

# THE LABORING OAR

*How To Navigate Your Way Through Employment Law*

**Recent News.** We are pleased to announce the arrival of William (Bill) Kampf, an associate with a strong labor and employment-based background. Bill is assisting Frank Melton and me in our labor and employment department.

## PICTURE PERFECT FOR THE BOSS

*By Olivia Goodkin, Esq.*

Many of our clients have asked whether they may utilize surveillance cameras in their workplaces. A recent court opinion, Hernandez v. Hillsides, clarifies the privacy rules applicable to employees.

### The Plaintiffs' Private Office

In Hernandez v. Hillsides, the two female plaintiffs worked for a residential facility for abused children, and shared an office with a locking door and a window with shades that could be drawn for privacy. In fact, one of the plaintiffs used the office to change clothes before leaving for the gym. The other plaintiff showed the changes in her postpartum body to her office-mate by exposing her breasts and stomach.

### The Defendants' Installation of Cameras

Hillside

s, Inc., which owned the residential facility, believed that someone was accessing pornographic websites at night from some of the offices, including Plaintiffs' office. Defendants (Hillsides and its director) installed a motion-activated video surveillance system in Plaintiffs' office in October 2002. Although Plaintiffs were not suspects for the improper use of their employer's computer, they were not told about the camera installation because the employer was concerned that they would leak the news to other employees.

The camera and motion detector were placed on a shelf in Plaintiffs' office and set up to broadcast images to a television monitor and video recorder located in a storage room across the hall.

### The Plaintiffs Discover the Camera

The camera system was activated on only three occasions. On one of those occasions towards the end of October 2002, Plaintiffs noticed a red light on a shelf in their office blinking when there was movement in front of it. They discovered the camera.

Plaintiffs were very upset by their discovery and took a few days off from work. They then asked to view the surveillance tapes, which showed mostly their empty office and some static. As it turned out, there was no computer access to pornographic web sites from the Plaintiffs' office during the three-week period the camera was installed in the office. The director of the facility had in fact intended to remove the camera the weekend after the Plaintiffs discovered the camera.

### The Legal Claims Brought by Plaintiffs and Defenses Asserted by Defendants

Plaintiffs filed suit for invasion of privacy and intentional and negligent infliction of emotional distress.



**Olivia Goodkin** has over two decades of experience representing corporations, individuals and closely-held businesses in employment law and business litigation. She advises on the termination of employees, wage and hour laws, employment contracts and other employment issues, and she defends companies in wrongful termination lawsuits. Olivia also creates trade secret programs for companies seeking to protect their valuable intellectual property.

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Defendants argued that the invasion of privacy action failed because the Plaintiffs had not actually been recorded or viewed by the camera in their office, so their privacy was not invaded. Defendants further argued that even if the Plaintiffs had been viewed or recorded, they had a diminished expectation of privacy in their office because a person could climb over a railing outside of their window and peek in; a doggie door in the office allowed anyone to bend down and see in the office; and at least 11 people had the key to their office.

Defendants' final argument was that they were justified in conducting surveillance in order to protect the children they were entrusted to care for from potential abuse or exposure to pornographic activity or material.

### What Constitutes Invasion of Privacy?

Intrusion of privacy is found when someone intentionally intrudes upon the seclusion of another if the intrusion would be "highly offensive to a reasonable person." The court in the Hernandez case found in favor of the Plaintiffs, holding that it is the intrusion itself, and not whether Plaintiffs were viewed or recorded, that comprised the wrongful conduct of Defendants. In other words, the Plaintiffs did not have to prove that private information about them had been disclosed to a third party. The court further ruled that while the Plaintiffs did not enjoy complete and absolute privacy in their office, it was reasonable for them to expect that images of them in their office with the door closed would not be transmitted to another part of the building. The fact that passerby could have viewed them through the doggie door did not deny them protection against the intrusion of the secret camera.

### What is "Highly Offensive?"

There is no bright line answer to this question. The courts will look at the degree of intrusion, the context, the conduct and circumstances surrounding the intrusion, as well as the intruder's motives and objectives. In Hernandez, the court reasoned that it could be concluded that the intrusion into the Plaintiffs' office was highly offensive. The camera was left on for no legitimate reason while Plaintiffs were present during the day, since the purpose of the camera was to catch night-time intruders that were using the computer to access pornographic web sites. However, the court held that a jury should ultimately decide whether Defendants' breach of privacy was highly offensive.

### There Was No Intentional Infliction of Emotional Distress

The court ruled that intentional infliction of emotional distress will be found only where the conduct of the defendant is extreme and outrageous and undertaken with the intention of causing emotional distress. The conduct must be so extreme and outrageous as to exceed all bounds of that usually tolerated in a civilized society.

Because the camera placement was not intended to spy on Plaintiffs, the court found as a matter of law that Defendants' conduct did not rise to the level of "extreme and outrageous." Moreover, Plaintiffs' claims did not meet the threshold for the lesser "negligent" infliction of emotional distress.

### Lessons for Employers

The area of employee privacy is fraught with uncertainty. However, the main question to ask is whether the employee has a reasonable expectation of privacy in his or her office, desk, computer, voice mail or anything else that is part of the workplace. If employers disclose that these spaces and systems are being monitored, then it is much less likely that employees could prove that they did not expect the "intrusion."

We suggest disclosing in writing the existence of surveillance cameras, and whether computer and voicemail systems are subject to monitoring. Having the employee sign a receipt of such a notice is a good idea.

You may find that the mere disclosure of the installation of surveillance cameras will correct the problem that the employer is seeking to capture on tape, since once employees know that they are being watched, they may be on their best behavior.

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