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## Hernandez v Hillsides Inc: Expectations of privacy in the workplace?

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The California Supreme Court has made it clear that, although employees may have an expectation of privacy in the workplace, this expectation is not unlimited.

In the case of *Hernandez v Hillsides Inc*<sup>1</sup>, the plaintiffs in this action were two employees who discovered a hidden surveillance camera in their enclosed office at a private residential facility for neglected and abused children. The undisputed evidence revealed that the facility's director installed the camera after learning that an unknown person had repeatedly used a computer in the office shared by the plaintiffs to access the internet and view pornographic websites. This was done after business hours and well after the plaintiffs had left for the day. The use of the computer for this purpose violated Hillsides' policies and was inconsistent with its aim of providing a safe haven for children.

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### Violation of the right to privacy?

Upon learning of the existence of the camera, the two plaintiffs filed a law suit alleging a violation of their right to privacy under common law and the California Constitution. The trial court granted summary judgment in favour of Hillsides, but the Court of Appeal reversed. On review, the Supreme Court reinstated the trial court order granting Hillsides' motion for summary judgment. In so doing, the court observed that although the plaintiffs maintained a privacy interest in their shared office and had a reasonable expectation that their employer would not install video equipment in that space, summary judgment was appropriate because:

- it was undisputed that Hillsides' intrusion was not highly offensive or sufficiently serious to constitute an actionable privacy claim; and
- the evidence was undisputed that Hillsides was motivated by strong countervailing concerns that justified the subject intrusion.

After setting forth the elements of privacy claims, the court assessed the parties' claims and the undisputed evidence under the rubric of both the common law and constitutional sources of privacy protections. Borrowing language from its seminal opinion in *Hill v NCAA*<sup>2</sup>, "which distilled the largely parallel elements of these two causes of action," the court focused on two elements:

- the nature of the intrusion upon reasonable privacy expectations; and
- the offensiveness or seriousness of the intrusion, including any justification and other relevant interests.

### Expectations of privacy

In assessing the nature of the intrusion on plaintiffs' privacy expectations, the court concluded that Hillside's video surveillance measures indeed intruded upon the plaintiffs' reasonable expectations of privacy. Citing an earlier decision, the court noted that there are degrees and nuances to societal recognition of expectations of privacy. Various factors, either individually or in combination, affect societal expectations of privacy.

One such factor is the identity of the intruder. Under the undisputed evidence, the court found that a reasonable expectation of privacy existed in this case, in large part due to the fact that the invasion was committed by agents of the employer against employees and did not involve transactions or events where other non-employer third-parties were present, such as customers or other members of the public.

Another relevant factor the court identified is the nature of the particular intrusion, including both the extent to which the subject interaction could be seen and overheard, and the means of intrusion. According to the court, these factors weighed heavily in the plaintiffs' favour. The court explained that on one end of the spectrum are places in which work or business is conducted in an open and accessible space, within the sight and hearing not only of co-workers and supervisors, but also of customers, visitors and the general public. At the other end of the spectrum are areas in the workplace subject to restricted access and limited view, and reserved exclusively for performing bodily functions or other inherently personal acts. Examples of the latter include bathrooms and changing areas.

In the middle, however, are common areas (such as the office shared by the plaintiffs) used by employees that are nonetheless not open to the general public. The court observed that mere visibility by others or the fact that others have access to a particular space does not strip away all expectations of privacy. Indeed, here the plaintiffs shared an office, yet the court concluded that they maintained a legitimate expectation of privacy in that office. In this regard, the court noted that employees who work in solo or shared offices and perform work and personal activities in relative seclusion would not expect to be secretly videotaped by their employer.

### The means of intrusion

Another factor the court identified as material in assessing the nature of the intrusion on the plaintiffs' privacy expectations is the means of intrusion at issue. The court observed that other courts and various statutes have previously acknowledged the intrusive effect of hidden cameras and video records in settings that otherwise seem private. In its defence, Hillside pointed out that the plaintiffs were not the target of the surveillance. Hill-

sides also pointed out that the plaintiffs were never even videotaped, because the surveillance system was only activated on a few occasions after their working hours. Although the court agreed with Hillside's that the undisputed evidence supported the foregoing, the court concluded that these facts bear on the offensiveness of the challenged conduct, and that they did not preclude the court from finding the requisite intrusion in the first place.

In light of the undisputed evidence, the court determined that the plaintiffs had a reasonable expectation of privacy and that Hillside's had intruded upon that expectation. Nonetheless, the court ultimately concluded that the trial court had properly granted summary judgment in Hillside's favour as the evidence showed that the intrusion was neither highly offensive to a reasonable person nor sufficiently serious and unwarranted such that it constituted an egregious breach of the social norms. In this regard, the court observed that "offensiveness" is an indispensable part of the privacy analysis and "reflects the reality that no community could function if every intrusion into the realm of private action gave rise to a viable claim."

### Motives and objectives

The court noted that in determining whether the "offensiveness" requirement has been met as a matter of law, it was required to examine all the surrounding circumstances, including the degree and setting of the intrusion and the intruder's motives and objectives. Also, courts may also be asked to determine whether a plaintiff, in attempting to defeat a claim of competing interests, has shown that the defendant could have minimised the privacy intrusion through other reasonably available, less intrusive means.

The court observed that the degree and setting of the intrusion logically encompasses the time, place, and scope of the surveillance efforts. Under the facts before it, the court concluded that these factors weighed heavily against a finding that the intrusion was highly offensive or sufficiently serious to warrant liability.

The court pointed out that Hillside's approach was measured and its surveillance efforts were largely confined to the area in which the unauthorised computer activity occurred. Access to the room in which the surveillance equipment was kept was limited, as was knowledge of the surveillance. Also, the camera was operational during a limited window of time and actual surveillance was limited in that Hillside took "the critical step" of connecting the surveillance equipment on only three occasions, after the plaintiffs' shifts had ended and after they normally had left the property. Finally, there was no evidence that the plaintiffs were surveilled while conducting personal activities.

According to the court, Hillside's successful effort to avoid capturing the plaintiffs on camera was inconsistent with an egregious breach of social norms. Citing a case in another jurisdiction, the court further observed that, even where an employer places a camera in areas reserved for the most personal functions at work (ie the

bathroom), the lack of any viewing or recording defeats an invasion of privacy claim.

Focusing on Hillside's motives, justifications, and related issues, the court concluded that under the undisputed evidence, the installation and activation of the surveillance camera was not intended for "socially repugnant or unprotected reasons," but rather that it was intended to confirm a strong suspicion that an unknown staff person was engaged in unauthorised and inappropriate computer use at night. Given the risk of doing nothing to avert the problem and the limited range of available solutions, Hillside's conduct was not highly offensive.

Finally, the court observed that defendants in a privacy case who posit a countervailing interest defence are not required to prove that there were no less intrusive means of accomplishing their legitimate objectives. Echoing its earlier decisions, the court declined to impose on a private organisation the burden of justifying

its conduct as the least offensive alternative possible under the circumstances.

The Hillside decision is instructive and helpful for employers in the United States, as it attempts to give greater definition to workplace situations where employees may have an expectation of privacy. The decision is also helpful to employers facing workplace privacy lawsuits in that they will not be required to prove the existence of a less intrusive means to accomplish their legitimate objectives. Lastly, the decision upholds the validity of workplace surveillance as a valid form of security – so long as it is used reasonably for legitimate reasons and care is taken to preserve any attendant expectation of privacy.

#### NOTES

<sup>1</sup> S147552 (3 August 2009).

<sup>2</sup> (1994) 7 Cal 4th 1