The $8 Million Burrito; Or How Not To Conduct Video Surveillance

May 18, 2018 | | Employment Lessons,Labor And Employment

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Many employers install video surveillance to stop theft and provide helpful evidence to support their employment decisions. From a legal standpoint, video surveillance generally is allowed if reasonable - monitoring the cash register is fine; installing a camera in a bathroom stall obviously is not. In truth, the vast majority of what is surveilled is frankly, boring: the camera largely becomes a forgotten silent witness to the daily grind. Hardly anyone ever watches what the camera records and no one would ever want to look at endless video of people coming and going and workers doing their jobs. Of course, the real reason a company installs cameras is not for all that boring stuff, it's for the interesting events – the situations where an employee steals from the company or someone fakes an injury. Then the cost of setting up the cameras can pay off. Still, to be useful, the surveillance has to – you know – *actually be used*. Last week the former manager of a Chipotle restaurant in California was awarded almost $8 million for wrongful termination because she allegedly stole $626 in cash from the restaurant safe. The company claimed they caught the whole thing on video. Unfortunately, when the manager demanded to see it, they suddenly threw up their hands and claimed that the video had been destroyed. Turns out she had filed a workers compensation claim against the company before her termination for a job-related wrist injury. Connecting the two events, the manager sued claiming a scheme to defame her for filing a worker's compensation claim. The jury agreed and awarded her $1.97 million for lost wages and another $6 million for emotional distress. In other words, an alleged $626 loss resulted in an almost $8 million verdict. It is unclear from news reports whether the video actually existed or was a bluff that the manager successfully called. If the video did exist and was destroyed, this begs the question as to what it showed and why it was destroyed. If it showed the manager taking the money, why wouldn't it have been kept? Alternatively, if the video proved the manager didn't take the money, why even claim that it did? Clearly the jury looked at these same questions and sided with the manager. There are several takeaways for employers from this episode. For one, if there is video evidence showing someone is stealing; take steps to ensure that the evidence is preserved. Make an extra copy and store both copies separately for good measure. If the company goes to the trouble and expense of installing surveillance and actually captures video of something interesting – and particularly something worth documenting – all of that time and expense is chucked away if the video is not maintained. Second, while we don't know precisely what happened in this particularly case, it stands to reason that if surveillance video doesn't show anything interesting, an employer should not pretend that it does. Assume that sooner

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or later that bluff will be called. Third, if an employer has an employee that already has filed a legal claim – like the one in this case – assume that everything the company says or does will become evidence in some legal action in the future. Fourth, before boasting about evidence that doesn't exist or which the company lost or destroyed, check with human resources, in house counsel (or your favorite outside counsel) and see what they think about making that comment before meeting with the employee.