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The Thirty-First Annual John Marshall Law School International Moot Court Competition in Information Technology and Privacy Law: Brief for the Petitioner, 29 J. Marshall J. Computer & Info. L. 701 (2012)

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BRIEF FOR PETITIONER

NO. 2012-CV-1001

In the
Supreme Court of the State of Marshall
Fall Term 2012

Jackson Peters,
Petitioner,
v.
O'Plenty Enterprises, Inc.,
Respondent.

On Appeal from the Marshall
Court of Appeals
for the First District

Brief for Petitioner

Kyle Fonville
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QUESTIONS PRESENTED

Whether the court erred in affirming O'Plenty Enterprises, Inc.'s summary judgment on Plaintiff Peters' claim of intrusion upon seclusion;

Whether the court erred in affirming O'Plenty Enterprises, Inc.'s summary judgment on Plaintiff Peters' claim of violation of the Marshall Human Rights Act.

OPINIONS BELOW

The Marshall County Circuit Court granted summary judgment in favor of Respondent, O'Plenty Enterprises, in case number 11-C-1000. The First District Court of Appeals for the State of Marshall affirmed the Marshall County Circuit Court's Order in case number 2011-016. The Opinion and Order of the First District Court of Appeals are found on pages 3–13 of the Record ("R.").

STATEMENT OF THE JURISDICTION

Pursuant to section 1020(2) of the Rules for the 31st Annual International Moot Court Competition in Information Technology & Privacy Law, the formal statement of jurisdiction has been omitted.

RELEVANT CONSTITUTIONAL PROVISIONS

The relevant statutory provision can be found in Appendix A of the official record: Marshall Human Rights Act. (R. at 14, app. A).

STATEMENT OF THE CASE

Factual Background

Jackson Peters is a life-long resident of Marshall. (R. at 4). He is a hard-working individual who was employed as an at-will employee by O'Plenty Enterprises, Inc. ("Respondent") for ten years, beginning in 2000. (R. at 4, 6–7). Respondent is a large real estate development company that focuses on lower- to middle-class residential rental properties in Marshall's capital, Marshall City. (R. at 3–4). Taking advantage of the financially troubled areas and the recent market crisis, Respondent has enjoyed substantial economic gain, company growth, and expanding control over Marshall City's real estate. (R. at 4).

Peters began his career with Respondent as an entry-level employee; however, he quickly worked his way through Respondent's management-training program, and in 2009, Respondent's founder and owner, Duffy O'Plenty, promoted him to the position of Regional Project Supervisor. (R. at 3, 5). Although Peters lived near company headquarters, Respon-

dent assigned him to a territory located 200 miles away in the city of Petersville—Peters's hometown. (R. at 5).

Peters has an exceptional work ethic and employment record, but he is more than just a "Regional Project Supervisor"; at times, he has been known to tell his friends, "[M]y job is what I do, not what I am." (R. at 4–5). In fact, Peters enjoys a life outside of the workplace, which until recently, he was successful at keeping separate from his employer, Respondent—a life justifiably entitled to remain private. For example, Peters is involved in local politics, and he is a supporter of the incumbent governor of Marshall, Ed Edison, in the 2012 election. (R. at 4–5). One of Governor Edison's platforms is a push to legalize same-sex marriage. (R. at 5). Indeed, Edison's position aligns with Peters's because Peters is in a long-term relationship with a member of the same sex. (R. at 6). Additionally, Peters maintains various contacts with prominent gay activists in Marshall. (R. at 6).

To be clear, it is likely that Peters felt obligated to separate his personal life from his work life in this way because of Respondent's clear political and moral position against homosexuality. (R. at 4). It is important to note that at the time of the events giving rise to this case, Respondent was controlled and operated by its owner Duffy O'Plenty, who also serves as the face of the company. (R. at 4). After withdrawing from his own campaign for governor in the 2012 elections, Mr. O'Plenty focused all of his efforts towards endorsing and supporting candidate Tom Timmons. (R. at 4). As expected, based on Mr. O'Plenty's own beliefs, candidate Timmons adamantly opposes same-sex marriage. (R. at 4).

In addition to his financial contributions, Mr. O'Plenty provides various venues owned by Respondent for candidate Timmons's fundraising and campaign events. (R. at 4). In fact, Mr. O'Plenty personally spoke on behalf of candidate Timmons during a 2010 event, where he publicly expressed his views by stating, "*Same sex marriage is unnatural. Homosexuality is a sin against God. It is unnatural and detrimental and ultimately destructive to the foundations of our society*." (R. at 4).

The Campaign Event

Approximately one year after Peters was promoted to Regional Project Supervisor, Respondent informed Peters that starting in 2010, he would be responsible for coordinating and facilitating various fundraising events for candidate Timmons, which would be held at the hotels owned by Respondent in Petersville. (R. at 5). Further, these new responsibilities were *in addition to* Peters's regular duties. (R. at 5). Although Respondent substantially increased Peters's workload and essentially forced him to support a candidate associated with public rep-

rimand against individuals such as himself, Peters accepted the added imposition. (R. at 5).

Understandably however, there were inherent limits to Peters's acquiescence and cooperation, and after roughly four months of coordinating these events, the exhaustion and stress began to catch up to Peters. (R. at 5). Aware that his performance was beginning to suffer, Peters spoke with his supervisors on two separate occasions. (R. at 5–6). But, Peters's supervisors dismissed his concerns, claiming that the additional responsibilities were merely a part of his job. (R. at 6).

Just as cautioned by Peters, however, the ancillary burdens from the campaign activities took their toll. During Peters's last visit to Petersville to coordinate an event for candidate Timmons, he was informed that his dog had died unexpectedly. (R. at 6). Unfortunately, this unforeseeable event triggered an emotional distraction for Peters that, in addition to his work-related stress, caused him to send the VIP list from the prior week's event to the hotel security for candidate Timmons's event (the "Event"). (R. at 6). Additionally, Peters forgot to arrange transportation for candidate Timmons. (R. at 6).

Although a mistake was undoubtedly made, it resulted in only a thirty-minute delay to the Event. (R. at 6). Candidate Timmons, however, characterized the Event as a "fiasco" and called Mr. O'Plenty directly to complain. (R. at 6). Thereafter, Respondent informed Peters that he had forty-eight hours to fly back to headquarters and submit a detailed report of the Event. (R. at 6).

The Missing Laptop

Considerably flustered and upset by the unusual events that had transpired, Peters hurriedly checked out of his hotel room, but when he arrived at the airport, he realized that his company-issued laptop computer was missing. (R. at 6). Pursuant to company policy, Peters immediately called Respondent's help line to report the missing laptop. (R. at 6). Fortunately the next morning, Peters received a call from the hotel manager who had found the laptop and had shipped it to him. (R. at 6).

As soon as the laptop arrived later that morning, Peters called Respondent to report that he had found the laptop. (R. at 6). But, Respondent's Information Technology ("IT") department did not answer the call, forcing Peters to leave a voicemail message. (R. at 6). Still under the forty-eight hour deadline imposed by Respondent, Peters began working on the Event report in his home office. (R. at 6). Unbeknownst to Peters however, his company-issued laptop was surreptitiously taking photographs of him through a hidden webcam that had been installed by Respondent. (R. at 5–6). It is undisputed that Respondent is entirely

responsible for installing the software on Peters's computer without his knowledge.

Approximately eight months earlier, Respondent installed a software program called Lost & Found® on all of its mobile electronic devices, including Peters's laptop. (R. at 5). The Lost & Found® technology is designed to remain innocuous and dormant during normal day-to-day use, but when Respondent so desires, it can trigger the spyware technology from a remote location, thereby activating an embedded webcam. (R. at 5). The webcam then takes photographs of both the user of the device and the device's screen. (R. at 5). The software is programmed to take these photographs at five-minute intervals while the user is connected to the Internet; the photographs are immediately sent to Respondent's web server, where they are forwarded to Respondent's Human Resources department as well as to Mr. O'Plenty himself. (R. at 5–6). Moreover, once the Lost & Found® technology is activated by Respondent, the software continues to retrieve photographs of the device's user until Respondent decides to deactivate it. (R. at 5). Consequently, after Respondent triggered the hidden webcam (and after Peters had reported his laptop missing), Respondent continued to receive photographs of Peters in his home office until Peters's voicemail was received—approximately *four hours* and nearly *fifty photographs* later. (R. at 6).

Importantly, Peters was wholly unaware that Respondent had taken pictures of the contents inside his home, including (1) several rainbow flags symbolizing the lesbian, gay, bisexual, and transgender movement and (2) several pictures on the wall behind Peters's desk that revealed both Peters's political acquaintance with a prominent gay activist who opposed candidate Timmons as well as Peters's relationship with his same-sex partner. (R. at 6). Although Peters was familiar with section 2.6 of Respondent's Employee Handbook (the section dealing with Respondent's computer policy),[1] he did not know "tracking software" included concealed webcams that could covertly take and send photographs of him. (R. at 9).

The Termination

Shortly after the Event, while Peters was still oblivious as to what information had been involuntarily disclosed to Respondent, Respondent suspended Peters pending an investigation of the Event. (R. at 7). During the suspension, Peters was isolated from his peers at work, and on at least two occasions, his co-workers failed to invite him to company-sanctioned events. (R. at 7). Finally, three weeks after Respondent had

1. Section 2.6 provides the following: "Company reserves the right to initiate and activate *tracking software* in order to track lost or stolen any type of company issued electronic equipment." (R. at 14, app. A) (emphasis added).

taken the pictures of Peters's home and discovered that he was gay, Respondent terminated Peters, purportedly due to his "poor job performance." (R. at 7).

Perplexed, Peters requested a copy of his employee file pursuant to section 3.5 of the Employee Handbook. (R. at 7; *see also* R. at 14, app. A). Included in the report was a file called "Stolen/Lost Laptop Report" that described in detail the recent missing-laptop incident as well as the pictures taken of him while working from his home office. (R. at 7). After inquiring about the report, Peters discovered, *for the first time*, the Lost & Found® technology. (R. at 7).

With knowledge of the information that Respondent had procured via the photographs taken inside of his home, Peters demanded an investigation into his termination; he claimed that he was not fired because of the Event in Petersville but because Respondent discovered that he was gay. (R. at 7). Respondent, however, refused to investigate the matter, claiming that it did not need a reason to fire Peters because he was an at-will employee. (R. at 7).

NATURE OF PROCEEDINGS

In 2011, Peters sued Respondent for (1) intrusion upon seclusion and (2) violation of the Marshall Human Rights Act for Respondent's discriminatory conduct in terminating Peters's employment. (R. at 8). Respondent filed motions for summary judgment on both counts, which the Marshall County Circuit Court granted in their entirety. (R. at 3, 8). The First District Court of Appeals for the State of Marshall affirmed the Circuit Court's Order, and this Court granted Peters's leave to appeal. (R. at 2, 13).

SUMMARY OF THE ARGUMENT

The First District Court of Appeals wrongfully affirmed the Order of the Marshall County Circuit Court granting Respondent's motions for summary judgment, as Peters has established a prima facie case on both of his claims, or alternatively, has raised genuine issues of material fact with respect to each claim.

PART I

Respondent intentionally intruded upon Peters's seclusion in a highly offensive manner. Respondent installed a software program called Lost & Found® on all of its employees' mobile devices with the specific intent to activate the technology and pry upon the devices' unsuspecting users. Although Respondent may urge that its desire was to catch persons who wrongfully obtained its property, it is clear that Respondent's policy also contemplates surreptitious surveillance of those

who innocently recover the property—whether that person be a random finder or a company employee, like Peters.

Furthermore, even if Respondent did not desire to take covert photographs of Peters while inside of his home, it knew with substantial certainty that such result was likely to occur. Indeed, notwithstanding the predictable situation in which an employee would misplace his mobile device coupled with the even-more-certain situation in which the same employee would subsequently recover his device (evidenced by Respondent's policy regarding employees' obligation to report recovered devices), Respondent failed entirely to warn its employees that they were subject to Respondent's observation any time they used their company-issued electronic devices.

Clearly, Respondent's intent to intrude upon Peters's seclusion is unaffected by any consideration of harbored malice. For, malice is not, nor has it ever been, an element of intent. Though Respondent succeeded in confusing the issues of intent and intrusion for the courts below, the two elements are distinct, e.g., there can be no intrusion, even if the conduct was intentional, when the intruder has the other person's permission or consent, but even when the intruder acts under the belief (accurate or not) that he has such permission, which *could* negate the presence of malice, his intrusion remains intentional. Even if this Court were able to follow Respondent's misplaced logic, Respondent has only established one thing: there is a genuine issue of material fact with respect to its belief.

Additionally, Peters has established that Respondent actually intruded upon his solitude, seclusion, and private affairs or concerns when it took photographs of him without his knowledge or consent inside of his home—the most sacred and private place in which no employer has the right to be. Indeed, given the sanctity of Peters's home, Respondent's intrusion would undoubtedly offend the sensibilities of any person, reasonable or otherwise. That no sexual or intimate conduct was captured on the photographs does not assuage this conclusion because it is not the information procured that gives rise to liability, it is the nature and circumstances in which the information was procured. Covert surveillance inside the confines of a person's home is *per se* highly offensive.

Finally, there is no plausible excuse that could ever justify an employer crossing the threshold of an employee's private home without the employee's knowledge or consent. In light of the fundamental right and personal autonomy involved in this case, it is appropriate for this Court to consider the other reasonably available, less-intrusive means that Respondent could have used to obtain its desired end. For example, if Respondent had merely included a sentence regarding the Lost & Found® technology in its Employee Handbook, it would have vitiated any chance that an employee would be photographed without his knowledge. In

sum, it is clear that Respondent intentionally intruded upon Peters's seclusion in a way that was highly offensive and without reasonable justification; therefore, Peters respectfully requests this Court to reverse the First District Court of Appeals's decision and remand this case for trial.

PART II

Respondent patently violated the Marshall Human Rights Act when it fired Peters after it wrongfully uncovered and exposed Peters's sexual orientation. Contrary to Respondent's misguided belief, Peters's status as an at-will employee did not grant Respondent a license to blatantly discriminate against him. Therefore, Respondent should be held liable for its actions against Peters in violation of the Marshall Human Rights Act.

To be clear, Peters has presented sufficient direct evidence linking Respondent's discriminatory animus to his termination. Specifically, the individual who both owned Respondent and served as the face of the company, Duffy O'Plenty, publicly hailed derogatory slurs toward homosexuals, including statements that "[h]omosexuality is a sin against God" and that it is "detrimental and ultimately destructive to the foundations of our society," demonstrating Respondent's official anti-gay sentiments. This evidence, coupled with the other evidence of discrimination presented by Peters, is clearly sufficient to support a finding by a reasonable fact finder that Respondent was motivated by an illegitimate criteria in firing Peters—its disdain for homosexuals.

Additionally, Peters's discrimination claim satisfies the standard set forth in *McDonnell Douglas*, as Peters, a gay man, clearly falls within the protections afforded by the Marshall Human Rights Act. Further, Peters was terminated despite ten years of employment and a near-perfect record. Indeed, the only blemish in Peters's file—besides his sexual orientation, which Respondent apparently perceives as a "blemish"—is the 2010 Event in Petersville. This Event, however, was not only predictable (based on Respondent's piling on of additional responsibilities), but it was reasonably excusable due to Peters's distraught emotional state brought on by the death of his beloved dog. While a rational employer would likely treat a corporate veteran like Peters with respect, Respondent used the situation as an excuse to rid itself of a homosexual employee.

Consequently, even if this Court accepts Respondent's excuse as "legitimate," Peters has sufficiently established that Respondent's excuse was manufactured in an attempt to avoid liability for its discriminatory conduct. There have been at least two separate occasions where Respondent was lenient in response to its heterosexual supervisors' analogous (or worse) mistakes against the company. For example, notwithstanding

Respondent's extreme efforts to preserve its proprietary information, it merely transferred a heterosexual supervisor who leaked such information. Further, in response to another heterosexual supervisor's blatant sexual discrimination, which subjected the company to multiple complaints, it barely administered a slap on the wrist. Therefore, in light of Respondent's history of leniency with respect to discrimination as well as its preferential treatment toward heterosexual employees, it is clear that Respondent's proffered reason for firing Peters was mere pretext to its discrimination against him. Accordingly, Peters respectfully requests this Court to reverse the First District Court of Appeals's decision and remand this case for trial.

STANDARD OF REVIEW

Summary judgment is a procedural tool that allows a court to dispose of all or part of a case prior to trial, but summary judgment is *only* appropriate when the moving party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *Smith v. Jasper*, 15 Marsh. 29 (2000); MARSHALL R. CIV. P. 56(c) (2012). On appeal, an appellate court reviews a grant of summary judgment *de novo* and applies the same standard as the trial court. *Id.* In doing so, "the court must draw all reasonable inferences in favor of the nonmoving party." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 150 (2000) (citing *Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 554–555 (1990)).

ARGUMENTS AND AUTHORITIES

RESPONDENT'S SURREPTITIOUS SURVEILLANCE OF PETERS INSIDE OF HIS HOME AND WITHOUT HIS KNOWLEDGE OR CONSENT AMOUNTS TO AN INTENTIONAL INTRUSION UPON PETERS'S SECLUSION FOR WHICH PETERS IS ENTITLED TO RECOVER.

The Restatement (Second) of Torts, which has been adopted by the appellate court below as well as the majority of courts in the United States, provides that "[o]ne who invades the right of privacy of another is subject to liability for the resulting harm to the interests of the other." RESTATEMENT (SECOND) OF TORTS § 652A (1977); *see, e.g.*, *Koeppel v. Speirs*, 808 N.W.2d 177 (Iowa 2011); *Valenzuela v. Aquino*, 853 S.W.2d 512 (Tex. 1993); *Mauri v. Smith*, 929 P.2d 307 (Or. 1996); Lake v. Wal-mart Stores, Inc., 582 N.W.2d 231 (Minn. 1998). According to the Restatement, an invasion of privacy occurs when one "intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns" in a way that is "highly offensive to a reasonable person." RESTATEMENT (SECOND) OF TORTS § 652B (1977)

(setting forth the elements of the cause of action known as "intrusion upon seclusion").

Therefore, to prevail on a claim for intrusion upon seclusion, Peters was merely required to establish the following three elements: (1) Respondent intended to intrude, physically or otherwise, (2) upon Peters's solitude, seclusion, or private affairs or concerns (3) in a way that would be highly offensive to a reasonable person. *See id.* Contrary to both the trial court and the First District Court of Appeals's position below, Peters has sufficiently established the foregoing elements and should therefore be afforded his just relief, or at a minimum, Peters should be granted the right to proceed to trial. Accordingly, Peters respectfully asks this Court to reverse the First District Court of Appeals's decision and remand this case to the trial court.

Respondent intentionally intruded upon Peters's seclusion because it installed its Lost & Found® technology on his computer with the specific desire to intrude upon the seclusion of its unsuspecting users, or alternatively, Respondent was substantially certain that such intrusion was likely to occur

The threshold question in an intrusion-upon-seclusion action, as is the case with any intentional tort, is whether the intrusion was "intentional." The Restatement defines "intent" to "denote that the actor desires to cause [the] consequences of his act, or that he believes that the consequences are substantially certain to result from it." RESTATEMENT (SECOND) OF TORTS § 8A (1977). To be clear, the presence or absence of malice is *not* an element. A defendant cannot escape liability for an intentional invasion of a plaintiff's privacy by claiming that he wished no harm or embarrassment upon the plaintiff as a result of wrongfully exposing the plaintiff to the public.[2] "The intent with which tort liability is concerned is . . . an *intent to bring about a result* which will invade the interests of another in a way that the law forbids." W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 2, at 7 (5th ed. 1984) (emphasis added).

Courts rarely address the element of intent when adjudicating claims for the intrusion upon the seclusion of another.[3] This is likely

2. Surely, this principle is so engraved in our legal system that it undoubtedly prompts flashbacks to the first-year torts classroom and the infamous "chair case," wherein the court held that "[t]he mere absence of any intent to injure the plaintiff or to play a prank on her or to embarrass her, or to commit an assault and battery on her would not absolve [Defendant] from liability" so long as he knew or was substantially certain that "that the plaintiff would attempt to sit down where the chair had been." *Garratt v. Dailey*, 279 P.2d 1091, 1094 (Wash. 1955).

3. *See* Daniel P. O'Gorman, *Looking Out for Your Employees: Employers' Surreptitious Physical Surveillance of Employees and the Tort of Invasion of Privacy*, 85 NEB. L.

true because courts generally have little difficulty in finding a defendant's invasive conduct to be "intentional." In this case, however, both the trial court and the appellate court have somehow managed to find such difficulty, which has led to unmistakable error at each level of this controversy. First, the courts below have wholly ignored the basic nature of Respondent's Lost & Found® technology; Respondent installed the software on its employees' computers for the specific purpose of prying into the lives of unsuspecting subjects. Second, the lower courts have confused malice with intent, resulting in the imposition of an unfounded element to the tort of intrusion upon seclusion.

Respondent desired to cause the consequences of its actions in implementing the Lost & Found® technology: to invade the privacy of both the "thief" and the "finder"—in this case, its own employee, Peters.

Before this Court can conduct a thorough and accurate analysis of this case, this Court, unlike the courts below, should acknowledge the true nature of Respondent's Lost & Found® technology. To be clear, this unfortunate yet undeniable situation stems from Respondent's fear that its electronic devices, or the information thereon, would be lost or stolen. (*See* R. at 5). In an effort to mitigate this risk, Respondent purchased the Lost & Found® technology and directed its IT department to install it on all electronic, mobile devices. (R. at 5). The Lost & Found® technology is specifically designed to surreptitiously take photographs of both the user of the device and the device's screen by using a concealed camera. (R. at 5).

Clearly, it cannot be said that the drastic, costly act of installing such software was the result of inadvertence or mistake. Rather, Respondent intentionally installed the software and was therefore fully aware of its capabilities. In that vein, it is important to note that once activated, the software does not differentiate between users, i.e., it captures the activities of any unsuspecting individual who is unfortunate enough to use the device. Despite Respondent's knowledge of this fact, however, it failed to inform its employees that it could, at any time, trigger the software and thereby subject them to unwanted observation.

In addition to recognizing the true nature of Respondent's Lost & Found® technology, it is important to understand Respondent's policy with respect to the technology. Per Respondent's direction, its employees were required to report any missing electronic device, regardless of whether the device was (1) lost or (2) stolen. (R. at 9). Although not

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REV. 212, 233–34 (2006) ("Rarely is intent (or lack of it) an issue in cases involving an employer's surreptitious physical surveillance of employees. Usually, the employer intends to conduct the surveillance and intends to learn whether the employee is engaging in the very activity that is ultimately viewed during the surveillance.").

immediately intuitive, this distinction—lost versus stolen—is crucial because it reveals that Respondent not only intended to photograph the "thief" but also the "finder" of the missing device. For example, in the normal case of stolen property, once an employee has reported the device missing, Respondent will activate the embedded webcam to catch the thief in the act. However, in the also-normal case of misplaced property, Respondent will immediately trigger the Lost & Found® technology in the exact same manner, inevitably capturing the finder of the device—whether that finder be an innocent bystander or a company employee.

From the above-stated examples, it is clear that Respondent implemented the Lost & Found® technology with the specific intent to capture the activities of, i.e., intrude upon, both the thief *and* the finder. Surely, in these situations (depending on the circumstances), a court may not always find the intrusion to be highly offensive to a reasonable person, thereby satisfying a claim for intrusion upon seclusion. However, in *every situation*, a court must find that the intrusion was intentional. Therefore, regardless of Respondent's primary objective in installing the Lost & Found® technology, it undeniably had the intent to intrude upon the seclusion of *any* individual who used the device after it had been reported missing. Here, the unfortunate and unsuspecting individual who used the device was Respondent's own employee, Peters. Therefore, Respondent intentionally intruded upon Peters's seclusion.

Pursuant to Respondent's Lost & Found® policy, Respondent knew with substantial certainty that any employee who recovered its lost or stolen property would unknowingly fall victim to its spyware technology.

Even if this Court finds that Respondent did not specifically desire to intrude upon Peters's seclusion, it should still find that Respondent was substantially certain that Peters's seclusion would be invaded by its Lost & Found® technology. With the influx of new technology and an increasing telecommuting workforce, Respondent decided to tap into the mobile workforce, and thereby Respondent assumed the correlative risk of stolen and lost equipment. To combat this foreseeable risk, Respondent implemented its Lost & Found® policy, aimed at recovering both stolen *and* lost property. Therefore, to say that its 'property was likely to be misplaced' is quite the understatement. At a minimum, there was a substantial certainty that Respondent's employees would misplace its property. Likewise, there was also a substantial certainty that the same employees who misplaced their property would subsequently find their property. Further, this certainty is demonstrated by Respondent's own employee handbook, which provides in relevant part that an "[e]mployee must report if company issued electronic equipment has been recovered." (R. at 14). If Respondent was so certain that its employees would inevi-

tably recover its missing devices as to create a policy for that very situation, it reasonably follows that Respondent was substantially certain that its employees would be caught in the line of fire by its Lost & Found® technology.

On appeal, Respondent argued that it did not intend to record Peters because its IT department did not receive Peters's voicemail until four hours, and approximately fifty photographs, after Peters reported that his laptop had been recovered; it stated that "it was accidental that the camera recorded Peters for as long as it did." (R. at 10). Assuming, without conceding, that it was negligent, as opposed to intentional, that Respondent failed to terminate the surveillance of the laptop after it was informed that the laptop was in Peters's possession, the result would not change. For, it was Respondent's policy (or lack thereof) that gave rise to the substantial certainty that it would wrongfully procure private photographs of Peters in his home.

As indicated above, despite the near-certain possibility that an employee–finder would be captured by the embedded webcam as well as the fact that Respondent neither warned nor implemented a policy to protect against unknowing employee surveillance, its intentional act of installing the Lost & Found® technology produced a substantial certainty that an employee—Peters—would be subject to privacy invasion via surreptitious surveillance. Therefore, it is clear that Respondent intentionally intruded upon Peters's seclusion.

The court below wrongfully confused the element of intent by imposing an unprecedented element of malice: Respondent's belief (even if true) that Peters consented to being observed inside of his home cannot negate its intent to intrude upon Peters's seclusion.

The conclusion that Respondent had the requisite intent to intrude upon Peters's seclusion is supported by the long-standing principle that malice is not an element of intent. *See Ali v. Douglas Cable Commc'ns*, 929 F. Supp. 1362, 1382 (D. Kan. 1996) (citing *Froelich v. Adair*, 516 P.2d 993, 997 (Kan. 1973) ("The precise motives for invasion of privacy are unimportant. Defendant's action, rather than precise motives accompanying the act or conduct, is the criterion of liability.")); *see also* Daniel P. O'Gorman, *supra* note 3, at 233–35 ("The intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids.").

Notwithstanding this basic principle, Respondent was somehow successful in its attempt to muddle the waters for the courts below by infusing the element of intent with that of intrusion. The practical effect of this confusion has created a giant loophole for Respondent to slip

through because *only* under Respondent's purported standard, could it argue that it lacked intent due to the fact that it did not maliciously intrude upon Peters's seclusion. Fortunately, this Court has the opportunity to set the record straight by applying the true standard—a standard that does not consider the presence or absence of malice.

Respondent's argument, which the courts below wrongfully adopted, is based on a 1989 Third Circuit Court of Appeals decision, *O'Donnell v. United States*, 891 F.2d 1079 (3d Cir. 1989). The essence of Respondent's argument was that it lacked intent because it believed that it had the "necessary personal permission or legal authority" to record Peters while he was inside of his home. (R. at 9). Because, in making this argument, Respondent relies so heavily on *O'Donnell*, it is important to consider the context in which that case was decided.

In *O'Donnell*, Thomas O'Donnell, a veteran who suffered from post-traumatic stress disorder, worked for the Commonwealth of Pennsylvania as a disabled veterans employment representative in its Hatboro office. *Id.* at 1081. Because of his disorder, O'Donnell requested a transfer to a different office. *Id.* In response, his supervisor told him to provide a statement from a Veterans Administration ("VA") psychiatrist to verify his need to transfer. *Id.* O'Donnell executed a consent form to release his information, but he failed to specify the exact information that could be disclosed. *Id.* O'Donnell's psychiatrist wrote two letters to his supervisor corroborating his need to transfer; however, a VA employee subsequently sent O'Donnell's supervisor his treatment summary containing additional, private information that was not pertinent to his transfer. *Id.*

O'Donnell sued the VA for invasion of privacy, and the VA argued that O'Donnell impliedly consented to the release of his information when he signed the consent form. *Id.* at 1081–83. In analyzing O'Donnell's claim, the Third Circuit expressly recognized the Restatement's definition of "intent." *Id.* at 1083 ("the actor desires to cause the consequences of his act, or . . . believes that the consequences are substantially certain to result from it"). The court went on to note that although the Restatement provides a clear definition of "intent," it does not define "intrusion." *Id.*

After considering the dictionary definition of the term "intrude" as well as the comments to section 652B of the Restatement, the court stated that "an 'intrusion upon seclusion' claim usually involves a defendant who does not believe that he has either the necessary personal permission or legal authority to do the intrusive act." *Id.* Thus, the court concluded that "an actor commits an intentional intrusion only if he believes, or is substantially certain, that he lacks the necessary legal or personal permission to commit the intrusive act." *Id.* As a result, the court held that "the VA believed it had O'Donnell's permission to release

the disputed record" and that because "O'Donnell offered no evidence to the contrary," the VA did not intentionally intrude upon O'Donnell's seclusion. *Id.*

This case is distinguishable from *O'Donnell* in two major respects. First, in *O'Donnell*, there was no question as to whether the VA intentionally disclosed O'Donnell's records. Clearly, the VA employee specifically intended to send O'Donnell's treatment summary to his supervisor (albeit, under the false impression that O'Donnell had consented). *See id.* at 1081. In fact, the VA did not even attempt to challenge this fact on appeal; its only claim was that it thought O'Donnell had consented to the disclosure. Furthermore, the court's analysis rested on the definition of "intrude." *Id.* at 1083 ("Webster's defines 'intrude' to mean to thrust oneself in without invitation, permission, or welcome."). Therefore, despite the court's unfortunate choice of language, the actual issue before the court was whether there was an "intrusion" under the Restatement—not whether such intrusion was intentional.

Hence, a careful reading of *O'Donnell* reveals that the element of intent does not rest upon the defendant's belief that his acts were wrong, i.e., malicious, but rather, whether he either desired to cause the consequences of his action or was substantially certain that such consequences were likely to result. Indeed, if malice were tied to the element of intent, it would lead to an absurd result. Specifically, if malice were an element, as long as one believed that his actions were non-tortious, he would escape liability. Setting aside the evidentiary concerns in proving (or disproving) such state of mind, this would reward ignorance of the law.

The second distinguishing factor from *O'Donnell* is that unlike Mr. O'Donnell, Peters has provided sufficient proof to raise a question of material fact with respect to Respondent's claim that Peters consented to Respondent's observation of him inside of his home. Whereas O'Donnell gave express consent, which was not limited to a particular type of information, Peters never consented, expressly or impliedly, to being observed by Respondent from inside of his home. *See id.* at 1081. Furthermore, even if this Court decides that Peters has not disproved his consent as a matter of law, Peters has at least raised a question of material fact with respect to whether or not he consented.

Even a cursory look at Respondent's Employee Handbook proves that Peters was never put on notice, nor did he consent, to the fact that Respondent could secretly procure photographs of him using his company-issued laptop. (*See* R. at 14). The relevant provision of the handbook reads as follows:

> Section 2.6 – Company reserves the right to initiate and activate *tracking software* in order to track lost or stolen any type of company issued electronic equipment.

(R. at 14) (emphasis added). It can hardly be said that a reasonable person (or any person for that matter) would consider the term "tracking software" to include covert surveillance using an embedded webcam. In fact, the appellate court even agreed that Respondent's policy was "vague at best." (R. at 9). Therefore, even assuming, without conceding, that Respondent's intent was tied to its belief that it had permission to photograph Peters in his home, Respondent's argument would fail because it has not established that Peters consented to being photographed as a matter of law. At the very least, this would present a genuine issue of material fact with respect to Respondent's true belief.

Respondent intruded upon Peters's solitude, seclusion, and private affairs or concerns by covertly taking photographs of Peters and thereby placing itself inside of Peters's home.

Clearly, there is no better example of an intrusion than photographing an individual in the safety of his home and without his knowledge. Peters had an objectively reasonable expectation of privacy inside of his home, and Respondent invaded that privacy, thereby intruding upon his seclusion. Indeed, with respect to the fundamental protections afforded by the United States Constitution, the Supreme Court has drawn "a firm line at the entrance of the house." *Kyllo v. United States*, 533 U.S. 27, 40 (2001) (quoting *Payton v. New York*, 445 U.S. 573, 590 (1980) and recognizing the absolute protection one enjoys inside of his home, regardless of how slight the compromise of privacy may be).

A measure of personal isolation and personal control over the conditions of privacy's abandonment is of the very essence of personal freedom and dignity, is part of what our culture means by these concepts. A man whose home may be entered at the will of another, whose conversations may be overheard at the will of another, whose marital and familial intimacies may be overseen at the will of another, is less of a man, has less human dignity, on that account. *Koeppel*, 808 N.W.2d at 180 (quoting Edward J. Bloustein, *Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser,* 39 N.Y.U. L. REV. 962, 973–74 (1964)).

Moreover, "[t]he tort of intrusion upon the plaintiff's solitude or seclusion is not limited to a physical invasion of his home" but extends to other forms of sensory invasion, e.g., photography. *Hamberger v. Eastman*, 206 A.2d 239, 242 (N.H. 1964) ("Whether actual or potential such 'publicity with respect to private matters of purely personal concern is an injury to personality. It impairs the mental peace and comfort of the individual and may produce suffering more acute than that produced by a mere bodily injury."). Additionally, an individual enjoys such protection regardless of whether he shares the residence with another or routinely invites others into his home—"visibility to some people does not strip

him of the right to remain secluded from others." *Stessman v. Am. Black Hawk Broad. Co.*, 416 N.W.2d 685, 688 (Iowa 1987) (quoting *Huskey v. Nat'l Broad. Co., Inc.,* 632 F.Supp. 1282, 1287–88 (N.D. Ill. 1986)). Consequently, although Respondent did not physically place itself inside of Peters's home, it nevertheless compromised his reasonable expectation of privacy, and therefore, Peters has satisfied his burden in establishing that Respondent intruded upon his seclusion.

Respondent's intrusion upon the solitude and seclusion of Peter's home, without his knowledge or consent, would most certainty offend the ordinary sensibilities of any reasonable person, and therefore, because Respondent has no legitimate excuse for invading Peters's reasonable expectation of privacy, its intrusion upon Peters's seclusion was highly offensive to a reasonable person.

The third element of an intrusion-upon-seclusion claim is that the intrusion occurred in a way that would be highly offensive to a reasonable person. *See* RESTATEMENT (SECOND) OF TORTS § 652B (1977). Having established that Respondent intentionally intruded upon Peters's seclusion, Peters respectfully submits that, contrary to the appellate court's position below, Respondent's intrusion was highly offensive. (*See* R. at 10); *see also Harkey v. Abate,* 346 N.W.2d 74, 76 (Mich. Ct. App. 1983) ("[T]he installation of the hidden viewing devices alone constitutes an interference with that privacy which a reasonable person would find highly offensive.").

In light of the sacred protection that Peters's should be afforded within the confines of his home, it is clear that Respondent's intrusion into the safety of Peters's home, without his knowledge or consent, would be highly offensive to any reasonable person.

For some reason, the court of appeals only addressed this element in a comment inserted after its holding, which stated that "we find the recording not to be highly offensive to a reasonable person." (R. at 10). The purported reasoning behind this position was that the webcam "did not capture [Peters] doing anything other than working." (R. at 10). The court's conclusory statement is flawed for two reasons. First, it ignores entirely the sanctity of the home. And second, the content of the photographs are irrelevant for purposes of this tort—it is sufficient that Respondent recorded Peters in the privacy of his home without his knowledge or consent. *See In re Marriage of Tigges*, 758 N.W.2d 824, 829–30 (Iowa 2008) ("The wrongfulness of the conduct springs not from the specific nature of the recorded activities, but instead from the fact that [the plaintiff's] activities were recorded without her knowledge and consent at a time and place and under circumstances in which she had a

reasonable expectation of privacy."); *Koeppel v. Speirs*, 779 N.W.2d 494, at *6 (Iowa Ct. App. 2010) *aff'd*, 808 N.W.2d 177 (Iowa 2011) ("[I]t is sufficient that the seclusion of the . . . private area[ ] was intruded upon," regardless of the quality or content of the images received).

Indeed, the element of intrusion does not hinge on the specific information or content procured. Rather, a person intrudes upon another's seclusion when he penetrates the other's objectively reasonable expectation of privacy. *See Hernandez v. Hillsides, Inc.*, 211 P.3d 1063, 1072 (Cal. 2009). *Hernandez*, discussed further below, demonstrates this principle. In *Hernandez*, the California Supreme Court held that the mere installation of a device capable of recording an employee in the workplace, without her knowledge or consent, was sufficient to establish a prima facie case of intrusion. *Id.* at 1074 ("[W]hile privacy expectations may be significantly diminished in the workplace, they are not lacking altogether."). The *Hernandez* court's conclusion was unaffected by the defendants' argument that the recording device never recorded the employee. *Id.*

The case at hand is also analogous to an Iowa Supreme Court case, *In re Marriage of Tigges*, 758 N.W.2d 824. In *Tigges*, the plaintiff's husband, Jeffery Tigges, installed several electronic recording devices in the couple's bedroom to record the plaintiff's activities. *Id.* at 825. When the plaintiff witnessed Jeffery removing a cassette from a recording device, she discovered that she was being video taped, and in connection with a subsequent divorce proceeding, she alleged that Jeffery had invaded her privacy by intruding upon her seclusion. *Id.* In response, Jeffery claimed that the intrusion was not highly offensive because "the videotape captured nothing of a 'private' or 'sexual' nature." *Id.* at 829. The Iowa Supreme Court held that Jeffery's "contention [was] without merit . . . because the content of the videotape is not determinative of the question of whether Jeffrey tortiously invaded [the plaintiff's] privacy." *Id.* at 830. Instead, the court concluded that the wrongfulness of the conduct arose from the "specific nature of the recorded activities," i.e., the recording of activities within the home. *Id.*

To be clear, *Tigges* demonstrates two relevant key facts. First, every individual—including Peters—is entitled "to be left alone, to live a life of seclusion, [and] to be free of unwarranted publicity." *Id.* at 829 (quoting *Bremmer v. Journal-Tribune Publ'g Co.*, 76 N.W.2d 762, 764–65 (Iowa 1956). Thus, any device that records intimate, private conduct within the confines of a person's home is *per se* highly offensive because it compromises the person's reasonable expectation of privacy. Accordingly, the fact that Respondent took photographs of Peters inside of his home and without his knowledge or consent is, by itself, highly offensive.

Second, *Tigges* reveals that liability for intrusion upon seclusion stems from the act itself, not from the specific information that was

wrongfully procured. Therefore, Respondent's argument that it only exposed images of Peters at his desk[4] (as opposed to other graphic images that could have been captured) is entirely irrelevant to the offensive nature of the act itself. *See Koeppel*, 779 N.W.2d at *6 ("[T]he camera need [not] be pointed at the toilet—it is sufficient that the seclusion of the bathroom, a private area, was intruded upon."). Notwithstanding the upsetting thought of what *could have* been captured by Respondent's Lost & Found® technology, conducting covert surveillance inside Peters's home, regardless of the specific area within his home, would undeniably offend the ordinary sensibilities of any reasonable person. In light of this, Peters respectfully urges this Court to hold that Respondent's conduct was highly offensive to a reasonable person.

Although no employer's intrusion into its employee's home, without the employee's knowledge or consent, is ever justified, Respondent's purported reason for doing so—to recover a used laptop using spyware technology—is without merit, and thus, its intrusion upon Peters's seclusion remains highly offensive.

Even when a plaintiff, like Peters, has established that a defendant intentionally intruded upon his seclusion in a way that was highly offensive, some courts still perform a balancing test to determine the level of offensiveness. *See* Daniel P. O'Gorman, *supra* note 3, at 262 ("[M]ost courts determine whether the intrusion would be highly offensive to a reasonable person by balancing 'the employer's interest in intruding and the employee's privacy interest.'"); *Parish Nat'l Bank v. Lane*, 397 So. 2d 1282, 1286 (La. 1981) (stating that "an actionable invasion of privacy exists only when the defendant's conduct is unreasonable and seriously interferes with the plaintiff's privacy interest" and that "[t]he reasonableness of the defendant's conduct is assessed by balancing his interest in pursuing his course of conduct against the plaintiff's interest in protecting his privacy.") (citations omitted). Therefore, although no plausible excuse could ever justify Respondent's placing itself inside Peters's home without his knowledge or consent, in an abundance of caution, Peters will address the issue here.

Although it is likely that Respondent will assert what it believes to be a "legitimate reason" for photographing Peters in his home, Respondent's proffered excuse must fail. For, this is not an instance of monitor-

4. It is important to note that although the court of appeals concluded that Respondent's camera "did not capture [Peters] doing anything other than working," the camera actually captured several personal items that belonged to Peters, including (1) private photographs of him and his partner engaged in kissing, embracing, and performing a "commitment" ceremony; (2) photographs of Peters with a prominent gay-rights activist; and (3) personal household items, including rainbow colored flags symbolizing Peters's sexual orientation. (*See* R. at 6).

ing employees in the workplace, nor is this an instance of monitoring employees' public behavior after working hours; here, Respondent monitored Peters inside of his home—an area that not even a truly legitimate business reason could justify intruding upon. Accordingly, it is clear that Peters has established a prima facie case that Respondent not only intentionally intruded upon his seclusion but that Respondent's intrusion was unjustified and thus, highly offensive.

The California Supreme Court has recently applied this balancing test in the context of employee surveillance. *See Hernandez*, 211 P.3d 1063. In *Hernandez*, Hillsides Children Center, Inc. ("Hillsides"), a residential treatment center for abused children, was looking into instances of computer misuse. *Id.* at 1068. According to its computer specialist, someone was accessing pornographic materials using the plaintiff Maria–Jose Lopez's computer.[5] Hillsides was especially concerned because in addition to the fact that downloading pornographic materials was against its "E–Mail, Voicemail and Computer Systems Policy," it suspected the culprit to be one of its program directors who worked with the children, many of whom had been abused by exposure to and participation in pornography. *Id.* at 1067–69.

In response to its suspicions, Hillsides set up a video camera system inside Lopez's office, but because Hillsides suspected an employee of the misuse, it did not tell Lopez about the system in fear that word of its plan would spread. *Id.* at 1069. Although the camera would activate any time there was movement in the room, in order for an image to display on the system's monitor or for a recording to be made, Hillsides had to plug a wireless device into the monitor. *Id.* It was undisputed that Hillsides never activated the recording device while Lopez was in her office, and Lopez was never caught on the camera. *Id.* at 1070.

Approximately three weeks after Hillsides had installed the camera, Lopez discovered it. *Id.* In shock, Lopez reported the camera to her supervisor and subsequently sued Hillsides for invasion of privacy. *Id.* at 1067, 1070. The trial court dismissed Lopez's invasion of privacy claim on summary judgment, but the court of appeals reversed and found that Hillsides's intrusion was highly offensive. *Id.* at 1071. After a lengthy analysis of California law regarding intrusion upon seclusion, the California Supreme Court held that Hillsides intentionally intruded upon Lopez's privacy but because of its justifications for doing so, the intrusion was not highly offensive. *Id.* at 1072–82.

The *Hernandez* court's analysis of the balancing test is particularly useful in this case. As indicated above, the court had no issue with determining that Hillsides's covert surveillance, regardless of the information

5. *Id.* It is important to note that Hillsides did not suspect Lopez because the misuse occurred at night after Lopez had left the office. *Id.* at 1069.

it procured, was a clear intrusion upon Lopez's seclusion. *Id.* at 1074–78. As the court noted, however, a plaintiff must also show that the intrusion would be highly offensive to a reasonable person. *Id.* at 1078 (citing *Shulman v. Grp. W Prods., Inc.*, 18 Cal. 4th 200 (Cal. 1998)). The court set forth the standard and stated that it must examine[ ] all of the surrounding circumstances, including the 'degree and setting' of the intrusion and 'the intruder's 'motives and objectives." . . . [It] also may be asked to decide whether the plaintiff, in attempting to defeat a claim of competing interests, has shown that the defendant could have minimized the privacy intrusion through other reasonably available, less intrusive means. *Id.* at 1079 (citing *Shulman*, 18 Cal. 4th at 236, *Miller v. Nat'l Broad. Co.*, 187 Cal. App. 3d 1463, 1483–84 (1986), and *Hill v. Nat'l Collegiate Athletic Ass'n*, 7 Cal. 4th 1, 38 (1994)).

Considering the degree and setting of the surveillance, the *Hernandez* court found that (1) Hillsides "took a measured approach" in conducting the operation, (2) its efforts were "largely confined," and (3) it "kept abreast of [its] own monitoring activities, and did not expose plaintiff[ ] to the risk of covert visual monitoring or video recording any longer than was necessary." *Id.* With respect to Hillsides's justification, the court held that Hillsides was motivated by a legitimate concern in protecting the "wholesome environment for the abused children" and avoiding "any exposure that might aggravate their vulnerable state[s]." *Id.* at 1081. Further, because it was a situation involving decreased expectations of privacy—the workplace—the court refused to force Hillsides to justify its actions against the least offensive alternative. *Id.* at 1082 (citing *Hill*, 7 Cal. 4th at 50); *see also id.* at 1073 ("[E]xcept in the rare case in which a 'fundamental' right of personal autonomy is involved—the defendant need not present a 'compelling' countervailing interest; only 'general balancing tests are employed.'").

Clearly, the case at hand is distinguishable from *Hernandez* in that (1) it does not involve a situation with a diminished expectation of privacy, but one in which a "fundamental right of personal autonomy is involved"—Peters's home—and (2) in light of the heightened privacy concerns and the more reasonable, less-intrusive alternatives, Respondent's conduct was egregious and highly offensive. Indeed, Respondent was not faced with the decision that Hillsides faced in *Hernandez*, i.e., either (a) inform the employee with the risk of compromising the entire plan or (b) do not inform the employee and take steps to ensure she is not recorded.

There is no plausible explanation for failing to give Peters notice that his laptop was bugged with a hidden camera. Therefore, even assuming, without conceding, that Respondent's motive for implementing the Lost & Foud® technology was legitimate, its methods in doing so—covertly and without Peters's consent—cannot justify the type of intru-

sion that occurred. Consequently, Respondent intruded upon Peters's seclusion in a way that would be highly offensive to a reasonable person, and thus, Peters is entitled to his just relief. Accordingly, Peters respectfully requests this Court to reverse the First District Court of Appeals's decision and remand this case for trial.

Respondent maliciously discriminated against Peters in violation of the Marshall Human Rights Act when it terminated Peters on the basis of his sexual orientation.

It is truly astonishing that notwithstanding our nation's extensive history and heinous experience with discrimination, some citizens remain inclined to persecute individuals based on their minority status. Indeed, this case demonstrates such travesty in that Peters—a gay man who zealously yet unsuccessfully tried to set his personal dispositions aside in order to hold a job equal to that of a heterosexual—was fired directly after his employer, Respondent, discovered his sexual orientation. As with any form of discrimination, discrimination based on sexual orientation, like Respondent's conduct at issue here, cannot stand. To be clear, Peters has established every necessary element to prove discrimination and is therefore entitled to his just relief, or at the very least, he is entitled to present his case at trial.

It has been argued that because Peters was an "at-will" employee, Respondent owed him no explanation of the rationale that drove its decision to terminate his employment. (*See* R. at 11–12 ("[A]n employer may ordinarily discharge an [at-will] employee for good cause, for no cause, or for a cause that some might view as morally indefensible." (citing *Miracle v. Bell Cnty. Emergency Med. Servs.*, 237 S.W.3d 555, 558 (Ky. Ct. App. 2007)))). However, this argument is incomplete because no court would hold that an at-will status grants an employer the categorical right to discriminate. *See Miracle*, 237 S.W.3d at 558 (holding that an employee has a cause of action when the wrongful discharge is contrary to public policy as evidenced by a constitutional or statutory provision); *Talley v. Wash. Inventory Serv.*, 37 F.3d 310, 311 (7th Cir. 1994) ("Illinois also recognizes an exception to the employment-at-will doctrine and allows an employee to sue in tort where termination from employment violates a public policy."). Accordingly, Respondent must answer for its discriminatory conduct in firing Peters because it terminated him in violation of the public policy established in the Marshall Human Rights Act ("MHRA"), discussed further below. (*See* R. at 15, app. B).

In light of the circumstances leading to Peters's termination, there is both direct and indirect evidence of Respondent's discriminatory animus sufficient to support a finding that Respondent's decision to terminate Peters was motivated by an impermissible criteria—Peters's sexual orientation.

As a threshold matter, Peters respectfully urges this Court to consider the direct evidence that shows Respondent wrongfully terminated him because of his sexual orientation in violation of the MHRA. To be clear, once Peters has presented direct evidence of discrimination—as he has sufficiently done here—this Court need not consider the *McDonnell Douglas* balancing test that was used by the courts below. *See Trans World Airlines, Inc. v. Thurston*, 469 U.S. 111, 121 (1985) (holding that the shifting burdens of proof described in *McDonnell Douglas* are not applicable if a plaintiff can cite direct evidence of unlawful discrimination); *Swierkiewicz v. Sorema N. A.*, 534 U.S. 506, 511 (2002) (same); *DeBrow v. Century 21 Great Lakes, Inc.*, 620 N.W.2d 836, 838 (Mich. 2001) ("Where direct evidence is offered to prove discrimination, a plaintiff is not required to establish a prima facie case within the *McDonnell Douglas* framework, and the case should proceed as an ordinary civil matter."); *Goodman v. Lukens Steel Co.*, 777 F.2d 113, 130 (3d Cir. 1985) *aff'd*, 482 U.S. 656 (1987) ("When direct evidence is available, problems of proof are no different than in other civil cases.").

First, it is appropriate for this Court to consider the direct evidence of Respondent's discrimination. In this context, direct evidence is evidence that "show[s] a specific link between the alleged discriminatory animus and the challenged decision, sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" Respondent's decision to terminate Peters. *Thomas v. First Na'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997) (quoting *Philipp v. ANR Freight Sys., Inc.*, 61 F.3d 669, 673 (8th Cir.1995)).

Here, Peters has presented sufficient evidence directly showing the link between Respondent's discriminatory animus and his termination, and therefore, summary judgment for Respondent was improper. In fact, not only were Respondent's discriminatory motives obvious to its employees but to the public as well. For example, during a public fundraiser for candidate Timmons, who adamantly opposed same sex marriage, Respondent's owner, Duffy O'Plenty, proclaimed the following:

> Same sex marriage is unnatural. Homosexuality is a sin against God. It is unnatural and detrimental and ultimately destructive to the foundations of our society. (R. at 4).

Not only did Mr. O'Plenty's statement clearly convey his own personal feelings against homosexuals, but coming from the individual who served as the face of the company, it openly declared Respondent's offi-

cial position on the issue—"[w]hen a major company executive speaks, 'everybody listens' in the corporate hierarchy." *Lockhart v. Westinghouse Credit Corp.*, 879 F.2d 43, 54 (3d Cir. 1989), *overruled on other grounds as recognized in Starceski v. Westinghouse Electric Corp.*, 54 F.3d 1089, 1099 (3d Cir. 1995). Just because Mr. O'Plenty's comments hurt Respondent's subsequent case at trial, Respondent should not be allowed to "compartmentalize th[e] executive as if he had nothing more to do with company policy than the janitor or watchman." *Id.*; *see also Kriss v. Sprint Commc'ns Co.*, 58 F.3d 1276, 1282 (8th Cir. 1995) (requiring "conduct or statements by persons involved in the decisionmaking process that may be viewed as directly reflecting the alleged discriminatory attitude sufficient to permit the factfinder to find that that attitude was more likely than not a motivating factor in the employer's decision") (internal quotations omitted).

Moreover, the direct evidence of Respondent's discriminatory animus coupled with many other forms of probative evidence regarding Respondent's discriminatory conduct establish that Peters is entitled to his just relief. *See Mingo v. Urban League of S. Bend*, No. 98CV0037 AS, 1994 WL 594611, at *37 (N.D. Ind. Sept. 12, 1994) ("Under the direct method, a plaintiff may still present circumstantial evidence from which an inference of intentional discrimination can be drawn.") (citing *Troupe v. May Dept. Stores Co.*, 20 F.3d 734, 736 (7th Cir. 1994)). Specifically, as discussed in greater detail below, (1) Respondent had a history of leniency when dealing with discriminatory behavior, (2) Respondent terminated Peters only *after* it discovered that he was gay, (3) Respondent terminated Peters for a relatively minor incident in light of his excellent record, and (4) Respondent failed to terminate other heterosexual employees who committed analogous mistakes. Although these are just a few examples of Respondent's blatant discriminatory attitude, this evidence is clearly "sufficient to support a finding by a reasonable fact finder that an illegitimate criterion actually motivated" Respondent's decision to terminate Peters. *Thomas*, 111 F.3d at 66.

Furthermore, because Peters established "through direct evidence that the employment decision at issue was based upon an impermissible factor"—Peters's gay status—the burden shifted to Respondent to "prov[e] by a preponderance of the evidence that it would have made the same employment decision even if it had not taken the impermissible factor into account." *McCarthy v. Kemper Life Ins. Cos.*, 924 F.2d 683, 686 (7th Cir. 1991) (quoting *Randle v. LaSalle Telecomms., Inc.*, 876 F.2d 563, 568–69 (7th Cir. 1989)); *Miles v. M.N.C. Corp.*, 750 F.2d 867, 875 (11th Cir. 1985) ("Where a case of discrimination is proved by direct evidence, the defendant bears a heavier burden."). Clearly, Respondent has failed to meet its burden because, in light of the circumstances surrounding Peters's termination, no rational juror could conclude that sexual ori-

entation did not play a material role in Respondent's decision to terminate Peters.[6]

It is likely that Respondent will conveniently categorize Mr. O'Plenty's offensive statements as "stray remarks" that do not give rise to liability. *See Beshears v. Asbill*, 930 F.2d 1348, 1354 (8th Cir. 1991) (stating "stray remarks" do not evidence discrimination). However, this argument fails for two reasons. First, a corporate executive—like Mr. O'Plenty—who has complete control of his company (including employment policies) and serves as the face of his company, cannot divorce the statements made on behalf of the company from its actual disposition: in this case, discriminatory employment practices. *See Lockhart*, 879 F.2d at 54; *compare Miles*, 750 F.2d at 875 (considering the racial slur made by an official who was closely involved in the hiring decisions as direct evidence of discrimination), *with Staheli v. Univ. of Miss.*, 854 F.2d 121, 127 (5th Cir. 1988) (excluding statement made by individual with no authority over plaintiff's tenure), *and Hill v. Spiegel, Inc.,* 708 F.2d 233, 237 (6th Cir. 1983) (excluding comments made by managers not involved in the decision to discharge plaintiff).

Second, even if this Court was so inclined to entertain Respondent's argument, its argument would prove only one thing: there is a genuine issue of material fact precluding dismissal of this case on summary judgment. *See DeBrow*, 620 N.W.2d at 839 (reversing summary judgment when employer claimed that its Vice President's discriminatory comment was a "stray remark" and stating that employer's argument was "an argument for the finder of fact to consider"); *Erwin v. Potter*, 79 F. App'x 893, 899 (6th Cir. 2003) (reversing summary judgment even though employer's statement was susceptible to nondiscriminatory interpretations; stating "assessments about the credibility, or import of statements, are improper on summary judgment"; and citing *Ahlers v. Schebil*, 188 F.3d 365, 369 (6th Cir. 1999)).

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6. It is important to note that Peters was *not* required to prove that his sexual orientation was the *only* factor motivating his termination, as was the case under *Price Waterhouse v. Hopkins,* 490 U.S. 228 (1989); rather, Peters was only required to establish that his sexual orientation was *one of the factors* that got him fired. *See, e.g.*, *Stender v. Lucky Stores, Inc.*, 780 F. Supp. 1302, 1305 (N.D. Cal. 1992) ("The Civil Rights Act reverses or modifies numerous recent Supreme Court cases including *Price Waterhouse* . . . ."). Section 107 of the Act modifies the Supreme Court's holding in *Price Waterhouse,* which held that an employer could avoid liability for intentional discrimination in 'mixed motive' cases if the employer could demonstrate that the same action would have been taken in the absence of the discriminatory motive. Section 107 states that 'an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, *even though other factors also motivated the practice*.' *Id.* at n.9 (citing Civil Rights Act of 1991, Pub. L. No. 102-166, § 107, 105 Stat. 1071 (1991)) (emphasis added).

Even if this Court were to disregard the direct evidence of Respondent's discrimination, Peters has clearly satisfied the burdens set forth in the McDonnell Douglas analytical framework.

Although Peters has sufficiently presented both direct and indirect evidence of Respondent's discriminatory animus (rendering any further analysis wholly unnecessary), Peters submits that he has adequately established his case under the standards set forth in *McDonnell Douglas*. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). Under the familiar *McDonnell Douglas* framework, Peters would bear the initial burden of establishing a prima facie case of employment discrimination. *Id.* at 802; *Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 252–53 (1981). Next, once Peters has established his prima facie case, the burden of production would shift to Respondent "to articulate some legitimate, nondiscriminatory reason" for Peters's termination. *McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 253. Lastly, if Respondent is able to articulate such reason, Peters would have the opportunity to prove that Respondent's "legitimate" reason was not its true reason but was mere pretext for discrimination. *McDonnell Douglas*, 411 U.S. at 804; *Burdine*, 450 U.S. at 253.

Peters has presented a prima facie case that proves Respondent discriminated against him because of his sexual orientation in violation of the Marshall Human Rights Act.

In this case, Peters has satisfied the first element of the *McDonnell Douglas* test by establishing a prima facie case that Respondent discriminated against him when it terminated his employment. *See Burdine*, 450 U.S. at 253 ("The burden of establishing a prima facie case of disparate treatment is not onerous."). In order to establish a prima facie case, a plaintiff is only required to show that (1) he is a member of a protected class, (2) he was performing satisfactorily, (3) he was discharged despite the adequacy of his work, and (4) a similarly situated employee who was not a member of the protected group was not discharged. *Owens v. Dep't of Human Rights*, 826 N.E.2d 539, 544 (Ill. Ct. App. 2005); *see also Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142 (2000). Further, the "[e]stablishment of the prima facie case in effect creates a presumption that the employer unlawfully discriminated against the employee." *Burdine*, 450 U.S at 254.

As an initial matter, it is clear that Peters is a member of a protected class. This fact is undeniably mandated by section 1-102 of the MHRA, which provides in relevant part that "[i]t is the public policy of [Marshall] . . . [t]o secure for all individuals within the State of Marshall freedom from discrimination against any individual because of his or her . . . sexual orientation . . . in connection with employment." (R. at 15, app.

B). Consistent with this policy, the recently revised MHRA dictates that it is unlawful "[f]or any employer . . . to act with respect to . . . discharge, discipline, tenure or terms, privileges or conditions of employment on the basis of unlawful discrimination." (R. at 10). Therefore, as a gay man, Peters falls directly under the protections afforded by the MHRA.

Second, it is also clear that Peters's performance was more than adequate, and thus, he was performing "satisfactorily" under the *McDonnell Douglas* test. *See Owens*, 826 N.E.2d at 544. Peters worked for Respondent for approximately ten years prior to his termination. (R. at 4, 7). Due to his outstanding work ethic and flawless record, Peters quickly moved up in the company's ranks and was eventually promoted to Regional Project Supervisor. (R. at 4–5). Indeed, the only blemish on Peters's record is the 2010 Event in Petersville. (R. at 6).

Even a superficial look at the circumstances surrounding the Event, however, shows that the Event stemmed from the concurrence of Respondent's added impositions and plain bad luck. To be clear, the mistake did not happen during the normal course and scope of Peters's employment but during an extraordinary event that Respondent charged Peters with—in addition to his regular tasks. Further, Respondent was fully aware that its supplementary tasks were wearing Peters down, which would indicate to any reasonable person that a mistake was likely to occur. (*See* R. at 5–6 (describing Peters's two separate objections with his supervisors)). Lastly, on top of the unusual stress, Peter's beloved dog died unexpectedly. (R. at 6). Clearly, this "perfect storm" caused Peters's mistake, and to a reasonable employer (not looking for a pretext to fire), this minor mistake would be justifiable or at least excused. Therefore, it cannot be said that Peters's job performance was inadequate or unsatisfactory, yet he was terminated nonetheless. (R. at 7).

Lastly, Peters has shown that Respondent gave preferential treatment to other similarly situated, yet heterosexual, employees who committed analogous (or worse) mistakes. (*See* R. at 7). For example, in March 2009, Regional Supervisor J. Erwin released confidential proprietary information to a provider via email. (R. at 7). In comparison to Peters's thirty-minute delay at the Event, Mr. Erwin's mistake had extremely drastic consequences for Respondent.[7] However, Respondent merely reassigned Mr. Erwin to another position. (R. at 7). In another case, Regional Supervisor L. Walker patently discriminated against all women in the company when he refused to include them for a business conference. (R. at 7). In the face of multiple complaints filed against the

7. Peters respectfully highlights the great value that Respondent places on its proprietary information; in fact, its principle purpose in installing the Lost & Found® technology on its mobile devices—an act that prompted this current controversy as well as Peters's termination—was to protect such information. (*See* R. at 5).

company, Respondent neither demoted nor penalized Mr. Walker for his conduct. (R. at 7). And although Mr. Walker was directed to attend sensitivity training, his "punishment" was apparently a sham because he never completed the training, yet he was not fired. (R. at 7). Tellingly, both Mr. Erwin and Mr. Walker were heterosexual individuals who supported candidate Timmons.

Without question, Respondent's lenient reaction to its heterosexual supervisors who brought about substantial harm to the company compared to its overly harsh and definite retaliation towards Peters—a homosexual supervisor whose performance had been more than adequate—irrefutably warrants the conclusion that Respondent harbored anti-gay sentiments. Alternatively, and at the very least, this evidence "raises an inference of discrimination" because, if left unexplained, it makes it more likely than not that Respondent's decision was based on an impermissible factor—Peters's sexual orientation. *See Burdine*, 450 U.S. at 254. Therefore, because Peters has established each of the foregoing factors, there is a presumption of discrimination that, if Respondent cannot rebut, entitles Peters to relief as a matter of law. *Id.* ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court must enter judgment for the plaintiff because no issue of fact remains in the case.").

Respondent has failed to clearly articulate any legitimate, nondiscriminatory reason for firing Peters.

In light of the fact that Peters has carried his burden of establishing a prima facie case of discrimination, Respondent was required to rebut the presumption of discrimination by articulating a legitimate, nondiscriminatory reason for its decision to fire Peters. *See McDonnell Douglas*, 411 U.S. at 802; *Burdine*, 450 U.S. at 254. To do so, Respondent must have clearly set forth the reasons for Peters's termination, and its explanation must be legally sufficient to justify a judgment in its favor. *Burdine*, 450 U.S. at 255 ("[T]he employer need only produce admissible evidence which would allow the trier of fact rationally to conclude that the employment decision had not been motivated by discriminatory animus."). Although this burden is not great, it rests upon Respondent all the same.

There is no doubt that Respondent will immediately point to the mistake made at the Event in Petersville to justify Peters's termination. Admittedly, on its face, the Event could be seen as a motive to terminate; however, Peters submits that Respondent failed to meet its burden nonetheless because it has not *clearly* set forth its reasons for terminating Peters. Without a clear explanation of its logic, Peters will be deprived of his "full and fair opportunity to demonstrate pretext." *See id.* (stating

that one reason for the burden-shifting approach is to "frame the factual issue with sufficient clarity so that the plaintiff will have a full and fair opportunity to demonstrate pretext"). Merely labeling the Event as a "fiasco"[8] does not explain Respondent's rationale for terminating Peters, a ten-year veteran of the company. For example, it fails to explain (1) why Respondent did not immediately fire Peters after the Event but rather, waited until three weeks after discovering that he was gay, (2) why the photographs of Peters indicating his sexual orientation were included in his employee file, which Respondent used in making its decision to terminate Peters, or (3) how the Event was any different than the mistakes committed by Peters's heterosexual co-workers. Therefore, because Respondent has failed to satisfy its burden, the court must grant Peters his just relief. *See id.* at 254 ("If the trier of fact believes the plaintiff's evidence, and if the employer is silent in the face of the presumption, the court *must* enter judgment for the plaintiff because no issue of fact remains in the case.") (emphasis added).

Respondent's proffered reason for terminating Peters was a mere pretext, fabricated to cover up its discriminatory conduct and to escape liability.

In the event that this Court finds that Respondent has met its burden in rebutting the presumption of discrimination, it should still reverse the trial court's grant of summary judgment because Respondent's purported reason was manufactured to avoid liability for its discriminatory conduct. *McDonnell Douglas*, 411 U.S. at 804 ("While [the discrimination statute] does not, without more, compel rehiring of [or retaining] respondent, neither does it permit petitioner to use respondent's conduct as a pretext for . . . discrimination."). At this time, it is crucial to note that this Court may consider all of the relevant evidence presented by Peters to prove that Respondent's proffered explanation is unworthy of credence and that its discriminatory animus was more likely than not the reason for Peters's termination. *See Reeves*, 530 U.S. at 143 (stating that even when the discrimination presumption is rebutted by a defendant, courts "may still consider the evidence establishing the plaintiff's prima facie case 'and inferences properly drawn therefrom . . . on the issue of whether the defendant's explanation is pretextual" (citing *St. Mary's Honor Center v. Hicks*, 509 U.S. 502 (1993) and *Burdine*, 450 U.S. at 255 n.10).

Accordingly, a review of all of the probative evidence that shows Respondent was motivated by its bias and discriminatory disposition against homosexuals is appropriate. To be clear, the asserted justification for Peters's termination is based on a single incident, which repre-

8. (*See* R. at 12).

sents a mere speck on his excellent employment record—the Event at Petersville. Though labeled as a "fiasco," the unfortunate mishap caused only a thirty-minute delay to candidate Timmons's fundraiser. It is against this backdrop that Respondent argues that this one-time occurrence justified terminating an employee of ten years. As indicated above, this mix up could have happened to any reasonable person who was under the amount of stress and grief as Peters. Moreover, Peters informed Respondent on two separate occasions that he was at his limit mentally and physically, yet Respondent refused to accommodate him. Considering the fact that Respondent was fully aware of Peters's concerns, it would be absurd for this Court to accept Respondent's excuse—that Peters's performance was slightly declining, which led to the ultimate blunder—as sufficient justification for its bigotry.

Furthermore, this Court has direct evidence that demonstrates Respondent's official stance against homosexuality—its owner's public statements that "[h]omosexuality is a sin against God" and that "[i]t is unnatural and detrimental and ultimately destructive to the foundations of our society." (R. at 4). The evidence also shows that Respondent had a history of going easy on discriminatory behaviors. In fact, even after one of its supervisors blatantly discriminated against every woman that Respondent employed, Respondent barely administered a slap on the wrist. In addition, when another supervisor leaked confidential information to an outside source—a danger that Respondent generally took great care to avoid—the response was a transfer, not termination. *McDonnell Douglas*, 411 U.S. at 804 (stating that an employer may "justifiably refuse to [retain] one who was engaged in unlawful, disruptive acts against it, but *only if* this criterion is applied alike to members of all races") (emphasis added). Importantly, both of the above-mentioned supervisors were heterosexual.

Clearly, this evidence is sufficient to discredit Respondent's asserted reason for terminating Peters. For, if Peters offered no other evidence for his position other than the context of his termination coupled with Respondent's knowledge of his sexual orientation, the only rational conclusion is that Respondent used Peters's conduct to cover up its invidious bias and resulting discrimination against a homosexual employee. But, even if the foregoing evidence does not establish Respondent's discrimination as a matter of law, it is at least sufficient to raise a genuine issue on a material fact; thus, summary judgment was improper. Accordingly, Peters respectfully asks this Court to reverse the trial court's grant of summary judgment and remand this case for trial.

CONCLUSION

The First District Court of Appeals erred in affirming the Marshall County Circuit Court's Order granting Respondent's motions for summary judgment because Peters has established a prima facie case that Respondent (1) intruded upon his seclusion and (2) violated the Marshall Human Rights Act. Alternatively, Peters has raised genuine issues of material fact with respect to each of his claims. Accordingly, Peters respectfully asks this Court to reverse the appellate court's decision and remand this case for trial.

Dated: Monday, October 8, 2012

Respectfully Submitted,

/s/ _____
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JACKSON PETERS