more widespread and intrusive, the need for such agreements will become so acute that arbitrators will no longer be forced to decide what is reasonable. In the meantime, these guidelines may be of some help to arbitrators who must create a "common law" of electronic surveillance.

MANAGEMENT PERSPECTIVE

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On November 3, 1990, Tracy Mayberry died at the feet of some half-dozen Los Angeles police officers. After Mayberry was handcuffed, one witness stated that police officers had beaten Mayberry for some seven minutes before he died. The autopsy showed extensive bruising and abrasions. No criminal or disciplinary action was taken against the officers.[1] Four months later, another individual was beaten by Los Angeles police officers. His name was Rodney King. He did not die—he was merely injured. His suffering, however, attracted worldwide attention. The officers were internally disciplined and several were criminally prosecuted.[2] Why the difference? What differentiates the beating of King from the slaying of Mayberry? The answer is simple. George Holliday videotaped the beating of King. No one videotaped Mayberry's beating.[3] As one juror in the King case stated, "I think the tape basically speaks for itself... I would have to say that's basically what convicted them."[4] Holliday gave no notice that he was videotaping the King beating. Nevertheless, this surreptitiously made videotape served to convict two officers and subject a number of them to discipline by their employer, the Los Angeles Police Department.[5] Where

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[1]Harris, *City Found Negligent in Death of Suspect; Courts: Family of Man Who Was Hogtied While in LAPD Custody Is Awarded $1.1-Million Judgment*, L.A. Times, Oct. 21, 1992, at B3; Cockburn, *Sudden Death, With Police at the Scene; When Tracy Mayberry Died, There Were No Cameras*, L.A. Times, Mar. 28, 1991, at B7.

[2]Newton, *2 Officers Guilty, 2 Acquitted; Guarded Calm Follows Verdicts in King Case; Trial: Federal Jury Finds That Stacey Koon and Laurence Powell Violated Beating Victim's Civil Rights. Sentencing Is Set for Aug. 4*, L.A. Times, Apr. 18, 1993, at A1.

[3]*Jury Foreman Says Video Was Crucial in Convictions; Trial: Sgt. Koon Had a Duty to Stop the Beating After King Had Surrendered, He Says*, L.A. Times, Apr. 20, 1993, at B4; Weinstein, *Jury Relied Heavily on Tape of King Beating*, L.A. Times, Apr. 18, 1993, at A1; Cockburn, *supra* note 1; Stroberg & Wood, *Grand Jury to Probe Beating of Motorist; Police: Indictments Will Be Sought Against More Than Three Officers. One Has Been Disciplined Before for Using Excessive Force*, L.A. Times, Mar. 9, 1991, at B1.

[4]Weinstein, *supra* note 3; Newton, *supra* note 2.

[5]Newton, *supra* note 2.

were the civil libertarians when Stacey Koon was disciplined by his employer? Does anyone seriously believe that Koon's employer should not have used the videotape as evidence because it was made electronically and without notice?

Similarly, in 1990 the Equal Employment Opportunity Commission (EEOC) officially endorsed the use of testers in the employment discrimination area.[6] To ensure the accuracy of the comparison and preserve evidence, testers are often outfitted with voice-activated recorders. Banning this electronic monitoring would handicap this effective tool of detecting workplace discrimination. On the other hand, one of our clients was recently the subject of an investigation by the EEOC based on a charge of racial discrimination. The charging party claimed that she quit in response to her manager's direction to work with a particular employee or, if that employee was unable to improve, to terminate him. She claimed that her manager made this statement because both she and the employee were black. In many circumstances, resolution of this question normally is difficult. Determining the true motivation of an employer who used subjective criteria in making the termination decision is not easy. In this case, however, the resolution of the question was quite easy. The manager's instructions had been based on data from computer tracking and on personal monitoring of the employee's conduct on the phone. These objective criteria demonstrated that the employee had been consistently at the bottom in production and that he failed to follow instructions with regard to conduct on the phone. As noted by the EEOC investigator, it was clear that the employer's decision was based on objective criteria and that discrimination played no role in the decision.

Incredulously, some unions and their allies, such as the American Civil Liberties Union, have objected to the use of these objective tools. As noted by one objector, monitoring "goes beyond watching people [and] is used to monitor individual performances as a job takes place"![7] That, of course, is exactly the point. Employers will and must make employment decisions. The question is simply what tools they can use in making these decisions. Depriving

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[6]EEOC, Policy Guide on Use of "Testers" in Employment Selection Process (Nov. 20, 1990) *reprinted in* FEP Manual 405:6899. Testers are used in the following manner: two individuals, one black and one white, with similar qualifications are sent to apply for the same position with an employer. According to the EEOC, if the potential employer treats the black applicant differently, that applicant may file a charge of discrimination even if there was never an intention to accept the position if it was offered.

[7]*Computer Monitoring Increases Stress, Reduces Privacy of Service Sector Employees*, 1987 Daily Lab. Rep. (BNA), No. 191:A-4.

employers of the objective tools provided by electronic monitoring merely forces employers to use subjective criteria or objective criteria less directly related to performance, such as seniority. When using a "good cause" standard for review of discipline and/or discharge decisions, objective criteria make easier the task of both the employer and the arbitrator. Recognizing the benefits of the objective evidence provided by electronic monitoring, unions have objected to discipline because it was based on information that was *not* obtained from electronic monitoring.[8]

One of the major objections raised by employee-advocate groups is that electronic monitoring causes stress in the workplace. Certainly electronic monitoring causes stress when an employee fails to live up to expectations, but so does any type of supervision and review holding an employee to a level of performance. When Michael Jordan hit only 12 of 32 shots in the second game of Chicago's series with New York, he experienced stress when questioned about his level of performance. Judging a player's performance by this objective criterion is certainly better, however, than merely stating, "Jordan's not any good 'cause he missed a lot of shots" or, even worse, "I just don't like his style of play." The National Basketball Association (NBA), of course, is the archetypical competitive marketplace. In every game only one team wins. Each year only one team wins the championship. Similarly, the global marketplace where other businesses compete is increasingly competitive. Inefficient companies lose market share and/or completely go out of business. When this happens, employees invariably lose their jobs, which inevitably causes problems like stress. In order to compete effectively, objective measurements must be made. Electronic monitoring provides exactly such measurements.

In addition to improving production and enabling an employer to identify employees whose performance is inadequate, electronic monitoring serves a number of other purposes. Electronic monitoring enables employers to ensure compliance with the law and to improve customer service. Holliday's videotape, for example, allowed the Los Angeles Police Department to discipline those officers who violated the law. When used effectively, electronic monitoring assists an employer to identify needs and deficiencies in employees' performances more rapidly and accurately, thus enabling the employer to provide timely assistance to employees for improvement of their performance. Electronic monitoring also

[8] *See, e.g., AT&T Communications*, 89 LA 1247, 1250 (Kaufman, 1987).

ensures that customers are not subjected to undue sales pressure from telemarketing employees and that other phone representatives provide accurate and legal information.[9]

A New Technology?

Lewis Maltby acknowledges that employers have always supervised employees but claims that electronic monitoring is a new phenomenon. While certainly not as old as the steam engine, electronic monitoring of employees was the subject of litigation as early as 1961[10] and was sufficiently common by 1969 so that legislative limitations were advocated by employee groups.[11] Using the typical three-year length of collective bargaining agreements, that is more than eight agreements ago.

The Legislative Response

For two dozen years organizations, such as the American Civil Liberties Union, have sought limits on electronic monitoring by employers. These legislative efforts have generally met with little success. In 1969 the Massachusetts legislature considered adopting the following legislation:

> An Act prohibiting the operation of any device by an employer to monitor certain activities of his employees.
>
> No employer shall operate a closed circuit television system or any other monitoring device in a manufacturing establishment or factory without the express consent of the employees, and unless the employees have first been notified that such system or device is in operation therein. For the purpose of this section "monitoring device" shall mean any device, either electronic, mechanical, visual or photographic, by means of which surveillance of another person may be effectuated both as to appearance, actions or speech.[12]

The legislation was seriously considered by the legislature but rejected after the Massachusetts Supreme Court held that the law would violate the due process and equal protection clauses of the U.S. Constitution.[13] Since that time some states have placed limits

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[9]*Need for Legislation on Electronic Monitoring Debated by Labor, Industry at House Hearing,* 1991 Daily Lab. Rep. (BNA), No. 113:A-12.

[10]*Thomas v. General Elec. Co.*, 207 F. Supp. 792 (W.D. Ky. 1962).

[11]*Opinion of the Justices to the House of Representatives*, 356 Mass. 756, 756–57, 250 N.E.2d 448, 448, 72 LRRM 2502 (1969).

[12]House No. 5328 (1969).

[13]*Opinion of the Justices to the House of Representatives, supra* note 11, at 757–58, 250 N.E.2d at 449.

on some types of electronic monitoring, but in general states have decided not to limit employee monitoring.[14]

In 1986 Congress considered and adopted certain limitations on employee monitoring. While Maltby has argued that "Congress has never balanced the competing rights of employers and employees in the brave new world of electronic mail, active badges, and miniature video cameras,"[15] he is really saying that he disagrees with the conclusions Congress reached. The technologies to which he refers were present when Congress passed the Electronic Communications Privacy Act of 1986 (ECPA).[16] Indeed, the legislative history specifically states that the purpose of the Act was to keep "pace with the development of communications and computer technology [including] large-scale electronic mail operations, computer-to-computer data transmissions, cellular and cordless telephones, paging devices, and video teleconferencing."[17] Congress also specifically considered the legality of computer monitoring.[18] When enacting the ECPA, Congress answered many of the policy questions Maltby poses. The legislative history specifically notes, for example, that installation of one's "own cameras and crea[tion] [of one's] own closed circuit television picture of a meeting" is permissible under the ECPA.[19] In addition, 18 U.S.C. §2510(5)(a)(i) allows an employer to monitor business phone calls by its employees, and 18 U.S.C. §2511(2)(c) provides that an employee's consent is required for an employer to monitor personal conversations. Section 2510(12)(D) specifically excludes tracking devices[20] from the ECPA's limitations. Finally, Congress realized that notice of electronic monitoring could thwart its very purpose. Thus, the criminal code provides for a penalty of up to five years in jail for anyone who "gives notice or attempts to give notice of the possible interception [or] electronic surveillance" during certain investigations.[21]

However, Maltby proposes that arbitrators ignore the policy choices made by Congress and instead use the standards in the

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[14]*See, e.g., New Means of Workplace Surveillance Seen Posing Legal Risks for Employers*, 1989 Daily Lab. Rep. (BNA), No. 193:A-13 (discussing California state law on telephone monitoring).

[15]*See More Employers Monitoring Workers Electrically, ABA Told*, 1993 Daily Lab. Rep. (BNA) No. 48:A-14.

[16]Electronic Communications Privacy Act of 1986, 18 U.S.C. §2510–3126 (1987).

[17]U.S.C.C.A.N. (99th Cong.) 3556 (1986).

[18]*Id.* at 3585.

[19]*Id.* at 3570–71.

[20]"[T]he term 'tracking device' means an electronic or mechanical device which permits the tracking of the movement of a person or object." 18 U.S.C. §3117(b).

[21]18 U.S.C. §2232(c) (amended 1986).

proposed federal legislation endorsed by his organization and sponsored, once again, by Senator Paul Simon. Senator Simon's bill, however, hardly represents a consensus position, let alone the intent of Congress.[22] In fact, this legislation has been repeatedly rejected by every session of Congress since at least 1987.[23] An arbitrator's adoption of these repeatedly rejected standards makes little sense. While it is true that the American Civil Liberties Union has endorsed the law, this endorsement equates with neither adoption nor widespread acceptance of the proposed standards by society as a whole.

Judicial History

Judicial cases discussing electronic monitoring date back at least to 1962, when Judge Shelbourne held that Robert Lee Thomas had no cause of action against his employer, General Electric, based on GE's use of motion picture photography to study "methods of production and the individual operations involved therein."[24] In upholding the company's right to record the employee's actions, the Court stated:

> [T]he photographs were taken . . . in order to increase the efficiency of defendant's operations and to promote the safety of its employees in the discharge of the duties they were employed to perform. No case has been referred to the Court and the Court has found none forbidding an employer to use such means to improve the efficiency of its workers and promote their safety.[25]

Since the Thomas decision courts have generally upheld the right of private employers to use electronic surveillance,[26] with the obvious exceptions of cases where the surveillance violated the ECPA's statutory limits.[27]

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[22]*Statements Adopted by AFL-CIO Executive Council, Bal Harbour, Fla.*, 1987 Daily Lab. Rep. (BNA), No. 34:E-1.

[23]*See, e.g., Electronic Monitoring Bill Provokes Debate at Conference*, 1993 Daily Lab Rep. (BNA), No. 99:C-1; *Bill to Curb Employee Monitoring Introduced in House by Rep. Clay*, 1989 Daily Lab. Rep. (BNA), No. 85:A-3; *Electronic Monitoring of Workplace Raises Privacy Questions, OTA Says*, 1987 Daily Lab. Rep. (BNA), No. 182:A-12.

[24]*Thomas v. General Elec. Co., supra* note 10, at 793.

[25]*Id.* at 799.

[26]*See, e.g., Walker v. Darby*, 911 F.2d 1573, 1578, 5 IER Cases 1342 (11th Cir. 1990) (critical question is whether employer complied with ECPA; if it did, employee has no cause of action).

[27]*See, e.g., Deal v. Spears*, 980 F.2d 1153, 1158–59, 8 IER Cases 105 (8th Cir. 1992) (finding employer liable for violating ECPA but not reversing discharge based on information gained through illegal actions). *Cf. James v. Newspaper Agency Corp.*, 591 F.2d 579, 581–82 (10th Cir. 1979) (because employee knew employer monitored business conversations, employee had no cause of action).

Public employers are slightly more limited by the Fourth and Fourteenth Amendments to the U.S. Constitution, which work together to bar "unreasonable searches and seizures" by any governmental entity. In *O'Connor v. Ortega*[28] the U.S. Supreme Court held that these constitutional limitations apply to "searches and seizures by government employers or supervisors of the *private* property of their employees."[29] In *O'Connor* the governmental employer entered Ortega's closed office, while he was on a forced leave of absence, and conducted a "quite thorough" search of his office, including the personal files in his desk and file cabinets, "to secure evidence for use against [Ortega] in administrative disciplinary proceedings." During the search the employer seized several items, "including a Valentine's card, a photograph, and a book of poetry all sent to Dr. Ortega by a former resident physician." In the subsequent administrative hearing these items were used "to impeach the credibility of the former resident, who testified on Dr. Ortega's behalf."[30] Although the Court held that Ortega had a reasonable expectation of privacy in his closed office, the employee's privacy expectation must be balanced "against the government's need for supervision, control, and the efficient operation of the workplace."[31] As a result of this balancing test, even constitutionally limited public employers have "wide latitude" to conduct searches "for work-related, noninvestigatory reasons."[32] With regard to investigations into an employee's actions, the Court noted that employers

> have an interest in ensuring that their agencies operate in an effective and efficient manner, and the work of these agencies inevitably suffers from the inefficiency, incompetence, mismanagement, or other work-related misfeasance of its employees . . . [P]ublic employers have a direct and overriding interest in ensuring that the work of the agency is conducted in a proper and efficient manner.[33]

Based on these interests, the Court held that even a public employer's search as part of an investigation is proper if "reasonable" at its inception and in its scope.[34] This requirement is usually satisfied if the search is for a legitimate purpose, and, under this standard, "almost any workplace search by a public employer" will be found reasonable.[35]

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[28]480 U.S. 709, 1 IER Cases 1617 (1987).
[29]*Id.* at 715, 1 IER Cases at 1619 (emphasis added).
[30]*Id.* at 713, 1 IER Cases at 1618.
[31]*Id.* at 719–20, 1 IER Cases at 1621.
[32]*Id.* at 723–24, 1 IER Cases at 1622.
[33]*Id.* at 724, 1 IER Cases at 1622.
[34]*Id.* at 725–26, 1 IER Cases at 1623.
[35]*Id.* at 734, 1 IER Cases at 1626–27 (Blackmun, Brennan, Marshall, Stevens dissenting).

Judicial decisions thus generally give an employer—even a public employer restricted by constitutional limitations—wide latitude in conducting workplace searches. Unless an employer violates the law, an employee has no basis for complaint. Moreover, even when an employer does violate the law and obtains information about an employee's misconduct, there is no exclusionary rule. The evidence of the employee's misconduct is still admissible to establish good cause for discharge.[36]

Collective Bargaining Agreements

Maltby also argues that the arbitrator must step in to insulate employees from electronic monitoring. As you know, most collective bargaining agreements do not last for more than three years without the opportunity for the union to reopen negotiations and, for example, seek limitations on employer supervision, such as electronic monitoring. Indeed, at least as far back as 1986, the AFL-CIO told its affiliate unions to address technological changes, including electronic monitoring, "at the bargaining table."[37] At its 1987 winter meeting the AFL-CIO Executive Council adopted a formal statement that "[t]he collective bargaining process provides the best means of preventing the punitive or oppressive uses of electronic surveillance and monitoring." Heeding this advice, unions have pressed for and in some instances obtained limits on electronic monitoring.[38] Given the AFL-CIO's past counsel to its unions to negotiate concerning electronic monitoring and their proven ability to do so, it seems absurd to impose through arbitration limits on electronic monitoring because this supervisory tool is "new." If a union desires limits on electronic monitoring, it can seek such limits through the collective bargaining process, not through arbitral fiat.

Arbitral Review of Electronic Monitoring

Under the standard advocated by Maltby, the Los Angeles Police Department would have been barred from using the videotape of

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[36] *See Montone v. Tandy Corp., Radio Shack Div.*, 698 F. Supp. 92, 94–95 (E.D. Pa. 1988) (evidence obtained in violation of state wiretap statute admissible in wrongful discharge action).

[37] *Problems of Technology Examined, Solutions Offered at Conference*, 1986 Daily Lab. Rep. (BNA), No. 82:C-1.

[38] *See, e.g., CWA, Four Ameritech Units Reach Accords, Union Calls an End to Bell Atlantic Strike*, 1989 Daily Lab. Rep. (BNA), No. 166:A-11.

Rodney King's beating when it disciplined Koon and others. Such a result would be outrageous. The National Labor Relations Board (NLRB) has specifically held that "an employer's secret surveillance of its employees, electronic or otherwise, violates the Act only if the purpose of the surveillance is to gain information about, or otherwise to intrude upon, the employees' protected activities."[39] Given this standard, most arbitrators have not disputed an employer's right to use electronic monitoring in the workplace.[40] While acknowledging this fact, Maltby argues that arbitrators should reverse direction and ignore current federal law and judicial and arbitral law in favor of the standards of legislation repeatedly rejected by Congress. Employers rely on past judicial and arbitral decisions to determine the proper course of action. Maltby's proposal would reverse more than three decades of decisional law by arbitrators, judges, and the NLRB. There simply is no basis for such a reversal.

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[39]*Danzansky-Goldberg Memorial Chapels*, 264 NLRB 840, 112 LRRM 1108 (1982).

[40]*See, e.g., Coca-Cola Bottling Midwest*, 97 LA 166, 167–68 (Daly, 1991) (suspending employee based on videotape evidence of drinking a can of Mountain Dew); *Bethlehem Steel Corp.*, 94 LA 1309, 1311 (Henle, 1990) (upholding discharge based on videotape showing injured employee was able to return to work); *Internal Revenue Serv.*, 92 LA 233, 233–34 (Lang, 1989) (suspending public employee for rudeness to taxpayers based solely on evidence obtained through electronic monitoring).