

# Private matters

How a recent case addressed the issue of workplace privacy

In the *Hernandez v. Hillside Inc.* decision, the California Supreme Court addressed some of the most important issues of workplace privacy.

In the case, the two plaintiffs were women who worked for the defendant Hillside and shared an enclosed office where they performed clerical work during the day. Hillside is a nonprofit residential facility for neglected and abused children, including victims of sexual abuse. The director of the facility learned that late at night, someone was accessing the company computer in the plaintiffs' office and viewing pornographic Web sites. This conflicted with company policy and was squarely at odds with Hillside's mission of providing a safe haven for children.

The director of Hillside set up a remotely activated hidden video camera in the office with the hope of catching whoever was coming in to access the computer. While he did not suspect either of the plaintiffs were the culprit, he did not notify them he had placed the video camera in their office. He never operated the camera during business hours, and neither of the plaintiffs' activities were ever viewed or recorded by means of this surveillance system, and neither of the plaintiffs ever contended otherwise.

"Nevertheless, the plaintiffs sued Hillside and the director alleging, among other things, that the existence of the video surveillance system intruded into a protected place and violated their constitutional right to privacy," says Peter B. Maretz, a shareholder with Stokes Roberts & Wagner ALC.

The trial court dismissed the case on Hillside's summary judgment motion, but the intermediate Court of Appeal reversed it, finding that the plaintiffs had suffered an intrusion into a protected zone of privacy that was so unjustified and offensive as to constitute a privacy violation.

*Smart Business* spoke with Maretz about *Hernandez v. Hillside Inc.* and what your company can learn from it.

## Was the Court of Appeal's decision the right one?

While the California Supreme Court ultimately found that the trial court correctly dismissed the case, it did so for different reasons. The court recognized that the office in question was in an administrative building that contained no treatment or residential facilities for any of the children on site. The office had a window with blinds, and an open panel at the bottom of the office



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door. Both plaintiffs testified they would, at times, draw the window blinds and use the office to change into exercise clothes at the end of the day. Hillside had an electronic systems policy that notified employees they had no expectation of privacy on the company computer systems. Hillside also offered evidence that, while the door to the office could be locked, several people other than the plaintiffs had keys to the door.

## So the plaintiffs didn't have any privacy rights in their office?

The court acknowledged that the office space did offer plaintiffs some level of privacy insofar as it was set up so that the blinds could be drawn and the door locked. While this was mainly to afford plaintiffs refuge from interruptions and distractions, it also reasonably allowed them a protected space to perform personal activities such as changing their clothes. The court further recognized that the remote activated video system could potentially pose an unreasonable intrusion into the plaintiffs' legitimate privacy in that space. That said, the fact that the intrusion was limited to after hours, was done only intermittently, and was for a legitimate reason (particularly in light of the nature of Hillside's operations) led the court to find that any intrusion that occurred by virtue

of the hidden video surveillance was not so egregious as to be actionable.

## In light of this case, should companies do more to monitor their workplaces?

Monitoring workplaces for theft or unauthorized use of company equipment, such as computers and the Internet, is a critical function of any business, and is increasingly important as the use of the Internet proliferates into regular business practices. The Hillside case teaches us that not all intrusions are inappropriate so long as they are narrowly tailored to achieve the legitimate business goal, employees are notified that surveillance or monitoring may take place, and that the nature of the intrusion does not outweigh the legitimate needs of the business (e.g., video surveillance of a dressing room will be treated differently than surveillance of a lunch room). The propriety of any monitoring is intensely factually specific, and the ramifications of an inappropriate intrusion can be profound and devastating. For that reason, it is critical that you review your systems and disclosures with counsel to minimize the risk of unlawfully invading your employees' privacy rights.

## Are there other timely employment-related rulings employers should know about?

One closely watched Supreme Court case in recent years, at least in the employment context, is the Brinker case, which considers, among other things, whether employers must ensure their employees take 30 minute meal breaks, and not simply provide the opportunity for the break. The briefing has closed on the case, oral argument will take place soon, and a decision is likely in mid 2010.

One notable occurrence is that the California Labor Commissioner, to the surprise of many, submitted an amicus brief to the effect that it does not interpret the relevant law as requiring employers to ensure that their employees take their meal breaks. Rather, the Labor Commissioner takes the position that employers need only ensure the employee is free of all duties, but that the employer is not in violation if the employee, nevertheless, voluntarily foregoes some or all of their meal breaks. This is by no means binding on the court, but is certainly a boost to the employer that the state enforcement authority views the law in such a fashion. <<

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