

Illinois Supreme Court: Employer Liable for Third-Party Investigator's Invasion of Former Employee's Privacy

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Based upon a recent decision by the Illinois Supreme Court, Illinois employers have an additional reason to be careful when investigating misconduct by current and former employees. In the case, [Lawlor v. North American Corporation of Illinois, Case No. 112530 \(Oct. 18, 2012\)](#), the State's highest court for the first time upheld an award of significant damages to a former employee based on the former employer's invasion of her privacy during an investigation into her competitive behavior. The decision is even more significant because the defendant employer was actually held vicariously liable for intrusions committed by a third-party investigator, signaling to all employers the importance of having a policy in place for such investigations.

In the case, the employer suspected one of its former salespersons of violating her noncompetition agreement by contacting the employer's clients as part of her work for a competitor. The employer recruited a private third-party investigator to verify its suspicions, providing the investigator with the former employee's personal information including her social security number. Using that information, the investigator posed as the former employee to obtain her telephone records. Although the employer had not specifically asked the investigator to obtain such records, it was "not surprised" when it did. The employer subsequently used the telephone records to determine whether the former employee had violated her agreement by calling its clients.

Upon learning that the private investigator had fraudulently obtained her records, the former employee filed suit against the employer for invasion of her privacy by "intrusion upon seclusion". A jury found in her favor, and the verdict was appealed to the Illinois Supreme Court.

At the outset, the Court recognized that it "ha[d] not expressly addressed whether the tort" of "intrusion upon seclusion" is actionable, but announced that it was "join[ing] the vast majority of other jurisdictions" in doing so. The Court then set forth the following test for the tort:

One 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....
... The intrusion itself makes the defendant subject to liability, even though there is no publication or other use of any kind of the information outlined.

Based upon that test, the Court found that the private investigator, in this case, had clearly intruded upon the former employee's privacy by using her personal information to fraudulently obtain her telephone records. The relevant question, then, was whether the employer was vicariously liable for that tortious conduct. The Court found that it was. The investigator was acting as the employer's agent, the Court determined — by providing the personal information to the investigator, the employer “was setting into motion a process by which” the investigator would impersonate the former employee to obtain her phone records. Further, the Court noted, even if the employer had not expressly requested that phone records be fraudulently obtained, it had still “provided [the investigator] with [the employee's] personal information,” which “was necessary in order for [the investigator] to obtain the records,” and it had used the improperly obtained telephone records in its investigation. In short, the Court concluded, the employer's conduct “was consistent with a principal exercising control over its agent by directing it to obtain specific information and providing with the necessary tools to accomplish the task.”

This case should serve as an alert to all Illinois employers: investigations into misconduct by employees or former employees — whether performed by the employer itself or a third-party investigator — bring the very real possibility of tort liability. Notably, the plaintiffs' bar is likely to take heed of this decision, particularly when considering counterclaims where an employer is suing to enjoin behavior in violation of a noncompetition agreement. Employers should make a decision early on as to whether they will exert control over an investigation or allow investigators to perform independently; a strategy of assisting investigators with potentially tortious invasions of privacy may expose the employer to significant liability.

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