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?"

II. 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

A. PRIOR PROCEEDINGS

On October 19, 1998, Gail Nelson brought suit in Essex Superior Court against her employer, Salem State College (the "College"), various College administrators and members of the College's police force, seeking injunctive relief and damages for their secret videotaping of her in areas in which she had a

reasonable expectation of privacy (App. I, p. 7).[1] She asserted that this secret videotaping violated the Fourth Amendment to the United States Constitution and the Massachusetts Privacy Act, G. L. c. 214, § 1B.[2]

After the completion of discovery, the defendants filed a motion for summary judgment with Ms. Nelson's Opposition on July 31, 2002. On September 18, 2003, the trial court (Kottmyer, J.) allowed the defendants' Motion for Summary Judgment based on qualified immunity and entered Judgment in favor of all of the defendants on all claims (the Trial Court's Decision is found in the Addendum to this brief and Appendix II at p. 178, and will hereinafter be referred to as "Decision").

Ms. Nelson filed a timely Notice of Appeal (App. II, p. 202), and the case was entered on the docket of

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1References to the Record Appendix will be denominated as "App. I" or "App. II" followed by the appropriate page and corresponding section of the document.

2In an Amended Complaint (App. I, p. 18), Ms. Nelson added a claim for negligence against the College for permitting the secret videotaping and for its failure to train or supervise the individual defendants. The Appellant contends that Salem State College can be held liable under G. L. c. 258 for its negligence in failing to properly train and supervise its employees and that the individual defendants can be held liable under both 42 U.S.C. § 1983 and G. L. c. 214, § 1B for their intentional acts in invading Ms. Nelson's privacy.

the Appeals Court on July 12, 2004.

B. STATEMENT OF FACTS

In June of 1995, officers of the College police force, with the knowledge and/or cooperation of College administrators, installed a hidden video camera and VCR in the College's Small Business Development Center ("SBDC" or the "Center"). The Center was located off-campus in a street level office at 197 Essex Street in Salem, Massachusetts, where Ms. Nelson worked as a secretary (App. I, p. 125 ¶¶ 2, 4, 16 and 20; App. II, p. 9 ¶¶ 19 and 27). Although the hidden video surveillance equipment was installed ostensibly to investigate possible illegal entries into the SBDC *after* normal business hours, the camera was set up to tape-record all activities at the Center for twenty-four hours a day (App. I, p. 125 ¶¶ 14, 15 and 21; App. II, p. 9 ¶¶ 14, 15, and 42-44). Although the defendants were conducting an investigation into possible criminal activity by unknown persons, they never made any effort to obtain a warrant for their secret video surveillance (App. II, p. 9 ¶¶ 14, 15, 43, 44 and 54). The secret twenty-four hour a day videotaping at the Center continued for a period of between 2 -4 months (App. I, p. 125 ¶¶ 22 and 23; App.

II, p. 9 ¶¶ 22 and 23). The hidden video camera recorded on tape areas of the Center, located behind partitions, that could not be seen either from the street through the Center's front window or by people entering the Center's front door (App. I, p. 125 ¶¶ 6 and 20; App. II, p. 9 ¶¶ 5, 6, 27, 30 and 33).

During the summer of 1995, Ms. Nelson would often bring a change of clothing to the Center (App. II, p. 9 ¶ 26). Because the layout of the Center provided her with some privacy, she sometimes would arrive at work early and change into her work clothes before the office opened; other times she would change her clothes after work for activities that she wanted to engage in without going home first (Id.). When changing from one set of clothes to another at the Center, for brief periods of time, she would only have on her underwear (Id.). In addition, during the month of July, 1995, while she was at work at the Center, Ms. Nelson had to frequently apply prescription medication to her chest and shoulders to treat a case of severe sunburn (Id.). In order to apply the sunburn medication, she had to unbutton her blouse, thereby revealing her upper torso and a portion of her breasts (Id.).

Ms. Nelson took great pains to protect her privacy when changing her clothes at the Center or applying her skin medication, including making sure no one else was in the SBDC, locking the front door whenever possible, moving behind one of the 5-6 foot tall partitions in the office, turning her back to the opening in the partition area, and listening carefully for anyone opening a door or approaching her (App. II, p. 9 ¶¶ 26 and 34-40). During the summer of 1995, Ms. Nelson was a 44 year old, unmarried, overweight woman, quite sensitive about her personal appearance and privacy, who would never have engaged in those private activities if she had known that anyone could see her or was making a videotape of her (App. II, p. 9 ¶¶ 26 and 34-37). Moreover, she knew that her supervisor (defendant Young) knew that she sometimes changed her clothes at the Center (App. II, p. 9 ¶¶ 40-41).

Ms. Nelson's precautions were all for naught, however, as the hidden video camera installed by the College police taped her every action, including her private activities in private areas of the office, before, during and after regular business hours at the Center, *without her knowledge*, for several months (App. I, p. 125 ¶¶ 20-22; App. II, p. 9 ¶¶ 6, 20, 26,

33 and 37). The secret videotaping, which never revealed any illegal or unauthorized activity, was never ordered to be halted by any of the defendants, and the video surveillance equipment was still in place in mid-October, 1995, when it was discovered accidentally by one of Ms. Nelson's co-workers (App. I, p. 125 ¶¶ 21-23; App. II, p. 9 ¶¶ 22-23 and 47). Numerous employees of the College, including defendants Fuller, O'Connell, Young, Pray, as well as another supervisor, Allan Leavitt, had access to and/or viewed the secretly made videotapes on which Ms. Nelson appeared (App. I, p. 125, ¶¶ 22 and 24; App. II, p. 9 ¶¶ 21 and 24).

The defendants did not take any steps to consider or protect the privacy of the people working in the SBDC, including Ms. Nelson, from the intrusiveness of secret twenty-four hour a day videotaping. Prior to installing the hidden camera, the College police officers did not take any other steps to investigate whether or not any illegal entries were occurring in the building (App. II, p. 9 ¶ 16). They did not consider alternatives such as putting an alarm system on the Center's door, having the Salem Police increase the frequency of their patrols, or interviewing

employees of the Center as to whether they had any information about illegal entries (Id.). They did not consider having a court review their right to conduct secret video surveillance by seeking to obtain a warrant (App. II, p. 9 ¶ 54). Further, instead of placing the camera so that it viewed only the front door to the Center, the camera taped a view of the entire length of the office, including private areas shielded by partitions (App. I, p. 125 ¶ 20; App. II, p. 9 ¶¶ 5, 20, 26 and 33). Finally, instead of using the VCR's timer mechanism so that the videotaping was limited to the evening hours when the Center was closed, the College police officers chose to videotape the Center twenty four hours a day (App. I, p. 125 ¶ 21; App. II, p. 9 ¶¶ 44 and 45).

Despite the fact that defendant Harrington, the President of the College, believed that it was inappropriate to conduct any covert video surveillance without her prior knowledge and approval, and that various College administrators were aware that the College police had conducted covert video surveillance at the College prior to the taping at the SBDC, the defendants did not develop any policies before the SBDC videotaping that required any administrator,

other than police chief Brian Pray, to be informed about, or to give prior approval for, the use of such secret video surveillance (App. II, p. 9 ¶¶ 48-53). Moreover, since obtaining the covert video surveillance equipment in 1993, the College police had not received any training whatsoever in the appropriate use of such equipment or on the issue of privacy rights as protected by the United States and Massachusetts Constitutions and laws (App. II, p. 9 ¶¶ 55-56).

SUMMARY OF ARGUMENT

The defendants' actions in secretly videotaping Gail Nelson at her workplace twenty-four hours a day for a period of several months, while she engaged in legitimate activities (such as changing her clothes and applying medication to her upper torso), which she reasonably believed she was keeping private from others, was extraordinarily intrusive and violative of her privacy, and was in violation of her constitutionally protected privacy rights under the Fourth Amendment to the U. S. Constitution. The trial court erred in not ruling that the defendants violated Ms. Nelson's objectively reasonable expectation of

privacy against being secretly videotaped while she engaged in those activities at her workplace (pp. 10-27).

In June, 1995, at the time of the defendants' actions, Massachusetts case law and statutes, and the consensus of case law from other jurisdictions, had clearly established Gail Nelson's right to be free of prolonged secret electronic surveillance at her workplace. It was therefore error by the trial court to allow the defense of qualified immunity to 42 U.S.C. § 1983 liability for the individual defendants (pp. 27-37).

Defendants Pray, Young, O'Connell and Fuller are not shielded by common law immunity for their continuing and intentional acts in secretly videotaping Ms. Nelson. Their intentional actions were not discretionary in nature and constituted an unreasonable and substantial invasion of Ms. Nelson's privacy in violation of the Fourth Amendment and the Massachusetts Privacy Act, G. L. c. 214, § 1B (pp. 37-45).

The liability of Salem State College for its negligent failure to properly train and supervise the individual defendants is not barred by the

discretionary function exemption of the Massachusetts Tort Claims Act, G. L. c. 258, because the College was required to train and supervise its employees concerning the limits placed upon their actions by the Fourth Amendment, Article 14 and G. L. c. 214, § 1B (pp. 45-49).

ARGUMENT

I. The Defendants' Prolonged Secret Videotaping Of Gail Nelson's Private Activities At Her Workplace, Including Changing Her Clothing Before And After Regular Business Hours, Violated The Fourth Amendment To The United States Constitution.

A. The Trial Court Erred By Failing To First Consider The Plaintiff's Claim Of A Constitutional Violation.

When confronted with the defense of qualified immunity, a court is required, before addressing the issue of immunity, to consider and rule on the threshold question of whether "[t]aken in the light most favorable to the party asserting the injury, [] the facts alleged show the [government actor's] conduct violated a constitutional right." Saucier v. Katz, 533 U.S. 194, 201 (2001). This salutary procedure is required by the decisions of the Supreme Court, Saucier v. Katz, *supra*, Hope v. Pelzer, 536 U.S. 730, 736 (2002), by the First Circuit, Bellville v. Town of Northboro, 375 F.3d 25, 30 (1st Cir. 2004), by the Supreme Judicial Court, Gutierrez v. Mass. Bay Transp. Authy., 437 Mass. 396, 403-404 (2002), and by this court, Henderson v. Commissioners of Barnstable

County, 49 Mass. App. Ct. 455, 463 (2000).[3]

In ruling upon the applicability of the defendants' qualified immunity claims in this case, however, the trial court bypassed consideration of the plaintiff's constitutional claims and proceeded to address only the issue of immunity. This procedure plainly affected the trial court's analysis of the qualified immunity claims as it lacked an appropriate standard against which to measure whether the rights asserted by the plaintiff were clearly established.

B. It Was A Clear Constitutional Violation For The Defendants To Secretly Videotape Gail Nelson At Her Workplace For A Period Of Several Months.

Gail Nelson was subjected to the most pernicious and invasive government intrusion into her privacy imaginable: secret videotaping of her every moment,

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3 The reason for initially addressing whether there was a violation of a constitutional right was explained by the Saucier court: "In the course of determining whether a constitutional right was violated on the premises alleged, a court might find it necessary to set forth principles which will become the basis for a holding that a right is clearly established. This is the process for the law's elaboration from case to case, and it is one reason for our *insisting* upon turning to the existence or nonexistence of a constitutional right as the first inquiry. The law might be deprived of this explanation were a court simply to skip ahead to the question whether the law clearly established that the officer's conduct was unlawful in the circumstances of the case." 533 U.S. at 201 (emphasis added).

without interruption, while she was physically in her workplace, for a period of some 2 - 4 months, despite the fact that she was not suspected of any illegal activity and that the videotaping revealed none.

There is no question that video surveillance is a search which implicates core Fourth Amendment concerns. Indeed, "[v]ideo surveillance has been recognized to be one of the most intrusive forms of searches performed by the government, regardless of the type of premises searched." State of Indiana v. Thomas, 642 N.E.2d 240, 245 (Ind.App. 1995). Consequently, "every court considering the issue has noted [that] video surveillance can result in extraordinarily serious intrusions into personal privacy.... If such intrusions are ever permissible, they must be justified by an extraordinary showing of need." United States v. Koyomejian, 970 F. 2d 536, 551 (9th Cir. 1992) (Kozinski, J., concurring). As Judge Posner explained in United States v. Torres, 751 F.2d 875, 882 (7th Cir. 1984), "it is unarguable that television surveillance is exceedingly intrusive...and inherently indiscriminate, and that it could be grossly abused – to eliminate personal privacy as understood in modern Western nations."

And so it was in this case. The silent unblinking lens of the hidden camera was intrusive in a way that no human observation of Ms. Nelson's office could have been. The camera recorded areas of the office that were not visible to the general public. It never looked away, never missed a detail, and it made a permanent record that, unlike human memory, would never fade, never forget, and could be played back for countless more observers. And the surveillance was all the more intrusive because it was conducted in secret. Ms. Nelson, like others in her office, was unaware that her every movement was being watched and recorded for several months by her boss and College police officers. During that time, there was never a single moment of privacy for the range of ordinary human behavior that occurs when individuals believe they are alone.

It is, of course, well established that electronic surveillance of Massachusetts citizens by government agents amounts to a search which would violate constitutionally protected privacy rights, under circumstances where "it is shown 'that a person [has] exhibited an actual (subjective) expectation of privacy,' and when that 'expectation [is] one that

society is prepared to recognize as "reasonable." '." Commonwealth v. Blood, 400 Mass. 61, 68 (1987), *quoting* Katz v. United States, 389 U.S. 347, 361 (1967) (Harlan, J., concurring).

On summary judgment, the trial court could only have concluded that Gail Nelson exhibited "an actual (subjective) expectation of privacy."[4] *See* App. II, pp. 35-36 and pp. 168-169. The only question before the court, then, was whether her expectation of privacy was one that was objectively reasonable. In considering that question, the Supreme Court has indicated that the inquiry should be framed by consideration of four factors, "the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted." Bell v. Wolfish, 441 U.S. 520, 559 (1979).

The particularly intrusive nature and scope of the defendants' video surveillance of Ms. Nelson, like all forms of electronic surveillance, poses a unique

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4 The trial court simply assumed that the plaintiff had a subjective expectation of privacy. It would be difficult to argue otherwise, given the affirmative steps Ms. Nelson took to protect her privacy and the nature of her conduct, which she clearly did not expect to be witnessed. *See* United States v. Nerber, 222 F.3d 597, 603 (9th Cir. 2000).

threat to individual privacy.

> '[I]t must be plain that electronic surveillance imports a peculiarly severe danger to the liberties of the person....' Lopez v. United States, 373 U.S. 427, 469-470 (1963) (Brennan, J., dissenting).... [B]ecause the peculiar virtues of these techniques are ones which threaten the privacy of our most cherished possessions, our thoughts and emotions, these techniques are peculiarly intrusive upon that sense of personal security which art. 14 commands us to protect.

Commonwealth v. Blood, 400 Mass. at 69-70. As one court has written, video surveillance "provokes an immediate negative visceral reaction: indiscriminate video surveillance raises the spectre of the Orwellian state." United States v. Cuevas Sanchez, 821 F.2d 248, 251 (5th Cir. 1987)(footnote omitted). Moreover, the Massachusetts legislature has long recognized as legitimate and reasonable an expectation of privacy against secret warrantless electronic surveillance by the government. As it stated 45 years ago in 1959, when it enacted the first modern wiretapping statute in Massachusetts, G. L. c. 272, § 99,

> The general court further finds that the uncontrolled development and unrestricted use of modern electronic surveillance devices pose grave dangers to the privacy of all citizens of the commonwealth. Therefore, the secret use of such devices by private individuals must be prohibited. The use of such devices by law enforcement

> officials must be conducted under strict judicial supervision and should be limited to the investigation of organized crime.[5]

Not surprisingly then, the trial court chose to focus its attention on the place in the which the secret videotaping took place, concluding that Ms. Nelson's expectation of privacy against being secretly videotaped was not "objectively reasonable" because the videotaping took place in an open office space to which the public had some access.

The protections of the Fourth Amendment and Article 14, however, apply to people even when they are in a business or commercial space. Commonwealth v. DiMarzio, 52 Mass. App. Ct. 746, 749 (2001) and cases cited. "[T]he Fourth Amendment *protects people,*

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5 Former S.J.C. Chief Justice Liacos also directly addressed the threats posed by secret electronic surveillance to constitutionally protected privacy rights in his dissent in Commonwealth v. Price, 408 Mass. 668, 678-679 (1990)(Liacos, J. dissenting):

> The citizens of this Commonwealth should not have to live with the fear that at any given moment they might be the subject of unauthorized covert electronic surveillance by the police.
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> I would hold that, regardless of an individual's expectation of privacy, art. 14 forbids the covert use of electronic surveillance by the police in the absence of an appropriate warrant specifically authorizing such activity. In my view, such a holding would be consistent also with the clear limitations on electronic surveillance set by the Legislature by enacting G. L. c. 272, § 99.

not places. What a person knowingly exposes to the public, even in his home or office, is not a subject of Fourth Amendment protection. (citations omitted). But what he seeks to preserve as private, *even in an area accessible to the public*, may be constitutionally protected." Katz v. United States, 389 U.S. 347, 351-352 (1967)(emphasis added). *See also* Mancusi v. DeForte, 392 U.S. 364 (1968)(holding that employees may have a reasonable expectation of privacy in their work place against intrusions by the police).

Indeed, the Supreme Court has expressly rejected the contention that public employees like Ms. Nelson can not have a reasonable expectation of privacy in their workplace, holding in O'Connor v. Ortega, 480 U.S. 709, 717 (1987), that "[i]ndividuals do not lose Fourth Amendment rights merely because they work for the government instead of a private employer." A majority of the O'Connor court found that an employee can still expect some privacy in an office *even if that office is open to other people*, as "[i]t is privacy that is protected by the Fourth Amendment, not solitude.... [T]he secretary working in an office frequently entered by...other employees is protected against unreasonable searches of that office by the

government....” Id. at 730 (Scalia, J., concurring in judgment). *Accord* Mancusi v. DeForte, 392 U.S. 364, 368-369 (1968)(holding that an employee who shared a single large office with several co-workers had a reasonable expectation of privacy that was violated by a police search of that office).

In the trial court, the defendants sought to characterize Ms. Nelson’s workplace as being an open space accessible to the public and other workers at all times that the covert video surveillance was being conducted. At best, this is a contested issue as the plaintiff’s factual submissions present a very different picture. The first floor of the Center where Ms. Nelson worked had two 5-6 foot tall partitions in it which created private areas in the office that could not be seen by the public (App. II, p. 9 ¶¶ 5, 20 and 26). In addition, the glare from the front plate glass window made it difficult, if not impossible, to see into the office from the street during daylight hours (App. II, p. 9 ¶¶ 5 and 26). The hidden video camera at the Center secretly videotaped private areas behind partitions that could not normally be seen by the public and videotaped Ms. Nelson when she was alone in that area outside of

regular business hours and when the office was locked (App. II, p. 9 ¶¶ 20, 26, 27, 30 and 33). The public did not have unfettered access to the Center. Ms. Nelson often worked alone there and she had both the right and the responsibility of locking the Center's door to exclude the public both during her required lunch break and outside of regular business hours (App. II, p. 9 ¶¶ 31, 41 and 42).

These facts serve to distinguish Ms. Nelson's case from the cases relied upon by the trial court in its Decision. In all of the cases cited by the trial court, and in stark contrast to Ms. Nelson's situation, there were no private areas which were hidden from the public's immediate view that were being videotaped, none of the people being videotaped were able to exclude the public from the area being videotaped, and none of them took specific steps to preserve their privacy in the area that was videotaped.[6]

6*See* Vega Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174 (1st Cir. 1997)(employees worked in a completely open and undifferentiated area where no employee had an assigned office, cubicle, work station or desk, nor exclusive use of an area, and cameras did not view or record any "enclosed spaces"); United States v. Bissell, 954 F.Supp. 841, 866-867 (D.N.J. 1996) (videotaped area was clearly visible through

The physical layout of Ms. Nelson's workplace and whether or not the public had some access to it are not by any means the sole, or even the controlling, factors to be used in determining whether or not she had an objectively reasonable expectation of privacy against being secretly videotaped. *See generally,* United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978); United States v. Taketa, 923 F.2d 665 (9th Cir. 1991); State of Hawaii v. Bonnell, 75 Haw. 124, 856 P.2d 1265 (1993); State of Indiana v. Thomas, 642 N.E.2d 240 (Ind.App. 1995); and United States v. Nerber, 222 F.3d 597 (9th Cir. 2000). All of these courts found a violation of an individual's reasonable

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large windows on three sides, no efforts were made to restrict access or viewing by the public, and the view of the camera was "not significantly different than that of a person standing outside the office and looking through the windows"); Thompson v. Johnson County Community College, 930 F. Supp. 501, 507 (D.Kan. 1996)(area being taped was a storage room, containing lockers, heating and air conditioning equipment, where other employees had "unfettered access," and plaintiffs did not have "exclusive use;" video surveillance was limited to specific hours when the activity being investigated might have taken place); State v. McLellan, 144 N.H. 602, 605 (1999)(school custodian was videotaped inside a classroom open to students and school staff; area was not his personal space, nor did he enjoy any exclusive use or control of it); Cowles v. State, 23 P.3d 1168, 1171 (Alaska 2001)(employee at university ticket office was videotaped when the box office was open and she could be seen by members of the public and by her fellow employees).

expectation of privacy in a covert electronic surveillance case and identified a number of factors which must be considered in making such a determination. Those factors included the nature of the area surveilled, the extent to which others had access to the area, whether or not the employee exercised dominion or control over the area, the precautions taken to insure privacy, whether or not the employee had notice of the surveillance, the location and point of view of the camera, and most importantly, the nature of the electronic intrusion. *Cf.* United States v. Taborda, 635 F.2d 131, 139 (2nd Cir. 1980)("enhanced viewing [using a video camera] of the interior of a home does impair a legitimate expectation of privacy...."); Vega Rodriguez v. Puerto Rico Telephone Co., 110 F.3d 174, 180 n. 5 (1st Cir. 1997)(distinguishing "cases involving the covert use of clandestine cameras").

The factors enumerated by these cases support the contention that Gail Nelson had a reasonable expectation of privacy against being secretly videotaped at her workplace. The hidden camera was placed on the back wall of the office, an area that was not a normal vantage point of either the public or

her coworkers; it recorded activities in the office twenty-four hours a day, including times outside of normal business hours, times when the office was locked and the public was not permitted access, and times when Ms. Nelson was the only employee physically working in the Center; and it recorded private areas of the office that were normally hidden from public view, including behind the two partitions in the office. Ms. Nelson used those private areas and took other affirmative steps, including locking the Center's door at times, to insure her privacy whenever she changed her clothes or applied her skin medication. *Cf.* Commonwealth v. Krisco Corp., 421 Mass. 37, 44-45 (1995)(expectation of privacy in a public place is reasonable where affirmative steps have been taken to limit public access).[7] *See also* Katz v. United States, 389 U.S. 347, 351-352 (1967)(a person in a glass telephone booth had a legitimate

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7 It is beyond question that Ms. Nelson's partially unclothed body would normally be entitled to greater considerations of privacy than would the contents of a dumpster. *See* York v. Story, 324 F.2d 450, 455 (9th Cir. 1963)("We cannot conceive of a more basic subject of privacy than the naked body" and holding that a plaintiff who was photographed in the nude without reason by a police officer in a police station stated a violation of her right to privacy as guaranteed by the Fourteenth Amendment).

expectation that his phone conversation would not be electronically intercepted, even though he had no legitimate expectation that his activities within the booth would not be observed).

Finally, with respect to the justification for the surveillance, it should be noted that the defendants continued the secret videotaping even when no illegal activity of any kind had been observed in the first thirty days of taping (App. I, p. 125 ¶¶ 21 and 22; App. II, p. 9 ¶ 22). Gail Nelson did everything that she could to insure that she maintained some degree of privacy at her workplace. However, her precautions were not enough to protect her, due to the extraordinary intrusiveness of the hidden video camera
installed and operated by the defendants.

In determining the reasonableness of Gail Nelson's expectation of privacy, the court must consider "the degree of intrusion inherent in the continuous nature of video surveillance." State of Indiana v. Thomas, 642 N.E.2d at 244. It is for exactly that reason that courts that have carefully considered the issue have held that, whatever other expectations of privacy a public employee might or

might not have at work, it is objectively reasonable that they would have an expectation of privacy against being secretly videotaped. The court in United States v. Taketa, 923 F.2d at 677, in holding that employees could have a reasonable expectation of privacy from video surveillance even in another person's office, stated

> Persons may create temporary zones of privacy within which they may not reasonably be videotaped, however, even when that zone is a place they do not own or normally control, and in which they might not be able reasonably to challenge a search at some other time or by some other means. [citation omitted].
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> We hold that [the defendant] had...a reasonable privacy expectation that he would not be videotaped by government agents in O'Brien's office....We base our holding expressly upon Katz [v. United States, 389 U. S. 347 (1967)] and upon our recognition of the *exceptional intrusiveness of video surveillance*. (emphasis added).

Accord State of Hawaii v. Bonnell, 75 Haw. at 147, 856 P.2d at 1277 ("Whatever the general privacy interest 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.' [citation omitted]); State of Indiana v. Thomas, 642 N.E.2d at 246 (same). *Cf*. United States v. Nerber, 222 F.3d at 604 ("[O]nce the informants left

the[ir hotel] room, defendants' expectation to be free from hidden video surveillance was objectively reasonable.").

This expectation of privacy, as found by the divers courts enumerated above, is fully in line with the express philosophy of the Massachusetts legislature and appellate courts concerning the use of secret electronic surveillance by the government. *See generally* Commonwealth v. Blood, 400 Mass. 61, 69-77 (1987)(describing the overwhelming dangers and intrusiveness inherent in electronic surveillance of citizens by the government); Commonwealth v. Eason, 43 Mass. App. Ct. 114, 122-125 (1997)(same); G. L. c. 272, § 99.

The fact that the public and other employees had some access to Ms. Nelson's work space did not make it unreasonable for her to have an expectation of privacy against being secretly videotaped therein. Such an expectation is not defeated merely because a work area is sometimes accessible to others, as "privacy does not require solitude." Taketa, 923 F.2d at 672. As was recognized in O'Connor v. Ortega, 480 U.S. at 717-718 and 730-731, even private business offices are

often subject to the legitimate visits of co-workers, supervisors and the public, without defeating an objectively reasonable expectation of privacy. *Accord* Mancusi v. DeForte, 392 U.S. 364, 368-369 (1968); Commonwealth v. DiMarzio, 52 Mass. App. Ct. 746, 749-750 (2001)("An individual's expectation of privacy out of public view inside a building does not disappear because the door to the building is open.").

Thus, while Ms. Nelson's expectations of privacy would not extend to incidental or occasional looks by members of the public, "they do extend to prolonged observation by the government from a non-public vantage point," using a hidden video camera. Thomas, 642 N.E.2d at 246. In Sanders v. ABC, 20 Cal.4th 907, 978 P.2d 67 (1999), the court found that employees in a shared office space had a legitimate expectation that their conversations would not be videotaped. As the court explained, privacy "is not a binary, all-or-nothing characteristic.... the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable as a matter of law," Id. at 914-915, 978 P.2d at 72. "[C]onsequently, an employee may, under some circumstances, have a reasonable expectation of visual

or aural privacy against electronic intrusion by a stranger to the workplace, despite the possibility that the conversations and interactions could be witnessed by coworkers or the employer." Id. at 915-916, 978 P.2d at 73-74.

Furthermore, to hold that only employees who had private offices would have a reasonable expectation of privacy that would prohibit secret government electronic surveillance would effectively tie an employee's constitutional rights to her economic status and her gender. Executives in private offices (mainly men) would be protected, but clerical workers in shared work spaces (mainly women) would not. This is not a distinction which the law should seek to make.

Thus, Gail Nelson had both a subjective and an objectively reasonable expectation of privacy against being secretly videotaped by the College police twenty-four hours a day for several months while at work in the summer of 1995. Construing the evidence in the light most favorable to the plaintiff, it is apparent that, as a matter of law, the defendants' actions were an unreasonable search of Ms. Nelson in violation of her constitutionally protected privacy

rights under the Fourth Amendment. The plaintiff has thus satisfied the first prong of the test to defeat the defendants' claims of "qualified immunity," by showing that the defendants' secret videotaping of her violated an actual constitutional right.

II. The Individual Defendants Are Not Entitled To Qualified Immunity As Gail Nelson's Right Under the Fourth Amendment To Be Free From Prolonged Secret Videotaping Of Her Private Activities At Her Workplace Was Well Established At The Time The Videotaping Occurred.

A. The Trial Court Failed To Apply The Correct Standard For Reviewing The Facts On Summary Judgment On The Issue Of Qualified Immunity.

When considering summary judgment on qualified immunity, the court is required to consider the facts "in the light most favorable to the party asserting the injury." Saucier v. Katz, 533 U.S. 194, 201 (2001); Orin v. Barclay, 272 F.3d 1207, 1216 (9th Cir. 2001).[8] Qualified immunity is an affirmative defense on which the defendant officials carry the burden of proof and persuasion. Harlow v. Fitzgerald, 457 U.S. 800, 815, 819 (1982); Gomez v. Toledo, 446 U.S. 635,

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8 The trial court was required to resolve all conflicts in the summary judgment materials and to make all logically permissible inferences in favor of Ms. Nelson, as the non-moving party. Willitts v. Roman Catholic Archbishop of Boston,411 Mass. 202, 203 (1991); Attorney Gen. v. Bailey, 386 Mass. 367, 371 (1982).

640-41 (1980). A defendant is entitled to summary judgment on grounds of qualified immunity only if there is no genuine issue of material fact, and those undisputed facts establish that the defendant is entitled to judgment as a matter of law. The importance of summary judgment in qualified immunity cases "does not mean...that summary judgment doctrine is to be skewed from its ordinary operation to give special substantive favor to the defense, important as may be its early establishment." Pritchett v. Alford, 973 F.2d 307, 313 (4th Cir. 1992).

The trial court's determination that the defendants were entitled to qualified immunity from suit rested entirely on its characterization of the location in which the most invasive video surveillance took place as an "open work area." (Decision, pp. 14-16). This characterization appears to have been based on the court's factual conclusions that (1) the plaintiff lacked "exclusive control" over the areas recorded on videotape, (2) a number of other people had access to those areas, (3) the camera recorded those portions of the office that were visible to anyone entering the front door or looking through the front window, (4) the plaintiff didn't lock the door

when changing her clothes, and (5) the office was intended to serve a large number of persons, including the public (Decision, App. II, pp. 191-193 and n. 12). These facts were plainly disputed by plaintiff's factual submission and were, indeed, inconsistent with the court's own analysis of the record.

The hidden video camera recorded various private areas of the office that were behind 5-6 foot tall partitions and which could not be seen from the street or by someone standing in the front part of the office. During the day, the glare from the sun made it almost impossible to even see into the office. Ms. Nelson only changed her clothes in those private areas either before or after regular business hours, when no one else was present, after when she locked the door, and the public did not have access to the office. She would apply medication to her chest in the private rear area only when no one else was present or expected in the office. *See* pp. 4-5 and 18-19, *supra*, and Decision, App. II, pp. 180-181 and 184.

B. Gail Nelson's Right To Be Free Of Secret Governmental Video Surveillance Of Her Private Activities Within The Workplace, Both During And Outside Of Work Hours, Was Clearly Established By June 1995.

The defense of qualified immunity is available only when the defendants' actions did not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." Harlow v. Fitzgerald, 457 U.S. 800, 818 (1982). When, as here, the law is clearly established, the qualified immunity defense must fail, "since a reasonably competent public official should know the law governing his conduct." Id. *See also* Wood v. Strickland, 420 U.S. 308, 321-322 (1975). Moreover, "[i]mmunity does not depend on the good faith or particular beliefs of the officer as to the state of the law; rather the test is objective." Pasqualone v. Gately, 422 Mass. 398, 402 (1996). The exact fact pattern at issue need not have been specifically addressed in case law. Id. at 403. It is only that

> "[t]he contours of the right must be sufficiently clear that a reasonable official would understand that what he is doing violates that right. This is not to say that an official action in question is protected by qualified immunity unless the very action has previously been held unlawful."

Pasqualone, 422 Mass. at 403-404, *quoting* Anderson v. Creighton, 483 U.S. 635, 640 (1987).

The object of the "clearly established" standard is to give "fair warning" to government actors, before they are subjected to suit, that their conduct is unlawful. Hope v. Pelzer, 536 U.S. 730, 739 (2002). "There is no requirement that the facts of previous cases be materially similar to the facts sub judice in order to trump a qualified immunity defense. Hope, 536 U.S. at 739-41; Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987)." Limone v. Condon, 372 F.3d 39, 48(1st Cir. 2004). *Accord* Wilson v. Layne, 526 U.S. 603, 615-617 (1999). Fair warning about unconstitutional conduct can come from a wide variety of sources, including general statements of the law, a general constitutional rule already identified in the decisional law that may be applicable to the specific conduct in question, and administrative regulations and reports. Hope, 536 U.S. at 740-746.[9]

9"To determine the contours of a particular right at a given point in time, an inquiring court must look both to Supreme Court precedent and all available case law. *See* United States v. Lanier, 520 U.S. 259, 268-69 (1997); Buckley v. Rogerson, 133 F.3d 1125, 1129 (8th Cir. 1998)." Hatch v. Dept. for Children, Youth and Their Families, 274 F.3d 12, 23 (1st Cir. 2001). *Accord* Suboh v. District Attorney's Office of the Suffolk

In order to determine whether or not Ms. Nelson's statutory or constitutional rights not to be continuously secretly videotaped over a period of 2-4 months were "clearly established" for purposes of applying the qualified immunity defense, the court must look at the state of the law "in effect at the time of the alleged violation," Laubinger v. Dept. of Revenue, 41 Mass. App. Ct. 598, 603 (1996), which was the summer of 1995. Dobos v. Driscoll, 404 Mass. 634, 647 (1989); Hatch v. Dept. for Children, Youth and Their Families, 274 F.3d 12, 22 (1st Cir. 2001).

By June, 1995, when the defendants conducted their secret video surveillance of Ms. Nelson, there was both well-established Massachusetts statutory and case law concerning electronic surveillance and a "consensus" of factually similar case law in other jurisdictions that had held similar conduct to be unconstitutional, all of which served to put the defendants on notice of the unlawfulness of their actions. Hope, 536 U.S. at 741 (government actors "can still be on notice that their conduct violates established law even in novel factual circumstances").

District, 298 F.3d 81, 90, 93, 94 (1st Cir. 2002); Tribble v. Gardner, 860 F.2d 321, 324 (9th Cir. 1988); Hayes v. Long, 72 F.3d 70, 73-74 (8th Cir. 1995).

By 1995, it was clearly established that the warrantless secret video surveillance of the private activities of a public employee in her work place, of the kind and duration perpetrated by the defendants herein, violated the Fourth Amendment.

As set out more fully in the preceding section of this brief, court decisions prior to June 1995, which had considered workplace privacy in general and video surveillance in particular, had addressed the constitutionally improper use of covert video surveillance. *See generally,* United States v. McIntyre, 582 F.2d 1221 (9th Cir. 1978); People v. Teicher, 52 N.Y.2d 638(1981); O'Connor v. Ortega, 480 U.S. 709, 717 (1987); United States v. Taketa, 923 F.2d 665 (9th Cir. 1991); State of Hawaii v. Bonnell, 75 Haw. 124, 856 P.2d 1265 (1993); and State of Indiana v. Thomas, 642 N.E.2d 240 (Ind.App. 1995).[10]

These appellate court decisions echoed the Supreme Judicial Court's warnings in the Blood case,

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10 *See also* cases concerning the dangers to constitutionally protected privacy rights generally posed by electronic government surveillance, Berger v. New York, 388 U.S. 41 (1967); Katz v. United States, 389 U.S. 347 (1967); United States v. Taborda, 635 F.2d 131 (2nd Cir. 1980); United States v. Torres, 751 F.2d 875 (7th Cir. 1984); United States v. Cuevas Sanchez, 821 F.2d 248(5th Cir. 1987); and United States v. Koyomejian, 970 F. 2d 536 (9th Cir. 1992).

supra, and the Massachusetts legislature's concerns explicitly stated in the 1959 preamble to G. L. c. 272, § 99, that secret electronic surveillance of citizens by government officials is particularly intrusive and far exceeds the reasonable expectations of privacy that people have in all but the most public locations. However, in making her determination that, in 1995, there was no "consensus" of persuasive authority as to whether continuous covert video surveillance violated an employee's reasonable expectation of privacy, the trial court judge cited *only cases decided in 1996 and later*, after the defendants had already secretly videotaped Ms. Nelson's in her workplace.[11] *See* Decision, App. II, pp. 193-196.

Pre-1995 case law from other jurisdictions, combined with earlier Massachusetts case law concerning electronic surveillance and the strong

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11The *only* pre-1995 employment privacy case cited by the defendants (but not by the court), Marrs v. Marriott Corp., 830 F.Supp. 274 (D.Md. 1992) was a trial court ruling that is completely inapposite. That case did not address any constitutional rights under the Fourth Amendment and summarily dismissed, without opposition, the employee's state law privacy claim by conclusorily stating that there "can be no liability for observing an employee at work since he is then not in seclusion." Id. at 283-284.

condemnation of such surveillance from our Legislature contained in G. L. c. 272, § 99, clearly established and gave fair warning to the individual defendants that secret warrantless video surveillance of the type and duration at issue was unconstitutional. This extensive body of law was more than adequate to alert any reasonable government official that a search, as part of a police investigation aimed at detecting illegal entries after business hours in a state college office, would more likely than not be violative of employees' Fourth Amendment rights, if it was conducted by a secret video camera, running twenty-four hours a day, while tape recording the entire office, including areas not always accessible to others.

The state of the law in 1995 concerning the constitutional limits on electronic surveillance gave the defendants "fair warning" that their conduct was unconstitutional. Hope, 536 U.S. at 740-741. To overcome a claim of qualified immunity, it is enough that there was prior case law sufficient to establish that, if a court were to be presented with a particular factual situation, the court would find that the plaintiff's rights had been violated. Caron

v. Silvia, 32 Mass. App. Ct. 271, 273 (1992), *citing* Hall v. Ochs, 817 F.2d 920, 925 (1st Cir. 1987). The contours of Ms. Nelson's right to be free of such secret and unreasonable electronic surveillance was, in June of 1995, "sufficiently clear that a reasonable official [in the defendants' position] would understand that what he is doing violates that right." Anderson v. Creighton, 483 U.S. 635, 640 (1987).

In Poe v. Leonard, 282 F.3d 123 (2nd Cir. 2002), the court addressed a closely analogous claim of qualified immunity and unequivocally rejected it. In Poe, the plaintiff was secretly videotaped by a state police officer at a police training center in a state of undress similar to that of Ms. Nelson in this case. Id. at 129. Finding that such conduct was a violation of both the Fourth Amendment and the right of privacy protected by the substantive due process guarantee of the Fourteenth Amendment, the court concluded that, *in 1993*, it was clearly established that a police officer could not view, photograph, videotape or otherwise record another person's partially unclothed body without that person's consent. Id. at 138-139. Although the police officer in Poe was not engaged in a legitimate investigation activity when he videotaped

the plaintiff, the court's rejection of his claim of qualified immunity turned on what the police officer should have known about the plaintiff's clearly established and reasonable expectation of privacy. Id. For the same reasons, this Court should likewise reject that defense in this case as claimed by defendants Bishop, Pray, Fuller, O'Connell and Young.[12]

12 The trial court did not separately discuss the plaintiff's claim that defendants Harrington, Cahill and Bishop are liable under 42 U.S.C. § 1983 for the violation of the plaintiffs' constitutional rights based on their failure to train and supervise their employees. As no other basis for the dismissal of this claim appears on the record, the trial court presumably believed that it was unnecessary to address the claim in light of its ruling that the right asserted by the plaintiff was not clearly established. Should this Court determine that the trial court's ruling on qualified immunity was erroneous, plaintiff submits that reversal of the dismissal of the claims against defendants Harrington, Cahill and Bishop would also be required.

III. The Individual Defendants Do Not Have Common Law Immunity From The Plaintiff's Claim For Invasion Of Privacy Under G. L. C. 214, § 1B, Because Neither The Prolonged Secret Videotaping Of The Plaintiff's Private Activities At Her Workplace Nor The Viewing Of The Tapes By The Defendants Were "Discretionary Acts."

Directly addressing the issue of the liability of public *employees* for an invasion of privacy claim as raised by the defendants herein, the court in Spring v. Geriatric Authy. of Holyoke, 394 Mass. at 286 and n. 9, held that, by operation of the Massachusetts Torts Claim Act ("MTCA") G. L. c. 258, § 10(c), public employers, *but not their employees*, are immunized from suit for intentional torts such as invasion of privacy: "While public employers, like the Authority, may not be held liable for intentional torts committed by their employees, the employees may be personally liable for any harm they have caused."[13] Despite this, the trial court ruled that the individual defendants were shielded from liability for invasion of privacy under G. L. c. 214, § 1B by "common law immunity"

13*Accord* Howcroft v. City of Peabody, 51 Mass. App. Ct. 573, 596 (2001)(claims for intentional infliction of emotional distress against individual public employees "are not barred by governmental immunity."); Breault v. Chairman of the Bd. of Fire Commrs. of Springfield, 401 Mass. 26, 35 (1987)(the MTCA "withheld immunity from public employees...where the acts complained of were 'intentional,' as opposed to negligent").

under Gildea v. Ellershaw, 363 Mass. 800, 820 (1973).

The trial court failed to recognize the extent to which Gildea's expansive definition of immunity had been narrowed by the legislature in the MTCA and by more recent decisions of the Supreme Judicial Court. While preserving the technical distinction between discretionary and ministerial acts for purposes of liability for intentional acts, the court in Breault, *supra*, held that an individual public official was not immune from liability based on his decision to condition reinstatement of a firefighter on waiver of the right to bring any claim against the city or its fire department, as that decision was not a discretionary function. The court noted that the "common law slate" for the immunity of public employees had been "wiped clean" by the passage of the MTCA, and its specific provisions for the liability of public employees for intentional torts, the indemnification of employees by the Commonwealth for such acts, and a new, narrower exemption from liability for public employers for discretionary acts (under G. L. c. 258, § 10[b]). Breault, 401 Mass. at 35-38.

The limitation of common law immunity for

discretionary acts implicit in Breault has been explicitly imposed in cases interpreting parallel language of the MTCA exempting discretionary functions. *See, e.g.*, Harry Stoller & Co. v. Lowell, 412 Mass. 139 (1992). Those cases provide a useful benchmark for consideration of what acts are "discretionary," for purposes of applying immunity to them. Because "[a]ll decisions involve some discretion,... the Supreme Judicial Court has narrowly interpreted the rule to provide 'immunity only for discretionary conduct that involves policy making or planning.'" Ku v. Town of Framingham, 62 Mass. App. Ct. 271, 277 (2004). *Accord* Harry Stoller, 412 Mass. at 141.[14]

The defendants' decisions concerning where to place the hidden video camera, what areas of the SBDC to include in the camera's field of view, whether to use the timer mechanism on the VCR to limit the hours of taping, and whether to continue the taping for a period of between 2 - 4 months were not the kind of

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14 Duarte v. Healy, 405 Mass. 43, 49-51 (1989), is not to the contrary. Duarte, which was decided three years prior to Harry Stoller, never discussed the MTCA, and, in any event, the individual defendants were both been engaged in discretionary functions on a policy-making level. Id. at 50-51.

discretionary decisions to which immunity applies. Under Harry Stoller, in order for discretionary decisions to provide immunity, they must involve a "'high degree of discretion and judgment involved in weighing alternatives and making choices with respect to public policy and planning,' as opposed to conduct that consists of 'the carrying out of previously established policies or plans.' Whitney v. Worcester, [373 Mass.] at 218." Ku, 62 Mass. App. Ct. at 277.

Many decisions, similar to the ones made by defendants Pray, Fuller, O'Connell and Young in this case, made by public employees in carrying out various policies and plans, have been held not to be discretionary functions which would confer immunity.[15]

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15 *See, e.g.*, Harry Stoller, 412 Mass. at 145-146 (firefighters' decision not to use a building's sprinkler system); Irwin v. Ware, 392 Mass. 745, 753 (1984)(police officer's decision as to whether to remove a drunken motorist from the roadway); Carleton v. Town of Framingham, 418 Mass. 623, 626-627 (1994) (same); Kelley v. Rossi, 395 Mass. 659, 665 (1985) (doctor's decision on how to treat a patient in an emergency room); Dobos v. Driscoll, 404 Mass. 634, 652-653 (1989)(decisions by state police officials concerning the implementation of disciplinary policies for a state trooper); A.L. v. Commonwealth, 402 Mass. 234, 245-246 (1988)(probation officer's decisions on monitoring probationer's compliance with probation terms); Alter v. Newton, 35 Mass. App. Ct. 142, 144-148 (1993)(decisions concerning the design and construction of school athletic field fence and failure to warn students of danger in that area);

These decisions confirm the reality that although many ministerial functions require the exercise of discretionary choices, those choices do not transform the conduct from ministerial to the discretionary character which would entitle the government actor to immunity. Such decisions, like the ones made by defendants Pray, Fuller, O'Connell and Young in this case, are simply not an integral part of governmental policy making or planning so that it is necessary to confer immunity for the consequences of those choices.

Thus, even in the area of law enforcement, where the court has noted that "[t]he decisions of law enforcement officers regarding whether, when, how, and whom to investigate, and whether and when to seek warrants for arrest are based on considerations of, and necessarily affect, public policy," the law "defines the outer bounds of" these decisions, and the court has "recognize[d], of course, that certain aspects of the investigatory process may not be characterized as discretionary for purposes of the discretionary functions exception." Sena v. Commonwealth, 417 Mass. 250, 256 (1994).

Serrell v. Franklin County, 47 Mass. App. Ct. 400, 402-403 (1999)(decisions by correctional officers on how to subdue an inmate).

In a decision rendered only five months after Sena, the court further clarified the limits of the discretionary functions exception. In Horta v. Sullivan, 418 Mass. 615, 621-622 (1994), the court held that the discretionary decision of a police officer to begin and continue high-speed pursuit of a vehicle did not involve policy making or planning, for purposes of immunity. The court analyzed the issue thusly,

> The question whether a governmental actor's conduct involves discretion of the planning or policy-making type must be narrowly focused on the allegedly negligent conduct, not on whether the actor's conduct is part of some broader governmental policy

Id. at 621.

The decisions made (in various combinations) by defendants Pray, Fuller, O'Connell and Young about where to place a hidden camera in the Center (so as to tape the whole office and not just the front door), whether or not to use the timer mechanism (to limit the videotaping to the evening hours or to tape 24 hours a day), to whom the videotapes would be available (Fuller, O'Connell, Pray, Young, and

possibly Cahill), whether or not to warn Ms. Nelson after seeing that the videotapes were capturing some of her obviously private activities, and how long to continue the secret videotaping (between 2 - 4 months) were, like the decisions of the firefighters in Stoller and the police officer in Horta, *ad hoc* decisions, based on the situation confronting them, not on broader law enforcement objectives which involved considerations of governmental policy or planning. "Such decisions have no close nexus to policy making or planning and do not 'involve' it." Horta, 418 Mass. at 622. It was these actions and decisions which directly lead to the invasion of Ms. Nelson's right to privacy, not the initial decision to investigate possible illegal entries into the Center or even the decision to use a hidden video camera.[16] As such, these particular defendants were not engaged in discretionary functions such that they are entitled to be covered with the cloak of immunity for their intentional tortious acts in carrying out the decision to investigate possible illegal activity at the SBDC.

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16 Indeed, if the hidden camera had been focused solely on the front door of the Center and been set to tape only after regular business hours, Ms. Nelson would not now be before this Court.

If the trial court's analysis of the common law immunity of the individual defendants for a violation of the Privacy Act, G. L. 214, § 1B, is allowed to stand, it would mean that both a public employer like the College and its public employees would be immunized from liability for intentionally violating the rights of a citizen, but not for negligently doing so! The College would be immunized for the intentional acts of its employees (by G. L. c. 258, § 10[c]), but not their negligent acts, and the employees would be immunized in almost all instances by the "discretionary acts done in good faith" definition contained in Gildea, because, as pointed out in Harry Stoller, "[a]lmost all conduct involves some discretion, if only concerning minor details." 412 Mass. at 141. If intentional conduct were to be immunized from liability simply because it has some element of discretion, common law immunity would substantially undermine the remedial purpose of statutes such as G. L. c. 214, § 1B. *Cf*. Breault, 401 Mass. at 35.

IV. The Negligent Failure Of The Supervisory Employees Of Salem State College To Provide Appropriate Training And Supervision Concerning Secret Electronic Surveillance Is Actionable Under G. L. C. 258, As Taking Measures Necessary To Prevent A

Constitutional Violation Is Not A Discretionary Function.

The College is liable for its negligent failure to properly train and supervise its employees with respect to the constitutionally permissible use of covert video surveillance, and such a claim is not barred by the "discretionary function" exemption of G. L. c. 258, § 10(b).[17]

Prior to June, 1995, President Harrington, Vice-President Cahill and Dean Bishop, the College administrators, knew that the College had used its video surveillance equipment to conduct covert videotaping on the campus. App. II, p. 9 ¶¶ 27 and 48. President Harrington believed that she and V-P Cahill should have reviewed and approved or vetoed any covert use of such equipment on campus. App. II, p. 9 ¶¶ 51 and 52. Dean Bishop, who supervised defendant Young, actively participated in the decision to place the hidden video camera at the Center in June, 1995. App. II, p. 9 ¶¶ 19 and 27.

Despite this knowledge and despite the clearly

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17 Under this statute, the College cannot be held liable for "any claim based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a public employer or public employee, acting within the scope of his office or employment, whether or not the discretion involved is abused."

established recognition of the threat posed to the constitutionally protected rights of citizens by the improper use of such electronic surveillance equipment (*see*, *e.g.*, the 1959 preamble to G. L. c. 272, § 99), none of these defendants had developed any policies requiring any College administrator, other than police chief Brian Pray, to give prior approval for or to monitor the use of secret video surveillance on the campus.[18] App. II, p. 9 ¶ 49.

The sole reason offered by the defendants for the lack of policies which would safeguard the privacy rights of individuals who might be subjected to covert video surveillance on the College campus was President Harrington's self-admitted inexperience, lack of knowledge and naivete. Id. And despite the knowledge of the prior use of covert video surveillance on the campus by the college police force, and the knowledge that Chief Pray was the only supervisor required to approve its use, none of those defendants ever required or provided training for the College police in the appropriate use of such equipment with regard to protecting people's constitutional and statutory

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18They did in fact institute such policies in October, 1995, *after* the secret videotaping of Ms. Nelson. *See* App. II p. 9 ¶ 53.

rights to privacy. App. II, p. 9 ¶¶ 55 and 56. Even if the College's administrators lacked actual knowledge of censurable conduct, they may be liable for the foreseeable consequences of such conduct if they would have known of it but for "deliberate indifference or willful blindness...." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994). *Accord* Lipsett v. University of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988)(once a supervisor has actual or constructive knowledge of potential constitutional violations and fails to take steps to prevent them, this can amount to deliberate indifference which will impose liability).

The College had a non-discretionary duty to safeguard the constitutional and statutory privacy rights of its students and employees by training and supervising its employees with regard to the limitations placed upon them under the Fourth Amendment, Article 14 and the Privacy Act, G. L. c. 214, § 1B. The College and its supervisory employees negligently failed to administer any such training or supervision. *See* App. I, p. 18 ¶ 56. The supervisory employees of the College had no discretion as to whether or not they should have provided such

training, as a reasonably competent public official is required to know the law governing his conduct. *See* Harlow v. Fitzgerald, 457 U.S. 800, 818-819 (1982); Wood v. Strickland, 420 U.S. 308, 321-322 (1975).

For individual College employees to know how their conduct in investigating a possible crime is prescribed so that they act within the bounds of the law, *see* Sena v. Commonwealth, 417 Mass. at 256, they must receive proper and adequate training and supervision from their public employer concerning the laws which govern that conduct. It can be presumed that had adequate (or even any) training and supervision on Fourth Amendment and privacy issues been provided to the employees of the College (which it was not, see App. II, p. 9 ¶¶ 55 and 56), the College's employees would not have engaged in the invasive and unreasonable actions which violated Ms. Nelson's rights. As there was no discretion on the part of the College as to whether or not to provide proper and adequate training and supervision on these constitutional issues, the plaintiff's negligence claim against the College for its failure to do so is not barred by the discretionary function exemption of G. L. c. 258, § 10(b).

CONCLUSION

Gail Nelson had an objectively reasonable expectation of privacy against being secretly videotaped when she engaged in private activities in private areas at her workplace during time periods when she was alone or the Center was closed to the public. The defendants' secret videotaping of her activities was an unreasonable search in violation of her privacy rights protected by the Fourth Amendment and was an unreasonable invasion of her privacy in violation of G. L. c. 214, § 1B. In addition there remain significant disputes of material fact which prohibit granting summary judgment to the defendants on these claims.

As Ms. Nelson's privacy rights not to be secretly videotaped at her work for a period of between 2-4 months were clearly established in 1995, none of the individual defendants are entitled to qualified immunity under 42 U.S.C. § 1983 for their conduct. Furthermore, defendants Pray, Young, O'Connell and Fuller are not entitled to common law immunity for their intentional acts in violation of Ms. Nelson's right to privacy under G. L. c. 214, § 1B. Finally, the College is not entitled to immunity for its

negligent failure to properly train and supervise the individual defendants under the discretionary function exemption of G. L. c. 258, § 10(b).

WHEREFORE, Ms. Nelson respectfully requests this Court to vacate the trial court's judgment in favor of the defendants and to remand this case for trial in the Superior Court.

Respectfully submitted,
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Certificate of Service

I, Jeffrey M. Feuer, under the pains and penalties of perjury hereby certify that a true copy of the Brief of Appellant Gail Nelson was served upon David R. Kerrigan, Esq., Assistant Attorney General, Government Bureau/Trial Division, Office of the Attorney General, One Ashburton Place, Boston, MA 02108-1598, who represents all the defendants, by hand delivery on January 18, 2005.

Jeffrey M. Feuer