

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
SECOND APPELLATE DISTRICT
DIVISION FIVE

BONITA P. BOURKE et al.,
Plaintiffs and Appellants,

v.

NISSAN MOTOR CORPORATION IN U.S.A.,
Defendant and Respondent.

No. B068705
July 26, 1993

APPEAL from a judgment of the Superior Court of Los Angeles County. Douglas A. McKee, Judge. Affirmed.

Latham & Watkins, Thomas L. Pfister and Andrew M. Paley for Defendant and Respondent.

Noel Shipman for Plaintiffs and Appellants.

Plaintiffs Bonita Bourke and Rhonda Hall appeal the entry of summary judgment in their suit against Nissan Motor Corporation in U.S.A. ("Nissan") alleging wrongful termination, invasion of privacy and violation of their constitutional right to privacy in connection with Nissan's retrieval, printing and reading of E-mail messages authored by plaintiffs. We affirm.

FACTS

Plaintiffs were hired by Nissan in June of 1989 as Information Systems Specialists, to assist Infiniti car dealership personnel in resolving problems with the computer system which ran the operations of Infiniti dealers. Plaintiffs were essentially customer service representatives for users of the computer system.

In June of 1990, one of plaintiffs' co-workers, Lori Eaton, was conducting a training session, demonstrating the use of E-mail at an Infiniti dealership. In order to show how E-mail could be used to aid the management of the dealership, Eaton randomly selected a message sent by Bourke to an employee of the dealership. Unfortunately, Bourke's E-mail was of a personal, sexual, nature and not business-related.

Eaton reported this incident to her supervisor, who with management's authorization reviewed the E-mail messages of the entire workgroup. Nissan found substantial numbers

of personal, including sexual, messages from Bourke and Hall, and issued written warnings to plaintiffs for violating the company policy prohibiting the use of the company computer system for personal purposes.

Over the course of her employment with Nissan, Bourke received periodic written performance reviews which indicated that she had problems in the areas of decision making, oral communication skills, job knowledge, and working with her peers. In her annual performance review, which she received in October 1990, Bourke was rated as "needs improvement," the second lowest of six levels.

When Hall's performance was reviewed on an interim basis in May 1990, she received an overall borderline satisfactory rating. Her performance was rated unsatisfactory in certain areas. She was criticized for spending too much time on personal business, and was told that she needed to demonstrate greater initiative and to put forth a greater effort to learn the computer system. In her annual performance review, Hall's overall evaluation was unsatisfactory, the lowest of six possible ratings. Her job performance deteriorated after the October 1990 review.

On December 28, 1990, while Nissan was closed for the Christmas holiday, plaintiffs filed grievances with Nissan's human resources department, complaining that the company had invaded their privacy by retrieving and reading their E-mail messages.

On January 2, 1991, Bourke was given a final warning notice, which stated that her performance would be monitored over the next three months and that she would be terminated if she did not meet the performance objectives outlined in the notice. Bourke resigned her position the next day. On that same day, Nissan terminated Hall. Hall had already accepted a job with another company, and was not surprised that she had been fired.

Based upon Nissan's actions in reviewing their E-mail messages as described above, plaintiffs sued Nissan for common law invasion of privacy, violation of their constitutional right to privacy, and violation of the criminal wiretapping and eavesdropping statutes. They also stated a cause of action for wrongful discharge in violation of public policy, that is, termination in retaliation for the filing of complaints objecting to Nissan's invasion of their privacy.

Nissan moved for summary judgment, contending that there existed no disputed issue of material fact to warrant trial of the matter. The trial court found in Nissan's favor on two grounds: (1) Based on the undisputed facts, plaintiffs had no reasonable expectation of privacy in their E-mail messages; and (2) plaintiffs failed to submit a separate statement meeting the requirements of Code of Civil Procedure section 437c, subdivision (a) [\[1\]](#) and Law and Discovery Policy Manual Paragraph 207.

STANDARD OF REVIEW

Summary judgment is appropriate where the record establishes as a matter of law that no material disputed issue of fact exists or that the cause of action cannot prevail. (*Wilkerson v. Wells Fargo Bank* (1989) 212 Cal.App.3d 1217, 1224.) Because the motion raises only questions of law regarding the construction and effect of the supporting and opposing papers, this court will make its own independent determination of the questions of law raised in the motion. (*Slivinsky v. Watkins-Johnson Co.* (1990) 221 Cal.App.3d 799, 803-804; *Wilkerson v Wells Fargo Bank, supra*, at p. 1225.) In making this determination, the court will strictly construe the papers of the moving party, and resolve any doubts in favor of the party opposing the motion. (*Isaacs v. Huntington Memorial Hospital* (1985) 38 Cal.3d 112, 134-135.)

DISCUSSION

I

Common Law Invasion of Privacy and Violation of Constitutional Right to Privacy

Under the common law, “[o]ne who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy, if the intrusion would be highly offensive to a reasonable person.” (Rest.2d, Torts § 652B.)” (5 Witkin, Summary of Cal. Law (9th ed. 1988) Torts, § 580, p. 674.) Moreover, Article 1, section 1 of the California Constitution establishes privacy as a fundamental right of citizens of this state. Because the constitutional right to privacy is broader than, and encompasses, the common law tort of invasion of privacy (*see Porten v. University of San Francisco* (1976) 64 Cal.App.3d 825, 829), we restrict our analysis to a discussion of the constitutional claim.

Whether an individual's constitutional right to privacy has been violated depends first on a determination whether that individual had a personal and objectively reasonable expectation of privacy which was infringed. (*Alarcon v. Murphy* (1988) 201

Cal.App.3d 1, 5; *People ex rel. Franchise Tax Bd. v. Superior Court* (1985) 164

Cal.App.3d 526, 540-541.) Nissan maintains that the evidence conclusively establishes that plaintiffs had no reasonable expectation of privacy in their E-mail messages. In support of this contention, they cite the following undisputed facts: (1) Plaintiffs each signed a Computer User Registration Form, which states that “[I]t is company policy that employees and contractors restrict their use of company-owned computer hardware and software to company business.” (2) In November or December of 1989, more than a year before her termination, Hall learned from co-workers that E-mail messages were, from time to time, read by individuals other than the intended recipient. Hall relayed this information to Bourke in March of 1990. (3) In June 1990, a full six months before Bourke's termination, a fellow employee, Lori Eaton, contacted Bourke to complain about the personal, sexual nature of Bourke's E-mail message which Eaton had retrieved for demonstration purposes during a training session at an Infiniti dealership.

Nissan contends that the foregoing uncontroverted facts regarding plaintiffs knowledge that E-mail messages could in fact be read without the author's knowledge or consent

establishes as a matter of law that plaintiffs had no objectively reasonable expectation of privacy in those messages. In contradiction of that conclusion, plaintiffs assert that they had such an expectation because they were given passwords to access the computer system and were told to safeguard their passwords. While plaintiffs' statements that they believed that their E-mail messages would remain private may be sufficient, on a motion for summary judgment, to raise the issue of plaintiffs' subjective understanding, the question presented to us is whether their expectations of privacy were objectively reasonable as a matter of law. We agree with the trial court that they were not.

In the absence of a reasonable expectation of privacy, there can be no violation of the right to privacy. (*Alarcon v. Murphy, supra*, 201 Cal.App.3d 1, 5.) Thus, plaintiffs' causes of actions for common law invasion of privacy and violation of the constitutional right to privacy were properly dismissed on summary judgment.

II

Violation of Penal Code section 631

Penal Code section 631 prohibits a person from “intentionally tap[ping], or mak[ing] any unauthorized connection . . . with any telegraph or telephone wire, line, cable, or instrument, . . . or . . . read[ing], or attempt[ing] to read, or to learn the contents of any message, report, or communication while the same is in transit or passing over any wire, line or cable” Penal Code section 637.2 provides a civil right of action against one who violates the wiretapping and eavesdropping statutes.

Plaintiffs have cited no authority to support their contention that section 631 covers the retrieval, printing and reading of E-mail messages which is not authorized by the author of the message. And by its express terms, the statute does not apply to the facts of this case: (1) There is no allegation that Nissan “tapped” into its own telephone lines, and indeed there would be no need to do so since, being the system operator, Nissan had access to the network without resort to a telephone line tap. (2) Likewise, as the owner and operator of the system, Nissan's connection to the telephone lines or cable which connected the system would necessarily be authorized. And (3) Nissan did not access the messages during transmission. Rather, the messages were retrieved from an electronic storage device and printed so that they could be read. Nissan's actions in retrieving, printing and reading plaintiffs' E-mail messages simply are not included within the actions proscribed by Penal Code section 631. While plaintiffs may argue that the law is outdated, judges are not authorized to amend statutes even to bring them up-to-date.

III

Violation of Penal Code Section 632

Penal Code section 632 prohibits the eavesdropping or recording of a "confidential communication by means of any electronic amplifying or recording device." Again, the plain words of the statute simple do not permit a finding that Nissan's conduct violated

the law, as no amplifying or recording device was used to retrieve and read plaintiffs' E-mail messages. Moreover, the court of appeal has held that section 632 proscribes only "the interception of communications by the use of equipment which is not connected to any transmission line" (*People v. Ratekin* (1989) 212 Cal.App.3d 1165, 1168), a circumstance not present in this case.

IV

Wrongful Discharge in Violation of Public Policy

In the absence of an agreement to the contrary, an employee may be terminated at-will, that is, for any reason or for no reason at all. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654,665.) An employer may not, however, fire an employee for a reason which violates public policy, "since otherwise the threat of discharge could be used to coerce employees into committing crimes, concealing wrongdoing, or taking other action harmful to the public weal." (*Ibid.*; see also, *Tameny v. Atlantic Richfield* (1980) 27 Cal.3d 167, 178 [employee terminated for refusing to engage in price-fixing]; *Petermann v. International Brotherhood of Teamsters* (1959) 174 Cal.App.2d 184, 188 [employee terminated for refusing to commit perjury].)

Plaintiffs contend that they were fired in retaliation for filing complaints about Nissan's review of their E-mail messages, and that their terminations therefore violated the public policy of the State of California that its citizen should be free from unauthorized and unreasonable intrusions into their private lives. A claim for wrongful termination in violation of public policy necessarily requires a violation of public policy. We concluded in Section I above that Nissan's actions in reviewing plaintiffs' E-mail messages did not violate their constitutional right to privacy. Therefore, plaintiffs have failed to state a claim for wrongful termination in violation of public policy.

Because we conclude that plaintiffs' claims were properly disposed of on summary judgment since there were no disputed issues of material fact requiring a trial of the matter, we need not decide whether the trial court abused its discretion in dismissing the action for plaintiffs' failure to submit a separate statement of facts pursuant to Code of Civil Procedure section 437c, subdivision(b).

DISPOSITION

The judgment is affirmed.

/signature/
ARMSTRONG, J.

We concur:

/signature/
TURNER, P.J.

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GRIGNON, J. FOOTNOTES:

FN1. While the court and the parties all cite subdivision (a) of section 437c of the Code of Civil Procedure as the pertinent statutory provision, it is subdivision (b) of that section that prescribes the format and content of the separate statement required in support of and opposition to a summary judgment motion.