COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

FOR THE COMMONWEALTH OF MASSACHUSETTS

No. 09519

ESSEX COUNTY

GAIL NELSON,
Plaintiff-Appellant

v.

SALEM STATE COLLEGE, ET AL.
Defendants-Appellees

On Appeal from a Judgment of the Superior Court

BRIEF OF AMICUS CURIAE AMERICAN FEDERATION OF STATE, COUNTY & MUNCIPAL EMPLOYEES, COUNCIL 93, AFL-CIO

WAYNE SOINI
BBO # 472020
JAIME DIPAOLA
BBO # 661515
AFSCME Council 93
8 Beacon Street
Boston, MA 02108
Tel.: (617) 367-6024

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Whether the trial court erred in holding that the individual defendants were entitled to qualified immunity and therefore not liable to Gail Nelson under 42 U.S.C. §1983 on the grounds that no clearly established constitutional right was violated by secretly videotaping her private activities at her workplace, including changing her clothing before and after regular business hours, every day for several months?

II. Whether the trial court erred in holding that the plaintiff's claim against the individual defendants for invasion of privacy under G. L. c. 214, §1B is barred by common law immunity because videotaping and viewing her private activities were "discretionary acts?"

III. Whether the trial court erred in holding that Salem State College is not liable under the Massachusetts Tort Claims Act on the grounds that the training and supervision of the individual defendants concerning the proper use of covert video surveillance

were discretionary functions which were exempted by G. L. c. 258, 10 (b)?

STATEMENT OF THE CASE

The Amicus adopts the Statement of Proceedings and Statement of the Facts of the Appellant, Gail Nelson.

STATEMENT OF INTEREST OF AMICUS CURIAE

The American Federation of State, County & Municipal Employees, Council 93, AFL-CIO (hereafter, "AFSCME") is a labor union. AFSCME represents some employees in the private sector, i.e., subject to Federal law and the National Labor Relations Board, as well as some employees in Maine, New Hampshire and Vermont. However, most of the 40,000 employees in AFSCME's bargaining units are Massachusetts public employees. Their wages, hours and working conditions are subject to their union contract, Massachusetts law and the Labor Relations Commission.

Among these members was Gail Nelson.

AFSCME's typical bargaining unit member is non-professional, including but not limited to clerical

and office workers, public works drivers and laborers, correction officers, custodians and trades workers and direct care workers of mental retardation and mental health facilities.

AFSCME employees are concerned about privacy at the public workplace, including their right to expect not to be subject to secret video surveillance.[1]

ARGUMENT

"Who lives well hidden, lives well."
-Ovid

Does privacy follow us to work?[2] Or do we leave home without it?

In other words, is there any remedy when our employers secretly videotape us?

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[1] AFSCME has no problem with entrance/exit video surveillance, which should be and typically is installed with a sign that there is video surveillance of the doorway. Further, on a bargained basis, the videotaping of "cell moves" at a facility housing inmates may be as protective of the correction officer(s) involved as of the inmate. That is, a videotape records the event, making it less available to exaggerated testimony or failures of recollection. But AFSCME has never approved panoramic videotaping, constant videotaping or, as here, secret video surveillance at any work sites.

[2] In the seventeenth century rationalist philosopher Rene Descartes adopted this saying as his motto. It is undefined whether he distinguished between home and work, given that he worked at home. Richard Watson, Cogito, Ergo Sum, The Life of Rene Descartes 108; Boston, David R. Godine, Publisher (2002).

The trial court answered a question for Gail Nelson; this Court will answer that question with finality not only for Gail Nelson but for many other Massachusetts workers as well: Is there an enforceable expectation of privacy against being secretly videotaped?

The employer below argued that office layout is dispositive.

The trial judge, although persuaded to dismiss the complaint ultimately, was unmoved by that particular employer argument, writing on point as follows: "[t]he contention that secret video surveillance does not violate objectively reasonable expectations of privacy because it captures only what one knowingly displays to public view is overly simplistic." Nelson v. Salem State College, Me. Decision and Ord., Docket No. 098-1986 (Mass. Super. Sept. 18, 2003) (Kottmyer, J.) at 16.

She footnoted that statement. It is from the dissenting opinion of Cowles v. State, 23 P.3d 1168, 1182 (Alaska 2001) (Fabe, J. dissenting), cert denied sub nom., Cowles v. Alaska, 534 U.S. 1131 (2002) where

the court noted that such surveillance exceeds reasonably expected observation of one's person in:

- *duration,*
- *proximity,*
- *focus and*
- *vantage point*.

The fact that an office area is shared may affect, but does not *per se* eliminate, the workers' rights to privacy. "Shared work space" is no bar to bringing an action for invasion of privacy (G.L. c. 214, sec. 1B) or a violation of the Fourth Amendment. (That the Fourth Amendment has application outside an individual's home and personal effects has been obvious for a very long time. In 1886 privacy at work was recognized in a case Justice Brandeis later praised in hyperbolic celebration as one "that will be remembered as long as civil liberty lives in the United States,"[3] Boyd v. United States, 116 U.S. 616 (1886). The Supreme Court, for its twelfth time ever, for the first time on basis of the Fourth Amendment,

[3] Olmstead v. United States, 277 U.S. 438, 474 (1928) (Brandeis, J., dissenting).

struck down a Federal law, in order to protect an invoice for a shipment of glass from prying governmental eyes.)

But besides the 1886 case that was to be remembered as long as civil liberty lives in the United States, is there anything more? Well, yes, more specifically and much more recently a "shared break room" defense was rejected.

In 1993 the Supreme Court of Hawaii considered privacy expectations in a break room used by post office employees and their invited guests. State v. Bonnell, 75 Haw. 124, 147 (1993),[4] transcended general privacy concerns to reach the specific one before the court, establishing the principle that should have been dispositive in this Massachusetts case: "Whatever the general privacy interests the defendants may or may not have had in the break room, they had an actual and objectively reasonable expectation of privacy against being videotaped in it." Id.

[4] The Court's obligation in Gail Nelson's case, involving her reasonable expectations in 1995, involves reconstructing the privacy expectations emanating from caselaw *circa* 1995.

But after breakdown in Hawaii of that "shared break room" argument, this Massachusetts employer continued to argue from office layout, asking, in effect:

"What did she expect?"

Well, in 1995 Gail Nelson, whatever her general privacy concerns, did not expect to be secretly videotaped. Indeed, one scholar associates the rise of government surveillance capacity with intensified privacy concerns, characterizing it as a hot issue "sizzling" since the Second World War:

> Privacy, seemingly one of our hottest issues, in fact has taken over a century to ignite. Beginning in 1890 with the famous Brandeis and Warren opinion (*sic*) on the 'right to be let alone,' and led by judicial, domestic, social, and scientific debates throughout the twentieth century, privacy issues really began to sizzle during the Cold War, when government spying was advanced by surveillance technology . . .
>
> -Molly Peacock, ed., The Private I; Privacy in a Public World vii (St. Paul, Minnesota; Graywolf Publisher) (2001)

The employer insinuated that an office at street level with a storefront window, an office to which others have keys even if she locks its front door, supports

no expectation of privacy—even against secret videotaping.

AFSCME argues on a foundation laid by the Hawaiian Supreme Court that secret video surveillance is *sui generis*.

Something is wrong if your boss can make you blush.

A workplace is no place for peepholes or hidden cameras. Nobody should have to be wary of secret video surveillance within their office space.

"What did she expect?"

When Gail Nelson undressed and changed, when she applied medication to her upper body for severe sunburn, she expected to be alone, not on camera, not recorded on videotape.

<u>The second issue: perpetuation of exposure</u>

Ironically, even the employer demonstrated an initially sensitive awareness of the extraordinary

nature of secret video surveillance. The record below refers to a written application, signed approval and (in the application on its face) a limited period, thirty days. The trial judge recounted that on June 21, 1995, Salem State College's Public Safety Officer O'Connell applied in writing to Director of Public Safety Pray for thirty days of secret video surveillance and Pray approved.

The secondary issue thus arose after thirty days, when nothing was discovered (no illegal conduct or unauthorized entries) but the secret video surveillance continued beyond the authorized period. The trial judge noted without further comment that there was "no evidence that either detective renewed the application or that Pray approved the continued surveillance in writing." Nobody signed off. Coming up empty, literally without renewed warrant, its videotapes demonstrating daily that nothing illegal was happening, twenty-four hours a day, the employer nonetheless persisted in secret video surveillance.

The lack of any strong basis for video surveillance struck the trial judge. Especially given the Superior

Court's role in hearing and deciding applications for search warrants, the trial judge's characterization of grounds for video surveillance is noteworthy:

> [T]he intrusive nature of the surveillance, the relatively weak justification for the surveillance, its duration and the failure to limit the scope of the surveillance . . . raise substantial issues as to whether the video surveillance violated an expectation of privacy in plaintiff's person that society is prepared to recognize as reasonable.
>
> -Nelson v. Salem State College, Me. Decision and Ord., Docket No. 098-1986 (Mass. Super. Sept. 18, 2003) (Kottmyer, J.) at 15.

The trial judge footnoted this statement, quoting Liacos, C.J., that "video surveillance is one of the most intrusive forms of searches and can be grossly abused." Commonwealth v. Price, 408 Mass. 668, 677 (1990) (Liacos, J. dissenting) (quoting U.S. v. Torres, 751 F.2d 875, 882 (7th Cir. 1984), cert denied, 470 U.S. 1087 (1985)).

In all of this the trial judge exhibited fidelity to her duty to identify issues clearly.

Although she did not specifically distinguish the initial thirty day period from the second month of video surveillance and she ultimately dismissed the plaintiff's case, AFSCME joins the trial judge in identifying the nature of the dispute. In contrast to the State's dismissive argument that employees working in offices with windows on the street floor live in glass houses, the trial judge exhibited a respectful tone in asking:

"What did she expect?"

AFSCME follows the trial judge in arguing that three factors 1) the employer's justification for secret video surveillance (weak); 2) the duration of secret video surveillance (excessive); 3) limits on the scope of secret video surveillance (missing)(e.g., not activating the timer, not angling the camera properly, not ceasing when privacy was manifestly invaded, if only accidentally) are to be weighed against Gail Nelson's expectation not to be subject to one of the most intrusive forms of search all day, every day, at work.

AFSCME parts company with the trial judge only after that point. AFSCME argues for holding that Gail Nelson's reasonable expectation of privacy was violated when she was secretly videotaped.

AFSCME thus answers the question differently:

"What did she expect?"

Gail Nelson was entitled to privacy.

In court, she was entitled to expect to be allowed to enforce her common law right to an "inviolate personality," part of a more general "right to be let alone."[5]

She was, in essence, entitled to expect that the new phenomenon of a secret constant gaze at work, preserved on videotape, would be subject to judicial oversight.

What standard?

[5] Brandeis and Warren, "The Right to Privacy," 4 HAR. L. REV. 193, 195 (1890).

What then is the judicial standard?

AFSCME argues that secret video surveillance is subject to strict liability.

When one keeps a lion and the lion escapes, one is strictly liable for any damages.

Secret video surveillance, highly intrusive, fraught with high risk, naturally affords any worker an opportunity to be heard on her humiliation and anguish. Inherently with the act, there follows liability. It is irrelevant that the employer may not have intended that his lion escape or that his lion bite anyone but his lion did escape and did bite someone. That is the *prima facie* case of strict liability. (Massachusetts' menagerie includes a stag, Marble v. Ross, 124 Mass. 44, 47 (1877), a bear, Bottcher v. Buck, 265 Mass. 4, 7 (1928) and a zebra, Smith v. Jalbert, 351 Mass. 432, 435-436 (1966). These are creatures from Nature's evolutionary mass. Ought the result in law differ when it is a creation of one of the creatures?)

An employer who brings secret video surveillance to the office is strictly liable for the *inevitable* "accidental" invasions of privacy that will occur, just as anyone who brings a lion to work without a leash.

Nobody can predict when the accidents will happen or who will be hurt. But one should be able to predict the results in court. One should be able to predict that the risks fall entirely upon the secret video surveiller. One seeing that the lion, the stag, the bear and the zebra escaped for their moment of judicial fame should be able to predict with confidence that it is now the turn of secret video surveillance to be judicially nailed as inherently dangerous. The danger is to privacy. The right to be free from secret video surveillance is fundamental. Its violation should subject the employer, in a workplace under no one's control but the employer's, to strict liability.

In another word, the plaintiff need not prove *intent* to capture a worker in one of his or her private

moments. It is sufficient that the worker was so caught on tape, reviewed by a co-worker, whether her image was then erased or preserved and played for a wider audience.

No court will be asked to enjoin a *secret* video camera. Pre-video litigation cannot, by definition, debug the office. The surveilled do not know about it. Instead, once the secret is discovered, judicial consequences must then or never encumber the surveiller. It is the post-video consequence, it is strict liability for damages, that will inhibit employers from secret video surveillance.

Negligence suffices elsewhere

> (H)omeowners' policies generally cover only accidents, or what is known as negligent conduct, and specifically exclude intentional acts. So an *intentional* invasion of privacy is not covered by insurance, but *negligent* infliction of emotional distress is.
>
> -Ellen Alderman and Caroline Kennedy, The Right to Privacy 241; New York, Alfred A. Knopf (1995).

In strategizing whether to sue on the former or the latter basis, plaintiff's counsel in a secret

videotape suit in Texas brought the case for negligent infliction of emotional distress. Accordingly, in Massachusetts, secret video surveillance may come to court as a negligent tort. The employer may yet prove prophetic in arguing about recklessness or negligence (if this Court does not identify "strict liability" as the appropriate standard). But ought that not be reserved for some later case in which the defendant is a homeowner with a homeowner's policy, and the victim is a guest? This workplace case arises in Massachusetts on a basis of strict liability because it encumbers a person's livelihood.[6] It is the position of *amicus* that no one need run a gauntlet of risk—passing walls with eyes, if not ears—to work in Massachusetts. Privacy is not the price of public employment.

[6] "Livelihood" is a legal catalyst that ramps up the degree of judicial scrutiny afforded to a constitutional claim. See, e.g., Goldberg v. Kelly, 397 U.S. 254, 264 (1970) (welfare rights, right to travel, Fourteenth Amendment), Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886 (1961) (cook's entry badge, interest in her job, Fifth Amendment).

What did she expect?

> Normally, if you help or watch someone change from nightclothes to street clothes, you share a close relationship. You are good friends or lovers or a parent with a child.
>
> -Janna Malamud Smith, Private Matters; In Defense of the Personal Life 45 (New York; Addison-Wesley Publ. Co., Inc.) (1997)

The discomfort or humiliation of a person not aware of being "on camera," on videotape, in an occupied office, is not limited to the moment of discovery. Indeed, the moment of discovery is only the beginning of the discomfort and humiliation.

Property right

One other, different aspect remains to describe and to discuss. The right to privacy exists as to the unique property that is one's own image.

The employer does not own the worker's image. The employer had not bargained for her likeness. What Gail Nelson thought she controlled was seized without notice or hearing. For the boss *secretly* to record

her for a month and display that image on a television monitor viewed by another employee is unconscionable. No exigency warranted that seizure. Moreover, the employer perpetuated secret surveillance without renewed warrant or probable cause.

Why was her recorded image in her employer's possession? It was never part of the union contract. It had never been demanded at table. Accordingly, absent either a reasonable expectation of the individual and/or negotiation with and through those responsible to represent her under a duty of fair representation, there exists no right to this worker's image.

To every wrong there is a remedy. The employer's seizure of her image, violation of her privacy, is not exempt from judicial oversight and rectification.

"I'm the boss," is not a panacea.

The boss has no greater rights than are afforded in common law and by contract. By neither did it have a right to secretly videotape Gail Nelson at her work

site, without strict liability for the consequences of that decision.

Respectfully submitted,

Wayne Soini
BBO # 472020
AFSCME Council 93, AFL-CIO
8 Beacon Street
Boston, MA 02108
Tel.: (617) 367-6024

Jaime DiPaola
BBO # 661515
AFSCME Council 93, AFL-CIO
8 Beacon Street
Boston, MA 02108
Tel.: (617) 367-6024

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