



3rd Circuit: Court Delineates Scope of Employee's Constitutionally Protected Privacy Interest David J. Riewald ▾

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By Cynthia G. Inda

An employee had a reasonable expectation of privacy in remaining free from videotaping by a co-worker when she was only partially clothed during physical inspection, according to the 3rd U.S. Circuit Court of Appeals.

Jane Doe, a deputy sheriff in Luzerne County, and her partner were attacked by fleas after they had served a bench warrant in a home with a dead cat. Doe and her partner were ordered to wait inside a police car with the windows up, to contain the spread of the fleas, until a senior officer arrived. Minutes later, Ryan Foy, a senior officer, arrived on the scene with a video camera and immediately began filming Doe and her partner. Foy allegedly laughed at Doe and her partner's plight and taunted them. Doe asked Foy to stop filming on at least four occasions, but he continued and told her to "shut up" because it was for "training purposes."

To get rid of the fleas, Doe and her partner were instructed to go to a nearby hospital to undergo a "decontamination," which included a shower. After Doe stepped out of the shower, she wrapped herself in semitransparent paper because there were no towels. The paper covered only parts of her body, and left at least her back, arms, and legs exposed. A female deputy then inspected Doe to ensure all the fleas were gone. During the inspection, Foy entered the room, along with other deputies, and continued filming Doe. How much of Doe's exposed body the film showed was disputed. In addition to showing her body, the video displayed Doe's girlfriend's initials tattooed on her back, thus revealing her sexual orientation.

Doe ordered Foy to leave, which he eventually did. Foy later saved the video onto his work computer and called several officers, both male and female to view the footage. Foy kept the video in a public computer work folder.

Doe sued Foy, the county, and the county's sheriff, alleging that the videotaping violated her right to privacy under the 14th Amendment, was an unlawful search and seizure under the 4th Amendment, and that the county had failed to train its employees as required by 42 U.S.C. Section 1983.

The trial court held that the case did not fall within the zone of privacy protected by the 14th Amendment and granted summary judgment. The appeals court disagreed. It found that Doe had a reasonable expectation of privacy while in the decontamination area, particularly while in the presence of members of the opposite sex, and that it was error to dismiss the 14th Amendment claim because there were still issues of material fact as to which parts of Doe's body were exposed. In addition, the court held that the videotape did not violate Doe's 4th Amendment right to be free from unlawful search and seizure because Foy arguably took the video out of "personal interest," not as part of his duties for the government. Finally, the court found that the municipality was not liable for failure to train its employees because 42 U.S.C. Section 1983 applies only if the failure to train amounts to "deliberate indifference" to the rights of persons with whom the police come in contact. Here, deliberate indifference was not demonstrated because there was no history of county employees mishandling videotapes.

Doe v. Luzerne County, 3rd Cir. No. 10-3921 (Oct. 12, 2011).

Professional Pointer: Although *Luzerne County* involved a government employer, the court's ruling in this case highlights the importance of exercising care when videotaping or photographing employees. The court of appeal specifically noted that the potential harm of nonconsensual disclosure of video "is exacerbated by the existence of the Internet, where one can upload image and video files and irretrievably share them with the world in a matter of seconds." In an abundance of caution, employers should not allow employees to post photos or videotapes of a personal nature on a shared company network without advance approval.

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Editor's Note: This article should not be construed as legal advice.

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