California Supreme Court Weighs in on Privacy in the Workplace

By Bill Whelan

Former Supreme Court Justice Potter Stewart famously wrote that hard-core pornography was hard to define, but "I know it when I see it."[1] At first blush, the California Supreme Court has taken a similar approach to privacy in the workplace in *Hernandez v. Hillsides, Inc.*[2] Either that or the basketball "no harm, no foul" rule. But on closer analysis, while the supreme court has not provided much in the way of definitive answers, it has given lower courts and practitioners an analytical framework for evaluating workplace privacy claims. Stressing that California law provides no bright line rule on employee privacy questions and that each case must be judged on its own facts, the court nevertheless set down some guiding principles.

Factual Background

Defendant, Hillsides, Inc., ran a residential facility for neglected and abused children. Plaintiffs Abigail Hernandez and Maria-Jose Lopez worked for Hillsides, sharing a private office. The facility's director, John A. Hitchcock, learned that at night, after plaintiffs had gone for the day, an unknown person had used a computer in plaintiffs' office to look at pornographic websites.[3]

Troubled that the culprit might be a staff member who worked with the children, Hitchcock set up a hidden camera and motion detector in their office, aimed at the computer in question, without notifying plaintiffs. While the camera could be turned on from a remote location, the equipment was never used to view or videotape either plaintiff. It was not Hitchcock's intent or expectation to catch plaintiffs on tape.

Hernandez periodically used her office to change into athletic clothes and, two or three times, Lopez raised her shirt to show Hernandez her post-pregnancy figure.[4]

So after plaintiffs discovered the camera and motion detector, they were understandably concerned. Hitchcock met with them to explain what he had done. During the meeting, Lopez asked to see the surveillance tape. Hitchcock agreed. The group went to Hitchcock's office and watched the tape on his television set. According to both plaintiffs, there was not much to see.[5]

Nonetheless, plaintiffs filed suit alleging, among other things, that Hillsides and Hitchcock had violated their right to privacy under both common law and the California Constitution.[6] The trial court granted defendants' summary judgment motion; the court of appeal reversed; and the supreme court granted review.

General Privacy Principles

The court explained that a "privacy violation based on the common law tort of intrusion has two elements. First, the defendant must intentionally intrude into a place, conversation or matter as to which the plaintiff has a reasonable expectation of privacy. Second, the intrusion must occur in a manner highly offensive to a reasonable person."[7] As to the first element "the defendant must have 'penetrated some zone of physical or sensory privacy ... or obtained unwanted access to data' by electronic or other covert means, in violation of the law or social norms."[8] Moreover, "the expectation of privacy must be 'objectively reasonable.' "[9] The

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1 The quote is actually a fragment from Justice Stewart's short concurring opinion in *Jacobellis v. Ohio*, 378 U.S. 184, 197 (1964). The end of the sentence—"and the motion picture involved in this case is not that"—is frequently dropped from the quote.

2 47 Cal. 4th 272 (2009).

3 *Id.* at 277.

4 *Id.* at 279.

5 *Id.* at 284.

6 *Id.* at 278.

7 *Id.* at 286 (citing Shulman v. Group W Productions, Inc., 18 Cal. 4th 200, 231 (1998) (holding that media company was entitled to summary judgment on publication of private facts claim for taping and broadcasting the rescue of plaintiffs who were automobile accident victims, but that triable issues existed on the intrusion into private places and conversation claims for taping and broadcasting segments from the rescue helicopter and hospital room); Miller v. Nat'l Broad. Co., 187 Cal. App. 3d 1463, 1482 (1986) (plaintiff entitled to a trial on claim that without her consent, NBC television crew entered her home to film the paramedics who had been called to try to save plaintiff's husband, a heart attack victim)).

8 *Id.* (citing *Shulman*, 18 Cal. 4th at 232).

9 *Id.*

reasonableness of the employee's privacy expectations is to be judged by examining such factors as "(1) the identity of the intruder, (2) the extent to which other persons had access to the subject place, and could see or hear the plaintiff, and (3) the means by which the intrusion occurred."[10]

The second element basically involves "a policy determination as to whether the alleged 'intrusion is highly offensive' under the particular circumstances. Relevant factors include the degree and setting of the intrusion, and the intruder's motives and objectives."[11] Because California tort law provides no bright line test to determine "offensiveness," each case must be decided on its own facts.[12]

The right to privacy found in the California Constitution has similar elements. First, the plaintiff must "possess a legally protected privacy interest."[13] Second, "the plaintiff's expectations of privacy must be reasonable."[14] "Third, the plaintiff must show that the intrusion is so serious in 'nature, scope and actual or potential impact as to constitute an egregious breach of the social norms.' "[15]

Hill v. National Collegiate Athletic Association[16] and its progeny further provide that no constitutional violation occurs (or, in other words, a defense exists) if the intrusion on privacy is justified by one or more competing interests. The defendant does not have to prove a "compelling countervailing interest," only "general balancing tests are employed."[17]

Condensing the largely parallel elements of these two claims, the supreme court concluded that workplace privacy claims require an evaluation of "(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."[18]

Intrusion Upon Reasonable Privacy Expectations

The supreme court's analysis started "from the premise that, while privacy expectations may be significantly diminished in the workplace," they do exist.[19] The court explained that in evaluating whether the employee has a reasonable expectation of privacy, the setting matters. "At one end of the spectrum are settings in which work or business is conducted in an open and accessible space, within the sight and hearing not only of coworkers 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."[20]

The court concluded that Hillsides had violated the plaintiffs' reasonable expectations of privacy. Hillsides had provided plaintiffs with an enclosed office with a door that could be shut and locked, and window blinds that could be drawn. Such a setting created legitimate expectations of privacy.[21] Other courts have recognized

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10 *Id.* at 287 (citing Sanders v. Am. Broad. Companies, 20 Cal. 4th 907, 923 (1999) (reporter working undercover for a national broadcasting company obtained employment alongside the plaintiff as a telepsychic, giving "readings" over the phone. The reporter secretly videotaped and recorded interactions with the plaintiff and other psychics using a hidden camera. Plaintiff sued the reporter and the broadcasting company for violating his privacy after one of his secretly taped conversations was shown on television); *Shulman*, 18 Cal. 4th at 233–35).

11 *Id.* (citing Taus v. Loftus, 40 Cal. 4th 683, 737 (2007); *Shulman*, 18 Cal. 4th at 236; *Miller*, 187 Cal. App. 3d at 1483–84).

12 *Id.* (citing *Shulman*, at 237).

13 *Id.* (citing Hill v. Nat'l Collegiate Athletic Assn., 7 Cal. 4th 1, 35 (1994) (Stanford student athletes unsuccessfully sued the NCAA claiming that its drug testing program violated their right to privacy)).

14 *Id.*

15 *Id.* (citing *Hill*, 7 Cal. 4th at 37; Sheehan v. San Francisco 49ers, Ltd., 45 Cal. 4th 992, 998 (2009) (plaintiffs objected on privacy grounds to NFL team's requirement that fans be patted down before being allowed to enter stadium; remanded for further proceedings); Pioneer Electronics (USA), Inc. v. Superior Court, 40 Cal. 4th 360, 370–71 (2007) (addressing issue of whether right to privacy protected consumers of allegedly defective product from having their identifying information disclosed to plaintiffs' class action counsel)).

16 7 Cal. 4th 1 (1994).

17 *Hillsides*, 47 Cal. 4th at 288 (citing *Hill*, 7 Cal. 4th at 34, 38).

18 *Id.*

19 *Id.*; *see* Sanders v. Am. Broad. Companies, 20 Cal. 4th 907 (1999).

20 *Id.* at 290 (citing Wilkins v. Nat'l Broad. Co., 71 Cal. App. 4th 1066, 1072–73, 1078 (1999) (holding for purpose of common law intrusion tort that businessmen lacked privacy in lunch meeting secretly videotaped on crowded outdoor patio of public restaurant); and federal court cases involving the secret videotaping of locker rooms, changing rooms and restrooms).

21 *Id.* at 291.

the intrusive effect of hidden cameras and video recorders in settings that otherwise seem private.[22]

Offensiveness/Seriousness Of The Privacy Intrusion

Continuing the analysis, the supreme court then stated that plaintiffs "must show more than an intrusion upon reasonable privacy expectations. Actionable invasions of privacy also must be 'highly offensive' to a reasonable person, and 'sufficiently serious' and unwarranted as to constitute an 'egregious breach of the social norms.' "[23]

A court determining whether this key second element has been met needs to examine all of the surrounding circumstances, including the "degree and setting" of the intrusion and the "intruder's 'motives and objectives.' "[24] "Courts also may be asked to decide whether the plaintiff, in attempting to defeat a claim of competing interest, has shown that the defendant could have minimized the privacy intrusion through other reasonably available, less intrusive means."[25]

Degree And Setting Of Intrusion

Looking at the facts, the court had no difficulty concluding that the defendants' violation of plaintiffs' privacy expectations was not highly offensive or sufficiently serious so as to warrant liability.[26] The court found that the defendants made a logical choice in selecting the location to videotape the person who was misusing the computer system. Once the camera was placed in the plaintiffs' office, it was aimed towards Lopez's desk and computer workstation only. Likewise, knowledge of the surveillance equipment was limited. Moreover, the surveillance equipment was activated during a limited time frame, and Hitchcock removed the equipment after 21 days, during which time no one had used Lopez's computer for pornographic purposes.[27]

In addition, on each of the three occasions, Hitchcock connected the wireless devices and allowed the system to remotely monitor and record events inside plaintiffs' office only after their shifts ended and after the plaintiffs normally left the facility. Hitchcock never activated the system during regular business hours when plaintiffs were scheduled to work. The evidence showed that they were not secretly viewed or taped while engaged in personal or work activities.[28] The court concluded that such measures were not excessive or egregious.[29]

Defendants' Motives And Justifications

The court was also persuaded by the fact that the surveillance was not conducted for purposes such as harassment, blackmail or prurient curiosity. Defendants had a legitimate right to try to identify the unknown staff person who was inappropriately using the computer system. The court also appeared to be sympathetic to the liability risk to Hillsides if it had done nothing to address the problem, as well as the limited range of available solutions.[30]

Conclusion

The court concluded by saying that nothing in its opinion was meant to encourage employers to use surveillance measures, particularly in the absence of adequate advance notice to those within camera range that their actions may be viewed and taped. Nevertheless, considering all of the circumstances, the court concluded that "plaintiffs could not reasonably expect to establish that the defendants' conduct was highly offensive and constituted an egregious violation of prevailing social norms."[31] The court found the use of the surveillance system was "narrowly tailored in place, time, and scope, and was prompted by legitimate business concerns," and that defendants had legitimately tried to avoid invading plaintiffs' privacy.[32]

In light of *Hillsides*, employers who feel a business need to use surveillance systems should do several things to avoid potential liability. First, employers should provide advance notice to employees and customers (through signs and handbooks) that surveillance systems are used on the premises. This serves to lessen any expectations of privacy. Second, employers should try other possible solutions first, and then document those efforts and their results. Third, employers should restrict any surveillance in place, time and scope to ensure that surveillance activities are no broader than necessary to address legitimate business

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22 *Id.*

23 *Id.* at 295 (internal citations to *Shulman*, 18 Cal. 4th at 231, and *Hill*, 7 Cal. 4th at 37, omitted in text).

24 *Id.* (citing *Shulman*, 18 Cal. 4th at 236).

25 *Id.* (citing *Hill*, 7 Cal. 4th at 38).

26 *Id.* at 296.

27 *Id.*

28 *Id.* at 297.

29 *Id.*

30 *Id.* at 297–98.

31 *Id.* at 301.

32 *Id.*

concerns. Fourth, employers should never use videotaping or surveillance equipment in locker rooms, rest rooms, and the like.[33] Fifth, without ensuring that all legal requirements have been met, employers should not record conversations as part of any surveillance efforts.[34] Finally, employers should take all reasonable security steps to ensure that their surveillance systems are never misused by other employees or third parties. By rigorously following and documenting these common sense steps, employers should have a valid defense to workplace privacy claims.

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[33] *See* Cal. Penal Code § 647(j) (prohibiting secret videotaping of a person in state of undress where person has reasonable expectation of privacy).

[34] *See id.* at § 632 (eavesdropping on or recording confidential communications); 18 U.S.C. § 2511 (interception and disclosure of wire, oral or electronic communications).