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California Supreme Court Provides Useful Guidance for Employers Engaging in Video Surveillance and Other Workplace Searches

By Philip L. Gordon and Gregory Iskander

In a recent opinion, *Hernandez v. Hillsides, Inc.*, the California Supreme Court held that an employer acted lawfully when it surreptitiously installed a video camera in a shared office even though both employees had a reasonable expectation of privacy there. While binding only in California, the court's decision is instructive for employers throughout the United States because the court's analysis is based upon legal principles applicable to invasion-of-privacy claims in virtually every jurisdiction.

Pertinent Factual Background

The case arises out of the attempt by Hillsides Children's Center, a residential facility for abused and neglected children, to identify the person who was accessing pornography on two of the facility's computers during late night and early morning hours. Hillsides' computer specialist, Tom Foster, was able to determine that this improper use had occurred at a computer in Hillsides' computer laboratory and at a second computer in the office shared by erstwhile employees and eventual plaintiffs, Abigail Hernandez and Maria-Jose Lopez. Foster could not discern from system activity records who had accessed the computer.

The porn-viewing concerned Hillsides' director, John Hitchcock, not only because it violated Hillsides' computer use policy but also because many of the facility's residents were children who themselves had been exposed to, or forced to participate in, pornography. Hitchcock did not suspect Hernandez or Lopez, who were not in the facility when the porn-viewing occurred. He suspected other staff members, such as security personnel, who had 24/7 access to the facility.

After trying, but failing, to identify the perpetrator by installing a concealed camera in the computer lab, Hitchcock concealed a video camera and motion detector in the plaintiffs' shared office, pointing the camera at the computer that had been used to access pornography. The motion detector would trigger the camera, which would broadcast images wirelessly to a television monitor and video recorder in a locked storage closet, but only when Hitchcock attached a receiving device to the monitor.

To avoid possibly tipping off the perpetrator, whom he believed to be an insider, Hitchcock strictly limited information about his investigation. Only Hitchcock, Foster and two administrators knew that the video camera had been installed in the plaintiffs' office. Only Hitchcock and one of the administrators had a key to the storage closet that contained the monitor and recorder.

The plaintiffs' office had a door that could be locked and exterior windows with blinds. Several coworkers had a key to the door. The door had a "doggie door," without a flap, through which an observer could peek into the office. Hernandez and Lopez testified that they, nonetheless would change their clothes in the office when the door was closed and the blinds were down and would engage in other private activity.

The plaintiffs discovered the camera three weeks after its installation. During that time period, Hitchcock connected the receiving device only three times and only after the workday. He disconnected it before the workday began. No images of the plaintiffs ever appeared on the monitor, and no images of the plaintiffs ever were recorded. Nonetheless, the plaintiffs rejected Hitchcock's explanations and apologies after they confronted him about the surveillance, and they sued Hillsides for invasion of privacy, among other things.

The California Supreme Court's Decision

Reversing the court of appeal, the California Supreme Court ruled that the trial court had properly granted summary judgment in Hillsides' favor on the plaintiffs' claims for invasion of privacy. The court focused its analysis on the two principal elements of an intrusion-upon-seclusion claim, regardless of whether the claim derives from the common law or from California's Constitutions, *i.e.*, (1) Did the surveillance occur in a place where the plaintiffs reasonably could expect privacy?; and (2) Was the surveillance conducted in a manner that would be highly offensive to a reasonable person?

The Plaintiff's Reasonably Could Expect Privacy in Their Shared Office

The court answered the first question in the affirmative. The court noted that "while privacy expectations may be significantly diminished in the workplace, they are not lacking altogether." In finding the plaintiffs' privacy expectations sufficiently reasonable to support a claim, the court relied on the fact that Hernandez and Lopez could control access to their office by shutting and locking the door and dropping the blinds. The court explained that these features "allow[ed] the occupants to obtain some measure of refuge, to focus on their work, and to escape visual and aural interruptions from other sources, including their employer."

The court rejected Hillsides' arguments that the shared office, the availability of the office key to others, and the ability to peek through the doggy door rendered the plaintiffs' privacy expectations unreasonable. The court reasoned that none of these facts could cause the plaintiffs to "reasonably expect to be the subject of televised spying and secret filming by their employer."

Notably, the court recognized that "notice of and consent to an impending intrusion can inhibit reasonable expectations of privacy" but found that Hillsides could not plausibly argue that Hernandez and Lopez had received notice of, and consented to, the surveillance. In this regard, the court emphasized that Hillsides had kept the investigation secret from the plaintiffs, and "nothing in Hillsides' computer policy mentioned or even alluded to" the possibility of Hillsides' installing surveillance equipment in the plaintiffs' office.

Hillsides' Intrusion Was Not Highly Offensive

Even though the employees could reasonably expect privacy in their office, the court found that the invasion in this case was not so highly offensive and sufficiently serious as to allow liability against the employer. The court explained that "no cause of action will lie for accidental, misguided, or excusable acts of overstepping upon legitimate privacy rights."

The court relied upon several factors in determining that Hillsides' intrusion was excusable. To begin with, Hillsides had a legitimate business justification for its investigation, rooting out a policy violator who could pose a significant risk of liability to the organization. Significantly, Hillsides installed the camera in the plaintiffs' office only after surveillance in the computer lab had failed; the surveillance in the plaintiffs' office focused only on the area where the violator likely could be caught; and Hitchcock connected the receiving device

only when the perpetrator might be caught and when the plaintiffs were known to be absent from their office. In addition, Hitchcock told only three other employees about the investigation, and only one other person could access the locked storage closet containing the monitor and any video recordings that might be made. Finally, the court could identify no less intrusive, alternative means for capturing the identity of the perpetrator.

The court noted in conclusion that its opinion is not "meant to encourage such surveillance measures, particularly in the absence of adequate notice to persons within camera range that their actions may be viewed and taped."

Lessons Learned From the Hillsides Decision

Employers, especially those in California, need to consider carefully whether a particular office setting is "private" before installing surveillance equipment there. The decision in Hillsides suggests that in many circumstances, an employee will be able to demonstrate a viable privacy expectation simply because his/her office has a door and, to the extent there are exterior facing windows that permit public view, blinds or curtains.

Hillsides suggests that California (and potentially other) courts will closely scrutinize any policy upon which an employer relies to defeat an employee's privacy expectations by demonstrating that the employee had notice of, and consented to, the intrusion. In the case of concealed cameras, it may not be enough to include a general warning in an employee handbook or an orientation package. *Hillsides* arguably supports the conclusion that to rely upon an employee's consent to defeat a privacy-based claim, an employer must provide prior notice of the nature and scope of the specific surveillance in question.

Perhaps most importantly, *Hillsides* teaches that even when an employer does intrude upon an employee's privacy in the course of a workplace search or investigation, the employer generally will not be subject to liability as long as the search is legitimate, narrowly tailored and tightly controlled. Consequently, employers can reduce their exposure to privacy-based claims arising from a workplace search by using the least intrusive means to achieve the investigation's legitimate business objectives and by sharing knowledge of the investigation and the fruits of the search only with those who legitimately have a need to know.

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