



# Workplace Whistleblower

*Perspectives on whistleblower situations that employers frequently face*

## Employers: Assume Your Employees Are Taping You... There's An App for That!

Here's the scenario: Bill, an African-American employee at a bank, goes into a performance review knowing that it could be very bad. He's already been told there are serious concerns about his performance. But like most Americans,<sup>1</sup> Bill has a smartphone. There are plenty of recording apps he can use. Bill likes Recorder Pro, which he can download from the app store for the staggering price of \$1.99<sup>2</sup>, far less than the \$4.20 he spent for a Big Mac at lunch. This app will record up to at least 290 hours.

Bill hits the record button before he goes in the meeting. Even if the boss looked at the smartphone, it would not be obvious at all that Bill is recording the conversation. During the meeting, the boss throws out these "gems" to Bill: "Those dreads in your hair make you look like a thug," and "We'd love you to speak proper English, not the jive you speak in the office."

Bill leaves the meeting with a big grin on his face, which is very puzzling to his boss. But the boss soon discovers why. He gets a call from the Company's lawyer later that afternoon and learns that Bill recorded their conversation and immediately emailed it to his attorney (very easy to do with the app). Bill's attorney shares the recording with the Company's lawyer and threatens to release the recording to the local media. Rather than risk adverse publicity and a potential lawsuit, the bank quickly agrees to a six-figure settlement and the employee's swift departure.

Wait, this didn't really happen did it? Oh yes, it did!<sup>3</sup> It also happened in another recent well-publicized case, where several dozen waiters and dishwashers at New York's Boathouse restaurant, armed with miniature cassette recorders, secretly recorded hundreds of workplace conversations with supervisors when complaining about pay and working conditions. When the restaurant owner fired 16 of the workers, they produced multiple audiotape recordings on which the owner told employees he'd go out of business if they voted for a union. These tapes provided proof that the owner had violated federal labor laws.<sup>4</sup>

It is estimated that anywhere between one-third to fifty percent of employees now surreptitiously tape conversations with their bosses. The EEOC in Houston reports that one-third of employees who visit them to file discrimination complaints bring secretly made recordings of sensitive conversations with their bosses or with human resources.<sup>5</sup> Lawyers representing employees say more than fifty percent of their clients bring in digital evidence, saying they are "more surprised when someone comes into [their] office *without* digital evidence."<sup>6</sup> So employers: Assume every conversation you have may be being recorded.

Wait, hold on another minute here — isn't it illegal to secretly tape conversations? Actually, it is perfectly legal to do so in most states. Thirty-eight states, as well as federal statutory law, require only the consent of one party to a call to legally tape a telephone conversation (so-called "single consent states").<sup>7</sup> However, 11 states — California, Connecticut, Delaware, Florida, Illinois, Maryland, Massachusetts, Montana, New Hampshire, Pennsylvania and Washington — require the consent of both parties to the call ("dual consent states"). However, even in those dual consent states, a surreptitious recording may still come into play. For example, the EEOC has no qualms about listening to and using tape recordings obtained illegally by employees.<sup>8</sup>

<sup>1</sup> It is estimated that almost fifty percent of Americans now have a smartphone. "Smartphones Are Used By Nearly Half Of Americans" [http://www.huffingtonpost.com/2012/03/01/most-americans-have-a-smartphone\\_n\\_1314914.html](http://www.huffingtonpost.com/2012/03/01/most-americans-have-a-smartphone_n_1314914.html)

<sup>2</sup> <http://www.recordertheapp.com/>

<sup>3</sup> <http://www.businessinsider.com/smartphones-spying-devices-2011-7>

<sup>4</sup> <http://www.adn.com/2011/08/14/2015177/employee-records-boss-secretly.html>

<sup>5</sup> <http://www.chron.com/business/sixell/article/One-third-of-workers-with-beefs-tape-their-bosses-1684505.php>

<sup>6</sup> <http://www.businessinsider.com/smartphones-spying-devices-2011-7>

<sup>7</sup> <http://www.rcfp.org/reporters-recording-guide/tape-recording-laws-glance>

<sup>8</sup> <http://www.chron.com/business/sixell/article/One-third-of-workers-with-beefs-tape-their-bosses-1684505.php>

Ok, well our policy makes it impermissible for employees to tape record conversations. So even in “one party consent” states, we can still terminate someone for violating our policy, right? The answer: Maybe. Terminating an employee for taping work-related conversations will, in the eyes of the EEOC, be retaliation, even if a workplace policy forbids it. Also, courts will carefully scrutinize a “no taping” policy to determine whether the policy was clearly violated. In one case<sup>9</sup>, an employee terminated for violating a company’s policy against taping work conversations argued she was really terminated because of her age. The employee pointed out that the policy only prohibited taping on company premises and her recordings were off site. She also pointed out that the purpose of the rule was to prevent the “unauthorized dissemination of proprietary information,” and that her termination for making a recording for personal reasons was inconsistent with the policy. Finally, she claimed that similarly situated employees violating the policy were not discharged. Because the employee sufficiently called into question the employer’s enforcement of its policy against her, the court allowed her case to proceed to a jury, which would decide whether her termination was motivated by her age or her violation of the recording policy.

And finally, let’s not forget the NLRB! The NLRB has held that an employer violated the National Labor Relations Act when it fired an employee for carrying a hidden audio recorder into a meeting where the employee claimed he reasonably believed he would be denied rights guaranteed to him under the Act. Additionally, the Board implied that any work rule prohibiting employees from making clandestine audio recordings in the workplace might be deemed unlawful, if the rule did not include an express exception for recordings made in an effort to protect or advance employee rights under Section 7.<sup>10</sup>

Despite all this gloom and doom, having a policy against secretly taping in the workplace is the employer’s best chance to effectively prohibit it. In addition to protecting privacy rights and proprietary information, such a policy can help maintain open communication between management, employees and co-workers. Employee recording of conversations can also significantly interfere with channels of communication.

An effective policy should at a minimum have a statement regarding the purpose of the policy; examples of the types of recordings that are prohibited without authorization (tape recording, videotaping, etc.); it should list individuals in the organization who have the authority to allow any exceptions to the policy; it should list situations, if any, in which recording is permissible and finally, inform employees of the consequences of violating the policy. Employers also need to decide whether their policy will contain an express exception for recordings made in an effort to protect or advance employee rights under Section 7 of the NLRA.

As our kids might say, welcome to the 21st century!

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<sup>9</sup> *Dedeaux v. R. J. Reynolds Tobacco Co.*, 2010 U.S. Dist. LEXIS 120873, 93 Empl. Prac. Dec. (CCH) P44036, 110 Fair Empl. Prac. Cas. (BNA) 1436 (W.D. Ark. Nov. 12, 2010)

<sup>10</sup> *Stephens Media, LLC, d/b/a Hawaii Tribune-Herald*, 356 NLRB No. 63 (2011)

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