc.*, S147552 at 20-21.

^[5] *Id.* at 25.

^[6] *Id.* at 28-30.

^[7] *Id.* at 31.

^[8] *Id.* at 18.

^[9] See, e.g., Cal. Labor Code 435(a) (prohibiting employers from recording the activities of employees in restrooms, locker rooms, or rooms designed for the changing of clothes); Cal. Pen. Code Section 647k (prohibiting using a peephole, two-way mirror, camera, or other device to look into a bathroom, changing room, fitting room, dressing room, or tanning booth, or the interior of any other area in which the occupant has a reasonable expectation of privacy, with the intent to invade the privacy of a person or persons inside).

^[10] See Cal Penal Code Section 632(a).

^[11] See, for example, "[Spain's Strict New Limitations on Video Surveillance](#)" (March 2009).

