

SHOULD YOU INSTALL SECURITY CAMERAS IN COMPANY BATHROOMS? (HINT: NO)

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Sometimes an employment lawyer is faced with a thorny question that involves multiple layers of analysis. Before advising a client, any good attorney will want to examine prior case decisions, statutory citations, regulatory guidance, and other resources to ensure a full understanding of the issue at play. Then, in developing the advice, that attorney will probably ponder the question, consider all possible outcomes, weigh the possibilities, and then provide the recommendation only after painful and precise deliberation.

But at other times, the advice is so simple and straightforward that almost anyone can answer it. Unfortunately, a business owner in Virginia never gave an employment lawyer the opportunity to tell him that his planned strategy of installing security cameras in his business's bathrooms was not wise, and is now facing the consequences.

Let's examine this situation a little closer to understand what lessons you can learn from his mistake.

THE PLOT

Dennis Smith owns Calabash Seafood Restaurant in Mechanicsville, Virginia (a suburb of Richmond). For years, Smith has claimed that he has had a problem with vandalism in his restaurant's bathrooms, including having urinals broken and torn from walls. His solution? He decided to

Related People



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install a security camera on the bathroom ceiling to be able to capture evidence of unwanted behavior.

A gross invasion of privacy, you say? An unwanted intrusion into sensitive behaviors, perhaps? An illegal recording of someone while partially dressed or naked, even? Smith claims he thought of all of these things, so he pointed the hidden camera at the common area of the bathroom capturing people when they enter and exit and not while, you know, doing their business. He didn't put up a sign or warn people that their activities were being monitored by security camera, however, and admits that people who chose to dress or undress in the common area of the bathroom would be captured on video.

But most of his customers who noticed the discrete object mounted on the ceiling figured it out and commended him on his actions, he says, telling him that he was well within his rights to do so. One such customer did not agree, and took it upon himself to vandalize the camera in his own effort to fight back and protect his (and others') privacy. In a delicious twist, Smith took the broken equipment and the footage of the vandal damaging his camera to the local authorities hoping to press charges.

It was only after Smith complained about the damage that the police learned of his secret bathroom surveillance; they obtained a search warrant and launched a criminal investigation into his conduct. The District Attorney is now deciding whether to charge Smith with a misdemeanor crime. Even as a criminal investigation is underway, Smith is unrepentant. He was quoted in a local newspaper as saying, "Well, whoopee. It's a misdemeanor. Are you kidding me? That would be a joke." When asked whether he thought any of his customers might not like the thought of the camera filming them in the bathroom, his response was, "if you don't like it, you don't have to eat here."

THE THEME OF THE STORY

While Smith's attitude may be a breath of fresh air in this button-down world of controlled corporate communications, his decision-making skills could certainly have used some redirection. If a client calls me and asks whether they could install a security camera in a company bathroom, I would not be able to say "NO" quick enough. Besides the possible legal consequences of videotaping employees or customers

while in various states of undress and while engaging in private conduct, business owners could face the real possibility of a civil lawsuit leading to a massive judgment for invasion of privacy.

The key legal element in these cases is whether your employees and customers have a reasonable expectation of privacy in various parts of your business. If so, it would be unlawful behavior for you to record them while they are in these locations. It goes without saying that people have a very reasonable expectation of privacy when they enter your bathroom, and for that reason, video cameras in the john are essentially an absolute no-no. And the same goes for any area of your business, such as locker rooms or fitting rooms where your employees or customers might be changing in and out of their clothes. These activities are so private that even a warning sign alerting people to the presence of a camera might not be enough to prevent civil and criminal liability.

But what about in other areas of your business? If you as an employer or business owner believe you have a legitimate business interest to monitor activity in public areas, you may have a general right to record such locations. You would first want to establish what legitimate business interest you have. Perhaps there has been a rash of thefts, or simply valuable product in a certain area that you want to protect. Or maybe there has been a lull in productivity and you want to monitor employee actions when you can't otherwise have supervisor's eyes on them. Or maybe the nature of your business leads to security or safety concerns and you want to have evidence for everyone's protection.

Once that has been established, you will want to alert your employees in no uncertain terms that they have no reasonable expectation of privacy in these areas, explicitly informing them of the presence of cameras. Signage is helpful, but you will also want a signed acknowledgment from your employees as part of their new-hire paperwork. Finally, you will want to limit your surveillance to video – audio recording raises a whole host of other legal concerns under state and federal wiretapping laws.

EPILOGUE

Wrapping up the story at the Calabash Restaurant, owner Dennis Smith says that if he is told he cannot continue

videotaping his business, "I'll walk around here with an M-16 to protect my property if that's what it's going to take." Perhaps next month's issue of the Labor Letter will deal with the legal consequences of patrolling your company with an assault rifle. But you can probably already figure out the answer to that question, right?

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