

Employers Caught on Tape – Are Secret Workplace Recordings Legal?

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By Ronda K. O'Donnell

One need only look to reports out of the White House this year to discover that employees, at times, feel compelled to secretly record their colleagues and bosses at work. The reasons for such activities are varied—some do it to publicly expose their employers concerning situations that they view as inappropriate, while others may attempt to use secret recordings to leverage positions in a court case alleging discrimination or retaliation in discipline or termination. The advent of smartphones with sophisticated recording capabilities has changed the landscape for how easily secret audio recordings can be made. As such, are employers at the mercy of employees with respect to secret recordings? The short answer is, it depends.

Legalities involving secret recordings in the workplace and circumstances involving the eventual use of those recordings is dependent upon the jurisdiction where the audio recordings occurred. Many jurisdictions, including New Jersey and Delaware, are “one-party consent” states, meaning that only one participant to a recording needs to provide consent to the recording in order for it to be legal. In those states, if the person recording the conversation is a participant in the conversation, the secret recording is, in fact, legal.

Employers in Pennsylvania, however, are subject to a different set of rules. Secret audio recordings in Pennsylvania are governed by Pennsylvania’s Wiretapping and Electronic

Surveillance Control Act, 18 Pa. C.S.A. Section 5701 et seq. (Wiretap Act). Under this act, it is a third degree felony to intercept or attempt to intercept any wire, electronic or oral communications. The act makes it unlawful to use or attempt to use the contents of intercepted communications, and specifies that it is only lawful to record communications if all parties involved in the communications provide their consent prior to being recorded. This means that unless everyone consents to the recording, use of the recording is illegal. There are noted exceptions in the act, but those are generally limited to law enforcement and other emergency personnel acting within the scope of their employment for public safety reasons. Furthermore, those exceptions are strictly construed.

Since the noted focus and purpose of Pennsylvania’s Wiretap Act is the protection of privacy, the act contemplates that protections should be afforded to any oral communication made by a speaker who has a justifiable expectation that the conversation would not be recorded or intercepted, i.e., an expectation of privacy. In determining whether an individual possesses a reasonable expectation of privacy, a court first examines whether the person exhibited an expectation of privacy and, second, whether the expectation is one that society recognizes as reasonable. The examination by a court is fact-specific and is dependent on the circumstances of the situation at hand.

For example, *Commonwealth v. Ward*, 3 Pa. D. & C.5th 268 (C.P. 2006), involved an employee's use of a tape recorder, purposefully placed near her assistant manager's desk, to record her conversations in order to find out if other employees were talking about the employee. The court held that, under the circumstances, the assistant manager possessed a reasonable expectation of privacy with regard to her communications at her desk and on her phone at work, and accordingly, there was sufficient evidence to find the employee violated the Wiretap Act. In its rationale, the court noted that, "the expectation of privacy is pivotal." The court further explained that, because the assistant manager was unaware that a recording device was hidden under her desk, her personal conversations which she could not have anticipated that anyone else would hear were recorded, and the fact that she confronted the employee and called the police upon discovering the device were all indicative of a violation of the manager's reasonable expectation of privacy.

In contrast, the facts found in *Agnew v. Dupler*, 553 Pa. 33 (1998), supported a contrary decision. In *Agnew*, the Pennsylvania Supreme Court held that the plaintiff did not have a reasonable expectation of privacy in his workplace communications with fellow officers when those communications occurred in the squad room, a common area in the police station consisting of four desks, two counters and four phones. The alleged "intercept" in that case consisted of the chief of police manually activating an intercom on one of the phones in the room to covertly monitor conversations taking place inside the squad room from his office. The chief of police testified that his intent in monitoring the squad room was to determine the extent and origin of a morale problem within the department. After the plaintiff became aware

that his conversations in the squad room had been monitored, he filed a civil action against the chief of police. The court, however, held that the evidence presented did not demonstrate a violation of the Wiretap Act. The court found that the plaintiff had no reasonable expectation of privacy because the conversations occurred in a common area among fellow police officers and could easily be overheard by others in the surrounding area. The court commented that at the time the statements were made, the door to the squad room was open, as it was the majority of the time, and the conversation could be heard outside of the room. Therefore, the court found that the plaintiff did not have a reasonable expectation of privacy in those conversations.

In addition, the technology of smartphones has been evaluated under the Wiretap Act, particularly since it is widely recognized that smartphones have computer-like capabilities. In *Commonwealth v. Smith*, 136 A.3d 170 (Pa. Super. Ct. 2016), Talbot Smith was employed as a vice president at Unilife Corp. In advance of his termination, Smith filed an internal ethics complaint alleging improprieties in conjunction with certain of the company's regulatory obligations. During a meeting with his supervisor in a private office, Smith, noticing a copy of his ethics complaint on his supervisor's desk, began recording the meeting on his iPhone's "Voice Notes" application. His supervisor was unaware at the time that Smith had recorded the conversation. Following his termination from employment, Smith filed a civil suit against his employer. The existence of Smith's iPhone recording was uncovered by the employer during discovery in the civil case. The company's attorney thereafter contacted local authorities and Smith was charged with a violation of the Wiretap Act.

In holding that Smith’s surreptitious recording of the conversation with his supervisor violated the provisions of the Wiretap Act, the court found that the supervisor had an expectation of privacy in the private office meeting and, further, Smith’s recording of that private conversation was without the supervisor’s knowledge or consent. The court commented that the use of an app on a smartphone, rather than a tape recorder, was of no consequence; the result was still the same. The *Smith* case is also of note for the fact that, in the civil suit filed by Smith, the employer and the supervisor filed counterclaims against Smith for violation of the Wiretap Act and for invasion of privacy. Both those claims were permitted to proceed by the district court. See *Smith v. Unilife*, 72 F. Supp.3d 568 (E.D. Pa. 2014).

Secret workplace recordings have also provided an employer with an appropriate basis to terminate an employee’s employment. In *Santos v. Wakefern Food*, 2017 U.S. Dist. LEXIS 12867, (E.D. Pa. 2017), the plaintiff was fired by her employer after the employer discovered, during the course of an investigation concerning complaints made by co-workers about the plaintiff, that she had recorded conversations with her supervisor while at work, without the supervisor’s permission. Co-workers of the plaintiff testified that she admitted using a device to record conversations with her supervisor. In granting summary judgment to the employer, the district court noted that it is a crime to record

a conversation under the Wiretap Act, unless all parties to the conversation consent. Moreover, in evaluating the plaintiff’s claim for retaliation, the court held that an employee’s opposition or conduct committed to combat alleged discrimination that violates the law is not “protected activity” for purposes of stating a retaliation claim.

As it now stands, advances in technology have made the possibility of secret recordings in the workplace a new reality for many employers. Because Pennsylvania is an “all parties consent” state for purposes of wiretap laws, however, employers in Pennsylvania stand in a better position to combat such secret audio recordings made by employees than employers in neighboring states. In situations where an audio recording is front and center in an employment case, an employer in Pennsylvania is well advised to consult with experienced labor and employment counsel to ascertain how and when to use the Wiretap Act to provide advantage in defending a claim.



Ronda K. O’Donnell is a shareholder in the Philadelphia office of Marshall Dennehey Warner Coleman & Goggin and is chair of the employment law practice group. She focuses her practice in the representation of employers covering the full range of employment law issues in federal and state courts and before the administrative agencies. Contact her at 215-575-2697 or at rkodonnell@mdwvcg.com.