

VIDEO SURVEILLANCE UNREASONABLE SEARCH IN LOCKER ROOM

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As illustrated by the cases described herein, the implementation of a video surveillance system to deter and detect wrongful conduct and/or investigate workplace or locker room theft would generally constitute an unconstitutional search in violation of the Fourth Amendment if it included areas where there is a "reasonable expectation of privacy."

PRIVACY EXPECTATION

In the case of *Doe v. Dearborn Public Schools* (E.D. Mich. 3/21/2008), several physical education teachers claimed the installation of two hidden cameras within their staff office violated their Fourth Amendment rights to be free from unreasonable searches. The camera was installed in response to a number of thefts in the adjacent boys' locker room. The thefts appeared to be occurring during one of the teacher's preparation times when he would be alone in the staff office. The teachers claimed they had "a reasonable expectation of privacy in their office and an expectation not to be video taped in their office."

As cited by the court, "[t]he Fourth Amendment, applicable to the States through the Fourteenth Amendment's Due Process Clause, prohibits government actors from conducting unreasonable searches and seizures":

The occurrence of a "search" is defined in terms of whether a person had a "constitutionally protected reasonable expectation of privacy." A "reasonable expectation of privacy" exists when: (1) the individual has manifested a subjective expectation of privacy in the object of the challenged search and (2) society is willing to recognize that expectation as reasonable.

In determining whether an area warrants "the most scrupulous protection from government invasion," the court would consider "whether the human relationships that normally exist at the place inspected are based on intimacy, confidentiality, trust or solitude and hence give rise to a "reasonable" expectation of privacy." In this particular instance, the court found the teachers had provided sufficient evidence that they were entitled to "an expectation of privacy in their locker room/office." In so doing, the court noted that "[t]he Supreme Court has acknowledged that society recognizes that a person enjoys a reasonable expectation of privacy in an office, even in a shared office."

The office was for the exclusive use of the male physical education teachers. Even if the Plaintiffs did not use the office to change their clothes, Plaintiffs still had a reasonable expectation of privacy in the office, as noted by the Supreme Court in light of the fact that the office was a room contained in the boys' locker room and was for the exclusive use of the male physical education teachers.

According to the court, "a search of an employee's office by a supervisor will be 'justified at its inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct." Further, the court found "[t]he search will be permissible in its scope when the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of the nature of the misconduct."

Applying these principles to the facts of the case, the court found the videotape search may have been justified at its inception to determine whether one of the teachers was stealing. On the other hand, in the opinion of the court, it was questionable "whether the measures adopted were reasonably related to the objectives of the search." In particular, the court noted that there were other teachers sharing the office who were not suspected in the alleged thefts. Moreover, since "the office was also used by the teachers and referees to change their clothing," the court found "the search may have been excessively intrusive." As a result, under the circumstances of this case, the court concluded that the teachers, as public employees, had produced sufficient evidence to establish a violation of their "constitutional right to be free from unreasonable video searches of their shared office."

SERIOUS INTRUSION

In the case of *Bernhard v. City of Ontario*, No. 06-55736 (9th Cir. 3/13/2008), the issue before the court was whether covert video surveillance of a police officers' locker room in connection with an investigation of a reported flashlight theft constituted an unreasonable search in violation of the Fourth Amendment.

In determining whether "a particular governmental intrusion constitutes an unreasonable search," the court had to consider "whether the persons searched had an expectation of privacy against the intrusion, and whether that privacy expectation was reasonable."

In this particular instance, the court found the "undisputed facts" demonstrated a violation of the employees' "Fourth Amendment right to be free from unreasonable searches."

Here, Plaintiffs clearly expected that they would not be secretly videotaped in their locker room. There were no signs in the locker room, or anywhere else in the building, announcing that the locker room was subject to video, audio, or photographic surveillance. Plaintiffs were never informed by management, either orally or in writing, that they might be subject to such surveillance. They engaged in private activities in the locker room, such as changing clothes, using the bathroom, and showering.

As a result, the court found that the employees had a reasonable "expectation of privacy against the covert video surveillance of the locker room." In so doing, the court noted that "hidden video surveillance is one of the most intrusive investigative mechanisms available" and "the place searched -- an employee locker room -- was not open to the public and was used for private behavior." Accordingly, the court found "common sense dictates that reasonable persons, including police officers, do not expect to be secretly videotaped by other police officers while changing clothes in their workplace locker rooms."

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As cited by the court, "every court considering the issue has noted video surveillance can result in extraordinarily serious intrusions into personal privacy" interests protected by the Fourth Amendment.

It is clear that silent video surveillance results in a very serious, some say Orwellian, invasion of privacy. Because of the invasive nature of video surveillance, the government's showing of necessity must be very high to justify its use. Indiscriminate video surveillance raises the spectre of the Orwellian state...

For obvious reasons, the privacy expectation against video surveillance in one's own locker room is greater than in another's office. Unlike most offices, employee locker rooms are usually same-sex. They do not have windows and are typically inaccessible to the public. Furthermore, people do not regularly engage in the private behavior of changing clothes, using the bathroom, or showering within their offices. Accordingly, if an office is a place where people have a privacy interest against covert video surveillance, a locker room is also such a place.

NO REASONABLE SUSPICION

In the case of *Brannum v. Overton County School Board*, 516 F.2d 489 (6th Cir. 2/20/2008), video surveillance equipment was installed throughout a middle school in an effort to improve security, including the boys' and girls' locker rooms. Several students alleged that "their constitutionally protected right to privacy encompasses the right not to be videotaped while dressing and undressing in school athletic locker rooms--a place specifically designated by the school authorities for such intimate, personal activity."

In the opinion of the court, "the privacy right involved here" was one "protected by the Fourth Amendment's guarantee against unreasonable searches." According to the court, "an abundance of common experience... leads inexorably to the conclusion that there must be a fundamental constitutional right to be free from forced exposure of one's person to strangers of the opposite sex when not reasonably necessary for some legitimate, overriding reason."

In determining whether the installation of the cameras was justified, the court also considered "whether the search--here the videotaped surveillance-- as actually conducted was reasonably related in scope to the circumstances which justified the surveillance/search in the first place." In so doing, the court had to determine whether there were "reasonable grounds for suspecting that the search will garner evidence that a student has violated or is violating the law or the rules of the school, or is in imminent danger of injury on school premises."

In the opinion of the court, increased security was "an appropriate and common sense purpose," but "the scope and manner in which the video surveillance was conducted" was still "subject to Fourth Amendment limitations."

A search--and there can be no dispute that videotaping students in a school locker room is a search under the Fourth Amendment -- is permissible in its scope when the measures adopted are reasonably related to the objectives of the search and

not excessively intrusive in light of the age and sex of the student and the nature of the infraction. It is a matter of balancing the scope and the manner in which the search is conducted in light of the students' reasonable expectations of privacy, the nature of the intrusion, and the severity of the school officials' need in enacting such policies, including particularly, any history of injurious behavior that could reasonably suggest the need for the challenged intrusion.

To pass constitutional muster, the court noted that the method chosen must be "justifiably intrusive in light of the purpose of the policy being carried out." In the opinion of the court, a hypothetical "heightened concern for student safety in the 'privacy' of student locker rooms" did not render "any and all means of detection and deterrence reasonable." Further, the court noted that "a valid purpose does not necessarily validate the means employed to achieve it." Instead, to satisfy constitutional requirements, the court found "the means employed must be congruent to the end sought."

Applying this reasoning to the facts of the case, the court found no evidence in the record indicating "any concerns about student safety or security in the locker rooms that would reasonably justify the installation of the cameras to record all the activities there."

The defendants do not claim that any misconduct occurred in these areas in the past or that the plan to install the surveillance equipment in the school locker rooms was adopted because of any reasonable suspicion of wrongful activity or injurious behavior in the future...

Given the universal understanding among middle school age children in this country that a school locker room is a place of heightened privacy, we believe placing cameras in such a way so as to view the children dressing and undressing in a locker room is incongruent to any demonstrated necessity, and wholly disproportionate to the claimed policy goal of assuring increased school security, especially when there is no history of any threat to security in the locker rooms.

As a result, given the students' expectation of privacy and the character of the intrusion in this situation, the court concluded that "the locker room videotaping was a search, unreasonable in its scope, and violated the students' Fourth Amendment privacy rights."