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Cautionary Tale:
Employee's Profanity Laced Facebook Post is Protected Activity in a Recent Federal Court Decision

Elizabeth Rae-O'Donnell

The Second Circuit Court of Appeals in *NLRB v. Pier Sixty, LLC*, 855 F.3d 115 (2nd Cir. 2017), recently upheld the National Labor Relations Board's conclusion that a terminated employee's profanity based comments about his supervisor on Facebook were not so egregious as to exceed protection under the National Labor Relations Act (NLRA or Act).

Pier Sixty operates a catering company in New York City. In 2011, many of its service employees began seeking union representation. Both sides agreed that a tense union organizing campaign occurred which included threats from management that employees could be penalized or discharged for union activities.

Two days before the election, on October 25, 2011, Bob McSweeney, a supervisor, gave Hernan Perez, a server, directions in a harsh tone and told him to stop "chitchatting." About 45 minutes later, during an authorized break from work, Perez posted with his iPhone on his Facebook page: "Bob is such a NASTY MOTHER FXXXER don't know how to talk to people!!! Fxxk his mother and his entire Fxxxing family!!! What a LOSER!!! VOTE YES for the UNION!!!"

"Bob" in the message was Perez's supervisor. Ten of Perez's coworkers were his friends on Facebook. Pier Sixty's employees voted to unionize on October 27, 2011. Perez took the Facebook post down on October 28, 2011. Management of Pier Sixty learned of the Facebook post and fired Perez on November 9, 2011. Perez filed a charge with the NLRB alleging he had been fired for "protected, concerted activities." The Union organizer for the employees filed a second charge alleging unfair labor practices and that an employer is prohibited from discharging employees for participating in protected, union-related activity.

An Administrative Law Judge issued a decision in favor of Perez and following an appeal by Pier Sixty, the NLRB affirmed. Pier Sixty filed a Petition for review with the Second Circuit.

The Second Circuit upheld the Board's decision under a deferential standard of review applied for appeals of Board decisions in unfair labor practice cases. The Court held that even though Perez's message contained vulgar attacks on his supervisor and his supervisor's family, the "subject matter" of the message included workplace concerns – management's allegedly disrespectful treatment of employees and the upcoming union election. The Court noted that Pier Sixty had demonstrated hostility toward union activities and had threatened to rescind benefits or fire employees who voted for union representation.

Further, the Court found it persuasive that supervisors and employees alike frequently used profanity in the workplace for which no one was ever disciplined. Finally, although the Court noted that the post was vulgar and inappropriate, the comment was not the equivalent to a "public outburst" in the presence of customers and could reasonably be distinguished for other cases of "opprobrious conduct."

Although the Court ruled against the employer, the Court did note that it was analyzing the specific facts presented, and stated an employee engaged in protected activity could act in a way that would result in the loss of protection under the NLRA. The Court gave deference to the findings of the Board but also stated that the case sits at the "outer-bounds" of protected, union-related comments.

This illustrates that employers must carefully examine all the facts and circumstances surrounding an employee's social media activities when deciding whether a posting is related to workplace

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issues, and if it does, whether a posting is so egregious so as to lose NLRA protection. The case also stands for the proposition that discipline was not evenly applied and this certainly worked against the employer.

Finally, while it is key that social media policies not inhibit concerted activity, employers still have not lost the right to reasonably discipline employees who engage in abusive conduct that harms morale, particularly if it constitutes outrageous activity or discloses company trade secrets.

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Security Cameras in Michigan Condominium Projects

Joe Wloszek

Whether inside a grocery store, at a gas station or even in your neighborhood, security cameras are everywhere in modern society. As technology evolves and cheaper and better cameras come onto the market each year, Michigan condominiums are experiencing an increase in surveillance and/or security camera usage. Security cameras raise significant legal questions that impact decisions made by the Board of Directors and co-owners. When considering the pros/cons of security cameras, some common questions arise:

- Does the Board of Directors have authority to install security cameras? If so, where?
- Do the governing documents allow co-owners to install security cameras through a modification/alteration agreement? If so, where?
- Who is in charge of the security cameras and who has access to the feeds?
- Do the security cameras look into other co-owners' units?
- Do the security cameras overlook the community pool?
- Do the security cameras watch children at a playground or school bus stop?
- Are the security cameras real or "dummy" cameras only there to deter potential criminals?
- Do the security cameras have sound capability?
- Are the security cameras fixed in place or do the cameras have 360 degree viewing at any given time?
- Are the security cameras motion activated?
- Who pays for the maintenance, repair and replacement of the security cameras?
- Who maintains insurance for the security cameras?
- Do the security cameras monitor and record or just monitor?
- What happens if a Board of Directors approves a security camera and the co-owner uses it inappropriately?

The answers to these questions impact whether security cameras may be appropriate in any given area of the condominium project or, alternatively, reflect a violation of the governing documents.

Common Locations for Security Cameras

While security cameras may be located at various locations in a condominium project, some locations are more common than others. First, security cameras may overlook common entrances or, if applicable, the guard shack and/or security gate. This allows the association to monitor all incoming and outgoing vehicles on any given day. As an example, after a rash of car break-ins and tires being stolen, one association was able to assist law enforcement in narrowing the number of potential suspects by reviewing what vehicles entered and exited a community during a specific time period. Second, some associations place security cameras overlooking community dumpsters. The cost of emptying community dumpsters is paid for by the co-owners as part of their monthly assessment and the security cameras reduced the likelihood of any illegal dumping of trash from nonco-owners. Third, security cameras may monitor recreational facilities or the entrance to the community pool. As an example, if a co-owner is using a security card to allow 50 friends to throw a party at the pool, the Association may wish to monitor and prevent such festivities in the future. Fourth, some co-owners seek to use security cameras for safety reasons on the outside or even on the inside of their units. For example, the victim of a sexual assault or a burglary may want additional security in the form of security cameras.

Legal Issues Surrounding Security Cameras

Security cameras are often utilized to reduce theft, deter vandalism, discover Bylaw violations, and monitor visitors and trespassers. Below are some examples of legal issues that may arise due to security cameras in a condominium.

1. Window Peeper or "Peeping Tom"

The Michigan Penal Code, specifically MCL 750.167(1)(c), considers a "window peeper" as a disorderly person. Simply, one co-owner should not be able to video monitor the inside of another co-owner's unit. This is particularly serious when the unit being monitored has small children. The Association should be weary of granting permission to a co-owner to have a security camera without knowing what such a security camera monitors.

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Security Cameras (cont.)

2. Invasion of Privacy

Michigan has long recognized the common-law tort of invasion of privacy. *Lewis v LeGrow*, 258 Mich App 175, 193; 670 NW2d 675 (2003); see also *DeMay v. Roberts*, 46 Mich. 160; 9 NW 146 (1881). The invasion of privacy tort has evolved into four distinct tort theories: (1) the intrusion upon another's seclusion or solitude, or into another's private affairs; (2) a public disclosure of private facts about the individual; (3) publicity that places someone in a false light in the public eye; and (4) the appropriation of another's likeness for the defendant's advantage." *Lewis*, 258 Mich App at 193.

Under the first theory, there are three necessary elements to establish a case of intrusion upon seclusion: (1) the existence of a secret and private subject matter; (2) a right possessed by the plaintiff to keep that subject matter private; and (3) the obtaining of information about that subject matter through some method objectionable to a reasonable person. *Doe v. Mills,* 212 Mich App 73, 88; 536 NW2d 824 (1995).

An association may install security cameras in numerous areas, however the association may not set up security cameras in any area where a co-owner has a reasonable expectation of privacy. For example, community locker rooms and community bathrooms may be off limits to security cameras depending on the location of the security cameras and the expectation of privacy of those individuals being monitored. Essentially, a security camera monitoring the entrance to a community locker room will likely be treated differently than a security camera inside the women's locker room changing area.

3. Nuisance

Nuisance is an interference with a landowner's use and enjoyment of their land. *Adams v Cleveland-Cliffs Iron Co*, 237 Mich App 51, 59; 602 NW2d 215 (1999). A private nuisance is a nontrespassory invasion of another's interest in the private use and enjoyment of land. *Adkins v Thomas Solvent Co*, 440 Mich 293, 302; 487 NW2d 715 (1992). Nuisances may be either per se or per accidens, that is, at law or in fact. *McDowell v Detroit,* 264 Mich App 337, 348-349; 690 NW2d 513 (2004). A nuisance in fact is a nuisance 'by reason of circumstances and surroundings.' Id. at 349. To establish the existence of a nuisance in fact, a plaintiff must show 'significant harm resulting from the defendant's unreasonable interference with the use or enjoyment of the property.' Id.; see, also, *Adkins*, supra at 304.

Most condominium bylaws prohibit any activity that is a nuisance to other co-owners or detrimentally impacts the aesthetics of the condominium project. In its discretion, a Board of Directors may decide to allow a co-owner to install 1-2 security cameras at a unit for security reasons, but not allow 8-10 security cameras under various nuisance theories. If a co-owner looks into other co-owners' units or if a co-owner uses security cameras to monitor children, the Board of Directors may wish to restrict the number and location of the security cameras.

4. Wiretapping

The Michigan Penal Code, specifically MCL 750.539c, states:

> Any person who is present or who is not present during a private conversation and who wilfully uses any device to eavesdrop upon the conversation without the consent of all parties thereto, or who knowingly aids, employs or procures another person to do the same in violation of this section, is guilty of a felony punishable by imprisonment in a state prison for not more than 2 years or by a fine of not more than $2,000.00, or both.

The Michigan Penal Code, specifically MCL 750.539d, states in relevant part:

> (1) Except as otherwise provided in this section, a person shall not do either of the following:
>
> (a) Install, place, or use in any private place, without the consent of the person or persons entitled to privacy in that place, any device for observing, recording, transmitting, photographing, or eavesdropping upon the sounds or events in that place.
>
> (b) Distribute, disseminate, or transmit for access by any other person a recording, photograph, or visual image the person knows or has reason to know was obtained in violation of this section.

Any security cameras that record sound must be closely scrutinized to determine whether the security cameras run afoul of the Michigan wiretapping statute.

5. Fake or "Dummy" Security Cameras

Some associations have installed fake or "dummy" security cameras to deter would be criminals. Co-owners may have a false sense of security that a particular area is being monitored. From a legal perspective, there is a growing body of law commonly called "negligent security lawsuits." Negligent security is an offshoot of premises liability whereby the victim attempts to hold the owner of the property liable for the actions of a third party. As an example, a man is burglarized below what he believes to be an active security camera, when in actuality, the camera was a "dummy" camera. Ultimately, having inoperable security cameras may expose the association to liability should a burglary, rape, assault or similar circumstances occur.

Conclusion

When considering the ramifications of allowing security cameras, the Board of Directors should use its business judgment. Often times, the Board of Directors will wish to implement reasonable Rules and Regulations regarding the usage of security cameras and/or enter into an alteration/modification agreement with a co-owner to limit the association's potential exposure should any problems arise.

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Our Vision

To meld our legal expertise, professional support staff, technical resources and variety of locations to deliver first rate legal services at a fair value to a full range of business, municipal, insurance and individual clients.

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