

Can Your Employee Secretly Record Conversations with Management?

By Warren E. Buliox, Esq.*

One of your employees, Fox Mulder, has built a reputation for stirring up problems within the workforce. For him, just about everything that takes place in the workplace is part of some grand conspiracy. So when you suspend him after learning he violated company policy, you suspect he might file a claim against your company. Unfortunately, your suspicions are confirmed when you get a package from his lawyer a few weeks later that includes a letter of empty threats and . . . a CD? You open the file on the CD and discover it is a recording of you from the meeting where you suspended Mr. Mulder. Huh!?!

With the advent of pocket-sized recorders, sophisticated cell phones, and other covert recording devices, a growing number of employees – whether disgruntled or not – are secretly recording conversations in and outside the workplace in the hope of catching their employers “in the act.” After all, secret recordings have paid off in the past. You may recall the disgruntled Texaco employee whose secretly recorded conversation of executives making what appeared to be racist comments resulted in a then-record \$176 million settlement in a race discrimination suit.

Suppose you learn that one of your employees has or may be surreptitiously recording conversations with management. Can the employee legally do this? And if so, what options do you have as an employer to prevent or thwart such activity? Does it matter whether the recording takes place outside the workplace or in a public setting, as opposed to in the workplace during a closed-door meeting between the employee and his or her supervisor? The answer may depend on your state.

Both federal and state laws place restrictions on wiretapping and eavesdropping. These laws generally apply to situations where one party listens in on the conversations of others without their knowledge and have been used to regulate electronic recordings of both telephone conversations and in-person interviews or meetings.

As a general matter, the ability to secretly record a conversation initially turns on whether or not a reasonable expectation of privacy can be attached to the conversation. If there is no expectation of privacy to the conversation, any party to the communi-

cation (and in some cases any non-party) is generally free to hit the record button. For instance, a California appellate court has held that the secret recording of a business meeting that took place in a crowded public restaurant did not violate state eavesdropping laws because the conversation was not a “confidential communication” due its location.¹ Similarly, a New York appellate court has held that those who talk in the presence of parties outside the conversation may not have an expectation of privacy in the conversation and therefore may not have a cause of action under New York law should the conversation be recorded.² If the conversation is in a quiet, secluded setting, so as to warrant an expectation of privacy to the communication, then eavesdropping and wiretapping laws come into play. Twelve states – California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania and Washington – generally prohibit individuals from recording conversations unless all parties to the communication consent to the recording. These states are typically referred to as “all-party consent” or “two-party consent” states.

The remaining thirty-eight states, along with the District of Columbia, are considered “one-party consent” states. In these states, individuals may legally record a conversation to which they are a party so long as one of the parties to the communication consents to the recording. Because the consenting party in these states can also be the individual doing the recording, the conversation may be – and often is – recorded without the knowledge or consent of any other party. This is also the rule under federal law.

So what does this mean for employers? In the minority of states that require all parties to a communication to consent to its recording, it means (at least in theory) very little, as employers need not worry about a conversation being secretly recorded unless the conversation takes place in public or in a manner in which the parties have no reasonable expectation of privacy. While individuals can certainly still record conversations in these jurisdictions either in ignorance or willful violation of the law and then attempt to blackmail or embarrass their employers by making the recordings public, most states have stiff civil and

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criminal penalties for such devious acts. In these situations, employers should be quick to advise such employees both of the law and of the fact that the company will not hesitate to pursue any remedy available to it, whether civil or criminal. Also, if the employer believes that the act of secretly recording a conversation is, in and of itself, a waste of company time and resources, an act of disloyalty, or otherwise inappropriate, employers are generally free to discharge the employee, assuming the employee is at-will. Getting to that point, however, is somewhat rare in "all-party consent" states given that the penalties under the law generally suffice to deter most from secretly recording conversations.

In "one-party consent" states, on the other hand, employers have much more to worry about, as just about any conversation can be legally recorded without their knowledge. To combat this, many employers have policies that expressly forbid clandestine recordings. For the most part, these policies are a permissible and effective way to deter employees from recording conversations without their employer's knowledge. They can also serve as legitimate non-discriminatory grounds for discharging employees who violate the policy.

Does this dynamic change, though, if the employee claims that the recording was done in order to document or investigate discrimination or harassment? Does the recording then become a protected activity? While according to the EEOC, the answer generally is yes, courts are split over the issue. Anti-retaliation laws prohibit employers from retaliating against employees because of the employee's opposition to or participation in an investigation of discriminatory conduct. Some courts, like the Second Circuit (which covers Connecticut, New York, and Vermont), have held that making a secret recording to collect evidence of discrimination is a protected activity and that employers, as a matter of law, cannot take action against employees for making those recordings.³ Other courts, such as the Seventh Circuit (which covers Illinois, Indiana, and Wisconsin), have held that employers can take disciplinary action

against employees for secretly recording conversations even if the recording was done under the guise of collecting information for a discrimination suit.⁴

Regardless of whether secret recordings are legal under state or federal law or qualify as a "protected activity" under anti-retaliation laws, employers are well-served by training managers and other decision makers to be careful in their conversations with other employees, especially those employees who may be on the verge of losing their job, are disgruntled, or are otherwise suspicious of the company. Should an employer discover that an employee is making secret recordings, it should contact legal counsel. Secret recordings typically do not "fly solo," as they almost always accompany other legal issues that an employer is facing or will soon face.

¹ See *Wilkins v. NBC, Inc.*, 71 Cal. App. 4th 1066 (Cal. Ct. App. 1989).

² See *People v. Kirsh*, 176 A.D.2d 652 (N.Y. App. Div. 1991).

³ See *Heller v. Champion Int'l Corp.*, 891 F.2d 432, 436-437 (2nd Cir. 1989).

⁴ See *Argyropoulos v. City of Alton*, 539 F.3d 724, 733-734 (7th Cir. 2008) ("Although Title VII indubitably protects an employee who complains of discrimination . . . the statute does not grant the aggrieved employee a license to engage in dubious self-help tactics or workplace espionage in order to gather evidence of discrimination.")



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