

Your Monthly Legal Update – October 2008

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## **THE PERILS OF ELECTRONIC SNOOPING & THE ELLERTH/FARAGHER DEFENSE IN SEXUAL HARASSMENT CASES**

### The Perils of Electronic Snooping

Happy October everyone!! Well, this month let's review something different regarding whether or not a complainant in a discrimination case is allowed to secretly tape a meeting relevant to her sexual harassment case. In *Argyropoulos v. City of Alton* (7<sup>th</sup> Cir., 91 EPD sec. 43,307), a female jailer decided to secretly tape record two of her superiors in connection with the investigation of her sexual harassment complaint.

This action triggered both her arrest, under Illinois' felony eavesdropping statute (note that this would also be illegal in Wisconsin) and her discharge. The 7<sup>th</sup> Circuit Court of Appeals reviewed this and declared that this did not constitute participation in protected activity and awarded summary judgment in favor of the City.

The jailer attempted to argue that she engaged in protected activity pursuant to Title VII because she only sought to obtain evidence relevant to her harassment suit. However, the Seventh Circuit did not buy this argument. The court opined, "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 retaliation...." Further, the jailer also failed to establish her claim of retaliation because she could not disprove management's arguments regarding her work performance, i.e. her failure to timely book prisoners that actually preceded her sexual harassment complaint. Also, she could not prove that she was treated less favorably than similarly situated employees who committed the same offenses. Finally, the precipitating event of illegal eavesdropping was clearly a legitimate reason for termination.

The jailer argued an exception to the Illinois statute that allows for eavesdropping to prevent imminent harm, arguing that she feared for her physical safety. The Court did not accept this argument and reminded her that while she may have had an argument relevant to an affirmative defense to the criminal charge, she could not refute the fact that she was unable to prove that the City acted in bad faith when they arrested her and discharged her. This is what she would have had to have proven to establish pretext.

Bottom line here is if an employee is caught eavesdropping into a conversation that they are not participating in directly, through the use of electronic devices, the conduct is not legal, even in the State of Wisconsin and the employee can be terminated for this reason. In Wisconsin, tape recording is only allowed if it is a participant in the actual conversation who is doing the taping. The law is based on the premise that if you are willing to provide information to another party, that you can then expect that party to tape record the conversation or disclose it to someone else which gives you less of a privacy interest. Therefore, you cannot invade the privacy of others who are not including you in the conversation. Employees have no right to bug rooms that are meant for investigations of claims when they are not present.

The Ellerth/Faragher defense is alive and well  
for employers in Sexual Harassment cases

The Eighth Circuit in *Adams v. O'Reilly Auto, Inc.* (8<sup>th</sup> Cir., 91 EPD sec. 42,304), concluded that while a female employee claimed she was sexually harassed for 2.5 years by her male supervisor, that because she failed to avail herself of the company's written sexual harassment policy procedure, that this employee could not recover damages. The Court based this decision on the fact that once she did report the harassment, the company promptly investigated her claims, and terminated the supervisor. The Court determined that the company properly remediated the situation once they were informed of the harassment.

The Employee did not argue that the company did not have a policy but that it was not reasonably and properly enforced. The Eighth Circuit Court disagreed, confirming that the policy was one of zero tolerance toward sexual harassment and mandated the investigation of any complaint of harassment. The Court noted that the complaint procedure within the policy had multiple channels for reporting sexual harassment and keeping complaints confidential.

An interesting component to this policy was that it required the claimant to have a witness to corroborate the harassment. It is interesting that the Eighth Circuit did not find this objectionable and sustained the policy since the complainant allegedly had the burden of proof prior to management taking any adverse action against its management. Likewise, the employee's arguments that the employer had constructive notice of the harassment failed because she did not file a complaint. The Court ultimately determined that the employee's failure to report for 2.5 years was unreasonable.

This decision may seem questionable to some of you and I would hope that it is. I do not recommend passing any policy requiring a victim to have a witness in order to substantiate a complaint. Further, I have long emphasized that all written sexual harassment policies should provide multiple ways for an individual to file a claim with someone in management they feel comfortable speaking with. If you narrow the channels of reporting you put yourself at risk. I just thought this case was of interest and what it means long term is unknown. For some reason, this court did not like this Plaintiff/employee and so it worked in this employer's favor because they fired the perpetrator as soon as she reported the complaint. This subjective factor may not always result in similar awards in favor of the employer.