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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 Respondent, 29 J. Marshall J. Computer & Info. L. 733 (2012)

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BRIEF FOR RESPONDENT

NO. 12-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 Respondent

Christopher Dabney
Kara Frankman

QUESTIONS PRESENTED

Whether the court of appeals properly affirmed the circuit court's grant of summary judgment on Petitioner's claim of intrusion upon seclusion.

Whether the court of appeals properly affirmed the circuit court's grant of summary judgment on Petitioner's 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, Inc., in Case No. 11-C-1000. The Marshall Court of Appeals, First District affirmed in Case No. 2011-016. The Order and Opinion of the Marshall Court of Appeals can be found on pages 3-13 of the record.

STATEMENT OF JURISDICTION

A formal Statement of Jurisdiction has been omitted pursuant to § 1020(2) of the Rules for the 31st Annual John Marshall Law School Moot Court Competition in Information Technology and Privacy Law.

STATUTORY PROVISIONS INVOLVED

The text of the statutory provisions involved is provided in Appendix A: Marshall Human Rights Act § 1-102.

STANDARD OF REVIEW

When reviewing a grant of summary judgment, an appellate court must apply the same standard as the trial court: the moving party must demonstrate that no genuine issue as to any material fact exists, and that he or she is entitled to a judgment as a matter of law. (R. at 3) (citing Marshall R. Civ. P., Rule 56(c)). Accordingly, the appropriate standard of review is *de novo*. *Id*.

STATEMENT OF THE FACTS

O'Plenty Enterprises, Inc. (Respondent) is a family business. Duffy O'Plenty, a religious man and life-long Marshall resident, founded the company over 30 years ago. (R. at 3-4). The company is closed on Sundays and all major religious holidays, supports religious schools, and provides scholarships to underprivileged children. (R. at 4). Respondent prefers internal promotions, offers management training courses to employees, and is flexible in accommodating its employees with alternate work arrangements like telecommuting. *Id.*

A real estate development company headquartered in the state of Marshall, Respondent has numerous high profile projects in and around the state capital of Marshall City. (R. at 3-4). Some of the most popular hotels in the area are owned and operated by Respondent, among a significant number of other commercial and residential properties. (R. at 4).

Mr. O'Plenty became involved in local politics in early 2010. *Id.* After he briefly considered running for Governor of Marshall in the 2012 election, Mr. O'Plenty instead decided to endorse gubernatorial candidate Tom Timmons. *Id.* While support for legalizing same-sex marriage had been increasing among certain groups in the State of Marshall, Timmons opposed such change. *Id.* Because of their shared beliefs, Mr. O'Plenty financially contributed to the Timmons campaign and made available Respondent's properties for Timmons campaign events. *Id.* Additionally, Mr. O'Plenty spoke in a Timmons fund-raising event in mid-2010 where he stated his personal belief that homosexuality is unnatural, detrimental to society, and a sin against God. *Id.*

Jackson Peters (Petitioner) is an at-will employee with O'Plenty Enterprises, Inc. (R. at 5). He was first employed in 2000 and, after two years, was given the opportunity to complete one of Respondent's management training courses. *Id.* Upon completion, Petitioner moved 200 miles to corporate headquarters where he worked his way up to become a Regional Project Supervisor in 2009. *Id.*

After almost a year as a Regional Project Supervisor, Respondent tasked Petitioner with coordinating and facilitating several campaign fund-raising events for Timmons at Respondent-owned hotels. *Id.* Petitioner is homosexual and, while he had already revealed his sexual orientation to several co-workers, was reluctant with this assignment because of Timmons' opposition to same-sex marriage. *Id.*

Within four months of performing these duties, Petitioner had grown increasingly tired and stressed and his job performance suffered. *Id.* Despite previously referring to overseeing the campaign events as his "job" to friends and co-workers, Petitioner later objected to his supervisors that overseeing Timmons events was not part of his job and that it took a physical and mental toll on him. (R. at 5-6). In each instance, Respondent reminded Petitioner that his job included ensuring the success of any event taking place in his assigned territory. (R. at 6).

Petitioner's declining work-product culminated at the July 2010 campaign event in Petersville. Prior to the event, Petitioner emailed the wrong VIP list to security and failed to arrange transportation for Timmons. *Id.* Timmons arrived 30 minutes late and some VIPs were denied entry until his arrival. *Id.* Calling the event a "fiasco," Timmons was upset and personally complained to Mr. O'Plenty. *Id.* Petitioner was in-

structed to return to headquarters and present a report within 48 hours. *Id.*

Petitioner hurriedly checked out of his hotel, leaving his laptop behind. *Id.* Realizing his mistake, Petitioner called Respondent from the airport to report the laptop missing. *Id.* The hotel found the laptop and shipped it by overnight courier to Petitioner's home. *Id.* Petitioner received the laptop the next morning and left a voicemail message for Respondent's IT department to report the laptop had been recovered. *Id.* Petitioner immediately checked the laptop for damage and, after about 45 minutes, moved to his home office and began working on his report. *Id.*

Respondent issued laptops to its upper level managers and supervisors, including Petitioner, to facilitate telecommuting. (R. at 5). In order to protect its proprietary information while still accommodating its employees, Respondent installed software on the laptops to aid in their recovery should they be lost or stolen. *Id.* The software was designed to capture a single image every five minutes, through the laptop's webcam, as soon as the missing laptop was connected to the internet. *Id.* Once Petitioner notified Respondent that he lost his laptop, Respondent activated the software. (R. at 6). During the time the software was active, but before Respondent's IT department received Petitioner's voicemail message, less than 50 images were sent to Respondent. *Id.* Most of the captured images showed Petitioner working at his desk. *Id.* Photographs on the wall of Petitioner's home office were visible in these images, including several depicting Petitioner and his partner embracing and kissing. *Id.*

Respondent successfully recovered ten lost or stolen laptops, utilizing this software, prior to this incident. (R. at 5). In six of those cases, images captured by the tracking software helped obtain theft convictions. *Id.* Following company policy, the images captured from Petitioner's laptop were sent to Human Resources and Mr. O'Plenty. (R. at 6).

Shortly after the Petersville mishap, Petitioner was placed on paid suspension during an investigation of the bungled campaign event. (R. at 7). Three weeks after Mr. O'Plenty received the images captured from Petitioner's laptop, Petitioner was informed that his employment was terminated due to poor job performance. *Id.* In compliance with company policy, Petitioner was given a copy of his employee file, including the captured images. *Id.* Petitioner claimed that he was terminated because of his sexual orientation and demanded a full investigation. *Id.* Respondent declined, citing Petitioner's poor job performance and noting that he was an at-will employee who could be discharged at any time and for any reason. *Id.*

In 2011, Petitioner filed suit against Respondent for intrusion upon seclusion and discrimination in violation of the Marshall Human Rights Act. (R. at 8). Respondent moved for summary judgment on both counts. *Id.* The Marshall County Circuit Court granted summary judgment in favor of Respondent. *Id.*

In the Marshall Court of Appeals, First District, Presiding Judge A.L. Reyes affirmed the order granting Respondent summary judgment on May 12, 2012. (R. at 13).

The Supreme Court of the State of Marshall granted Petitioner motion for leave to appeal the decision of the First District Court of Appeals on July 15, 2012, to address whether the Court of Appeals erred in affirming Respondent's summary judgment on Petitioner's claims of intrusion upon seclusion and violation of the Marshall Human Rights Act. (R. at 2).

SUMMARY OF THE ARGUMENT

In order to sustain a claim of intrusion upon seclusion, Petitioner must establish that (1) Respondent intentionally intruded into Petitioner's seclusion without authorization, (2) the matter intruded on was private, and (3) the intrusion was highly offensive to a reasonable person. An intrusion is intentional if the defendant either desires to cause an unauthorized intrusion or believes, with certainty, that one is likely to occur. Respondent did not intend to capture images of Petitioner's home. This intrusion was merely incidental to Respondent's use of tracking software on a laptop that it had every reason to believe was not in Petitioner's home. Further, Petitioner agreed to the use of tracking software on the laptop and actually triggered its use by notifying Respondent that it was missing. However, Petitioner failed to adequately notify Respondent of the laptop's recovery and, as a result, diminished his own expectation of privacy within proximity of the laptop. Although Petitioner may have had a subjectively reasonable expectation of privacy, his expectation was not objectively reasonable. Finally, the actual intrusion was narrowly tailored and served a legitimate business goal. The tracking software was only engaged when triggered by Petitioner, the webcam took one still image every five minutes, and was deactivated immediately upon receipt of notice that the laptop was recovered. Therefore, Respondent did not have the requisite intent to intrude, Petitioner had a diminished expectation of privacy, and a reasonable person would not find the intrusion highly offensive.

To succeed on a claim under the Marshall Human Rights Act, a plaintiff must prove unlawful discrimination by either a showing of direct evidence or through establishing a prima facie case under the *McDonnell Douglas* framework. Petitioner failed to assert evidence

showing a strong causal link between the decision to terminate his employment and the alleged discriminatory intent of Respondent. To establish a prima facie case, Petitioner must show that (1) he was a member of a protected class, (2) he was performing satisfactorily, (3) he was terminated despite his adequate performance, and (4) similarly-situated, nonclass members were treated differently. During the last four months of his employment, Petitioner's job performance declined, culminating in the Petersville event. This debacle injured Respondent, both financially and socially, unlike any other employee mishap noted by Petitioner. Because Petitioner was not performing adequately and was unable to provide any appropriate comparators, he is not able to establish a prima facie case of discrimination. Further, Respondent's articulated reason for terminating the employment was Petitioner's poor job performance. Because this is a legitimate, nondiscriminatory reason for termination, Petitioner has the burden of proving both that this reason is pretextual and that Respondent's actual motive for terminating the employment was improper. In any event, Petitioner was unable to prove his allegation of discrimination by a preponderance of the evidence and, therefore, summary judgment was appropriate.

ARGUMENT

The Court of Appeals correctly affirmed summary judgment because no genuine issue of material fact exists regarding Petitioner's tort claim of intrusion upon seclusion and for violation of the Marshall Human Rights Act. Summary judgment is appropriate when no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. Marshall R. Civ. P. Rule 56(c); *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Summary judgment should be granted "against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." *Celotex* at 322. If a reasonable jury could not return a verdict favorable to the nonmoving party, then there is no genuine issue of material fact. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249 (1986). Further, "a complete failure of proof concerning an essential element of the nonmoving party's case necessarily renders all other facts immaterial." *Celotex Corp.* at 323. The mere fact that there exists "some alleged factual dispute between the parties" is insufficient to defeat a motion for summary judgment. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247 (1986).

An appellate court reviews a grant of summary judgment *de novo*, applying the same standard as the trial court. *Smith v. Jasper*, 15 Marsh. 29 (2000). The undisputed facts indicate that Petitioner failed to

state a claim for both intrusion upon seclusion and unlawful discrimination under the Marshall Human Rights Act. Respondent requests that this Court affirm summary judgment.

I. THE COURT OF APPEALS PROPERLY AFFIRMED SUMMARY JUDGMENT IN FAVOR OF RESPONDENT ON PETITIONER'S CLAIM OF INTRUSION UPON SECLUSION BECAUSE RESPONDENT DID NOT COMMIT AN INTENTIONAL INTRUSION, PETITIONER HAD A DIMINISHED EXPECTATION OF PRIVACY, AND ANY INTRUSION WAS NOT HIGHLY OFFENSIVE TO A REASONABLE PERSON.

While privacy is a recognized principle entitled to certain legal protections, no absolute right to privacy exists. *Bank of Ind. v. Tremunde*, 365 N.E.2d 295, 298 (Ill. App. Ct. 1977). The origin of the common law right to privacy is typically traced to 1890, when Justices Warren and Brandeis published a revolutionary article on the emerging topic. *See generally* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890). Seventy years later, Dean William L. Prosser analyzed the developing privacy jurisprudence to classify four distinct causes of action: (1) intrusion upon seclusion; (2) public disclosure of private facts; (3) publicity placing a person in a false light; and (4) misappropriation of a person's name or likeness. William Prosser, *Privacy*, 48 CAL. L. REV. 381, 389 (1960). The Restatement (Second) of Torts adopted Dean Prosser's analysis. See Restatement (Second) of Torts §§ 652A to 652E (1977). Petitioner has brought this claim against Respondent, his private employer, under the theory of intrusion upon seclusion.

Courts should proceed with caution in defining the right of privacy within the private employment setting. *See Bradley v. Cowles Magazines, Inc.*, 168 N.E.2d 64, 65 (Ill. App. Ct. 1960). At common law, intrusion upon seclusion is defined by several limiting principles, preventing the tort from becoming an all-encompassing, constantly-litigated assertion of an individual right. Robert C. Post, *The Social Foundations of Privacy*, 77 CAL. L. REV. 957, 1008 (1989). The full context of a particular employment relationship must guide any assessment of an employee's professed expectation of privacy. *Acosta v. Scott Labor LLC*, 377 F. Supp. 2d 647, 651 (N.D. Ill. 2005) (citing *O'Connor v. Ortega*, 480 U.S. 709 (1987)).

This case is the first time the State of Marshall has allowed a cause of action for intrusion upon seclusion, and the issue was a matter of first impression before the district court. (R. at 8). Marshall's legislature does not recognize the tort. (R. at 8). In situations like this, Marshall courts have turned to the Restatement (Second) of Torts. (R. at 8). The

Restatement states that to be subject to liability for intrusion upon seclusion, a person must intentionally intrude, "physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns" and the intrusion must be "highly offensive to a reasonable person." Restatement (Second) of Torts § 652B (1977).

A majority of courts have also adopted the Restatement for a claim of intrusion upon seclusion. *See, e.g.*, *Russ v. Causey*, 732 F. Supp. 2d 589 (E.D. N.C. 2010); *Bradley v. Atlantic City Bd. of Educ.*, 736 F. Supp. 2d 891 (D.N.J. 2010) (applying New Jersey law); *Clements-Jeffrey v. City of Springfield, Ohio*, 810 F. Supp. 2d 857, 879 (S.D. Ohio 2011); *O'Donnell v. United States*, 891 F.2d 1079, 1083 (3d Cir. 1989); *Wilcher v. City of Wilmington*, 60 F. Supp. 2d 298, 301-02 (D. Del. 1999). Some states include an additional element, that the intrusion causes anguish and suffering, but this element is not necessary for establishing liability under the Restatement. *See Cooney v. Chi. Pub. Sch.*, 943 N.E.2d 23, 32 (Ill. App. Ct. 2010); *see also Winberry v. United Collection Bureau, Inc.*, 697 F. Supp. 2d 1279 (M.D. Ala. 2010) (the intrusion must be done in "such manner so as to outrage or to cause mental suffering, shame, or humiliation to a person of ordinary sensibilities"). Plaintiff bears the burden to establish each element of intrusion upon seclusion. *Mauri v. Smith*, 929 P.2d 307, 311 (Or. 1996). This principle applies to elements that involve a defendant's state of mind, including their intention. *Id.*

To state a claim for an intrusion upon seclusion, Petitioner must prove each of the following elements: (1) Respondent intentionally intruded into Petitioner's seclusion without authorization, (2) the matter intruded on was private, and (3) the intrusion was highly offensive to a reasonable person. Failure to prove any element of the tort necessarily destroys the claim. *Tremunde*, 365 N.E.2d at 298. Because Petitioner failed to establish every element of intrusion upon seclusion, the Court of Appeals properly granted Respondent's motion for summary judgment.

A. *The Intrusion Was Not Intentional Because Respondent Neither Desired to Cause an Unauthorized Intrusion Nor Believed One was Substantially Certain to Occur.*

A claim for intrusion upon seclusion must fail absent proof of an intentional and unauthorized invasion. Restatement (Second) § 652(B); *see also O'Donnell*, 891 F.2d at 1083. An "intentional intrusion" may only be found when an actor "desires to cause an unauthorized intrusion or believes that an unauthorized intrusion is substantially certain to result from committing the invasive act in question." *Mauri*, 929 P.2d at 311. "[A]n 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." *O'Donnell*, 891 F.2d at 1083. Fur-

thermore, "unintended conduct amounting merely to a lack of due care" does not constitute an intentional intrusion. *Snakenberg v. Harford Cas. Ins. Co.*, 383 S.E.2d 2, 7 (S.C. Ct. App. 1989).

1. *Respondent did not act with the intent to intrude Petitioner's seclusion.*

Courts have analogized the element of "intentional intrusion" to physical trespass. *Sitton v. Print Direction, Inc.*, 718 S.E.2d 532, 537 (Ga. Ct. App. 2011), *reh'g denied*. However, the Restatement notes that the intrusion need not be physical; it can also be through the use of a camera. Restatement (Second) of Torts § 652(B) cmt. b. Under the Restatement's definition of intent, Petitioner must show that Respondent either "*desire[d]* to cause the consequences of his act" or "*believe[d]* that the consequences were substantially certain" to result. Restatement (Second) of Torts § 8A (emphasis added); see *Mauri*, 929 P.2d at 311. However, the Restatement does not define "intrusion." Webster's defines "intrude" to mean to thrust oneself in without invitation, permission, or welcome. *Webster's Third International Dictionary of the English Language, Unabridged* 97 (1993). Both the "intrusion, as well as the action, must be intentional." *O'Donnell*, 891 F.2d at 1083. Plaintiff bears the burden to establish each element of intrusion upon seclusion, including the defendant's intention. *Mauri*, 929 P.2d at 311.

Respondent did not act with the desire to photograph Petitioner in his private home. Triggered by Petitioner's notification that he lost the company-issued laptop, Respondent's IT department activated the theft-recovery software. (R. at 6). However, the requirement that the intrusion was "intentional" is not satisfied simply because the software was turned on. The tort of intrusion upon seclusion requires an action coupled with the objective to intrude. But for Petitioner's professed loss of his laptop, Respondent would not have activated the tracking software. Ultimately, Petitioner triggered the intrusion. The images captured by the software were an unintentional, and unexpected, consequence. In this case, the activation of software was deliberately done, but Respondent acted only with the intent to recover its valuable property, not to capture interior images of Petitioner's home.

Not only did Respondent act with the desire to cause an intrusion, Respondent did not believe that the tracking software would be substantially certain to capture images inside Petitioner's home. Respondent utilized the theft-recovery software for eight months, and with great success, before Petitioner's incident. (R. at 5). The software was instrumental in recovering lost or stolen computers on ten previous occasions. *Id.* Information gathered by the software aided in the successful prosecution of six individuals for theft. *Id.* Petitioner triggered this recovery proce-

dure when he reported his company-issued laptop missing the day before the alleged intrusion. Unbeknownst to Petitioner or Respondent, a third party discovered the computer that same day and shipped it nearly 200 miles to Petitioner's private home. (R. at 6). The laptop arrived the next morning by overnight courier. *Id.* Because of the long distance and short time frame in which it was recovered, it is unreasonable to conclude that Respondent believed, with substantial certainty, that any images would be captured inside the home of the very employee who reported the laptop missing.

In the absence of intent, a claim of intrusion upon seclusion must fail. Section 652(B) of the Restatement does not permit claims for reckless or negligent intrusion upon seclusion. An actor is not guilty of an intrusion for "unintended conduct amounting merely to a lack of due care." *Snakenberg*, 383 S.E.2d at 7. The Restatement explicitly requires a defendant act "intentionally." Restatement (Second) of Torts § 652(B) (1977). This inclusion is significant because there is no mention of "intentionally" in the Restatement's other three privacy torts. *See Id.* §§ 652(C) to 652(E). By including "intentionally" in § 652(B), while omitting it in the other three sections, the Restatement's authors acted deliberately and purposefully. Therefore, any attempted argument for a negligent or reckless intrusion must fail. Because no cause of action exists for a negligent intrusion, and Respondent neither desired an intrusion, nor believed one would occur, Petitioner cannot establish the first element of intrusion upon seclusion.

2. *Respondent believed its conduct was authorized.*

Assuming arguendo that Respondent intruded with the required intent, Petitioner still fails to establish the first element because Respondent believed its conduct was authorized. "[A]n 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." *O'Donnell*, 891 F.2d at 1083 (emphasis added). Even when a court finds an intrusion was intentional, if a defendant can demonstrate he subjectively believed he had legal or personal permission, a claim for intrusion upon seclusion must fail. *Id.*

Petitioner cannot create a genuine issue of material fact regarding Respondent's belief that it had the necessary permission to intrude. In *Sitton*, the plaintiff used his personal laptop for work. 718 S.E.2d 532. The employer suspected the plaintiff of running a competing business using customer information from the employer's customer files. *Id.* at 535. Acting on this suspicion, the employer entered plaintiff's office to find the privately-owned laptop alone on a desk. *Id.* The employer then accessed the employee's private laptop to obtain e-mails that proved the

suspicions true. *Id.* The *Sitton* court held that the employer's review of the plaintiff's email on his personal laptop was not an unreasonable intrusion into the employee's seclusion or solitude. The court reasoned the employer's activity was "reasonable in light of the situation" where the employee's personal computer was used at work, contained company owned records, and brought onto company property. *Id.* at 537.

As the owner of the computer and all the company information it contains, and with the direct receipt of Petitioner's personal notification that the laptop was missing, Respondent reasonably believed that it had the legal and personal permission to activate the tracking software. At some time on the morning following his loss of the laptop, Petitioner left a voicemail message to relay that his laptop had been unexpectedly discovered and delivered to his home. (R. at 6). Because Petitioner spoke to no one directly, he had no reasonable expectation that this latest announcement would be instantaneously received by the IT department. The IT department deactivated the software immediately after hearing Petitioner's voicemail. *Id.* Thus, the court should find that Respondent acted with the belief that Petitioner authorized it to engage tracking software, thereby negating any possible finding of an intentional intrusion.

Petitioner cannot create a genuine issue of material fact regarding Respondent's belief that he had the necessary legal permission to intrude. Respondent entrusted Petitioner with a company-issued laptop. (R. at 5). The laptop remained the property of Respondent, O'Plenty Enterprises. *Id.* More urgently, the laptop contained sensitive proprietary information. *Id.* Respondent has the necessary legal authority to install and activate tracking software to protect the proprietary information that the laptop undisputedly contained.

The circumstances of this case are far from the atrocious actions of an employer who surreptitiously installs a program to spy from the inside of an employee's home. *See, e.g.*, *Burns v. Masterbrand Cabinets, Inc.*, 874 N.E.2d 72 (Ill. App. Ct. 2007) (where an agent of an employer, wearing a hidden fanny pack camera, gained access to the interior of an employee's home under false pretences to record movement and conversation). As previously noted, Respondent used the software with great success. The software not only facilitated the recovery of all ten laptops that had been lost or stolen, but the images captured aided law enforcement in prosecuting six individuals for theft. (R. at 5). Further, in section 2.6 of the Employee Handbook, Respondent explicitly reserved the right to utilize "tracking software" to retrieve "lost or stolen computers." (R. at 14). No genuine issue of material fact could support a conclusion that Respondent utilized the software with the belief that it was an illegal action. As such, Petitioner's claim must fail as a matter of law.

Furthermore, Respondent believed he directly received personal permission to activate the software directly from Petitioner. In *O'Donnell*, the plaintiff authorized the Veteran's Administration Agency (VA) to release information to his employer to prove that he suffered from post-traumatic stress disorder (PTSD). 891 F.2d at 1081. Despite articulating the general objective of releasing "proof of disability" to his employer, the plaintiff did not specify the precise information to be disclosed. *Id.* To effectuate plaintiff's objective, the VA provided plaintiff's employer with information not only showing plaintiff's PTSD, but also released additional information detailing plaintiff's anger problems. *Id.* When the plaintiff alleged an intrusion for disclosure of information beyond his PTSD, the court refused to impose liability. The plaintiff's essential argument was that he gave permission only for a subset of the intrusion that actually occurred. However, the *O'Donnell* court held that because the VA subjectively believed that the plaintiff had provided "necessary legal or personal permission" for all the records, the VA did not intend to intrude upon the plaintiff's privacy when it released the plaintiff's full treatment summary. *Id.* at 1080-83.

Like the plaintiff and VA in *O'Donnell*, Petitioner and Respondent shared an understanding for a general objective. The logical goal of reporting a laptop missing is its recovery, as stated in the Employee Handbook, through the use of "tracking software." (R. at 14). Petitioner contacted Respondent's IT department to notify them he lost his company-issued laptop. (R. at 6). Respondent properly understood Petitioner's alert, which warned that the computer was unintentionally out of Petitioner's possession, and activated the software. *Id.* Respondent's program effectuated recovery through images taken of the computer's surroundings from the laptop's imbedded webcam. (R. at 5). The images not only aided in discovering the location of the laptop, but in ascertaining the unauthorized user or thief. *Id.* Even though Petitioner may not have contemplated *how* the location of the laptop would be ascertained, Petitioner gave permission for Respondent to activate "tracking software." Petitioner now claims that the intrusion undertaken by Respondent was outside the scope of authorization given to track the laptop. Just as the *O'Donnell* court held that the plaintiff's authorization to release medical proof of disability validated the VA's belief of having the necessary legal or personal permission to disclose his full treatment summary, this court should likewise hold that Petitioner's authorization to track the laptop validates Respondent's belief that it had the necessary legal or personal permission.

Although the belief of either legal or personal permission defeats the claim of an unauthorized intrusion, Respondent believed it had both the personal and legal permission to use theft-recovery software on its company computers. Because Respondent neither desired an unauthorized

intrusion, nor believed one was substantially certain to occur, Petitioner's claim of intrusion upon seclusion must fail.

B. *Petitioner Diminished his Expectation of Privacy When he Notified the IT Department that his Company-Owned Laptop Was Lost.*

Proof of an intentional intrusion alone is not enough to sustain a claim for intrusion upon seclusion. Petitioner must allege an invasion of privacy. *Busse v. Motorola, Inc.*, 813 N.E.2d 1013 (Ill. App. Ct. 2004). Courts have recognized that "the right of privacy is not an absolute right, but a right that is qualified by the circumstances and the rights of others." *Wilcher*, 60 F. Supp. 2d at 302 (internal citation omitted). Within the context of private employment, an employee's professed expectation of privacy must be "assessed in the full context of the particular employment relationship." *Acosta*, 377 F. Supp. 2d at 651 (citing *O'Connor*, 480 U.S. 709).

Two requirements are relevant in making a determination of a reasonable expectation of privacy: (1)"'whether the individual, by conduct, has exhibited an actual expectation of privacy; that is, whether he has shown that he sought to preserve something as private;'" and (2)"'whether the individual's expectation of privacy is one that society is prepared to recognize as reasonable.'" *Clements-Jeffrey*, 810 F. Supp. 2d at 865 (quoting *United States v. King*, 227 F.3d 732, 743–44 (6th Cir. 2000)). While the "first factor is subjective and involves a question of fact; the second factor is objective and involves a question of law." *Clements-Jeffrey*, 810 F. Supp. 2d at 865 (citing *United States v. Welliver*, 976 F.2d 1148, 1151 (8th Cir. 1992)). Without proof of both subjective and objective expectations, Petitioner cannot demonstrate the matter intruded upon was private, and a claim of intrusion upon seclusion cannot succeed. See *Med. Lab. Mgmt. Consultants v. Am. Broad. Cos. Inc.*, 306 F.3d 806, 818-19 (9th Cir. 2002).

1. *Petitioner could have exhibited a subjective expectation of privacy within the walls of his home.*

Respondent does not contest any subjective expectation of privacy that Petitioner may claim. Because the images were taken from the interior of Petitioner's home, Petitioner need only show that he sought to preserve his home as private. Furthermore, in the absence of an expressed contractual provision, Petitioner has no lesser expectation of privacy in his home office than in other areas inside his home. Respondent concedes that a reasonable trier of fact could conclude that Petitioner exhibited a subjective expectation of privacy.

However, it is important to clarify that a photograph of Petitioner is not enough to constitute an intrusion alone. If the same company-issued

laptop had taken photos in some other public place, like an internet cafe, or even the work area of an office, there would be no actionable intrusion. See *Fogel v. Fores, Inc.*, 500 F. Supp. 1081, 1087 (E.D. Pa. 1980) (a couple photographed without their consent at an airport terminal was not actionable because the tort does not apply to matters which occur in a public place). Courts have also "consistently held that videotaping a work area or office in an attempt to monitor workplace conduct is not a violation of privacy," and advance notice of such surveillance is not determinative of an invasion. *Acosta*, 377 F. Supp. 2d at 651 (citing *Vega-Rodriguez v. P.R. Tel. Co.*, 110 F.3d 174 (1st Cir. 1997). Petitioner's claim for intrusion upon seclusion rests solely on the fact that the images were taken from the inside of his home.

2. *Petitioner's expectation of privacy was not objectively reasonable.*

When taken alone, Petitioner's subjective expectation of privacy, under the circumstances of this case, is insufficient to sustain a claim of intrusion upon seclusion. Even if Petitioner subjectively had an expectation of privacy in his home, this belief was not objectively reasonable within the immediate proximity of his laptop after it was reported missing. "No community could function if every intrusion into the realm of private action, no matter how slight or trivial, gave rise to a cause of action for invasion of privacy." *Hill v. Nat'l Collegiate Athletic Ass'n*, 865 P.2d 633, 660 (Cal. 1994). Petitioner knew that Respondent would engage tracking software after receiving notice of a lost or stolen laptop. Petitioner should have reasonably understood that such tracking software would not be disabled until Respondent acquired notice that the missing laptop was recovered.

In *Trotti*, an employee placed her purse into an employer-provided locker of her own choosing, which she secured with a lock at her own expense. *K-Mart Corp. Store No. 7441 v. Trotti*, 677 S.W.2d 632, 634 (Tex. App. 1984). The employer did not require the plaintiff to provide either the combination to the lock or a duplicate key. *Id.* at 635. Although the plaintiff was not specifically suspected of any wrongdoing, the employer intentionally broke into her locker to conduct a general search for items missing from the store. *Id.* Not only was the interior of the locker searched, but her purse was found in "considerable disorder." *Id.* The *Trotti* court held that the employee, by placing a lock on the locker at her own expense and with the employer's consent, demonstrated a legitimate expectation to a right of privacy in both the locker and the personal effects within. *Id.* at 639.

The *Trotti* court focused the determination of offensiveness on the objectively reasonable expectation of privacy. Unlike the employer in *Trotti*, Respondent did not ignore an outward assertion of Petitioner's

expectation of privacy. To accommodate the rise in telecommuting, Respondent assigned laptops to high-level managers, such as Petitioner, but retained all ownership interests in the computers as well as the proprietary information contained on the hard drives. See *Hilderman v. Enea TekSci, Inc.*, 551 F. Supp. 2d 1183 (S.D. Cal. 2008). In just the first eight months after installing the theft-tracking software, ten laptops had either been lost or stolen. (R. at 5). Respondent did not initiate the tracking software with the intent to pry into Petitioner's home, but merely as a reaction to Petitioner's alert that his laptop was missing, a report Respondent had every reason to believe. By notifying the Respondent that the laptop was missing, Petitioner, in effect, created a zone of diminished privacy around the laptop. Having failed to properly notify Respondent of the laptop's recovery, Petitioner allowed this zone to persist. By bringing the laptop into his home while the zone of diminished privacy persisted, Petitioner effectively invited Respondent into his home. Because Petitioner did not ensure that Respondent immediately received notice of the laptop's recovery, and until the voicemail was actually received, Petitioner compromised his own expectation of privacy while in the zone of diminished privacy. Petitioner cannot establish an objective expectation of privacy and, therefore, his claim for intrusion upon seclusion must fail.

C. *The Intrusion was not Highly Offensive to a Reasonable Person Because Respondent's Act was a Reasonable and Narrowly Tailored Business Justification.*

Even if the Court determines that Petitioner's expectation of privacy was reasonable, Petitioner is still required to prove that the alleged intrusion would be highly offensive to a reasonable person. The element of a highly offensive intrusion is a fundamental piece of an invasion of privacy claim. *Trotti*, 677 S.W.2d 632. A Plaintiff is required to show that the intrusion would be highly offensive to a reasonable person. Restatement (Second) of Torts § 652B. Liability under intrusion upon seclusion "‘depends upon some type of *highly offensive prying* into the physical boundaries or affairs of another person.'" *Horgan v. Simmons*, 704 F. Supp. 2d 814, 821 (N.D. Ill. 2010) (quoting *Lovgren v. Citizens First Nat'l Bank*, 534 N.E.2d 987, 989 (Ill. 1989) (emphasis added)).

The court must make a threshold determination of offensiveness to discern the existence of a cause of action for intrusion upon seclusion. *Stien v. Marriott Ownership Resorts, Inc.*, 944 P.2d 374, 379 (Utah Ct. App. 1997) (citing *Wolf v. Regardie*, 553 A.2d 1213, 1219 (D.C. 1989). The highly offensive standard incorporates all circumstances surrounding an alleged invasion of privacy. *Wolfson v. Lewis*, 924 F. Supp. 1413, 1421 (E.D. Pa. 1996). "The common law right of privacy is neither absolute nor globally vague, but is carefully confined to a specific set of inter-

ests that must be inevitably weighed in the balance against competing interests before the right is judicially recognized." *Wilcher*, 60 F. Supp. 2d at 302 (quoting *Hill*, 865 P.2d at 648). To determine whether an intrusion is "highly offensive," a court balances "'the degree of intrusion, the context, conduct and circumstances surrounding the intrusion as well as the intruder's motives and objectives, the setting into which he intrudes, and the expectations of those whose privacy is invaded.'" *Stien*, 944 P.2d at 379 (quoting *Miller v. Nat'l Board. Co.*, 232 Cal. Rptr. 668, 679 (Cal. Ct. App. 1986)); *see also Hilderman*, 551 F. Supp. 2d at 1203.

1. *The degree of the alleged intrusion was minimal.*

Respondent's action did not rise to the level of an *exceptional* kind of prying and, therefore, is not "highly offensive." See *Bassett v. I.C. Sys., Inc.*, 715 F. Supp. 2d 803, 813 (N.D. Ill. 2010). If the "method of surveillance chosen is the least indiscriminate possible for achieving a lawful and important objective, the stranger whose privacy is incidentally and accidentally compromised" may not bring a complaint for an invasion of privacy. *Acuff v. IBP, Inc.*, 77 F. Supp. 2d 914, 926 (C.D. Ill. 1999) (quoting *Brazinski v. Amoco Petroleum Additives Co.*, 6 F.3d 1176, 1183 (7th Cir. 1993). Similarly, no plaintiff reasonably can claim a right to privacy in publicly known information. See Restatement Second, Torts § 652B, cmt. c. When a court finds that the degree of the intrusion was minimal, a claim of intrusion upon seclusion must fail. *Stien*, 944 P.2d at 379.

Petitioner asserts that the photographs of the inside of his home are an intrusion of such a high degree as to support an action for intrusion upon seclusion. This argument must fail. The degree of the alleged intrusion can be weighed, in part, by the number and type of photographs. The software program runs automatically once it is switched on. (R. at 5). Because the software was running for approximately four hours before the IT department received Petitioner's message, approximately 50 snapshots were taken. (R. at 6). These snapshots were taken at automatic intervals of five minutes, each representing only a single flash in time.

Additionally, most of the images were of the wall directly behind Petitioner's desk. *Id.* The heart of Petitioner's complaint is the company's alleged "discovery" that he is homosexual. While the theft-recovery software was active, images of Petitioner's wall were captured depicting rainbow flags and what appeared to be a commitment ceremony between Petitioner and another man. *Id.* However, Petitioner previously injected knowledge of his homosexuality into the workplace by disclosing his sexual orientation to friends and co-workers. (R. at 5). Because no one can claim a right to privacy in publicly known information, and the degree of

the intrusion was minimal, the alleged intrusion was not "highly offensive."

Furthermore, the theft-recovery software was an unobtrusive, narrowly tailored program. The program consisted of two automatic functions: one snapshot and one screenshot every five minutes. The program, by design, does not intercept communications, track keystrokes, record video, record audio, or monitor internet use. Respondent's program effectuated recovery through images taken of the computer's surroundings from the laptop's imbedded webcam. *Id.* The images not only aided in discovering the location of the laptop, but ascertaining the unauthorized user or thief. *Id.* The screenshots were merely a "photograph" of what appeared on the screen. The screenshots aided in determining if any proprietary information was seen by an unauthorized user. Not only was the program running for a reasonable amount of time and for a reasonable business objective, but the invasion, if any, was limited to mere snapshots. Petitioner's voicemail message was the Respondent's first indication that they no longer had the need or authority to recover the stolen laptop; as such, the software was immediately deactivated.

2. *The context, conduct, and circumstances of the alleged intrusion preclude a finding that the act was "highly offensive."*

Because the context, conduct, and circumstances of the alleged intrusion were innocuous and legitimate, Petitioner's claim must fail. *Wilcher*, 60 F. Supp. 2d at 304. Respondent had no intention to disturb or intrude upon Petitioner's privacy. The software was not activated for the purpose of monitoring Petitioner in a private place. Petitioner triggered the activation when he spoke to the IT department about his missing laptop. (R. at 6). Respondent, having the personal confirmation of the missing property, believed it was acting with the dual purpose to both discover the location of the missing laptop and apprehend a potential thief. Because the software runs automatically after the IT department turns a program on, Respondent was not actively conducting an investigation. (R. at 5).

In only the first eight months of utilizing the software, ten lost or stolen laptops were successfully reclaimed. *Id.* The high loss rate combined with the valuable nature of the laptop supports Respondent's high degree of interest in reclaiming lost electronics. Additionally, Respondent did not activate tracking procedures until receiving notification directly from Petitioner. (R. at 6). Under the circumstances, Petitioner's alert that he lost his company-issued laptop created the interest for Respondent to track down the missing property. Furthermore, Petitioner did not speak directly with anyone regarding his repossession of the laptop. *Id.* Petitioner could not reasonably expect instant gratification

from a voicemail message. It is reasonable that a voicemail may remain unheard for four hours. That Petitioner was accidentally photographed in his private home was an unexpected consequence that no reasonable person would find highly offensive.

3. *Respondent did not have the objective or motive to intrude.*

Because Respondent did not act with the motive or objective to invade Petitioner's privacy, a claim of intrusion upon seclusion must fail. If justification is apparent and is even plausible on the face of the complaint, the plaintiff "must do more than suggest conclusorily" that the defendant had an improper motivation. *French v. United Parcel Serv., Inc.*, 2 F. Supp. 2d 128, 131 (D. Mass. 1998) (applying Massachusetts law). Respondent did not act with the intent to pry on Petitioner in his private home. The activation of theft-recovery software was done at Petitioner's warning that he lost the company property. (R. at 6). A reasonable person could only conclude that this alleged intrusion, motivated and triggered for the purpose of recovering missing property, is not highly offensive. Petitioner fails to create a genuine issue of material fact for intrusion upon seclusion and summary judgment for Respondent should be affirmed.

II. The Court of Appeals properly affirmed summary judgment in favor of Respondent on Petitioner's claim for violation of the Marshall Human Rights Act because Petitioner, an at-will employee, was discharged for unsatifsatory job performance.

The Court of Appeals properly affirmed summary judgment because Petitioner cannot prove that unlawful discrimination was a motivating factor in Respondent's decision to terminate his employment. The only evidence Petitioner claims are the disparaging comments made by Respondent's owner, Mr. O'Plenty, regarding homosexuals. However, these comments were not made specifically toward Petitioner, did not comment on the worth of homosexuals as employees, and in no way indicated that Mr. O'Plenty's personal beliefs were operative on Respondent's decision to terminate Petitioner's employment. Petitioner failed to offer direct evidence of discrimination because nothing in the record shows a strong causal connection between the bias alleged by Petitioner and the adverse employment decision.

In the absence of direct evidence, a plaintiff may sustain a claim of discrimination by establishing a prima facie case as outlined in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973) and *Owens v. Dep't of Human Rights*, 826 N.E.2d 539 (Ill. App. Ct. 2005). This requires Petitioner to show that (1) he was a member of a protected class, (2) he was performing satisfactorily, (3) he was terminated despite his adequate

performance, and (4) similarly-situated, non-class members were treated differently. However, Petitioner's job performance leading up to his termination was not satisfactory, as exemplified by the Petersville event. Additionally, Petitioner cannot identify any similarly-situated non-members of his class who were treated differently. Accordingly, Petitioner cannot establish a prima facie case of discrimination.

Regardless, poor job performance is a legitimate, nondiscriminatory reason for termination. Because Respondent articulated such a reason, Petitioner can only succeed on a claim of discrimination by proving both that his poor job performance was not Respondent's real reason for terminating his employment and that its true reason was unlawfully discriminatory.

Because Petitioner has no direct evidence of discrimination, failed to establish a prima facie case of discrimination, and cannot prove that Respondent's articulated reason for terminating his employment was merely pretextual by a preponderance of the evidence, summary judgment was appropriate.

A. Respondent was Entitled to Terminate Petitioner's At-Will Employment at Any Time and for Any Reason.

Petitioner was employed by Respondent on an at-will basis. In the State of Marshall, an at-will employment relationship is established between an employee and an employer in the absence of contract provisions specifically stating otherwise. (R. at 11-12). "[A]bsent a clear statement not to terminate without cause, the assumption is that the parties intended to enter into an ordinary employment relationship, terminable at the will of either party." *McNutt v. Mediplex of Ky., Inc.*, 836 F. Supp. 419, 421 (W.D. Ky. 1993). In fact, the courts of forty-nine states, as well as the District of Columbia, "recognize the principle that employment is presumptively an at-will relationship." Restatement (Third) of Employment Law § 2.01 cmt. a (2009). When an employee is terminable at-will, the employer "may ordinarily discharge an employee 'for good cause, for no cause, or for a cause that some might view as morally indefensible.'" *Miracle v. Bell Cnty. Emergency Med. Servs.*, 237 S.W.3d 555, 558 (Ky. Ct. App. 2007). Despite such broad power, an employer may not discriminate against an individual based on sexual orientation. Marshall Human Rights Act §1-102(A).

Prior to his termination, Petitioner had been employed by Respondent since 2000 as an at-will employee. (R. at 4). In 2009, Petitioner was promoted to Regional Project Supervisor. (R. at 5). Almost one year later, in 2010, Respondent assigned to Petitioner the additional duty of overseeing several election fund-raising events held at hotels owned by Respondent for the benefit of gubernatorial candidate Timmons. *Id.*

When speaking to the friends and co-workers, who knew he was homosexual, regarding his conflict over coordinating the Timmons events, Petitioner stated: "my job is what I do, not what I am, so I will just do my job as a professional and that's the end of it." *Id.* Although he continued to perform as a Regional Project Supervisor, and considered the new assignment to be a part of his job, Petitioner later objected to his new duties on two occasions. (R. at 5-6). On each occasion, Petitioner's supervisors dismissed his objection and, in any event, Petitioner chose to continue his at-will employment with Respondent for over four months before his ultimate termination. Petitioner now asserts that oversight of the Timmons campaign fund-raising events was not a part of his regular duties as a Regional Project Supervisor but merely incidental to his regular duties. As such, Petitioner argues, his unsatisfactory performance in overseeing the Petersville event should not be considered in assessing his performance as an employee. (R. at 11).

As an extension of an employer's power to terminate an employment relationship for good cause, no cause, or otherwise, "[a]n employer can change any term in an at-will employment and the employee's continued employment is deemed to be a consent thereto. Consequently, when an employer notifies an employee of changes in the employment terms, the employee generally must accept the new terms or quit." 30 C.J.S. Employer—Employee § 27; *see generally Stieber v. Journal Publ'g Co.*, 901 P.2d 201, 204 (N.M. Ct. App. 1995) (holding that an employer may "change the terms of the employment relationship unilaterally and without cause"); *Hathaway v. Gen. Mills, Inc.*, 711 S.W.2d 227, 229 (Tex. 1986) (holding that "[i]f the employee continues working with knowledge of the changes, he has accepted the changes as a matter of law"); *Lake Land Emp. Grp. of Akron, LLC v. Columber*, 804 N.E.2d 27, 32 (Ohio 2004) (holding that "mutual promises to employ and to be employed on an ongoing at-will basis, according to agreed terms, are supported by consideration: the promise of one serves as consideration for the promise of the other"). In some states, an employer may only prospectively alter an at-will employment. In such a case, proposed changes to the at-will employment agreement do not take effect unless the employee has been given an opportunity to terminate the employment if the new terms are unacceptable. *Gebhardt v. Time Warner Entm't*, 284 A.D.2d 978 (N.Y. App. Div. 2001).

Almost all jurisdictions recognize the default rule of at-will employment, and a majority of courts also "interpret the general 'employment-at-will rule' as a rule of construction, mandating only a presumption that a hiring without a fixed term is at will, a presumption which can be overcome by demonstrating that the parties contracted otherwise." *Duldulao v. Saint Mary of Nazareth Hosp. Ctr.*, 505 N.E.2d 314, 318 (Ill. 1987). While parties can explicitly alter a contract, it is also possible for the

actions of employers or employees, in certain limited cases, to impliedly create enforceable contractual rights. An employee handbook that details disciplinary or termination procedures, such that an employee understands it to amount to a promise to act in a certain manner, may curtail an employer's right to terminate an at-will employment. *Id.* Any such offer, however, must "be definite in form and must be communicated to the offeree." *Pine River State Bank v. Mettille*, 333 N.W.2d 622, 626 (Minn. 1983). Further, "[w]hether a proposal is meant to be an offer for a unilateral contract is determined by the outward manifestations of the parties, not by their subjective intentions." *Id.* (citing *Cederstrand v. Lutheran Bhd.*, 117 N.W.2d 213, 221 (Minn. 1962)).

The record does not indicate that Respondent ever made an offer for a unilateral contract to Petitioner that would have altered the at-will employment. While Respondent did have an Employee Handbook, the record does not indicate that the handbook in any way restricted Respondent's power to terminate an at-will employee. Petitioner received notification that he was responsible for overseeing the Timmons campaign fund-raising events and, after receiving notification, Petitioner declined to terminate the at-will employment. Not only was the new task clearly communicated, Petitioner necessarily demonstrated such knowledge on the two separate occasions when he raised objections to the new terms. By declining to exercise his own power to terminate the at-will relationship, Petitioner's continued employment with Respondent amounted to constructive acceptance of the prospective alterations. Even if overseeing the fund-raising events was not Petitioner's duty under his original employment arrangement, he assumed such a duty by the time of his termination. Thus, coordinating and facilitating the Timmons campaign fund-raising events were within the scope of Petitioner's duties as a Regional Project Supervisor. Respondent appropriately considered Petitioner's failure to satisfactorily perform these duties in reaching its decision to terminate the at-will employment.

B. Petitioner Cannot Prove that Respondent Unlawfully Discriminated Against him in its Decision to Terminate his Employment.

The trial court properly granted Respondent's motion for summary judgment, with regard to Petitioner's claim of discrimination in violation of the Marshall Human Rights Act, because Petitioner failed to offer direct evidence in support of his claim. Petitioner also failed to establish a prima facie case of discrimination under the three-part burden-shifting framework established by the U.S. Supreme Court in *McDonnell Douglas*. 411 U.S. 792. Further, Respondent articulated a legitimate, nondiscriminatory reason for discharging Petitioner that would rebut any presumption of discrimination raised by a prima facie case. Without a clear showing of discrimination, direct or otherwise, Respondent was en-

titled to terminate Petitioner's at-will employment at any time and for any reason.

1. *Petitioner failed to offer direct evidence of discrimination.*

The Supreme Court of the State of Marshall looks for direct evidence in deciding employment discrimination cases under the Marshall Human Rights Act. (R. at 10). In this context, direct evidence is "[e]vidence showing 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 the adverse employment action." *Thomas v. First Nat'l Bank of Wynne*, 111 F.3d 64, 66 (8th Cir. 1997). Direct evidence "is not the converse of circumstantial evidence." *Griffith v. City of Des Moines*, 387 F.3d 733, 736 (8th Cir. 2004). Rather, it "refers to the causal strength of the proof." *Id.* Thus, a "plaintiff with strong (direct) evidence that illegal discrimination motivated the employer's adverse action does not need the three-part McDonnell Douglas analysis to get to the jury, regardless of whether his strong evidence is circumstantial." *Id.* In the context of a *McDonnell Douglas* analysis, a complainant might be able to show direct evidence of discrimination even if the only evidence available is circumstantial; however, that evidence must establish a strong causal link between the alleged discriminatory animus and the adverse employment action.

Because the standard cited by the Marshall Court of Appeals is taken from *Griffith* and *Thomas*, both Eighth Circuit decisions, it is appropriate to examine other opinions of that court for further guidance on what conduct qualifies, or not, as direct evidence. Although not an Eighth Circuit opinion, *Price Waterhouse* provides a suitable starting point. *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989). There, the Supreme Court considered the repeated comments by one partner in an accounting firm that "he could not consider any woman seriously as a partnership candidate and believed that women were not even capable of functioning as senior managers" as direct evidence of improper discriminatory employment practices. *Id.* at 236. Justice O'Connor, in a concurring opinion, wrote that neither "stray remarks in the workplace," "statements by nondecisionmakers," nor "statements by decisionmakers unrelated to the decisional process itself" could be considered direct evidence. *Id.* at 277 (O'Connor, J., concurring).

Even though the holding of *Price Waterhouse* was superseded by statute in the 1991 amendments to the Civil Rights Act, Justice O'Connor's analysis of direct evidence was not addressed by the amendments and was subsequently adopted in Eighth Circuit decisions. In *Beshears v. Asbill*, an age discrimination case, the court found direct evi-

dence in the remarks of defendant company's president that "older employees have problems adapting to changes and to new policies." 930 F.2d 1348, 1354 (8th Cir. 1995). Another official commented that "younger people were more adaptable . . . than older people." *Id.* One other worker was told that he "would not be happy as an installer because of his age and job experience." *Id.* The court held that these comments were "made during the decisional process by individuals responsible for the very employment decisions in controversy." *Id.* Likewise, in *Stacks v. Southwestern Bell Yellow Pages,* a gender discrimination case, the court found direct evidence when plaintiff's immediate supervisor stated "women in sales were the worst thing that had happened to this company . . ." and that "the business had gone downhill since the company had started hiring women and blacks . . . ." 27 F.3d 1316, 1318 (8th Cir. 1994).

In *Radabaugh v. Zip Feed Mills, Inc.*, an age discrimination case, corporate planning documents emphasized youth as a desired quality among its managers. 997 F.2d 444 (8th Cir. 1993). The court found direct evidence of discrimination because the author of those documents was one of two people involved in the decision to terminate the plaintiff. The court held that, to establish direct evidence, a plaintiff must show "'evidence of conduct or statements by persons involved in the decision-making process that may be viewed as directly reflecting the alleged discriminatory attitude . . . sufficient to permit the factfinder to infer that that attitude was more likely than not a motivating factor in the employer's decision.'" *Id.* at 449 (quoting *Ostrowski v. Atl. Mut. Ins. Cos.*, 968 F.2d 171, 182 (2d Cir. 1992)).

In *Rivers-Frison v. Se. Mo. Cmty. Treatment Ctr.*, plaintiff Sandra Rivers-Frison, an African-American female, was employed as a substance abuse counselor by Southeast Missouri Community Treatment Center. 133 F.3d 616 (8th Cir. 1998). Center employees made comments regarding the hair, anatomy, and sexual behavior of African-Americans at staff meetings. Jerry Sullivan, the human resource coordinator and acting director of the Center, ran these meetings and, in response to the inappropriate comments, either remained silent or laughed. Sullivan himself also commented to Rivers-Frison that "too many African-Americans were moving to Farmington." *Id.* at 618. The Eighth Circuit concluded that "comments made by the Center's staff clearly fall within the category of stray remarks made by non-decisionmakers." *Id.* While the court determined that Sullivan was involved in the termination decision, his comment was unrelated to the decisional process. *Id.* at 619. The court held that "[d]irect evidence of employment discrimination must have some connection to the employment relationship." *Id.*

In *Griffith*, the plaintiff fireman claimed that a fire chief's previous remarks about African American and women employees constituted di-

rect evidence of discriminatory motive. 387 F.3d 733. The Eighth Circuit held that because the plaintiff "presented no evidence that . . . [any] City decisionmaker ever uttered a single negative racial remark about Griffith's Hispanic background . . . the requisite causal link between remarks reflecting racial or gender bias and actions taken against Griffith [was] lacking." *Id.* at 736. Thus, alleged comments indicating that an agent of Griffith's employer held a general bias toward a protected class, but not specifically toward the individual complainant, were not enough to establish a strong causal link to the adverse employment decision.

The only evidence presented by Petitioner fails to rise to the level of "direct evidence" as understood by the Eighth Circuit. In each of the Eighth Circuit decisions discussed above, great emphasis was placed on the relationship between the alleged discriminatory comments and the adverse employment action. Comments that a woman would never be a suitable partnership candidate, corporate planning documents explicitly stating a preference for the young, and a statement that women in sales was the worst thing that ever happened to a company, when spoken or written by a decision-maker, may constitute direct evidence. On the other hand, comments that there are too many African-Americans in town, or racially insensitive remarks made about others, do not necessarily constitute direct evidence even when uttered by a decision-maker. Each of these decisions supports the position that, in order for evidence to show a strong causal connection between a discriminatory animus and an adverse employment decision, a plaintiff must demonstrate not only that the decision-maker held an unfair opinion about a person or class of persons, but that this belief was actually operative on the decision to terminate the employee.

The record indicates that Mr. O'Plenty made demeaning comments about homosexuals at a campaign fund-raising event in mid-2010. (R. at 4). While these comments were made regarding a class protected under the MHRA, they do not indicate that Mr. O'Plenty held any belief that homosexuals are inferior employees or in any way suggested that a homosexual would likely be treated any differently in employment. More importantly, the comments establish no causal link to the specific employment decision to terminate Petitioner. Even if Mr. O'Plenty's comments are considered a manifestation of bias, they do not indicate that Mr. O'Plenty, or Respondent company, were more likely to make employment decisions adverse to Petitioner. Because Petitioner has failed to assert evidence showing that Mr. O'Plenty's belief was actually operative on the adverse employment decision, Petitioner has failed to present direct evidence of unlawful discrimination.

2. *Petitioner failed to establish a prima facie case of discrimination under the burden-shifting framework of McDonnell Douglas.*

In the absence of direct evidence, an assertion of employment discrimination may be sustained using indirect evidence to establish a prima facie claim. In *McDonnell Douglas*, the U.S. Supreme Court considered the "order and allocation of proof in a private, non-class action challenging employment discrimination." 411 U.S. at 800. To effectuate such analysis, the Court introduced a framework in which the burden of proof shifts between the complainant and the employer.

The complainant in a Title VII trial must carry the initial burden under the statute of establishing a prima facie case of racial discrimination. This may be done by showing (i) that he belongs to a racial minority; (ii) that he applied and was qualified for a job for which the employer was seeking applicants; (iii) that, despite his qualifications, he was rejected; and (iv) that, after his rejection, the position remained open and the employer continued to seek applicants from persons of complainant's qualifications. *Id.* at 802. If the complainant meets his burden of establishing a prima facie case of racial discrimination, the first step of the *McDonnell Douglas* analysis is complete. Next, the "burden then must shift to the employer to articulate some legitimate, nondiscriminatory reason for the employee's rejection." *Id.* Finally, if the employer is able to articulate such a reason, the burden once again returns to the complainant, who "must be afforded a fair opportunity to show that employer's stated reason for plaintiff's rejection was in fact pretext." *Id.* at 804.

Though the U.S. Supreme Court dealt with alleged discriminatory hiring practices in *McDonnell Douglas*, the framework also applies to an alleged discriminatory discharge of an employee. The Appellate Court of Illinois adapted the *McDonnell Douglas* framework to the context of an employee discharge. According to the Illinois court, Petitioner must show "by a preponderance of the evidence 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" in order to establish a prima facie case. *Owens*, 826 N.E.2d at 544 (Ill. App. Ct. 2005).

Petitioner is a member of a protected class.

Petitioner can meet the first part of his burden to establish a prima facie case because he can show that he was a member of a protected class at the time of the adverse employment action. Even though an individual's sexual orientation is not protected by the 1964 Civil Rights Act, out of which the *McDonnell Douglas* framework sprang, it is the public policy

of this State to "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 . . . ." Marshall Human Rights Act § 1-102(A). Petitioner is a homosexual man. (R. at 5). The still photographs of Petitioner's home office revealed several photos of Petitioner and his boyfriend, including one of an apparent "commitment" ceremony. (R. at 6). Under the facts of the record and the plain language of the MHRA, Petitioner is a member of a protected class within the meaning of *Owens*.

Petitioner did not perform satisfactorily.

The mere membership in a protected class is not enough to establish a Petitioner's claim. Petitioner cannot meet the second part of his burden to establish a prima facie case because his performance as an employee of O'Plenty Enterprises, Inc. was not satisfactory. Satisfactory is defined as "sufficient to meet a[n] . . . obligation." *Webster's Third International Dictionary of the English Language, Unabridged 2017* (3d ed. 1993). "What matters is not the employee's 'self-perception' regarding the quality of his job performance, but "'the perception of the decision-maker . . .'" *Mungro v. Giant Food, Inc.*, 187 F. Supp. 2d 518, 522 (D. Md. 2002) (internal citations omitted). Respondent tasked Petitioner with the coordination of a campaign fund-raising event that was to be hosted on the site of one of Respondent's hotel locations in Petersville. (R. at 5). Petitioner failed to arrange transportation to the event for candidate Timmons. (R. at 6). Petitioner further failed to deliver the correct VIP list to security prior to the event. *Id.* As a result, a number of important guests were prevented from entering the event until candidate Timmons arrived. *Id.* Petitioner himself acknowledged that his performance was a lapse in what he characterized as an otherwise excellent job performance. *Id.* Timmons personally complained about the "fiasco" to Mr. O'Plenty. *Id.* O'Plenty Enterprises, Inc., as well as Mr. O'Plenty, suffered considerable losses in the marketplace, in credibility, and in reputation. (R. at 7). Given the inestimable injury inflicted on Respondent by Petitioner, Petitioner's performance as an employee at O'Plenty Enterprises, Inc. was not satisfactory.

Petitioner was not discharged despite the adequacy of his work.

Petitioner fails to establish the third element of a prima facie case because he was not discharged "despite the adequacy of his work." There is no dispute that the settled facts of the record indicate that Petitioner was discharged from his employment with Respondent. The third part of Petitioner's burden under the *Owens* adaptation of *McDonnell Douglas*, however, requires Petitioner to show that he was discharged "despite the

adequacy of [his] work." *Owens*, 826 N.E.2d at 544. If Petitioner cannot establish that he performed adequately in his employment, then he cannot establish that he was discharged despite his performance.

Petitioner cannot satisfy the fourth element of a prima facie case because there are no appropriate comparators.

Petitioner cannot meet the fourth part of his burden to establish a prima facie case because no similarly-situated employee is appropriate for comparison. Whether a terminated plaintiff is similarly situated to a comparator employee is best determined by the nature of the plaintiff's acts. According to the Sixth Circuit Court of Appeals, "[i]t is fundamental that to make a comparison of a discrimination plaintiff's treatment to that of non-minority employees, the plaintiff must show that the 'comparables' are similarly-situated *in all respects*." *Mitchell v. Toledo Hosp.*, 964 F.2d 577, 583 (6th Cir. 1992) (quoting *Stotts v. Memphis Fire Dep't*, 858 F.2d 289 (6th Cir. 1988)). In order to be considered similarly situated, then, the comparators "must have dealt with the same supervisor, have been subject to the same standards and have engaged in the same conduct without such differentiating or mitigating circumstances that would distinguish their conduct or the employer's treatment of them for it." *Mitchell*, 964 F.2d at 583.

The Second Circuit Court of Appeals adopted the Sixth Circuit's "all material respects" standard, but noted the conduct of a plaintiff need not be identical to that of a comparator to be similarly situated. *Graham v. Long Island R.R.*, 230 F.3d 34, 40 (2d Cir. 2000). The U.S. Supreme Court suggested that, in determining whether two individuals are similarly situated within the context of the *McDonnell Douglas* framework, it is useful to examine whether the employee and the comparator engaged in conduct of "comparable seriousness." *McDonnell Douglas*, 411 U.S. at 804. The Sixth Circuit incorporated the "comparable seriousness" language into its "all material respects" standard. *Graham*, 230 F.3d at 40. The Eighth Circuit also adopted this "comparable seriousness" standard, holding that "[w]here the employer has terminated a plaintiff due to acts of the plaintiff, the plaintiff has the burden of showing that his and the more favorably treated employee's acts were of 'comparable seriousness.'" *Ricks v. Riverwood Int'l Corp.*, 38 F.3d 1016, 1019 (8th Cir. 1994). The Tenth Circuit similarly adopted this standard when it considered testimony from employees who had committed offenses different from the plaintiff's, but of comparable seriousness, as evidence of disparate treatment. *McAlester v. United Air Lines, Inc.*, 851 F.2d 1249, 1261 (10th Cir. 1988).

Petitioner points to the examples of heterosexual regional managers J. Erwin and L. Walker, who included proprietary information in an e-

mail to a provider and refused to invite several women to a management training course, respectively, but neither of whom were terminated for their offenses. (R. at 7). The facts do not indicate, however, that either of these regional managers were tasked with the same duty to oversee campaign fund-raising events such as the Petersville event. Nor do the facts indicate that those regional managers were tasked with overseeing any similarly large-scale, publicly-hosted events. Finally, the facts do not indicate that either of those managers caused Mr. O'Plenty or Respondent company to suffer any loss similar to that inflicted by Petitioner's mishandling of the Petersville campaign event. For that matter, Petitioner does not even allege that either Erwin or Walker caused Respondent to suffer any damages at all. Therefore, neither of J. Erwin's or L. Walker's respective failures were as comparably serious as Petitioner's failure in Petersville. The record further indicates that Petitioner was unable to produce any other comparable incidents within the company. *Id.* While Erwin and Walker were not members of a protected class and were not discharged from employment, Petitioner has failed to support the assertion that they were similarly situated. As a result, Petitioner has failed to meet his burden under *McDonnell Douglas* and *Owens* for establishing the four elements of a prima facie case of employment discrimination.

3. *Respondent articulated a legitimate, nondiscriminatory reason for discharging Petitioner.*

Assuming arguendo that Petitioner is able to establish a prima facie case by a preponderance of the evidence, "a rebuttable presumption arises that the employer unlawfully discriminated against plaintiff." *Zaderaka v. Ill. Human Rights Comm'n*, 545 N.E.2d 684, 687 (Ill. 1989). Under the second step of the *McDonnell Douglas* framework, this presumption of unlawful discrimination is rebutted if the employer can articulate "a legitimate, nondiscriminatory reason" for its employment decision. *Id.* The U.S. Supreme Court stated that there is "a significant distinction between merely 'articulat[ing] some legitimate, nondiscriminatory reason' and 'prov[ing] absence of discriminatory motive.'" *Bd. of Trustees of Keene State Coll. v. Sweeney*, 439 U.S. 24, 25 (1978). Thus, the "defendant need not persuade the court that it was actually motivated by the proffered reasons." *Texas Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 254 (1981); *see also Sweeney*, 439 U.S. at 25. It is important to note, then, that the burden on Respondent at this stage is merely one of production and not one of persuasion. *Burdine*, 450 U.S. at 255; *Zaderaka*, 545 N.E.2d at 687.

A proffered reason for discharging an employee is sufficient if the employer's "evidence raises a genuine issue of fact as to whether it discriminated against plaintiff." *Burdine*, 450 U.S. at 254. To do this, Re-

spondent must "clearly set forth, through the introduction of admissible evidence, the reasons for the plaintiff's rejection. The explanation provided must be legally sufficient to justify a judgment for the defendant." *Id.* at 255. However, in evaluating whether a proffered reason is sufficient, "'[c]ourts may not sit as super personnel departments, assessing the merits – or even the rationality – of employers' . . . business decisions.'" *Meuser v. Fed. Express Corp.*, 564 F.3d 507, 519 (1st Cir. 2009) (quoting Mesnick v. Gen. Elec. Co., 950 F.2d 816, 825 (1st Cir. 1991). This approach is widely embraced among the U.S. Courts of Appeal. *See DeJarnette v. Corning Inc.*, 133 F.3d 293, 298-99 (4th Cir. 1998); *Bender v. Hecht's Dep't Stores*, 455 F.3d 612, 627-28 (6th Cir. 2006); *Giannopoulos v. Brach & Brock Confections, Inc.*, 109 F.3d 406, 410 (7th Cir.1997); *Verniero v. Air Force Acad. Sch. Dist. No. 20*, 705 F.2d 388, 390 (10th Cir. 1983); *Holcomb v. Powell*, 433 F.3d 889, 897 (D.C. Cir. 2006). It is not the role of a court "to second-guess the wisdom of an employer's business decisions – indeed the wisdom of them is irrelevant – as long as those decisions were not made with a discriminatory motive." *Alvarez v. Royal Atl. Developers, Inc.*, 610 F.3d 1253, 1266 (11th Cir. 2010) (citing Chapman v. AI Transp., 229 F.3d 1012, 1030 (11th Cir. 2000).

Respondent has sufficiently met its burden at this stage of the *McDonnell Douglas* framework because it articulated a legitimate, nondiscriminatory reason for discharging Petitioner. The record indicates that Respondent noted a decline in Petitioner's performance quality for the four months prior to Petitioner's discharge. (R. at 12). During this time, Petitioner objected to his assigned tasks and reported to Respondent that his duties took a toll on him physically and mentally. (R. at 6). Finally, Petitioner's decline in performance culminated with the Petersville campaign event "fiasco." *Id.* In other words, Petitioner was discharged because he was ill-equipped to carry out his assigned duties, his work performance had steadily declined over four months, and he caused Respondent and Mr. O'Plenty to suffer financial harm and social embarrassment. Respondent has, therefore, met its burden by producing a legitimate, nondiscriminatory reason for discharging Petitioner. Furthermore, "the presumption raised by the prima facie case is rebutted, and the factual inquiry proceeds to a new level of specificity." *Burdine*, 450 U.S. at 255.

4. *Petitioner failed to meet his burden of showing that Respondent's articulated reason for discharging him was merely pretextual.*

If the employer is able to meet its burden of production and articulate a legitimate reason for discharging the employee, "the presumption of unlawful discrimination falls and plaintiff must then prove by a preponderance of the evidence that the employer's articulated reason was

not its true reason, but was instead a pretext for unlawful discrimination." *Zaderaka*, 545 N.E.2d at 687. Even though the employer has the burden of production in articulating a legitimate reason for terminating the employment, the "ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." *Burdine*, 450 U.S. at 253. See also *Sweeney*, 439 U.S. at 25, n. 2 (where the Court agrees with the Kennedy dissent that an employer need only explain its actions by producing evidence of a legitimate motive and need not prove the absence of nondiscriminatory motives). Once the employer meets its burden of articulating a nondiscriminatory motive, the plaintiff must be allowed an "opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Reeves v. Sanderson Plumbing Prods., Inc.*, 530 U.S. 133, 142-43 (2000) (quoting *Burdine*, 450 U.S. at 253). See also *St. Mary's Honor Ctr. v. Hicks,* 509 U.S. 502, 507-08 (1993). To show that an employer's proffered reason for termination is pretextual, the plaintiff must do more than prove that reason false. Rather, "a reason cannot be proved to be 'a pretext for discrimination' unless it is shown *both* that the reason was false, *and* that discrimination was the real reason." *Hicks*, 509 U.S. at 515.

Petitioner failed to assert facts that indicate Respondent's proffered reason for terminating his employment was pretextual. The record establishes that Mr. O'Plenty made public comments in mid-2010 indicating his belief that homosexuality is detrimental to the foundation of our society. (R. at 4). The record further establishes that Petitioner was discharged for poor job performance and, in particular, the negative repercussions of the Petersville event. (R. at 7).However, the record does not show, and Petitioner did not assert, any facts indicating a strong causal relationship between Mr. O'Plenty's public statements and Petitioner's termination. Petitioner does not assert facts indicating that O'Plenty even noticed the content of the pictures in Petitioner's home office. Nor does Petitioner assert that Mr. O'Plenty did not already know that Petitioner was homosexual. Petitioner himself had previously injected such knowledge into his workplace. (R. at 5). While Petitioner alleges a causal connection between his termination and Mr. O'Plenty's statements, Petitioner only asserts facts showing that Mr. O'Plenty had a discriminatory animus and that Petitioner was ultimately terminated from employment. In effect, Petitioner points to opposite shores of a river and expects this Court to infer a bridge between the two. Merely asserting the existence of two points does not support an allegation that the two points are connected.

Though an employee must be allowed an opportunity to show pretext, and may succeed in such a showing, the employee is not entitled to

a favorable judgment merely because the articulated reason for terminating the employment is shown to be pretextual. *Hicks*, 509 U.S. at 515-16. Even if the Court concludes that Petitioner can establish both a prima facie case of employment discrimination and Respondent's articulated reason to be pretextual, "a final determination of unlawful discrimination . . . must be established by, and supported with, a factual finding." *Illinois J. Livingston Co. v. Human Rights Comm'n*, 704 N.E.2d 797 (Ill. App. Ct. 1998) (citations omitted).

It is unlikely that Mr. O'Plenty's public statements could be attributed to the Executive Board that actually made the decision to discharge Petitioner. However, even if this Court finds that Mr. O'Plenty's statements can be imputed to the Executive Board of Respondent company, Petitioner still lacks evidence showing a strong casual link between the discriminatory animus and his termination. Petitioner fails to establish or support his allegations of unlawful discrimination for essentially the same reasons that he fails to show that Respondent's proffered reason for termination was pretextual. Petitioner did not assert facts showing a causal link between the discriminatory animus and his termination and, therefore, cannot succeed in proving his allegations of unlawful discrimination by a preponderance of the evidence.

The U.S. Supreme Court has held that, "in the face of the defendant's properly supported motion for summary judgment, the plaintiff could not rest on his allegations of a conspiracy to get to a jury without 'any significant probative evidence tending to support the complaint.'" *Liberty Lobby*, 477 U.S. at 249 (citing *First Nat'l Bank of Ariz. v. Cities Service Co.*, 391 U.S. 253 (1968)). Petitioner has done nothing more than allege a conspiracy of discrimination. Although Petitioner asserts facts showing that Mr. O'Plenty held a personal belief regarding homosexuality, he offers nothing in support of the allegation that a discriminatory animus was the basis for his termination. Because Petitioner failed to produce direct evidence or establish a prima facie case of discrimination, and failed to show that Respondent's articulated, legitimate reason for termination was pretextual, summary judgment for Respondent was appropriate.

CONCLUSION

Respondent respectfully requests the judgment of the court of appeals be affirmed.

Dated this 8th day of October, 2012.

Respectfully submitted,

/s/ ______________________________

Attorneys for Respondent

APPENDIX A

Marshall Human Rights Act § 1-201:

Sec. 1-102. Declaration of Policy. It is the public policy of this State:

(A) Freedom from Unlawful Discrimination. To secure for all individuals within the State of Marshall freedom from discrimination against any individual because of his or her race, color, religion, sex, national origin, ancestry, age, order of protection status, marital status, physical or mental disability, military status, sexual orientation, or unfavorable discharge from military service in connection with employment, real estate transactions, access to financial credit, and the availability of public accommodations.