COMMONWEALTH OF MASSACHUSETTS

ESSEX, SS.

SUPERIOR COURT DEPARTMENT
CIVIL ACTION NO. 98-1986C

GAIL NELSON,
Plaintiff

v.

SALEM STATE COLLEGE, BOARD OF TRUSTEES OF SALEM STATE COLLEGE, COMMONWEALTH OF MASSACHUSETTS, NANCY D. HARRINGTON, individually and as President of Salem State College, STANLEY P. CAHILL, individually and as Vice-President of Salem State College, BRIAN C. PRAY, individually and as Director of Public Safety for Salem State College, MARGARET L. BISHOP, individually and as Dean of Salem State College, FREDERICK H. YOUNG, individually and as Director of the Small Business Development Center of Salem State College, JANICE FULLER, individually and as a Public Safety Officer of Salem State College, and VINCENT O' CONNELL, individually and as a Public Safety Officer of Salem State College,
Defendants

PLAINTIFF'S STATEMENT OF LEGAL ELEMENTS

1. Electronic surveillance of Massachusetts citizens by government agents amounts to a search which would violate a person's constitutionally protected right to privacy, 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." ' Katz v. United States, [389 U.S. 347, 361 (1967)](Harlan, J., concurring)." Commonwealth v. Blood, 400 Mass. 61, 68 (1987).

2. The protections of the Fourth Amendment and Article 14 of the Massachusetts

Declaration of Human Rights apply to people even when they are in a business or commercial space in an area accessible to the public. Commonwealth v. DiMarzio, 52 Mass.App.Ct. 746, 749 (2001) and cases cited. See also Katz v. United States, 389 U.S. 347, 351-352 (1967), Mancusi v. DeForte, 392 U.S. 364 (1968)

3. Public employees as well as private citizens have a reasonable expectation of privacy in their workplace. O'Connor v. Ortega, 480 U.S. 709, 717 (1987).

4. Electronic surveillance imports a severe danger to the liberties of a person because such surveillance threatens the privacy of a citizen's thoughts and emotions and are peculiarly intrusive upon that sense of personal security guaranteed by Art. 14 of the Massachusetts Declaration of Human Rights. Commonwealth v. Blood 400 Mass. at 69-70 in reliance on Lopez v. United States, 373 U.S. 427, 469-470 (1963) (Brennan, J., dissenting).

5. The factors which a court must consider in determining whether an employee has an objectively reasonable expectation of privacy against being secretly videotaped at her workplace include 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. *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).

6. Video surveillance is one of the most intrusive forms of searches performed by the government, regardless of the type of premises searched. Such surveillance is exceedingly

intrusive, inherently indiscriminate, and could be grossly abused so as to eliminate personal privacy as understood in modern Western nations. State of Indiana v. Thomas, 642 N.E.2d at 245, United States v. Torres, 751 F.2d 875, 882 (Judge Posner., 7th Cir. 1984).

7. An employee may create a temporary zone of privacy within which she may not reasonably be videotaped even when that zone is a place which she does not own or normally control (such as another person's office) and in which she might not be able reasonably to challenge a search at some other time or by some other means. United States v. Taketa, 923 F.2d at 677.

8. While a person's expectations of privacy would not extend to incidental or occasional looks by members of the public, it does 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.

9.. Because video surveillance can result in extraordinarily serious intrusions into personal privacy, any government intrusion must be justified by an extraordinary showing of need." United States v. Koyomejian, 970 F. 2d 536, 551 (9th Cir. 1992)(Kozinski, J., concurring).

10. Warrantless searches are presumptively illegal, and the circumstances that have been recognized as justifying failure to obtain a warrant have been severely circumscribed by the courts as being both few, Katz v. United States, 389 U.S. 347, 357 (1967), and exceptional, G.M. Leasing Corp. v. United States, 429 U.S. 338, 352-353, 358 (1977). The government's heavy burden in such cases is to show that, even within the few, narrow exceptions, proceeding without a warrant was 'imperative.' , Welsh v. Wisconsin, 466 U.S. [740,] 749-750 [1984], McDonald v. United States, 335 U.S. 451, 456 (1948)." Commonwealth v. DiGeronimo, 38 Mass.App.Ct. 714, 721 (1995) as cited in Commonwealth v. Sondrini, 48

Mass.App.Ct. 704, 707-708 (2000).

11. Where the search is conducted without a warrant, the burden is on those seeking the exemption to show the need for it. Tyree v. Keane, 400 Mass. 1, 7 (1987).

12. The defendants carry the burden of proof on their claim that they are entitled to qualified immunity, an affirmative defense. Harlow v. Fitzgerald, 457 U.S. 800, 815, 819 (1982).

13. A public official can successfully plead the defense of qualified immunity only if he or she can prove that he or she neither knew nor should have known of the relevant legal standard. Id. at 819.

14. On a motion for summary judgment, the relevant question is whether a reasonable official could have believed his or her actions were lawful in light of clearly established law and the information the official possessed at the time of his allegedly unlawful conduct. McBride v. Taylor, 924 F.2d 386, 389 (1st Cir. 1991).

15. To be protected by the defense of qualified immunity, the defendants must show that (1) each of them was performing a discretionary function when they conducted the warrant less secret video surveillance of Ms. Nelson, and (2) each of them did not know, nor should they have known, that the conduct at issue violated Ms. Nelson's clearly established right to be free of such surveillance of her private activities in her work place. Id. at 815-819; Anderson v. Creighton, 483 U.S. 635, 639-641 (1987).

16. The "appropriate dividing line" for whether or not governmental immunity should be applied "falls between those functions which rest on the exercise of judgment and discretion and represent planning and policymaking and those functions which involve the implementation and execution of such governmental policy or planning." Whitney v.

Worcester, 373 Mass. 208, 217 (1977).

17. Whether an official is engaged in a discretionary function, and thus eligible for qualified immunity, is a factual determination to be made on a case-by-case basis. Horta v. Sullivan, 418 Mass. 615, 620 (1994).

18. Discretionary functions are limited to "discretionary conduct that involves policy making or planning." Harry Stoller & Co. v. Lowell, 412 Mass. 139, 141 (1992). Furthermore, discretionary functions involve "social, political or economic policy decisions." Horta v. Sullivan, 418 Mass. 615, 621 (1994).

19. Governmental immunity does not result automatically just because the governmental actor had discretion. Discretionary actions and decisions that warrant immunity must involve a high degree of discretion and judgment in weighing alternatives and making choices with respect to public policy and planning. Id. at 142-143. *See also* United States v. Gaubert, 499 U.S. 315, 322-323 (1991); Berkovitz v. United States, 486 U.S. 531, 537 (1988).

20. 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. Horta v. Sullivan, 418 Mass. 615, 621 (1994).

21. If the governmental actor had no discretion because a course of action was prescribed by a statute, regulation, or established agency practice, a discretionary function exception to governmental liability has no role to play in deciding the case." Harry Stoller and Co., Inc. v. City of Lowell, 412 Mass. 139, 141 (1992)

22. If the law is clearly established, the qualified immunity defense must fail, "since a

reasonably competent public official should know the law governing his conduct". Harlow v. Fitzgerald, 457 U.S. 800, 818-819 (1982).. Moreover, violations of constitutional rights cannot be excused by ignorance or disregard of basic settled law concerning those rights. Wood v. Strickland, 420 U.S. 308, 321-322 (1975). "Immunity 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 contours of the right [to privacy] 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. at 640.

23. In cases where there is warrantless electronic surveillance, the most secure course constitutionally, is for law enforcement officials to procure warrants in cases where probable cause for surveillance can be shown, and even in cases where it does not appear that the statutes require a warrant." Commonwealth v. Thorpe, 384 Mass. 271, 286 (1981). *See also* the 1959 preamble to G. L. c. 272, § 99.

24. Defendants Harrington, Cahill and Bishop are liable under 42 U.S.C. § 1983, and not entitled to qualified immunity, because their failure to develop and implement a policy concerning covert video surveillance on campus, and particularly its use against the public employees of the College, amounted to a reckless or callous indifference to the constitutional rights of others. Gutierrez-Rodriguez v. Cartegena, 882 F.2d 553, 562 (1st Cir. 1989).

25. A supervisor may be held liable if their conduct *or inaction* amounts to a deliberate, reckless or callous indifference to the constitutional rights of others. Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553, 562 (1st Cir. 1989). "[E]ven if a supervisor lacks actual knowledge

of censurable conduct, he may be liable for the foreseeable consequences of such conduct if he would have known of it but for his deliberate indifference or willful blindness, and if he had the power and authority to alleviate it." Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d 576, 582 (1st Cir. 1994).

26. 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 imposing liability under § 1983). Lipsett v. University of Puerto Rico, 864 F.2d 881, 902 (1st Cir. 1988) In addition, a supervisory official can be held liable under § 1983 for a failure to properly or adequately train subordinates, when that failure, amounts to deliberate indifference and is causally linked to the violation of the plaintiff's civil rights by those subordinates. Maldonado-Denis v. Castillo-Rodriguez, 23 F.3d at 582; Voutour v. Vitale, 761 F.2d 812, 819-820 (1st Cir. 1985).

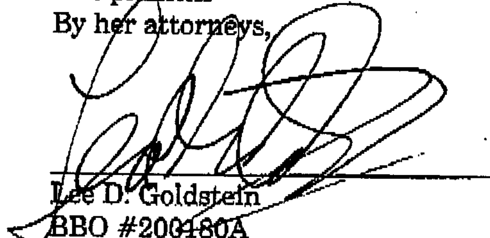
27. The Massachusetts Privacy Act, G.L. c. 214, § 1B, provides that a person shall have an enforceable right against any invasion of their privacy that is both unreasonable and substantial or serious. Schlesinger v. Merrill Lynch, Pierce, Fenner & Smith, Inc., 409 Mass. 514, 518 (1991). The statute applies to a search by secret video surveillance which is "clearly a serious and substantial interference with privacy" unless such a search "is performed pursuant to constitutional requirements and is otherwise reasonable." Id. *See also* Tyree v. Keane, 400 Mass. 1 (1987).

28. On a claim brought pursuant to G. L. c. 214, § 1B, "[w]hether the conduct complained of...is unreasonable, as well as either serious or substantial, is a matter to be resolved by the trier of fact". Ellis v. Safety Ins. Co., 41 Mass.App.Ct. 630, 638 (1996).

29. Under the Massachusetts Tort Claims Act, G.L. c. 258, § 10©), public employers, *but*

not their employees, are immunized from suit for intentional torts including invasion of privacy. Consequently, the employees may be *personally* liable for any harm they have caused. Spring v. Geriatric Authy. of Holyoke, 394 Mass. 274, 286 & n. 9. *Accord* Howcroft v. City of Peabody, 51 Mass.App.Ct. 573, 596 (2001).

Respectfully submitted,
The plaintiff
By her attorneys,



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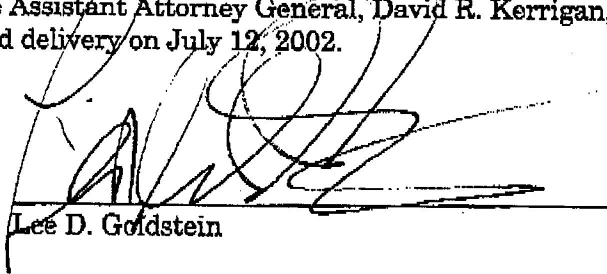
Certificate of Service

I hereby certify that a true copy of the above PLAINTIFF'S STATEMENT OF LEGAL ELEMENTS was served upon the Assistant Attorney General, David R. Kerrigan, who represents all the defendants, by hand delivery on July 12, 2002.



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