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8 UNITED STATES DISTRICT COURT
9 CENTRAL DISTRICT OF CALIFORNIA
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11 TRACY CARTER et al.,) Case No. CV 09-07656 DDP (OPx)
12)
13 Plaintiff,)
14) **ORDER GRANTING PLAINTIFFS' MOTION**
15 v.) **FOR SUMMARY JUDGMENT IN PART AND**
16) **DENYING MOTION IN PART; AND**
17) **DENYING DEFENDANTS' MOTION FOR**
18) **SUMMARY JUDGMENT**
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1 summary judgment in part and DENIES them in part; the court DENIES
2 Defendants' motion for summary judgment.

3 **I. BACKGROUND**

4 The Carter Plaintiffs and Amber Richards are dispatchers who
5 work for the County of Los Angeles Department of Public Works
6 ("DPW").

7 In August 2008, Angelica Cobian of the DPW's Internal Audit
8 Division received an anonymous complaint alleging possible employee
9 misconduct by government employee Richards. (Carter Pl's Statement
10 of Uncontroverted Facts ("SUF") ¶ 67.) The complaint alleged that,
11 among other misconduct, Richards had engaged in sexual activity
12 with a visitor in the dispatch room while she was on duty at night.
13 (Id. ¶ 68.)

14 Richards's supervisor, DWP Assistant Director Chuck Adams,
15 considered the allegation of misconduct to be credible. (Adams Dep.
16 86: 6-13; Celles Dep. 39:18-40:22.) Adams, however, did not
17 interview potential witnesses because, he stated, he worried that
18 word of the investigation would spread thereby compromising the
19 investigation. (Adams Dep. 118:13-18.) In September 2008, Adams
20 installed a hidden camera inside of a fake smoke detector in the
21 dispatch room. (Id. 93: 2-8.) Adams received the DWP Director's
22 approval to do so. (Carter Pl's Statement of Genuine Issues("SGI")
23 ¶ 16.) Adams assigned Rhea Celles of Internal Audit to review the
24 video tapes for any inappropriate conduct. (Cholakian Dep.
25 93:15-20; Adams Dep. 93:2-8; 139:7-14.) Although it was possible to
26 program the camera to record for limited intervals – for example,
27 during Richards's shifts – no attempt was made to restrict the
28 covert videotaping. (Cholakian Dep. 138:12-145:1.)

1 Surveillance began on October 8, 2008. (Carter Pl's SGI ¶ 75.)
2 Adams directed Cholakian to set the camera to record continuously,
3 which it did, until it was discovered on December 10, 2008.
4 (Cholakian Dep. 74:1-4; Celles Dep. 57:20-58:10.) According to
5 Celles, the objective of the investigation was to ascertain whether
6 Richards was in fact engaging in the alleged misconduct, and thus
7 she would typically only view the portions of the tape where
8 Richards worked alone and fast-forward the rest. (Celles Dep.
9 70:3-19.) Ultimately, Celles discovered several acts of
10 inappropriate employee conduct by Richards, including inappropriate
11 touching with visitors. (Carter Pl's SGI ¶ 18.)

12 However, Jeanine Thomas, the Head Departmental Civil Service
13 Representative in the Human Resource Division of the DPW,
14 instructed Celles to check if there were any other violations of
15 policy by other staff. (Thomas Dep. 33:1-23.) Celles admits to
16 watching other employees on the tape. (Celles Dep. 198:19-199:2.)

17 Plaintiffs each declared that they worked in the dispatch room
18 and believed the dispatch room was private. (See, e.g., Carter
19 Decl. ¶ 2; De Leon Decl. ¶ 2; Gentry Decl. ¶ 2.) The dispatch room
20 is a secured space separated by restricted access. (Cholakian Dep.
21 64:17-65:4, 66:18-21.) It is located on the second floor of the
22 DPW's headquarters building, with a window that is generally
23 covered and, even if it were not covered, is too high up for a
24 pedestrian to see inside. (Carter Pl's SUF ¶ 35.) There are two
25 ways to enter the dispatch room: through the adjacent room, the
26 Disaster Operations Center ("DOC") door, or through the door that
27 leads into the hallway. (Cholakian Dep. 63:15-64:12.) The door that
28 leads into the DOC and the door from the dispatch room to the

1 hallway are both equipped with an OMNI lock system, which
2 automatically lock outside of normal business hours. (Cholakian
3 Dep. 65:1-17, 66:18-67:6; Carter Dep. 19:1-22.) Non-dispatcher
4 County employees rarely enter the dispatch room, and when they do
5 they typically knock to announce their presence before entering.
6 (Mendoza Decl. ¶ 4; Cholakian Dep. 58:2-59:2, 69:1-10.)

7 While on duty in the dispatch room, Plaintiffs often worked
8 long shifts alone and generally did not leave their post except for
9 brief bathroom breaks. (Carter Dep. 24:11-25:11; e.g. Carter Decl.
10 ¶ 6.) Plaintiffs were required to take their meal and rest breaks
11 in the dispatch room. (Richards Dep. 85:21-86:5.) It was not
12 uncommon during the "after hours" shifts for the entire building to
13 be empty with the exception of the dispatcher on duty and the
14 security personnel. (Cholakian Dep. 54:12-56:17.) The DWP furnished
15 the employees with personal lockers in the dispatch room, as well
16 as with a television, food cooking items, and storage items.
17 (Carter Pl's SGI ¶ 58.) Plaintiffs engaged in a number of private
18 acts in the dispatch room, which are not disputed. For example,
19 Plaintiffs admit that on occasion in the dispatch room they changed
20 into or out of work-out clothes, pumped breast milk, adjusted or
21 undid their bras, applied deodorant, picked zits, removed or
22 adjusted their sanitary napkins, picked their nose, stretched,
23 cleaned body piercings, and engaged in other acts normally reserved
24 for private spaces. (Carter Pls.' SUF ¶ 61.)

25 There is a dispute as to whether there was a sign in the
26 public lobby by the main entrance of DPW Headquarters indicating
27 that the building is under surveillance. (Carter Pl's SGI ¶ 68.)
28 None of the cameras in the other areas of the building are hidden.

(Cholakian Dep. 76:11-15.) After a security incident in 2005, there was discussion of installing security cameras in the dispatch room, but at that time DWP decided against installing cameras. (Mendoza Dep. 15:6-12; 17:1-19:9.) Plaintiffs state that it was their understanding at that time that DWP decided not to install cameras in the dispatch room to protect the employees' privacy. (See, e.g., Mendoza Dep. 17:23-18:18, 22:21-23:10.) Plaintiffs were under the impression cameras would never be installed in the dispatch room. (Id.)

On December 10, 2008, Richards discovered that she was being covertly videotaped at work. She filed suit against Defendants. At the same time, the Carter Plaintiffs, who had also been subjected to covert video surveillance on the job, sued Defendants. Collectively, the Carter and Richards Plaintiffs assert that Defendants violated their Fourth Amendment right to be free from unreasonable searches and seizures. (Compl. ¶ 30.) Plaintiffs also bring suit under the California Constitution for a violation of their privacy. (Id. ¶ 38.) On November 22, 2010, Defendants moved for summary judgment. On the same day, the Carter Plaintiffs and Richards Plaintiffs each also for summary judgment.

II. Legal Standards

A. Summary Judgment

Summary judgment is appropriate where "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c); see also Celotex Corp. v. Catrett, 477 U.S. 317, 324 (1986). In deciding a motion for summary judgment, the evidence is

1 viewed in the light most favorable to the non-moving party, and all
2 justifiable inferences are to be drawn in its favor. Anderson v.
3 Liberty Lobby, Inc., 477 U.S. 242, 255 (1986).

4 A genuine issue exists if "the evidence is such that a
5 reasonable jury could return a verdict for the nonmoving party,"
6 and material facts are those "that might affect the outcome of the
7 suit under the governing law." Id. at 248. No genuine issue of
8 fact exists "[w]here the record taken as a whole could not lead a
9 rational trier of fact to find for the non-moving party."

10 Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574,
11 587 (1986).

12 It is not enough for a party opposing summary judgment to
13 "rest on mere allegations or denials of his pleadings." Anderson,
14 477 U.S. at 259. Instead, the nonmoving party must go beyond the
15 pleadings to designate specific facts showing that there is a
16 genuine issue for trial. Celotex, 477 U.S. at 325. The "mere
17 existence of a scintilla of evidence" in support of the nonmoving
18 party's claim is insufficient to defeat summary judgment.
19 Anderson, 477 U.S. at 252. "Credibility determination, the
20 weighing of the evidence, and the drawing of legitimate inferences
21 from the facts are jury functions, not those of a judge [when he or
22 she] is ruling on a motion for summary judgment." Id. at 255.

23 **III. Discussion**

24 All parties have moved this court for summary judgment and are
25 in general agreement that the material facts in this case are not
26 in dispute. Nonetheless, the court must as an initial matter
27 consider whether summary judgment is appropriate here, or whether
28

1 the questions at issue in this case are ones that require further
2 factual development or might be better suited for resolution by a
3 jury.

4 Plaintiffs bring two claims: one for a violation of their
5 Fourth Amendment rights under the U.S. Constitution and one for a
6 violation of the California Constitution. Resolution of
7 Plaintiffs' Fourth Amendment claim requires application of two
8 multi-factor tests set forth by the Supreme Court's plurality
9 opinion and Justice Scalia's concurring opinion in O'Connor v.
10 Ortega. 480 U.S. 709 (1987). The court is sensitive to the fact
11 that, at their core, these tests each involve an assessment of the
12 reasonableness of the search in context. As the plurality observed
13 in O'Conner, reasonableness is a fact-specific question that
14 involves weighing the character and scope of the search against any
15 expectation of privacy. Id. at 728. With such considerations in
16 mind, in O'Connor the Court held that the district court had erred
17 in granting petitioners summary judgment because there was a
18 dispute of fact "about the character of the search" and "no
19 findings were made as to the scope of the search." Id. The Court
20 remanded the case to the district court to evaluate "the
21 reasonableness of both the inception of the search and its scope."
22 Id.

23 Here, unlike in O'Connor, there is no dispute as to
24 circumstances leading to the inception of the search or the scope
25 of the search. Furthermore, there is a well-developed factual
26 record, which clearly recounts the events surrounding DWP Assistant
27 Director Adams' investigation of Richards and related video
28

1 surveillance of the dispatch employees in the dispatch room.
2 Accordingly, the court concludes that the present dispute is an
3 appropriate candidate for summary judgment.

4 **A. Fourth Amendment claim**

5 The Fourth Amendment protects the "right of people to be
6 secure in their persons, houses, papers, and effects, against
7 unreasonable searches and seizures" U.S. Const. amend. IV.
8 It has long been established that "the Fourth Amendment protects
9 people, not places," Katz v. United States, 389 U.S. 347, 351
10 (1967), and that a person is protected by the Fourth Amendment when
11 he or she has "a subjective expectation of privacy and . . . the
12 expectation [is] one that society is prepared to recognize as
13 reasonable." Id. at 361 (Harlan, J., concurring).

14 **1. O'Connor plurality test**

15 In the employment context, a plurality of the Court in
16 O'Connor rejected the contention that "public employees can never
17 have a reasonable expectation of privacy in their place of work,"
18 and set forth a two-step framework for considering Fourth Amendment
19 claims against government employers. 480 U.S. at 717-19; 725-26.
20 First, a reviewing court must consider "[t]he operational realities
21 of the workplace" in order to determine "whether an employee has a
22 reasonable expectation of privacy" there. Id. at 717. Such
23 determination is made on "a case-by-case basis." Id., at 718.
24 Next, where an employee has a legitimate privacy expectation, an
25 employer's intrusion on that expectation "for noninvestigatory,
26 work-related purposes, as well as for investigations of
27 work-related misconduct, should be judged by the standard of
28 reasonableness under all the circumstances." Id. at 725-726.

1 Here, Plaintiffs undeniably manifested a belief that their
2 actions were executed in private: they performed various grooming,
3 cleaning, and changing acts reserved for private places. See Bond
4 v. United States, 529 U.S. 334, 338 (2000); Taketa v. United
5 States, 923 F.2d 665, 670 (9th Cir. 1991). After a review of the
6 facts and hearing oral argument, the court concludes that
7 Plaintiffs' belief that they were free from video surveillance was
8 reasonable. See Minnesota v. Carter, 525 U.S. 83, 88 (1998)
9 ("[T]he extent to which the Fourth Amendment protects people may
10 depend upon where those people are.").

11 Plaintiffs worked in a secure, non-public, and often solitary
12 office. While on duty, a dispatcher was required to take her meal
13 and rest breaks in the dispatch room. An employee might, for
14 example, nap in the dispatch room during her break. The fact that
15 the space was used not just for work, but also for resting, eating,
16 and napping is reflected in the room itself. The dispatch room is
17 furnished with objects normally associated with activities reserved
18 for a home, not work, setting – e.g., a television and cooking
19 implements. The presence of such objects in the dispatch room
20 office supports Plaintiffs' characterization of the room as a
21 "second home" and private. (Carter Pl's SGI ¶ 68.)

22 Defendants argue that the nature of the search was reasonable
23 because the dispatch room was not private; security and management
24 level supervisors had access to the room and, during regular
25 business hours, multiple employees shared the office. (Def's Mot.
26 7:27-8:1.) The court is not persuaded by this argument. While the
27 Court in O'Connor recognized that a government employee's office
28 could be "so open to fellow employees or the public that no

1 expectation of privacy [would be] reasonable," O'Connor, 480 U.S.
2 at 717-18, the dispatch room is not such a space. The dispatch
3 room is a secured office separated from the rest of the DWP
4 building by restricted access doors. It is not open to the public,
5 and it is not visible to the public or other employees from the
6 outside. (See Carter Pl's SUF ¶ 35; Carter Pl's SGI ¶ 35.) Nor does
7 the occasional entry of supervisors destroy a reasonable
8 expectation of privacy. As the O'Connor plurality and Justice
9 Scalia agreed, "constitutional protection against *unreasonable*
10 searches by the government does not disappear merely because the
11 government has the right to make reasonable intrusions in its
12 capacity as employer." Id. at 718 (internal quotation marks
13 omitted). Or, put another way, "[p]rivacy does not require
14 solitude." Taketa, 923 F.2d at 519 n.1.

15 In Taketa, the Ninth Circuit held that a government employee
16 had a reasonable expectation of privacy in his workplace office,
17 even though other employees had access to the office. Id. at 673.
18 In Taketa, the Ninth Circuit further held that an employee who was
19 videotaped while in another employee's office had "a reasonable
20 privacy expectation that he would not be videotaped [in the other
21 employee's office]." Id. at 677. In that case, the Ninth Circuit
22 expressly based its holding "upon [its] recognition of the
23 exceptional intrusiveness of video surveillance." Id. Similarly,
24 here, although different dispatchers staffed the room and
25 supervisors entered the room on occasion, the court concludes that
26 the Carter and Richards Plaintiffs had an objectively reasonable
27 expectation that they would not be surreptitiously videotaped.
28 See, e.g., Trujillo v. Ontario, 428 F. Supp. 2d 1094, 1104 (C.D.

1 Cal. 2006) (holding that "Plaintiffs need not have an expectation
2 of total privacy in order to have a reasonable expectation that
3 they will not be recorded surreptitiously").

4 The court notes that the facts in this case in support of
5 Plaintiffs' reasonable expectation of privacy in the dispatch room
6 are compelling. The court, therefore, finds it important to make
7 clear that its determination that Plaintiffs' had a reasonable
8 expectation of privacy in the dispatch room does not depend on the
9 fact that the dispatch room had locked doors or that employees
10 occasional worked alone. Absent the aforementioned – and unusual –
11 workplace scenario where a government employee's office is so open
12 to others that no expectation of privacy would be reasonable, an
13 employee has a Constitutionally protected right to privacy in the
14 workplace. O'Connor, 480 U.S. at 718. This right undeniably
15 extends to shared offices. See, e.g., Id. at 731 (explaining that
16 a "government secretary working in an office frequently entered by
17 other government employees," retains her Constitutional protection
18 against unreasonable searches by the government) (Scalia, J.,
19 concurring).

20 Next, the court considers the second factor under the O'Connor
21 plurality test, i.e., the reasonableness of the search. Under the
22 plurality's test, a search is reasonable if: (1) it is justified at
23 its inception; (2) the measures adopted are reasonably related to
24 the objectives of the search; and (3) the measures adopted are not
25 excessively intrusive in light of the circumstances giving rise to
26 the search. Id. at 725-26.

1 As a general matter, a government employer is permitted to
2 conduct an internal disciplinary investigation of a government
3 employee where there is individualized suspicion. See id. at 726.
4 The Carter Plaintiffs, however, were subject to video recording
5 because of an anonymous complaint against Richards – a complaint
6 which in no way implicated them. (Carter Pl’s SUP ¶ 70.) DWP
7 Assistant Director Chuck Adams made no effort to limit the hours or
8 individuals he covertly recorded. (Adams Dep. 120:4-9); Compare
9 City of Ontario, Cal. v. Quon, 130 S. Ct. 2619, 2633 (2010)
10 (holding that the police department conducted a reasonable
11 investigation when it reviewed an officer’s text messages where the
12 government limited the search to a sample of the messages and
13 redacted all messages sent while off duty). Furthermore, Thomas
14 directed Celles to check the videotape for any wrongdoing by any of
15 the dispatchers, and Celles admits to watching other employees on
16 the tapes. (Thomas Dep. 33:1-23; Celles Dep. 198:19-199:2.)
17 Plaintiffs were watched unknowingly as they performed acts they
18 never would have performed in public. Defendants’ video
19 surveillance of the Carter Plaintiffs lacked justification at the
20 inception of the search.

21 At the risk of stating the obvious, employers can investigate
22 allegations of employee misconduct. Employers have many
23 traditional tools available in that regard. Covert video
24 surveillance is not a traditional tool. We pride ourselves on our
25 respect for individual privacy. Outside of a strip search or a
26 body cavity search, a covert video search is the most intrusive
27 method of investigation a government employer could select. Secret
28 videotaping goes against the grain of our strong anti-Orwellian

1 traditions. Secret videotaping should be reserved for those
2 extreme and rare circumstances involving serious transgressions
3 where it is highly improbable that less odious techniques will be
4 effective. The intrusiveness of the search must be commensurate
5 with the seriousness of the suspected misconduct. Although some
6 investigation into Richards alleged misconduct may certainly have
7 been appropriate, the court concludes that a secret video
8 surveillance search was excessively intrusive. The status of being
9 an employee does not carry with it the elimination of personal
10 dignity.

11 The court is not alone in recognizing the severity of covert
12 video surveillance. See, e.g., United States v. Koyomejian, 970
13 F.2d 536, 551 (9th Cir. 1992) (Kozinski, J., concurring) ([E]very
14 court considering the issue has noted [that] video surveillance can
15 result in extraordinarily serious intrusions into personal
16 privacy."); Taketa, 923 F.2d at 677 (finding a fourth amendment
17 violated in part on the bases of the "exceptional intrusiveness of
18 video surveillance"); United States v. Torres, 751 F.2d 875, 882
19 (7th Cir. 1984) ("We think it . . . unarguable that television
20 surveillance is exceedingly intrusive."); United States v. Falls,
21 34 F.3d 674, 680 (8th Cir. 1994) ("It is clear that silent video
22 surveillance results . . . in a very serious, some say Orwellian,
23 invasion of privacy."); United States v. Mesa-Rincon, 911 F.2d
24 1433, 1443 (10th Cir. 1990) ("Because of the invasive nature of
25 video surveillance, the government's showing of necessity must be
26 very high to justify its use."); United States v. Cuevas-Sanchez,
27 821 F.2d 248, 251 (5th Cir. 1987) ("[I]ndiscriminate video
28 surveillance raises the specter of the Orwellian state.").

1 Here, DWP Assistant Director Chuck Adams knew that the
2 allegation was that Richards was engaging in sexual activities in
3 the dispatch room at night, and that, if substantiated, he was
4 likely to capture her on film without her knowledge. Although the
5 court is mindful that an employer is not limited to employing the
6 least intrusive search practicable, the court notes that here
7 several alternatives existed through which DWP's search could have
8 been limited, including only video recording Richards when she
9 worked alone, checking the guest logs for unauthorized visitors,
10 videotaping the door to the dispatch room to monitor entry to the
11 dispatch room, or interviewing Richards' co-workers. Furthermore,
12 unlike in the Supreme Court's recent case, Quon, the employees here
13 were never specifically told that their office could be subject to
14 review in this fashion. Quon, 130 S. Ct. at 2631. (See also Adams
15 Dep. 117:7-20.)

16 For the reasons explained above, the court concludes that
17 under the circumstances the inception and the scope of the
18 intrusion the Carter and Richards Plaintiffs were subjected to was
19 not reasonable. Under the O'Connor plurality test, Plaintiffs
20 Fourth Amendment rights were violated.

21 **2. Scalia's concurrence test**

22 The second test from O'Connor to determine whether a
23 government employer has violated the Fourth Amendment rights of an
24 employee is provided by Justice Scalia's concurrence. Under this
25 test, the court asks if the government's search would be "regarded
26 as reasonable and normal in the private-employer context."
27 O'Connor, 480 U.S. at 732 (Scalia, J., concurring).
28

1 In the private sector, the Carter and Richards Plaintiffs
2 could sue for the common law tort of intrusion. In California, a
3 privacy violation based on the common law tort of intrusion has two
4 elements. First, the Defendant must "intentionally intrude into a
5 place . . . or matter as to which the plaintiff has a reasonable
6 expectation of privacy," and, second, "the intrusion must occur in
7 a manner highly offensive to a reasonable person." Hernandez v.
8 Hillsides, Inc., 211 P.3d 1063, 1072-73 (Cal. 2009).

9 Resolution of this question is, in large part, redundant of
10 the previous discussion. For the reasons set forth above, the
11 court concludes that Plaintiffs had a reasonable expectation of
12 privacy in the dispatch room.

13 A comparison with the California Supreme Court case of
14 Hernandez, which also involved covert video surveillance, is
15 instructive. In Hernandez, the Court held that a private employer
16 violated its employees' reasonable privacy expectation when it
17 placed a hidden video camera inside the employees' semi-private
18 office. Id. at 1075. The Hernandez court explained that
19 "employees who retreat into a shared or solo office, and who
20 perform work or personal activities in relative seclusion there,
21 would not reasonably expect to be the subject of . . . secret
22 filming by their employer." Id. at 1076. Just as the employees in
23 Hernandez had no reasonable expectation that their employer would
24 intrude "so tangibly into their semi-private office," id. at 1078,
25 the dispatch workers here reasonably believed that their restricted
26 area, equipped with both personal and work space, was also at least
27 semiprivate. Id. at 292.

1 Next, the court notes once again that the intrusion here was
2 by way of hidden video camera. Secret video surveillance is one of
3 the most intrusive methods of search, and video surveillance of the
4 Carter and Richards Plaintiffs was "highly offensive to a
5 reasonable person." Id. at 286.

6 In sum, the court concludes that because of the constant and
7 non-discriminating nature of the surveillance, and because it
8 occurred in a semi-private area where employees had to perform non-
9 work activities (like eating and taking breaks), under either
10 Justice Scalia's O'Connor test or the O'Connor plurality test, the
11 video surveillance was unreasonable and in violation of the Carter
12 Plaintiffs' and Richards Plaintiffs' Fourth Amendment rights.
13 Plaintiffs are entitled to a judgment as a matter of law on this
14 claim. See Fed. R. Civ. P. 56(c).

15 **2. Monell liability**

16 Neither the Carter nor Richards Plaintiffs bring suit against
17 individual named defendants. Rather, Plaintiffs sue two municipal
18 entities. In Monell v. Department of Social Services of the City
19 of New York, 436 U.S. 658 (1978), the Supreme Court held that a
20 municipality is subject to suit under § 1983 only if the alleged
21 constitutional deprivation resulted from a city custom or policy.
22 In practice, this means that in order to hold Los Angeles County or
23 the DWP liable for a Fourth Amendment violation under § 1983,
24 Plaintiffs must establish that the alleged constitutional violation
25 was (1) committed pursuant to a formal government policy,
26 longstanding practice, or standard operating procedure, (2)
27 committed by an official with final policy-making authority, or (3)
28 ratified by an official with final policy-making authority. See

1 City of St. Louis v. Praprotnik, 485 U.S. 112, 126-27 (1988); see
2 also Board of County Commissioners v. Brown, 520 U.S. 397, 409
3 (1997) (explaining that "evidence of a single violation of federal
4 rights, accompanied by a showing that a municipality has failed to
5 train its employees . . . could trigger municipal liability").

6 Here, Plaintiffs argue all of the above. According to
7 Plaintiffs: the DWP has a policy or longstanding custom of using
8 covert surveillance to monitor its employees; DWP Director Dean
9 Efstathiou authorized the surveillance in the present instance and
10 is an official with final policy-making authority; and the County
11 of Los Angeles failed to adequately train its employees with regard
12 to surveillance. (See Carter Pl.'s Opp'n 15-19.) Defendants
13 challenge each of these arguments. (See Def.'s Opp'n 11:19-26.)

14 As noted above, the factual record is well developed with
15 respect to the nature, context, and scope of the video search. The
16 record, however, is not equally developed with respect to Monell
17 liability. Neither Defendants nor Plaintiffs have satisfied their
18 initial burden of showing that there are no genuine issues of
19 material fact concerning Plaintiffs' Monell claim. Accordingly,
20 the court bifurcates resolution of Plaintiffs' Fourth Amendment
21 claim and Plaintiffs' Monell claim and denies Plaintiffs' motions
22 and Defendants' motion for summary judgment on Plaintiffs' Monell
23 claim. See Berry v. Baca, 379 F.3d 764, 769 (9th Cir. 2004)
24 (noting that "[w]hether a local government has displayed a policy
25 of deliberate indifference to the constitutional rights of its
26 citizens is generally a jury question") (internal quotation marks
27 omitted); Green v. Baca, 226 F.R.D. 624, 632 (C.D. Cal. 2005)

(bifurcating a § 1983 trial in order to "separate the question[] regarding the . . . city's liability under Monell").

B. California Constitution claim

The Carter and Richards Plaintiffs further allege that Defendants violated their privacy rights under Article I, section 1 of the California Constitution. In Hernandez, the California Supreme Court recently articulated the factors a plaintiff claiming a privacy violation under the California Constitution must allege: (1) a legally protected privacy interest, (2) a reasonable expectation of privacy in the circumstances, and (3) an intrusion so serious in nature, scope, and actual or potential impact as to constitute an egregious breach of social norms. Hernandez, 211 P.3d at 1073.

A legally protected privacy interests is generally manifest where one would expect to conduct "personal activities without observation, intrusion, or interference, as determined by 'established social norms'" Id. The grooming and other personal acts engaged in by the Carter and Richards Plaintiffs clearly meet this standard. (Carter Pls' SUF ¶ 61.)

Next, in assessing the reasonableness of Plaintiffs' expectations under California law, "customs, practices, and physical settings surrounding particular activities may create or inhibit reasonable expectations of privacy." Hill v. Nat'l Collegiate Athletic Ass'n, 865 P.2d 633, 655 (Cal. 1994). In Hernandez, the California Supreme Court noted that Plaintiffs worked in an office space with a door that could be locked, with blinds that could be drawn, and that they "may perform grooming or hygiene activities or conduct personal conversations, during the

workday." 211 P.3d at 1076. Similarly, in the instant case, the dispatch room door remained closed during regular business hours, non-dispatcher employees would typically knock before entering, and no one could see into the dispatch room. (Cholakian Dep. 52:24-53:6; 58:2-59:2, 69:1-10.) Furthermore, after regular business hours, it was not uncommon for Plaintiffs to work alone in the room. (Carter Dep. 19:1-22.) Defendants once again argue that multiple individuals shared and had access to the room, upsetting any reasonable expectation of privacy. Just as in the federal context, the California Supreme Court has recognized that privacy is not an "all-or-nothing characteristic," and "the fact that the privacy one expects in a given setting is not complete or absolute does not render the expectation unreasonable." Hernandez, 211 P.3d at 1074 (citing Sanders v. American Broadcasting Cos., 978 P.2d 67, 72 (Cal. 1999)). The court concludes that under California law, the Plaintiffs had a reasonable expectation of privacy in the dispatch room.

Finally, in assessing whether the surveillance is a sufficiently serious intrusion as to constitute an egregious breach of social norms, California courts have analyzed the surrounding circumstances, the degree and setting of the intrusion, the motives and objectives of the intruder, and whether less intrusive means would have sufficed. Hernandez, 211 P.2d at 1079. The court in Hernandez found the videotaping not offensive because the scope of the videotaping was limited to only three instances after work hours, the defendant in that case removed the camera after three weeks, and the Plaintiffs were never captured on camera. Id. In contrast, Plaintiffs in the instant case were recorded while they

1 unknowingly performed private acts, the surveillance was constant,
2 and it continued even after the stated objective was complete.
3 Furthermore, Thomas instructed Celles to monitor all of the
4 employees, not just Richards. Finally, as discussed previously,
5 several less intrusive methods were available to Defendants in
6 investigating the allegations against employee Richards. Thus,
7 Defendants violated Plaintiffs' right to privacy under the
8 California Constitution.

9 For the foregoing reasons, the court grants Plaintiffs motion
10 for summary judgment on this claim.

11 **IV. Conclusion**

12 For the forgoing reasons, the court DENIES Defendants' motion
13 for summary judgment and GRANTS in part and DENIES in part the
14 Carter Plaintiffs' and Richards' Plaintiffs' motions for summary
15 judgment.

16
17 IT IS SO ORDERED.

18
19
20 Dated: February 22, 2011


DEAN D. PREGERSON
United States District Judge