TO SAY OR NOT TO SAY: PROPOSED ADMISSIBILITY STANDARDS FOR SECRET WORKPLACE RECORDINGS BY EMPLOYEES

*Marc Chase McAllister**

As victims of harassment and discrimination know full well, complaints of harassment and discrimination are often dismissed by employers and are difficult to prove in court. Victims are responding to these obstacles by secretly recording workplace conversations to obtain evidence for their claims. However, secretly recording conversations often causes more harm than good. For one, those who engage in this activity will usually be terminated for workplace misconduct, and their unreasonable surveillance activities may preclude the very claims that prompted their recordings. In addition, the business itself may suffer a variety of harms, including erosion of trust and loss of employee morale.

Despite the numerous drawbacks in secretly recording workplace conversations, courts have incentivized this activity by relying on the contents of such recordings at trial and when resolving dispositive motions. Given the legitimate employer interests in eliminating employees' secret workplace recordings and the harms flowing from such activity, this Article argues that such recordings should have limited evidentiary value, particularly in workplaces with a no-recording rule. Accordingly, to eliminate the primary incentive for secretly recording conversations, this Article borrows from analogous exclusionary rules found in state wiretap laws and proposes that Congress amend the federal employment discrimination laws to provide that recordings obtained in violation of an employer's no-recording rule are generally inadmissible for claims arising under those laws. This Article further proposes an important exception to this proposed exclusionary rule for recordings made after an employer failed to take appropriate corrective action on the recording individual's complaint of harassment or discrimination. In this manner, victims of harassment or discrimination would be encouraged to report their mistreatment, while employers would be incentivized to take such reports seriously. Through this balanced approach, workplace privacy will be preserved, without undermining the most legitimate use of this evidence-gathering approach against employers that shirk legitimate employee complaints.

* Marc McAllister is an Assistant Professor of Business Law and the Graduate Programs Director for the Wall College of Business at Coastal Carolina University.

TABLE OF CONTENTS

INTRODUCTION

Lisa Cornell worked for a trucking company from February 2011 until she was fired on May 31, 2012.[1] According to Cornell, her supervisor, Shawn Corbett, sexually harassed her "on a nearly daily basis" during her employment.[2] On May 4, 2012, Cornell reported Corbett's sexual harassment to upper management.[3] According to Cornell, management did not act upon her complaint and instead fired her a short time later.[4]

In a subsequent lawsuit against her former employer, Cornell admitted that because she was typically alone with Corbett when he harassed her, she often "discreetly record[ed] her conversations [with Corbett] using a hidden audio recorder."[5] According to Cornell, Corbett's close relationship with the company's owners and his comments suggesting he was immune from employer punishment "instilled a fear in [her] that, even if she did complain, she would never be able to prove that Corbett had engaged in the illegal conduct that she endured on a daily basis."[6] In essence, Cornell recorded her interactions with Corbett because she believed it was the only way she could combat his word against hers.[7]

Cornell's story is not an isolated incident, and her evidence-gathering approach is not unique.[8] Indeed, employees who wish to obtain evidence for claims such as discrimination or harassment often do so by secretly

---

1. Plaintiff's Brief in Support of Motion for Order Regarding Sequence of Discovery at 1, Cornell v. Jim Hawk Truck Trailer, Inc., 297 F.R.D. 598 (N.D. Iowa 2013) (No. 5:13-cv-04022-DEO).

2. *Id.* at 2.

3. *Id.* at 1.

4. Cornell v. Jim Hawk Truck Trailer, Inc., 297 F.R.D. 598, 599 (N.D. Iowa 2013); Plaintiff's Brief in Support of Motion for Order Regarding Sequence of Discovery at 1–2, Cornell v. Jim Hawk Truck Trailer, Inc., 297 F.R.D. 598 (N.D. Iowa 2013) (No. 5:13-cv-04022-DEO).

5. *Cornell*, 297 F.R.D. at 599.

6. Plaintiff's Brief in Support of Motion for Order Regarding Sequence of Discovery at 2–3, Cornell v. Jim Hawk Truck Trailer, Inc., 297 F.R.D. 598 (N.D. Iowa 2013) (No. 5:13-cv-04022-DEO).

7. *See id.* at 3 (stating that Cornell chose to make these recordings because she was "[w]ell aware of the difficulties women face in proving they have been targets of illegal harassment and discrimination.").

8. *See, e.g.*, Moray v. Novartis Pharms. Corp., No. 3:07-CV-1223, 2009 WL 82471, at *11 (M.D. Tenn. Jan. 9, 2009) (in discussing a whistleblower retaliation claim, noting that the plaintiff secretly recorded a conversation with her supervisor "because she believed that [her employer] 'trusted and believed' [her supervisor's] word over hers and did not take her complaint seriously, and she apparently felt [her employer] would believe her if the company had access to the tape."), *aff'd*, 345 F. App'x 144 (6th Cir. 2009). *See also* Keith Cunningham-Parmeter, *The Sexual Harassment Loophole*, 78 WASH. & LEE L. REV. 155, 194 (2021) (noting that victims of sexual harassment who report the harassment to their employer "frequently experience retaliation, both in overt ways such as discharge and in more subtle forms such as receiving negative performance evaluations"); Holly Corbett, *#MeToo Five Years Later: How The Movement Started And What Needs To Change*, FORBES (Oct. 27, 2022, 12:02 PM), https://www.forbes.com/sites/hollycorbett/2022/10/27/metoo-five-years-later-how-the-movement-started-and-what-needs-to-change/?sh=3ea7aae85afe [https://perma.cc/5SVR-NUBP] (describing a similar case and stating that "more than 70% of workers who report [sexual] abuse [at work] are retaliated against in some way—whether they are fired, demoted, given fewer hours on their schedule, denied a promotion, or threatened with legal action").

recording workplace conversations, an activity that has become more common due to the recording capabilities of modern cell phones.[9]

To combat the recent increase in recording activity, employers are responding by enacting policies that prohibit secret workplace recordings ("no-recording" rules or policies).[10] There are numerous reasons an employer might wish to adopt a no-recording rule, including:

- Protecting the privacy of workplace communications;[11]
- Fostering open communication to maintain healthy relationships among co-workers;[12]
- Preserving open dialogue between management and employees;[13]

---

9. *See* Allen Smith, *Employees Secretly Record Managers for Litigation*, SHRM (Aug. 8, 2018), https://www.shrm.org/topics-tools/employment-law-compliance/employees-secretly-record-managers-litigation [https://perma.cc/H668-EH5Z] (stating that secret workplace recordings are "definitely on the increase," and reporting the following remark of Marc Katz, an attorney with DLA Piper in Dallas: "I've been practicing for 24 years and did not see recording like this years ago. Now it's relatively commonplace."); Mark Keenan, *Just a Reminder: Your Employees May be Recording You*, BARNES & THORNBURG, LLP (Feb. 13, 2020), https://btlaw.com/insights/blogs/labor-relations/2020/just-a-reminder-your-employees-may-be-recording-you [https://perma.cc/QQ6D-3BL5] (noting that "[o]ver the past decade, more and more employees have begun recording workplace meetings and conversations – particularly as the evolution of smartphones makes surreptitious recordings easier to accomplish"); *Secretly Recording Conversations at Work: Risky Business*, NELLIGAN L. (Aug. 7, 2019), https://nelliganlaw.ca/blog/secretly-recording-conversations-at-work/ [https://perma.cc/74XT-9M46] [hereinafter *Secretly Recording Conversations at Work*] (stating that since most people now have smartphones, "it should come as no surprise that employees are increasingly recording conversations with colleagues or managers in the workplace in secret"); Ronald J. Rychlak, *Sound in the Courtroom: Audio Recordings at Trial*, 39 AM. J. TRIAL ADVOC. 1, 1 (2015) (noting that "virtually everyone today has a recording device, such as a cell phone, on their person"). *See also* Caro v. Weintraub, 618 F.3d 94, 96 (2d Cir. 2010) (discussing a wiretap claim based on defendant's use of an iPhone to record a conversation).

10. *See* Doug Chartier, *Do Employers Have the Green Light to Install No-Recording Policies?*, L. WEEK COLO. (Aug. 27, 2018), https://www.lawweekcolorado.com/article/do-employers-have-the-green-light-to-install-no-recording-policies/ [https://perma.cc/XM7V-AL27] ("With secret workplace recordings showing up in nightly newscasts and high-profile lawsuits, employers are perhaps more interested than ever in maintaining policies that restrict workers from capturing conversations.").

11. *See* Hudson v. Blue Cross Blue Shield of Ala., No. 2:09-CV-920-JHH, 2010 WL 11519253, at *10 (N.D. Ala. Dec. 14, 2010), *aff'd*, 431 F. App'x 868 (11th Cir. 2011).

12. *See* Chartier, *supra* note 10 (reporting that Steven Gutierrez, a labor and employment attorney in Denver, "tends to recommend that employers ban workers from secretly recording workplace conversations because such a ban 'provides comfort to employees and management that they can have open dialogue'"); Smith, *supra* note 9; Amber Gregory, *Recording Conversations at Work*, CITRUSHR (Dec. 11, 2023), https://citrushr.com/blog/hr-headaches/recording-conversations-at-work/ (recognizing that although "[r]ecording conversations at work is a very murky area in terms of legalities, . . . [o]ur advice is to lay out your stance on recordings within your employee handbook;" further recognizing the "best practice" of clarifying secret recordings as misconduct).

13. *See* Chartier, *supra* note 10 (noting that "[t]he specter of secret recordings can cause managers to walk on eggshells around employees and avoid candid, non-scripted conversation with them").

- Preventing the erosion of trust and employee morale that can result from secret recordings;[14]
- Protecting the confidentiality of sensitive employment-related issues that may arise in disciplinary meetings and workplace investigations;[15]
- Protecting other confidential or sensitive business information, including customer data, trade secrets, and similar proprietary information;[16] and
- Preventing the negative publicity that may stem from the release of such recordings, especially those that lack context.[17]

Aside from this array of legitimate employer objectives, recent rulings by the National Labor Relations Board ratifying no-recording rules will likely make them even more prevalent.[18] With more employers adopting no-recording rules, employees like Cornell should think carefully before attempting to gather recorded evidence. Indeed, when an employee violates their employer's no-recording rule, they will typically be terminated for their misconduct, and courts will generally not overturn those terminations.[19] Employees may suffer additional legal harms as

---

14. *See Secretly Recording Conversations at Work*, *supra* note 9 (noting that "[s]ecret recordings . . . . would likely impair relationships and foster an environment of mistrust in the workplace"). *See, e.g.*, Moray v. Novartis Pharms. Corp., No. 3:07-CV-1223, 2009 WL 82471, at *2 (M.D. Tenn. Jan. 9, 2009) (involving a no-recording policy prohibiting employees from recording "the conversation of another employee without his or her full knowledge and consent," on the basis that "[u]nauthorized electronic surveillance of employees is disruptive to employee morale and inconsistent with the respectful treatment required of our employees"), *aff'd*, 345 F. App'x 144 (6th Cir. 2009); Ingram v. Pre-Paid Legal Servs., Inc., 4 F. Supp. 2d 1303, 1314 (E.D. Okla. 1998) (stating that "the surreptitious tape recording of one's supervisors may implicate confidentiality and employee trustworthiness concerns to such an extent that immediate disciplinary would be justified").

15. Tracy M. Evans, *The Perks and Pitfalls of No-Recording Policies in the Workplace*, Saxon Gilmore & Carraway, P.A. (Aug. 29, 2016), https://www.saxongilmore.com/the-perks-and-pitfalls-of-no-recording-policies-in-the-workplace/ [https://perma.cc/C72P-FPES].

16. *See, e.g.*, T-Mobile USA, Inc. v. N.L.R.B., 865 F.3d 265, 269 (5th Cir. 2017) (involving a no-recording policy noting the need to protect confidential information); BMW Mfg. Co., 370 NLRB No. 56, 2020 WL 7338076, at *4 (N.L.R.B. Dec. 10, 2020) (stating "employer[s'] interest in safeguarding proprietary secrets" and classified information is compelling and served by no-recording provision); Hoffman v. Netjets Aviation, Inc., ARB No. 09-021, 2011 WL 1247208, at *1 (ARB Mar. 24, 2011) (recognizing the employer's concern "that confidential proprietary business information, which had been shared with [employees] at their regular training meetings, might become public").

17. *See* Evans, *supra* note 15 (noting that "[r]ecordings by employees are likely to be conducted on a biased, selective basis, and could have a negative effect on client relations and public perception").

18. *See* AT&T Mobility, LLC, 370 NLRB No. 121, 2021 WL 1815083, at *4 (N.L.R.B. May 3, 2021) (finding that no-recording rules are categorically lawful to maintain under the National Labor Relations Act). *See also* Chartier, *supra* note 10 (noting that "[e]mployers recently received the NLRB's go-ahead to enforce no-recording rules").

19. *See, e.g.*, Gray v. Deloitte LLP, No. 1:17-CV-4731-CAP-AJB, 2019 WL 12520100, at *1 (N.D. Ga. Feb. 13, 2019) (summarizing one employer's policy stating that "the use of . . . equipment or

well.[20] For example, employees who secretly record conversations may face civil liability or criminal penalties for wiretap violations,[21] and they may be found liable for invasion of privacy under tort law.[22] In addition, employees who engage in such espionage will often find courts unreceptive to claims of retaliation under the employment discrimination laws.[23] Employees may also have otherwise legitimate harassment claims dismissed for attempting to gather evidence through recorded conversations rather than reporting the harassment immediately.[24]

---

devices . . . to create an . . . audio recording is prohibited in the workplace," with violations subject to "disciplinary action up to and including termination of employment"), *aff'd*, 849 F. App'x 843 (11th Cir. 2021); Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 475, 479–80 (6th Cir. 2012) (noting that employee's secret recordings of workplace conversations to create evidence for a discrimination lawsuit violated her employer's policy and was a terminable offense); Harrison v. Off. of the Architect of the Cap., 964 F. Supp. 2d 81, 89, 97, 102 (D.D.C. 2013) (involving violation of a rule prohibiting the use of recording devices at work), *aff'd sub nom.* No. 14-5287, 2015 WL 5209639 (D.C. Cir. July 16, 2015); Peterson v. West, 122 F. Supp. 2d 649, 658–59 (W.D.N.C. 2000) (recognizing that "[t]he surreptitious tape recording of conversations with superiors is a clear example of insubordination warranting employee admonishment"), *aff'd*, 17 F. App'x 199 (4th Cir. 2001).

20. *See* Marc Chase McAllister, *Employee Beware: Why Secret Workplace Recordings Are Risky Business for Employees*, 106 MARQ. L. REV. 485, 539–42 (2023) (discussing the numerous reasons employees should refrain from secretly recording workplace conversations).

21. *See, e.g.*, Coulter v. Bank of Am., 33 Cal. Rptr. 2d 766, 767–68 (Ct. App. 1994) (granting summary adjudication on wiretap claims against an employee who secretly recorded conversations in anticipation of a sexual harassment suit, leading to $132,000 in damages against the employee). *See also* Phillips v. Bell, 365 F. App'x 133, 141–42 (10th Cir. 2010) (suggesting that the tortious purpose of "invasion of privacy" could satisfy the requirements of the Federal Wiretap Act, 18 U.S.C. § 2511(2)(d), if supported by sufficient factual allegations).

22. *See* Caro v. Weintraub, 618 F.3d 94, 101 (2d Cir. 2010) (recognizing that recording a private conversation could impose liability under the tort of intrusion upon seclusion); Wall v. Canon Sols. Am., Inc., No. 17-CV-4033-DDC-GEB, 2017 WL 3873755, at *3 (D. Kan. Sept. 5, 2017) (recognizing that "recording private phone conversations without all parties' consent is an unreasonable intrusion upon the seclusion of another"); Vasyliv v. Adesta, LLC, No. CV106011737S, 2010 WL 5610901, at *3–4 (Conn. Super. Ct. Dec. 20, 2010) (refusing to dismiss an employee's tort of intrusion claim based on his allegation that another employee had secretly recorded their conversation); WVIT, Inc. v. Gray, No. CV 950547689S, 1996 WL 649334, at *3–4 (Conn. Super. Ct. Oct. 25, 1996) (upholding tort of intrusion claim against employee for surreptitiously recording conversations she had with co-workers). *See also* Janelle Lamb, *He Said. She Said. The iPhone Said. The Use of Secret Recordings in Domestic Violence Litigation*, 110 CALIF. L. REV. 1095, 1135–37 (2022) (discussing a similar situation for domestic violence victims who wish to create secret recordings of their abuse).

23. *See infra* notes 37–42 and accompanying text.

24. *See, e.g.*, McKinney v. G4S Gov't Sols, Inc., 711 F. App'x 130, 137 (4th Cir. 2017) (dismissing harassment claim of employee who experienced a racially hostile work environment because he did not immediately report such harassment, but instead began recording workplace conversations in preparation for filing suit). In this context, the *Faragher-Ellerth* defense allows an employer to avoid liability for harassment if the employer proves the following elements: (a) the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff-employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998).

Despite these risks, employees like Cornell are incentivized to record conversations because of their litigation value. As this Article shows, courts have considered the contents of such recordings in ruling on dispositive motions, and the Federal Rules of Evidence often make secret recordings admissible at trial.[25] Even in the early stages of litigation, secret recordings can have a big impact. For example, in one class action discrimination lawsuit, *Roberts v. Texaco, Inc.*, an employee's secret recordings of Texaco board meetings led the company to promptly settle the case for over a hundred million dollars.[26]

Given the risks for employees who secretly record conversations and the legitimate employer interests in banning such recordings, this Article questions whether recordings obtained in violation of an employer's no-recording rule should be admissible evidence and whether their contents should be considered by courts when ruling on dispositive motions. Indeed, if employees knew that such recordings could not be considered by courts, the primary incentive for gathering evidence in this manner would be eliminated and workplace privacy would be preserved. Nevertheless, cases like Cornell's show that secret recordings might play an important evidentiary role in the narrow instance where the recordings were made after the recording individual raised a legitimate complaint of harassment or discrimination that was dismissed out of hand by the employer, conduct that should not be awarded through an overly broad exclusionary rule. Accordingly, this Article proposes a two-part admissibility standard for employees' secret workplace recordings designed to balance the competing employer and employee interests at stake.

First, to deter employees from secretly recording workplace conversations during routine business interactions, this Article proposes that Congress amend the federal employment discrimination laws to provide that recordings obtained in violation of an employer's no-recording rule are generally inadmissible for claims arising under those laws and may not be considered by courts when resolving dispositive motions in such cases. As discussed in Part VI.A., this proposed exclusionary rule is analogous to certain state wiretap laws that make recordings obtained in violation of those laws inadmissible while implementing the same deterrent objective for such activity.

---

25. *See* Chartier, *supra* note 10 (stating that "[a]s employment litigators know well, secret workplace recordings often end up playing a significant role in employees' legal claims").

26. *See* Roberts v. Texaco, Inc., 979 F. Supp. 185, 189–91 n.2 (S.D.N.Y. 1997) (discussing the impact of an employee's surreptitious recordings in a race discrimination class action suit). *See also* Burton Kainen & Shel D. Myers, *Turning Off the Power on Employees: Using Employees' Surreptitious Tape-Recordings and E-Mail Intrusions in Pursuit of Employer Rights*, 27 STETSON L. REV. 91, 91–92 n.1 (1997) (discussing the *Texaco* case).

Second, to prevent this proposed exclusionary rule from painting too broad a brush and sheltering employers who disregard legitimate complaints of harassment or discrimination, this Article further proposes an exception making select recordings admissible where the recordings were made after the employer failed to take appropriate corrective action in response to the recording individual's complaints of harassment or discrimination. Finally, to give this proposed exception its full effect, this Article proposes that Congress establish a statutory protection from wrongful termination for having made such recordings. Through this balanced approach, secret workplace recordings will be deterred and workplace privacy will be preserved, without undermining the most legitimate use of recorded evidence against employers that shirk employee complaints of harassment or discrimination.

Part I of this Article examines instances of employee discipline for violating an employer's no-recording rule, and shows how courts have typically responded to such disciplinary actions. Turning to the admissibility of secret recordings and their role in litigation, Part II provides case examples where secret recordings have been used or cited by courts to support favorable outcomes for employees against their employers. Because these courts have often discussed the contents of such recordings without analyzing their admissibility, Part III examines the rules of evidence that impact the admissibility of secret recordings. From there, Part IV examines analogous exclusionary rules that make secret recordings obtained in violation of wiretap laws inadmissible, and Part V discusses the arguments for and against the use of secret recordings in litigation. Finally, Part VI details the proposals outlined above, and the final Part concludes.

I. Terminations for Violating an Employer's No-Recording Rule

While this Article focuses primarily on the admissibility of employees' secret workplace recordings, before turning to that analysis, this Part shows that no-recording rules are generally permissible, demonstrates how employees can be disciplined by their employers for violating no-recording rules, and discusses the generally deferential approach of courts to such employer-imposed discipline.

As technology has progressed, including the rise of modern smart phones, the ability to record conversations has progressed as well.[27]

27. *See* Smith, *supra* note 9 (noting that secret recordings are "definitely on the increase"). *See, e.g.*, Benjamin v. Citationshares Mgmt., LLC, ARB No. 12-029, 2013 WL 6385831, at *2 (Nov. 5, 2013) (involving an employee who recorded a meeting with management using a pocket-size audio recorder); Argyropoulos v. City of Alton, 539 F.3d 724, 730, 731 n.4 (7th Cir. 2008) (involving an employee who recorded a conversation using a tape recorder concealed in her jacket); Meredith

In addition, the proliferation of the #MeToo movement has led to a heightened awareness of workplace harassment.[28] The end result is that employees are recording workplace conversations more frequently than in the past.[29] Employers, in turn, are responding by enacting no-recording rules, creating a tension between the desire of certain employees to record evidence of discrimination or harassment and employer rights to prevent such surveillance activity.[30]

Within the workplace itself, the scales are tilted in the employer's favor. This is because employers generally have freedom to enact reasonable workplace rules, including no-recording policies, that are fitting and appropriate to their business.[31] In addition, as outlined in the Introduction, employers have numerous reasons to outlaw secret workplace recordings, including the desire to foster open communication and protect confidential or sensitive business information.[32] Moreover, in workplaces with a no-recording policy in place, an employee's violation of that policy can amount to misconduct, with penalties up to and including termination.[33] Finally, courts are generally deferential towards

---

v. Gavin, 446 F.2d 794, 796 (8th Cir. 1971) (involving a telephone conversation recorded with a dictaphone machine).

28. *See* Tristin K. Green, *Was Sexual Harassment Law a Mistake? The Stories We Tell*, 128 YALE L.J. F. 152, 167 (2018) (stating that "[t]he #MeToo movement presents an extraordinary moment of awareness and willingness to listen to and believe people who tell their stories of harassment"); Abbe Smith, *Can You Be A Feminist and a Criminal Defense Lawyer?*, 57 AM. CRIM. L. REV. 1569, 1585 (2020) (describing the effect of #MeToo as "a broader awareness of the impact of sexual assault and harassment and the need for accountability"). *See also* Lorefice v. New York, No. 1:21-CV-01367-MAD-CFH, 2022 WL 3577102, at *2 n.4 (N.D.N.Y. Aug. 18, 2022) (stating that "[t]he #MeToo movement is a 'movement to increase awareness of sexual harassment and assault'") (quoting Minn. Voters All. v. Mansky, 138 S. Ct. 1876, 1890 (2018)).

29. *See* Smith, *supra* note 9.

30. *See* Chartier, *supra* note 10.

31. *See* Stengart v. Loving Care Agency, Inc., 990 A.2d 650, 665 (N.J. 2010) ("Companies can adopt lawful policies relating to computer use to protect the assets, reputation, and productivity of a business and to ensure compliance with legitimate corporate policies. And employers can enforce such policies. They may discipline employees and, when appropriate, terminate them, for violating proper workplace rules that are not inconsistent with a clear mandate of public policy.").

32. *See supra* notes 11–17. *See, e.g.*, T-Mobile USA, Inc. v. N.L.R.B., 865 F.3d 265, 269–70 (5th Cir. 2017) (involving a no-recording policy noting, among other things, the need to protect confidential information); *see also* BMW Mfg. Co., 370 NLRB No. 56, 2020 WL 7338076, at *4 (N.L.R.B. Dec. 10, 2020).

33. *See*, *e.g.*, Gray v. Deloitte LLP, No. 1:17-CV-4731-CAP-AJB, 2019 WL 12520100, at *1–3 (N.D. Ga. Feb. 13, 2019) (noting employer's policy against secret audio recordings and dismissing plaintiff's retaliation claims tied to his termination for having secretly recorded workplace conversations), *aff'd*, 849 F. App'x 843 (11th Cir. 2021); Stark v. S. Jersey Transp. Auth., No. A-1758-11T2, 2014 WL 2106428, at *7, *18 (N.J. Super. Ct. App. Div. May 21, 2014) (noting that one plaintiff-employee was terminated for secretly recording a conversation with her superiors in violation of a state wiretap law and affirming summary judgment to employer on employee's retaliation claim). *See also* Kainen & Myers, *supra* note 26, at 92–93 (noting that "[s]ome courts have upheld employers' rights to . . . disciplin[e] . . . employees" for surreptitiously recording conversations); Gregory, *supra* note 12 (recognizing that "if an individual makes a recording in secret without asking, or

employers that enforce no-recording rules.[34] For example, courts have ruled that violating an employer's no-recording policy can be grounds for termination, regardless of whether the recorded content supports some other viable claim by the offending employee, such as discrimination or harassment.[35]

In the specific context of retaliation, when an employee is fired for violating a no-recording policy despite having previously complained of discrimination or harassment, courts often reject the employee's claim that their no-recording rule violation is a pretext to conceal the employer's true, retaliatory motive.[36] In one exemplary case, *Argyropoulos v. City of Alton*, an employee named Christina was fired for recording a meeting with her supervisors where she believed her previous complaints of sexual harassment would be discussed.[37] Thereafter, Christina claimed she was fired as an act of retaliation for her previous harassment complaints, arguing that "because her aim was to obtain evidence of discrimination," her recording activity constituted "statutorily protected activity" under the employment discrimination laws.[38]

---

after [their employer] denied them permission, this will [typically] be seen as misconduct, and could even amount to gross misconduct justifying dismissal"); *Secretly Recording Conversations at Work*, *supra* note 9 ("Secretly recording a conversation at work could be just cause for your dismissal. Secret recordings are usually a breach of confidentiality, privacy, and workplace policies.").

34. *See* Ingram v. Pre-Paid Legal Servs., Inc., 4 F. Supp. 2d 1303, 1313–14 (E.D. Okla. 1998) (stating that "[w]hile [plaintiff] may disagree with [his employer's] policy against [surreptitious] tape recordings, [the employer] is free to implement and enforce reasonable business regulations governing its internal operations," and noting that an employer's "decision to discharge [plaintiff] based on what it believed was a serious infraction warranting termination without warning is not subject to being second guessed by this court"); Woods v. Advance Cirs., Inc., No. C8-98-475, 1998 WL 551918, at *1 (Minn. Ct. App. Sept. 1, 1998) (noting that plaintiff violated company policy by tape-recording a conversation among his co-workers, and concluding that plaintiff's "tape-recording of his co-workers constituted a disregard for the standards of behavior that an employer has a right to expect from its employees").

35. *See, e.g.*, Moray v. Novartis Pharms. Corp., No. 3:07-CV-1223, 2009 WL 82471, at *12 (M.D. Tenn. Jan. 9, 2009) (rejecting plaintiff's whistleblower retaliation claims and upholding termination of plaintiff for secretly recording workplace conversations in violation of the employer's no-recording rule), *aff'd*, 345 F. App'x 144 (6th Cir. 2009). As one employment attorney notes:

> If you have a legal recording that proves you were wrongfully fired . . . the company can then turn around and . . . fire you for the recording if it's banned in the policy handbook . . . . It's like cutting off your nose to spite your face.

Kathryn Vasel, *Should You Secretly Tape Conversations With Your Boss?*, CNN BUS. (Sept. 30, 2018, 11:39 AM), https://www.cnn.com/2018/09/30/success/legal-to-record-conversations-boss-office/index.html [https://perma.cc/DU9V-AHZZ] (reporting the comments of Kristin Alden, an employment attorney in Washington, DC).

36. *See infra* Part IV.A.

37. Argyropoulos v. City of Alton, 539 F.3d 724, 729–31 (7th Cir. 2008) (citing 720 ILL. COMP. STAT. 5/14–2). Christina was given "three reasons for her dismissal: (1) poor job performance; (2) her allegedly criminal conduct (eavesdropping) while on duty as an employee of the City; and (3) untruthful statements [she gave] to . . . during a search of her residence [for the audio recording at issue]." *Id.* at 731.

38. *Id.* at 732–33.

Rejecting these arguments, the court declared that "[a]lthough Title VII . . . 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."[39] As such, Christina's retaliation claim was dismissed on summary judgment and her termination was upheld.[40]

Numerous other courts have reached similar rulings, both on the question of pretext,[41] and on whether recording conversations to gather evidence for a potential lawsuit is statutorily protected activity.[42] In the

39. *Id.* at 733–34 (citation omitted).

40. *Id.* at 741.

41. *See, e.g.*, Hudson v. Blue Cross Blue Shield of Ala., 431 F. App'x 868, 869–70 (11th Cir. 2011) (rejecting employee's argument that firing her for violating the company's no-recording policy was a pretext to retaliate against her for having complained of harassment because her employer had a good faith belief that she had violated the company's no-recording policy and she could not show that other employees outside her protected class were treated differently); Hartigan v. Utah Transit Auth., 595 F. App'x 779, 780–82 (10th Cir. 2014) (dismissing discrimination and retaliation claims after finding employer's stated reasons for terminating employee—namely, that employee recorded conversations during employer's initial investigation of employee's alleged harassment of female co-workers, made dishonest statements about another employee, and threatened another employee—not pretextual); Brooks v. Se. Pub. Serv. Auth., No. 95-2260, 1996 WL 751744, at *1–2 (4th Cir. Jan. 7, 1997) (finding employee's dismissal for insubordination, due to employee's act of secretly recording a meeting in defiance of a supervisor's order, was a legitimate nondiscriminatory reason which the plaintiff had failed to show was pretextual); Bodoy v. N. Arundel Hosp., 945 F. Supp. 890, 898–99 (D. Md. 1996) (rejecting plaintiff's Title VII retaliation claim, which was based on his termination that occurred a few years after he filed discrimination complaints with the EEOC, because his employer fired him for surreptitiously recording conversations with his supervisors, which violated Maryland's two-party consent law, and plaintiff admitted that he made such recordings), *aff'd*, 112 F.3d 508 (4th Cir. 1997); Shoaf v. Kimberly-Clark Corp., 294 F. Supp. 2d 746, 759 (M.D.N.C. 2003) (granting summary judgment to employer on terminated employee's retaliatory discharge claim because employee did not prove employer's reason for his termination, secretly recording conversations at work, was pretextual); Ingram v. Pre-Paid Legal Servs., Inc., 4 F. Supp. 2d 1303, 1306–07, 1313–14 (E.D. Okla. 1998) (finding employee was lawfully discharged for surreptitiously tape recording conversations with superiors in violation of employer policy, which employee failed to prove was pretextual); Peterson v. West, 122 F. Supp. 2d 649, 658–59 (W.D.N.C. 2000) (recognizing that "[t]he surreptitious tape recording of conversations with superiors is a clear example of insubordination warranting employee admonishment," and finding that plaintiff had failed to prove pretext), *aff'd*, 17 F. App'x 199 (4th Cir. 2001); Mohamad v. Dallas Cnty. Cmty. Coll. Dist., No. 3:10-CV-1189-L-BF, 2012 WL 4512488, at *14–19 (N.D. Tex. Sept. 28, 2012) (granting summary judgment to employer on terminated employee's retaliation claim because employee was unable to prove that his termination for violating his employer's no-recording policy was pretextual); Hashop v. Rockwell Space Operations Co., 867 F. Supp. 1287, 1299–1301 (S.D. Tex. 1994) (granting summary judgment to employer on employee's FLSA retaliation claim based upon finding that employee's violation of no-recording policy was legitimate grounds for termination not shown to be pretextual).

42. *See, e.g.*, Whitney v. City of Milan, No. 1:09-CV-01127-JDB-EGB, 2014 WL 11398537, at *10 (W.D. Tenn. Feb. 25, 2014) (stating that "[w]hile Plaintiff insists that her possession of the tape recorder with intent 'to obtain . . . proof of Mayor Crider's sexual harassment . . . was . . . a protected activity under the [Tennessee Human Rights Act],' she cites to no case law to support her position, and, as such, the Court rejects it"); Gray v. Deloitte LLP, No. 1:17-CV-4731-CAP-AJB, 2019 WL 12520100, at *3–4 (N.D. Ga. Feb. 13, 2019) (dismissing plaintiff's retaliation claims tied

end, these cases reveal that no-recording policies are permissible and that, when violated, they can be used to discipline employees who might be contemplating suing their employers for harassment or discrimination.[43] Nevertheless, this is not to suggest that the *content* of employees' secret recordings are not relevant to other claims or that they might not be used against employers in other ways, including as evidence to rebut arguments raised by employers on claims of discrimination or harassment.

II. Secret Recordings Used Against Employers in Litigation: Case Examples

This Part provides case examples where courts have relied upon employees' secret recordings as support for claims against their employers.

A. Cases Resolved on the Merits

In some cases, an employee's secret workplace recording has been cited as critical evidence leading to liability against their employer. In one recent example, *Deltek, Inc. v. Department of Labor*, the United States Court of Appeals for the Fourth Circuit found employer Deltek liable for retaliation for terminating an employee for having complained of Deltek's securities law violations.[44] The terminated employee, Dinah Gunther, alleged she was fired for her whistleblowing activities in violation of the Sarbanes-Oxley Act.[45] Gunther's employer, however, claimed she was fired for her "disruptive" conduct at work the day before her termination.[46] On that morning, Gunther met with Deltek executives about her continued employment at Deltek.[47] Gunther secretly recorded that meeting.[48] The next day, Deltek fired Gunther, allegedly for being "confrontational" and "demanding" in the meeting she had recorded.[49] But after listening to Gunther's recording, an Administrative Law Judge (ALJ) rejected that characterization.[50] Accordingly, the ALJ

---

to his termination for having secretly recorded workplace conversations and rejecting plaintiff's argument that his secret audio recordings were protected activity), *aff'd*, 849 F. App'x 843 (11th Cir. 2021); *Shoaf*, 294 F. Supp. 2d at 754–55 (rejecting argument that secret audio recordings were protected under Title VII's opposition clause).

43. *See infra* Part IV.A.

44. Deltek, Inc. v. Dep't of Lab., 649 F. App'x 320, 322–23 (4th Cir. 2016).

45. *Id.* at 322.

46. *Id.* at 325, 329.

47. *Id.* at 324.

48. *Id.* at 325.

49. *See id.* at 325.

50. *See Deltek, Inc.*, 649 F. App'x at 325–26.

found Deltek's explanation for her termination pretextual, resulting in liability against Deltek for retaliation.[51]

The United States Court of Appeals for the Fourth Circuit later affirmed the ALJ's decision.[52] Again highlighting Gunther's secret recording as the critical evidence in the case, the court reasoned:

> Deltek's position . . . is that Gunther was fired not for whistleblowing activity, but as a result of her "egregious[ly]" disruptive and confrontational conduct at Deltek on October 26, 2009. But after a painstaking review of the evidence, and having listened to Gunther's audio recording of the day's events "more than once" . . . the ALJ rejected that contention as "contradicted by the tape" and unsupported by the evidence. Gunther was not, as Deltek alleged, "confrontational"; instead, she was "[a]t all times . . . calm, quiet, and . . . polite."[53]

In short, because Gunther's secret audio recording rebutted her employer's explanation for her termination, she was able to prove the critical pretext requirement.[54]

Without Gunther's secret recording, it would have likely been more difficult for Gunther to rebut her employer's account, as the alternative explanations for Gunther's termination would have amounted to a "he said, she said" situation, with Gunther claiming she was not confrontational during her meeting with higher-ups and her employer claiming

---

51. *Id.* at 326. "Applying the mandate of the Sarbanes–Oxley Act that an employee who prevails on a retaliation claim 'shall be entitled to all relief necessary to make the employee whole,' the ALJ awarded Gunther back pay and benefits." *Id.* at 326–27 (quoting 18 U.S.C. § 1514A(c)(1)).

> [B]ecause the parties agreed that Gunther should not be reinstated at Deltek, [the ALJ also awarded] four years of front pay. . . . The front pay award was based on the ALJ's finding that without a college degree, it was unlikely that Gunther could obtain a job comparable to her financial analyst position at Deltek. But four years of front pay combined with a restoration of tuition reimbursement benefits, the ALJ concluded, would be sufficient to make Gunther "whole," allowing her to complete an undergraduate degree and find a job similar to the one she held with Deltek.

Id. at 327.

52. *Id.* at 331.

53. *Id.* at 329 (citations omitted).

54. *Id.* at 329–30. Applying the Administrative Procedure Act, which governs Sarbanes–Oxley retaliation claims, the Fourth Circuit explained that its standard of review is deferential and that it "must affirm the Board's decision unless it is 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law,' or is 'unsupported by substantial evidence.'" *Id.* at 327 (quoting 5 U.S.C. § 706(2)(A), (E)) (citing Platone v. U.S. Dep't of Lab., 548 F.3d 322, 326 (4th Cir. 2008)). The court explained that it will defer to the factual findings of the ALJ if they are supported by substantial evidence. *Id.*

> And in reviewing for substantial evidence, [the court's] role is not to "substitute our judgment" for that of the ALJ or the Board; "we do not undertake to re-weigh conflicting evidence [or] make credibility determinations." Rather, the "substantial evidence" standard requires only that there be in the record "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion."

Id. at 327–28 (citations omitted).

the opposite.[55] Accordingly, this case demonstrates that secret audio recordings can serve a critical evidentiary function while protecting legitimate whistleblowing activity.[56]

Similar to *Deltek*, in *Sauers v. Salt Lake County*, the United States Court of Appeals for the Tenth Circuit relied on the contents of a recorded workplace conversation to find that an employee had established a prima facie case of retaliation against her employer.[57] The plaintiff in that case, Debra Sauers, served as a secretary in the Salt Lake County Attorney's Office, and Theodore Cannon, the county attorney, was her supervisor.[58] About two years into her employment, Cannon began sexually harassing Sauers and another secretary, Shauna Clark.[59] According to Sauers, a particularly severe incident of harassment occurred on September 16, 1986.[60] Three days later, Shauna Clark filed sexual harassment charges against Cannon, which Sauers later supported with testimony about Cannon's harassment, and on that same day Sauers was reassigned to a different office.[61]

Sauers herself eventually brought sexual harassment and retaliation claims against her employer, but the district court entered judgment for the defendants after a jury trial on those claims.[62] On appeal to the Tenth Circuit, Sauers argued that her reassignment was unlawful retaliation under Title VII because it was motivated by her opposition to Cannon's conduct and by his fear that she would sue for sexual harassment.[63] To prove a prima facie case of retaliation, Sauers had to prove that: "(1) [she engaged in] protected opposition to discrimination or participat[ed] in a proceeding arising out of discrimination; (2) [she suffered an] adverse employment action; and (3) [there was] a causal connection between [her] protected activity and the adverse action."[64]

---

55. *Cf.* Lamb, *supra* note 22, at 1133 ("In general, recordings provide powerful and persuasive evidence. Perhaps the most powerful evidence of domestic violence is a video or audio recording of the abuse. When cases come down to 'he-said, she-said,' a recording can prove a damning tie-breaker. Although the case law is very scant, secret recordings–when admitted as evidence–have been critical to a judge's finding of domestic violence.").

56. *See Deltek*, 649 F. App'x at 328 (finding that Gunther genuinely and reasonably believed her employer was violating the law). Importantly, the employer in *Deltek* did not have a policy prohibiting surreptitious audio recordings. *See id.* at 333. Thus, it remains an open question whether a secret workplace recording like Gunther's should be admissible in the event the employer has a no-recording policy in place.

57. Sauers v. Salt Lake Cnty., 1 F.3d 1122, 1128 (10th Cir. 1993).

58. *Id.* at 1126.

59. *Id.*

60. *Id.* at 1126, 1128. On September 16, Cannon allegedly rubbed his groin against Sauers's shoulder; he also allegedly attempted to grab Sauers's breasts. *Id.*

61. *See id.* at 1126–27.

62. *Id.* at 1124.

63. *Sauers*, 1 F.3d at 1127–28.

64. *See id.* at 1128 (citing Williams v. Rice, 983 F.2d 177, 181 (10th Cir. 1993)).

Finding these requirements met, the Tenth Circuit relied on a secret workplace recording presented by Sauers.[65] This recording involved a "conversation between Cannon and Shauna Clark, in which Cannon appear[ed] to be concerned about someone filing sexual harassment charges against him."[66] According to the court, this evidence—along with the suspicious timing of Sauers's reassignment just a few days after both this recorded conversation and the most severe incidents of harassment—enabled Sauers to prove a prima facie case of retaliation.[67] In the court's words:

> [Sauers] had not yet taken any action against which Cannon could retaliate, but the tape-recorded conversation between Cannon and Clark indicates his fear that a sexual harassment complaint might soon be filed by [Sauers]. Action taken against an individual in anticipation of that person engaging in protected opposition to discrimination is no less retaliatory than action taken after the fact; consequently, we hold that this form of preemptive retaliation falls within the scope of [Title VII's retaliation provision].[68]

In sum, although Sauers did not ultimately prevail on her retaliation claim, this opinion demonstrates, like *Deltek*, that secret workplace recordings can play a critical role in developing claims against employers, including claims of retaliation.[69]

B. Cases Resolved on Summary Judgment

While secret workplace recordings have sometimes led to liability against an employer, courts have also invoked secret recordings when ruling on dispositive motions at earlier stages of litigation. This Section examines cases involving motions for summary judgment.[70]

According to the Supreme Court, "[o]ne of the principal purposes of . . . summary judgment . . . is to isolate and dispose of factually unsupported claims or defenses" before trial.[71] To accomplish this objective,

---

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* at 1128.

69. Despite finding that Sauers had proven a prima facie case of retaliation, the court went on to find that the defendants had presented non-retaliatory reasons for her reassignment, including another supervisor's prior dissatisfaction with her work, thereby rebutting the inference of retaliation raised by Sauers. *Sauers*, 1 F.3d at 1128–29.

70. Generally speaking, when a recording is authentic and otherwise admissible, courts have found it appropriate to consider the audio recording for purposes of determining summary judgment. *See, e.g.*, Smith v. City of Chicago, 242 F.3d 737, 741–42 (7th Cir. 2001) (considering on summary judgment an audio tape recording of a conversation between police officers and a dispatcher during an incident where a car refused to pull over as evidence that the officers activated their siren during the stop).

71. *See* Celotex Corp. v. Catrett, 477 U.S. 317, 323–24 (1986).

Rule 56(a) of the Federal Rules of Civil Procedure states that "[t]he court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[72] However, such a showing cannot be made based on "mere allegations" in the pleadings, but rather on the evidence, or the opposing party's lack thereof.[73]

Litigants have great flexibility with regard to the types of evidence that may be used on summary judgment.[74] Specifically, Rule 56(c)(1)(A) provides that parties may support their assertions by citation to "depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials."[75] In short, "[t]he court may consider any material that [could] be admissible . . . at trial."[76]

A party opposing a motion for summary judgment "may . . . object on the ground that the cited materials cannot be presented in a form that would be admissible . . . ."[77] Generally speaking, "[m]aterial that is inadmissible will not be considered on a summary-judgment motion because it would not establish a genuine dispute of material fact if

---

72. FED. R. CIV. P. 56(a).

73. *See* Williams v. United Parcel Serv., Inc., 963 F.3d 803, 807 (8th Cir. 2020) (stating that on summary judgment, "we do not credit '[m]ere allegations, unsupported by specific facts or evidence'"); Beasley v. Warren Unilube, Inc., 933 F.3d 932, 935 (8th Cir. 2019) (in a race discrimination suit, noting that the plaintiff cannot "rely on mere 'allegations or denials'" to defeat summary judgment); Mitchell v. Mills, 895 F.3d 365, 370 (5th Cir. 2018) (recognizing that "[a]t the summary-judgment stage, [a plaintiff] may not rest on mere allegations or unsubstantiated assertions but must point to specific evidence in the record demonstrating a material fact issue concerning each element of his claim"); Bush v. District of Columbia, 595 F.3d 384, 386 (D.C. Cir. 2010) (finding it improper for plaintiffs to have relied upon portions of their amended complaint to show a genuine issue of material fact, stating that they were barred from "resting upon 'mere allegations'" and "[t]heir obligation was to adduce evidence"). As stated in Rule 56(c),

> [a] party asserting that a fact cannot be or is genuinely disputed must support the assertion by [either] (A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or (B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

FED. R. CIV. P. 56(c)(1).

74. *See* 10A CHARLES ALAN WRIGHT, ARTHUR R. MILLER & MARY KAY KANE, FEDERAL PRACTICE AND PROCEDURE § 2721 n.10 (4th ed. 2022) (citing cases).

75. FED. R. CIV. P. 56(c)(1)(A).

76. *See* Smith v. City of Chicago, 242 F.3d 737, 741 (7th Cir. 2001) (internal quotation marks omitted) (stating that "[i]n granting summary judgment, a court may consider any material that would be admissible or usable at trial, including properly authenticated and admissible documents or exhibits"). *See also* WRIGHT ET AL., *supra* note 74, § 2721.

77. WRIGHT ET AL., *supra* note 74, § 2721.

offered at trial and continuing the action would be useless."[78] Inadmissible hearsay is one example of material that cannot be considered.[79] In short, on summary judgment, the evidence need not be in admissible form, but it must be admissible in content.[80] Accordingly, when a court considers the contents of a secret recording on summary judgment, the court will often find—or at least imply—that those contents would be admissible.[81]

One interesting case where a court relied on a secret recording to deny summary judgment to an employer is *Magyar v. Saint Joseph Regional Medical Center*,[82] a 2008 opinion from the Seventh Circuit. The plaintiff in that case, college student Jessica Houston, began working in April 2004 in the surgical department at Saint Joseph Regional Medical Center (Hospital).[83] Thereafter, a fifty-two-year-old male co-worker came into a crowded Hospital lounge and sat on Houston's lap, whispering, "You're pretty" in her ear.[84] Houston later reported the matter to her boss, Pam Goddard.[85] Unsatisfied with Goddard's response, Houston then complained directly to the Hospital's attorney, Robert Wade.[86] Thereafter, Wade instructed Goddard to meet with Houston again.[87]

---

78. *Id.* § 2727.2.

79. *See* Garside v. Osco Drug, Inc., 895 F.2d 46, 50 (1st Cir. 1990) (citing cases from six Circuits); *see, e.g.*, Johnson v. Weld Cnty., Colo., 594 F.3d 1202, 1208–10 (10th Cir. 2010) (refusing to consider on summary judgment the plaintiff's testimony that certain co-workers had told plaintiff that the individual in charge of hiring did not hire plaintiff because of her sex and her disability because such statements were inadmissible hearsay).

80. Winskunas v. Birnbaum, 23 F.3d 1264, 1267–68 (7th Cir. 1994); Wheatley v. Factory Card & Party Outlet, 826 F.3d 412, 420 (7th Cir. 2016) ("In granting summary judgment, a district court may consider any evidence that would be admissible at trial. The evidence need not be admissible in form, but must be admissible in content, such that, for instance, affidavits may be considered if the substitution of oral testimony for the affidavit statements would make the evidence admissible at trial.") (citation omitted).

81. *See* Brown v. Perez, 835 F.3d 1223, 1232 (10th Cir. 2016) (noting that "[t]o determine whether genuine issues of material fact make a jury trial necessary, a court necessarily may consider only the evidence that would be available to the jury"), *as amended on reh'g* (Nov. 8, 2016); Gross v. Burggraf Constr. Co., 53 F.3d 1531, 1541 (10th Cir. 1995) ("It is well settled in this circuit that we can consider only admissible evidence in reviewing . . . summary judgment."). *See, e.g.*, Whitney v. City of Milan, No. 1:09-CV-01127-JDB-EGB, 2014 WL 11398537, at *4–6, 12–13 (W.D. Tenn. Feb. 25, 2014) (rejecting challenges to the admissibility of a secretly recorded conversation under FED. R. CIV. P. 56(c)(2), and later relying on the contents of that recording in denying summary judgment to employer on a retaliation claim); Macuba v. Deboer, 193 F.3d 1316, 1325 (11th Cir. 1999) (finding the district court to have erred in considering certain hearsay testimony on summary judgment because the statements at issue were hearsay, none of the statements would be admissible at trial under a hearsay exception, and they would not otherwise be admissible as substantive evidence).

82. 544 F.3d 766 (7th Cir. 2008).

83. *Id.* at 767–68.

84. *Id.* at 768.

85. *Id.*

86. *Id.* at 769.

87. *Id.*

Houston and Goddard did eventually meet again, but their discussion focused on why Houston felt the need to approach Wade.[88] Unbeknownst to Goddard, Houston recorded this conversation.[89] Two days later, Houston sent Wade a formal letter complaining about how Goddard handled her initial complaint and the new fact that Houston's "job had been posted on the job listings . . . in apparent retaliation for [Houston] turning . . . [Goddard] in."[90] Less than two weeks later, Goddard began the process of restructuring Houston's position.[91] After the restructured position was awarded to someone else, Houston was formally terminated, and "Goddard marked 'no' in the box asking whether [Houston] was eligible for rehire."[92]

Houston later sued the Hospital under Title VII claiming it had retaliated against her for complaining about sexual harassment and for objecting to Goddard's handling of her complaint.[93] The district court granted summary judgment to the Hospital, but the Seventh Circuit reversed.[94] Noting that "[s]uspicious timing . . . can sometimes raise an inference of a causal connection," the Seventh Circuit determined that no more than nine days transpired between the time Houston complained about Goddard's handling of her complaint and the advertisement of Houston's job, an event that led to her termination.[95] To combat this suspicious timing, the Hospital attempted to minimize the apparent causal link between Houston's complaint to Wade and Goddard's alleged retaliatory restructuring of Houston's job by pointing out that Goddard "stated (in a secretly-tape-recorded conversation) [made by Houston] that she had no problem with 'anyone taking anything to the Legal Department.'"[96] Upon closer examination of Houston's recording, however, the court determined that "as a whole, a rational jury could interpret the conversation in Houston's favor."[97] The court then quoted the full recorded comment, as follows:

> I have no problem with anyone taking anything to the legal department but I am just curious when the situation was dealt with I thought it was dealt with very effectively it was a positive outcome. You got

88. *Magyar*, 544 F.3d at 769.
89. *Id.* at 776.
90. *Id.* at 769 (internal quotation marks omitted).
91. *Id.*
92. *Id.* at 769–70.
93. *Id.* at 770.
94. *Magyar*, 544 F.3d at 767–68. As the Seventh Circuit noted, to prevail on her retaliation claim, Houston had to present sufficient evidence that (1) she engaged in a statutorily protected activity, (2) she suffered an adverse employment action, and (3) these events were causally connected. *Id.* at 770.
95. *Id.* at 772–73.
96. *Id.* at 773; *see id.* at 776 (Posner, J., dissenting).
97. *Id.* at 773.

> what you asked for. And yet you still because you don't think I said the right words or I phrased the right sentence what was your expectation of what you wanted to see happen after taking it to the [legal] department.[98]

In the court's view, "[a] reasonable jury could find Goddard's statements defensive and accusatory."[99] In the recording, the court noted, Goddard "comes across as having a substantial problem with Houston's decision to take the matter to the legal department, despite her perfunctory statement to the contrary."[100] According to the court, this recorded evidence—along with Goddard's defensive and irritated tone, Goddard's admission that she was "shocked" when she learned that Houston had complained about her, and Goddard's posting of Houston's job shortly after this meeting—was "more than mere suspicious timing" and "sufficient to raise an inference of causation."[101] Accordingly, the Hospital was not entitled to summary judgment on Houston's retaliation claim.[102]

In dissent, Judge Richard Posner questioned the majority's finding of retaliation for having engaged in protected conduct.[103] In doing so, Judge Posner repeatedly noted that Houston had secretly recorded her conversation with Goddard "in violation of Illinois law."[104] In one passage, Judge Posner reasoned, "[i]n the conversation with Goddard that she secretly recorded in violation of Illinois law, Houston confirmed that she had complained to the general counsel only because" of how Goddard had handled her complaint, rather than for any underlying harassment.[105] In another passage, Judge Posner described Houston's recording as "an illegal secret tape recording" conducted for "litigation planning" once Houston realized she was about to lose her job.[106] Finally, Judge Posner declared that "[t]his is not a case about the sexual harassment of an employee, but about the litigation harassment of an employer," and that "[t]he district judge was right to end it."[107]

In the end, *Magyar* shows how courts can rely on an employee's secret recording as critical evidence on summary judgment, both in the employee's favor (as in the majority opinion) and in the employer's

---

98. *Id.*

99. *Id.*

100. *Magyar*, 544 F.3d at 773.

101. *Id.*

102. *Id.* at 774. In reaching this result, the court also found that the Hospital failed to show an absence of material fact on the question of whether it would have taken the same action even without a retaliatory motive. *See id.* at 773–74.

103. *Id.* at 774 (Posner, J., dissenting).

104. *Id.* at 777 (Posner, J., dissenting) (citing 720 ILL. COMP. STAT. 5/14–2(a)(1)).

105. *Id.*

106. *Magyar*, 544 F.3d at 779.

107. *Id.* at 780.

favor (as in the dissent). For its part, the majority relied upon Houston's secret recording as evidence to rebut her employer's explanation for why she was terminated, while the dissent cited the very act of recording itself as a reason to terminate the case in a manner reminiscent of the general judicial attitudes towards secret recordings outlined in Part I (as depicted in cases like *Argyropoulos*).[108] These divergent uses of an employee's secret recording demonstrate that such recordings can play a critical role on summary judgment.

In a more recent case, *Whitney v. City of Milan*,[109] a district court relied on a secret audio recording of a conversation between the plaintiff and her boss as the critical evidence necessary to deny summary judgment to the employer on plaintiff's retaliation claim. The plaintiff in that case, Lindsey Whitney, was hired in 2006 by the City of Milan (the City) to work in the street department.[110] The following summer, City Recorder Keri Williams began training Whitney for other positions with the City, and they became friends.[111] In September 2008, Mayor Chris Crider fired Williams, prompting Williams to sue the Mayor and the City.[112]

Within a few months, Whitney became administrative assistant to the Milan Fire Chief, James Fountain.[113] Thereafter, Whitney was deposed in Williams's suit and testified that Crider had threatened to fire her if she got involved in that suit.[114] After her testimony, Whitney claims that she was denied EMT training and promotion opportunities within the fire department.[115] Thereafter, Whitney filed her own suit alleging that the City and Crider reduced her job duties and denied her training opportunities and a promotion in retaliation for participating in Williams's suit.[116] Defendants later moved for summary judgment.[117]

Before addressing the motion, the court first addressed the City's evidentiary objections to a secret audio recording and transcript that captured a telephone conversation between Whitney and Chief Fountain.[118] The City sought to remove the recording from summary judgment consideration under Federal Rule of Civil Procedure 56(c)(2), arguing that it "cannot be presented in a form that would be admissible

108. *See id.*; *see* discussion *supra* Part I.
109. No. 1:09-CV-01127-JDB-EGB, 2014 WL 11398537, at *13 (W.D. Tenn. Feb. 25, 2014).
110. *Id.* at *2.
111. *Id.*
112. *Id.*
113. *Id.*
114. *Id.*
115. *Whitney*, 2014 WL 11398537, at *3.
116. *Id.* at *4.
117. *Id.* at *1.
118. *Id.* at *4.

in evidence."[119] Specifically, the City challenged the admissibility of the recording based on authenticity, best evidence, and hearsay concerns.[120] The court rejected each challenge.[121]

First, the City argued that neither the recording nor the purported transcript were properly authenticated as required by Federal Rule of Evidence 901.[122] The court disagreed.[123] As the court noted, to authenticate an item of evidence, Rule 901 requires the proponent to present "evidence sufficient to support a finding that the item is what the proponent claims it is."[124] To satisfy this requirement, Whitney produced her own affidavit stating that the audio recording at issue is "an accurate and true recording of [a] conversation between [herself] and Chief Fountain."[125] "This sworn statement of Whitney, a participant in the conversation, [was] sufficient to [authenticate] . . . the recording."[126] For similar reasons, the court found sufficient evidence to prove the authenticity of the transcript.[127]

Next, the City objected to the audio recording under the "best evidence rule."[128] This rule provides that "[a]n original . . . recording . . . is required in order to prove its content . . . ."[129] An exception to this rule makes a duplicate recording "admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."[130] Because the City failed to argue that the original recording's authenticity is in doubt or that it would be unfair to admit the duplicate, the court rejected this challenge as well.[131]

Finally, the City argued that the recording should not be considered on summary judgment because it contained inadmissible hearsay.[132] The court also rejected this challenge, finding that "[a]ny statements that

---

119. *Id.*; FED. R. CIV. P. 56(c)(2).
120. *Whitney*, 2014 WL 11398537, at*4–6.
121. *See id.*
122. *Id.* at *4.
123. *Id.*
124. *Id.*; FED. R. EVID. 901(a).
125. *Whitney*, 2014 WL 11398537, at *4.
126. *Id.*
127. *Id. at* *5.
128. *Id.*
129. FED. R. EVID. 1002.
130. FED. R. EVID. 1003.
131. *Whitney*, 2014 WL 11398537, at *5. The court rejected this challenge even though the original recording, which Whitney no longer possessed, had been heavily edited. *Id.* As the court described it, the City argued that the audio recording submitted by Whitney "is but a shell of its former self in that the original form of the recording contained between twelve and eighty hours of recorded time; Plaintiff's attorneys edited the original recording by eliminating 'dead time'; and Whitney is no longer in possession of the original, unedited recording." *Id.*
132. *Id.* at *6.

Fountain made during the telephone conversation are party-opponent admissions within the meaning of Federal Rule of Evidence 801(d)(2) and are therefore nonhearsay statements."[133] In addition, the court found that Whitney's end of the conversation is "nonhearsay to the extent the Court considers them as admissible not for their truth, but rather to provide context to Fountain's end of the conversation."[134]

Having determined that it could consider Whitney's secret recording on summary judgment, the court then analyzed Whitney's state law retaliation claim under the Tennessee Human Rights Act (THRA) based on the alleged reduction in her job duties after testifying in the Williams case.[135] Before addressing that claim, the court noted that it had previously dismissed Whitney's similar First Amendment retaliation claim due to her "conclusory allegations . . . that she [was] no longer allowed to perform 'many' of her job responsibilities . . . ."[136] With the addition of her recording, however, Whitney now presented "more than her own assertions" to defeat summary judgment on her THRA retaliation claim.[137]

After quoting at length from the recorded telephone conversation between Whitney and Chief Fountain, the court found that "[t]his exchange supplies . . . what had been missing before with regard to [Whitney's] proof [of retaliation]: some description of the nature of her job duties prior to and following her protected activity."[138] The court further declared that "[i]f this [recorded] evidence is to be believed, Whitney went from being a hands-on and mobile assistant, actively involved in the affairs and outside endeavors of the Department, to being a largely clerical employee, fixed to her desk and confined to ministerial duties."[139] In the end, this recorded evidence enabled Whitney to withstand summary judgment on her retaliation claim.[140]

---

133. *Id.*

134. *Id.*

135. *See id.* at *9–16. Similar to the federal employment discrimination laws, under the THRA, employers are prohibited from retaliating against any individual "because such person has opposed a practice declared discriminatory by [the statute] or because such person has made a charge, filed a complaint, testified, assisted or participated in any manner in any investigation, proceeding or hearing under the THRA." *Id.* at *9 (quoting TENN. CODE ANN. § 4-21-301(1)). *Cf.* 42 U.S.C. 2000e-3(a) (making it unlawful under Title VII "for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter").

136. *Whitney*, 2014 WL 11398537, at *12.

137. *Id.*

138. *Id.* at *13.

139. *Id.*

140. *Id.*

As in *Magyar*, *Whitney* shows how a secret recording can be used to defeat an employer's bid for summary judgment on a retaliation claim. And although Rule 56 permits a party on summary judgment to "object that [a secret recording] . . . cannot be presented in a form that would be admissible in evidence,"[141] *Whitney* demonstrates that the Rules of Evidence often make recorded evidence admissible at trial, an issue more fully developed in Part III below.[142] Before addressing the admissibility issue, the next Section examines how a plaintiff's reference to recorded conversations in a complaint can prove beneficial at the motion to dismiss stage.

C. Cases Resolved on a Motion to Dismiss

At times, references to secretly recorded conversations in a plaintiff's complaint might help stave off dismissal of claims of harassment, discrimination, or retaliation. One interesting example is *Irrera v. Humpherys*, an opinion from the United States Court of Appeals for the Second Circuit that reversed an order granting the defendants' motion to dismiss a retaliation claim based on having complained of sexual harassment.[143]

The plaintiff in that case, Joseph Irrera, was admitted to the Doctor of Musical Arts (DMA) program at the University of Rochester's Eastman School of Music (Eastman) and began taking piano lessons from Dr. Douglas Humpherys, a piano professor and Chair of Eastman's Piano Department.[144] In his complaint, Irrera alleged that Humpherys made unwanted sexual advances towards him in September 2010 and touched him inappropriately during piano lessons.[145] After Irrera asked Humpherys to stop, Humpherys allegedly retaliated against him by assigning his first required solo recital a failing grade.[146] After further solo recital failures, Irrera complained to University administration about Humpherys's alleged harassment.[147]

---

141. FED. R. CIV. P. 56(c)(2).

142. *See infra* Part III.

143. Irrera v. Humpherys, 859 F.3d 196, 198 (2d Cir. 2017).

144. Irrera v. Univ. of Rochester, No. 15-CV-6381, 2016 WL 9447210, at *1 (W.D.N.Y. May 23, 2016), *aff'd in part, rev'd in part and remanded sub nom.* Irrera v. Humpherys, 859 F.3d 196 (2d Cir. 2017).

145. *Id.* In this Article, references to Irrera's complaint refer to his proposed amended complaint, Doc. 12-1, the subject of the defendants' motion to dismiss. *See* Proposed Amended Complaint and Jury Demand at 7, Irrera v. Univ. of Rochester, No. 6:15-cv-06381 (W.D.N.Y. Oct. 26, 2015) (describing the alleged sexual harassment).

146. *Irrera*, 2016 WL 9447210, at *2.

147. *Id.* at *1–2. *See also* Proposed Amended Complaint and Jury Demand at 11, Irrera v. Univ. of Rochester, No. 6:15-cv-06381 (W.D.N.Y. Oct. 26, 2015) (describing a failed second recital).

Irrera eventually switched his training to a different faculty member, and graduated from the DMA program in May 2014.[148] Following his graduation, "Irrera applied to twenty-eight colleges and universities for open teaching positions in their piano department, but did not receive a single . . . interview."[149] Such an outcome, he alleges, is "'extraordinarily rare . . .' for an Eastman graduate, [as] [p]ractically all of the DMA students at Eastman . . . found a job shortly after they graduated and some even while they were still completing the DMA degree."[150]

Given these unusual circumstances, Irrera alleged retaliation "on the theory that the absence of any interviews resulted from negative references from Humpherys and that [he] gave a negative reference as a result of Irrera's rejection of [his] sexual advances."[151] To support this theory, Irrera's complaint references numerous secretly recorded conversations with Humpherys and other university officials.[152] In one of those recordings, Humpherys told Irrera that he "would never get a university professor job."[153] He also allegedly threatened to "make his life a living hell if he made any written report of sexual harassment."[154] Moreover, Marie Rolf, an Eastman dean, informed Irrera in a recorded conversation "she expected that 'future employers would call, email or otherwise contact Humpherys to get feedback regarding [his] abilities to perform in his primary instrument.'" Rolf also stated that "she received calls all the time even though not listed as someone's reference," and that "we cannot get [Humpherys] out of your life—he has been your teacher for so long[.]"[155]

At the trial level, defendants moved to dismiss Irrera's complaint for failure to state a claim on which relief can be granted under Federal Rule of Civil Procedure 12(b)(6).[156] Granting the motion, the district court found that Irrera failed to make any specific factual allegations that Humpherys or anyone else actually gave a negative reference,

148. *Irrera*, 2016 WL 9447210, at *1–2.

149. Irrera v. Humpherys, 859 F.3d 196, 198 (2d Cir. 2017).

150. *Id.*

151. *Id.*

152. *See* Proposed Amended Complaint and Jury Demand, Irrera v. Univ. of Rochester, No. 6:15-cv-06381 (W.D.N.Y. Oct. 26, 2015).

153. *See id.* at 11 (¶ 31), 14 (¶ 41).

154. *See id.* at 17 (¶ 49).

155. *Irrera*, 859 F.3d at 198 (citations omitted). *See also* Proposed Amended Complaint and Jury Demand at 15, Irrera v. Univ. of Rochester, No. 6:15-cv-06381 (W.D.N.Y. Oct. 26, 2015) (describing this recorded conversation with Dr. Rolf).

156. Irrera v. Univ. of Rochester, No. 15-CV-6381, 2016 WL 9447210, at *1 (W.D.N.Y. May 23, 2016), *aff'd in part, rev'd in part and remanded sub nom.* Irrera v. Humpherys, 859 F.3d 196 (2d Cir. 2017).

making his claim speculative.[157] But the Second Circuit Court of Appeals reversed, finding Irrera's claim "sufficiently plausible to withstand a motion to dismiss at the pleading stage."[158]

According to the Second Circuit, "[t]he context of Irrera's retaliation claim is the unsuccessful quest of a graduate conservatory piano student for a teaching position after he declined alleged sexual approaches from the man who was his teacher and the department chair."[159] Given Irrera's background and the fact that he graduated from "one of the Nation's most highly regarded schools of music," the court found it "plausible that these [twenty-eight] schools received negative references from the chairman of Eastman's piano department, who had been Irrera's teacher."[160] The court also found it "plausible that a teacher who warned his student that he would make his life a 'living hell' if he made a written report of the teacher's sexual advances would give that student a negative reference, even if the student later complained to a school dean only orally."[161] Further, the court deemed it "plausible that, since such a teacher is the chair of a department, he would be contacted by schools to which Irrera applied even though he was understandably not listed as a reference."[162] Accordingly, the court determined that Irrera plausibly alleged a valid retaliation claim, even though his "complaint makes no allegation that he is aware of a negative reference sent to any particular school."[163]

Although the Second Circuit did not cite any of Irrera's alleged secret recordings in its plausibility analysis, those recordings undoubtedly influenced its decision. For example, one of Irrera's recordings captured various statements by Dean Rolf indicating that potential employers would likely contact Humpherys given his involvement in Irrera's education, and in its analysis the court found it plausible that Humpherys "would be contacted by schools to which Irrera applied even though he was understandably not listed as a reference."[164] The court also invoked the statement in Irrera's complaint alleging that Humpherys stated "he would make his life a 'living hell' if he [reported the alleged] sexual

157. *See id.* at *2 (noting that "[f]actual allegations must be enough to raise a right to relief above a speculative level"); *id.* at *4–5 (discussing this retaliation claim).

158. *Irrera*, 859 F.3d at 197. Before analyzing the merits of the case, the court first acknowledged that "courts have struggled to draw the line between speculative allegations and those of sufficient plausibility to survive a motion to dismiss." *Id.* at 198.

159. *Id.* at 198.

160. *Id.* at 198–99.

161. *Id.* at 199.

162. *Id.*

163. *Id.*

164. *Irrera*, 859 F.3d at 199.

advances,"[165] one that is similar to the recorded statement—noted earlier in the Second Circuit's opinion—where Humpherys told Irrera that he "would never get a university professor job . . . ."[166] In sum, Irrera's complaint demonstrates how allegations of secretly recorded conversations can bolster an otherwise borderline claim by making it more plausible, particularly when those recordings would likely be admissible at trial, an issue addressed in the next Part.

III. Admitting Secret Recordings at Trial Under the Rules of Evidence

While "[a]udio tape recordings are generally admissible as evidence,"[167] the admissibility of audio recordings lies within the trial court's discretion and is "predicated on the proponent's ability to produce [sufficient] evidence of the authenticity, accuracy, and relevance of such recordings."[168] Under the Federal Rules of Evidence, in particular, an audio recording must be audible and must be relevant to a material issue in the case.[169] In addition, to authenticate a recording, "a witness must testify that the recording is a fair and accurate reproduction of the sounds she made or heard."[170]

Beyond the core requirements of authenticity, accuracy, and relevance, audio recordings must not be inadmissible under other Rules of Evidence, such as hearsay rules, and must withstand potential constitutional objections.[171] With this background, this Part examines the major evidentiary issues that are likely to arise with respect to employees' secret audio recordings, beginning with the basic requirement of relevance.

---

165. *Id.*

166. *See id. at 198. See also* Proposed Amended Complaint and Jury Demand, at 11, Irrera v. Univ. of Rochester, No. 6:15-cv-06381 (W.D.N.Y. Oct. 26, 2015) (describing this recorded conversation).

167. Smith v. City of Chicago, 242 F.3d 737, 741 (7th Cir. 2001).

168. United States v. Vasconcellos, 658 F. Supp. 2d 366, 398 (N.D.N.Y. 2009) (citing United States v. Ruggiero, 928 F.2d 1289, 1303 (2d Cir. 1991)). *See also* Rychlak, *supra* note 9, at 5; United States v. Murdock, 699 F.3d 665, 670 (1st Cir. 2012) (stating that "[t]he admissibility of voice recordings and voice identifications is left to the sound discretion of the trial judge"); United States v. Webster, 84 F.3d 1056, 1064 (8th Cir. 1996) (noting "[t]he admission of tape recordings is 'within the sound discretion of the trial court and will not be reversed unless there has been an abuse of that discretion'").

169. Rychlak, *supra* note 9, at 2–3 (citing Fed. R. Evid. 401).

170. *Id.* at 3 (citing Fed. R. Evid. 901(a)).

171. *See* Fed. R. Evid. 402 (stating that "[r]elevant evidence is admissible unless any of the following provides otherwise: the United States Constitution; a federal statute; these rules; or other rules prescribed by the Supreme Court").

A. Relevance

Under the Federal Rules of Evidence, evidence that is relevant is generally admissible.[172] Moreover, "[e]vidence is relevant if: (a) it has any tendency to make a fact more or less probable than it would be without the evidence; and (b) the fact is of consequence in determining the action."[173]

Secret recordings will often satisfy this simple relevance standard. Consider a sexual harassment case involving a secret recording of a supervisor requesting a sexual favor from the employee who made the recording. In this instance, this recording (the item of evidence) would certainly make the alleged fact of having been the victim of harassment "more . . . probable than it would be without the evidence," and would help the plaintiff prove the elements of her harassment claim.[174]

Courts have recognized that secret recordings might be relevant in this type of scenario.[175] In the *Cornell* case noted earlier, Lisa Cornell sued her former employer alleging that she had been sexually harassed by her supervisor, Shawn Corbett.[176] In her lawsuit alleging retaliation for having complained of that harassment, Cornell admitted that she had secretly recorded her conversations with Corbett "using a hidden audio recorder."[177] Cornell later sought a court order that would allow her to withhold discovery of her recordings until certain witnesses were deposed, but the court rejected the request because the recordings were relevant to a claim or defense in the case.[178] Indeed, the court found that "the recordings at issue go directly to the merits of [Cornell's] case," and Cornell herself had acknowledged that at least some of the recordings "'are relevant and likely admissible evidence.'"[179] Accordingly, the court determined that Cornell "must produce the requested audio recordings without further delay."[180] As this case reveals, it is generally not difficult

---

172. *See id.*

173. FED. R. EVID. 401.

174. *Id. See also* Blomker v. Jewell, 831 F.3d 1051, 1056 (8th Cir. 2016) (stating the elements of sexual harassment under a hostile work environment theory); King v. McMillan, 594 F.3d 301, 310 (4th Cir. 2010) (discussing relevance of certain evidence of harassment).

175. *See* People v. Montes, 992 N.E.2d 565, 580 (Ill. App. Ct. 2013) ("There is no doubt that sound recordings are admissible if they are otherwise competent, material and relevant and where a proper foundation is laid.").

176. Cornell v. Jim Hawk Truck Trailer, Inc., 297 F.R.D. 598, 599 (N.D. Iowa 2013).

177. *Id.*

178. *See id.* at 602–03 (citing FED. R. CIV. P. 26(b)(1)). Under the Federal Rules of Civil Procedure, "[p]arties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claim or defense." FED. R. CIV. P. 26(b)(1).

179. *Cornell*, 297 F.R.D. at 602.

180. *Id.* at 603.

to satisfy the relevance requirement, and numerous cases exist where courts have deemed recorded conversations relevant and admissible.[181]

B. Hearsay

One common evidentiary objection to secretly recorded conversations is that they constitute inadmissible hearsay insofar as they contain statements that a "declarant does not make while testifying" in court.[182]

Under the Federal Rules of Evidence, hearsay is generally "not admissible."[183] Nevertheless, hearsay challenges should not normally bar a typical audio recording. As an initial matter, the Federal Rules of Evidence define "hearsay" as "a statement that (1) the declarant does not make while testifying at the current trial or hearing; and (2) a party offers in evidence to prove the truth of the matter asserted in the statement."[184] Under requirement (1) of this definition, if an employee like Lisa Cornell seeks to admit a recording of a conversation made out-of-court where a speaker in that recording (the declarant) makes harassing comments, this would constitute "a statement" that this particular "declarant does not make while testifying at the current trial or hearing."[185] For two reasons, however, the recording might still be admissible.

First, under requirement (2) above, an out-of-court statement would not actually constitute hearsay if the statement is offered to prove something other than the truth of its content, a requirement that is arguably lacking in the scenario involving recorded statements of a sexual nature.[186] To illustrate, assume an employee, Jessica, has a recording in which her supervisor makes comments about her body and appearance, such as, "Your shirt is extra tight today, Jessica!" Under Rule 801(c), an out-of-court statement would constitute "hearsay" only if it is "offer[ed] in evidence to prove the truth of the matter asserted in the

---

181. *See, e.g.*, United States v. Culver, 929 F.2d 389, 391 (8th Cir. 1991) (finding recorded conversations of an undercover agent, confidential informant, and co-conspirators relevant to a material issue in the case); United States v. Oslund, 453 F.3d 1048, 1057 (8th Cir. 2006) (finding district court did not abuse its discretion in admitting taped conversations between a defendant and an informant); Rochefort v. Glob. Precision Servs., No. EP-20-CV-00298-FM, 2021 WL 3566428, at *1–2 (W.D. Tex. Feb. 23, 2021) (recognizing that plaintiff's secret recordings, which he claimed would disprove allegations of sexual harassment against him, "may be evidence relevant to the merits of [p]laintiff's claims").

182. FED. R. EVID. 801(c)(1). *See also* Rychlak, *supra* note 9, at 17–18.

183. FED. R. EVID. 802.

184. FED. R. EVID. 801(c).

185. *See id. See also* FED. R. EVID. 801(b) (defining "declarant" as "the person who made the statement").

186. FED. R. EVID. 801(c)(2).

statement."[187] In this example, the assertion is that Jessica's shirt was extra tight on the day in question, but the recorded statement would not be offered as evidence that Jessica's shirt was indeed tight that day. Rather, Jessica would offer this statement as evidence that comments of a sexual nature were made by her boss.[188] In this sense, the statement is a "verbal act"—i.e., one that has independent legal significance simply for having been said, such as, "I accept your offer" in a dispute over whether a contract was formed.[189] Here, the compliment to Jessica takes on independent legal significance in tending to prove an element of sexual harassment under a hostile work environment theory, specifically, that the plaintiff experienced unwelcome sexual harassment in the form of sexually charged comments about her appearance.[190] As such, the statement is not hearsay because it is not being offered to prove what the declarant said about Jessica's shirt was in fact true; rather, it would be offered as evidence of the legally significant event itself (harassment).[191]

---

187. *Id.*

188. Blomker v. Jewell, 831 F.3d 1051, 1056 (8th Cir. 2016) ("To establish the elements of a sexual harassment claim based on a hostile environment, a plaintiff must show that: (1) she belongs to a protected group; (2) she was subject to unwelcome sexual harassment; (3) the harassment was based on sex; (4) the harassment affected a term, condition, or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take proper remedial action.").

189. *See* Paul F. Kirgis, *Meaning, Intention, and the Hearsay Rule*, 43 WM. & MARY L. REV. 275, 307 (2001) (noting that "traditional hearsay doctrine holds that verbal acts, such as contractual promises, defamation, and fraud, are not hearsay either because they are nonassertive, or because they are not offered for the truth of the matter asserted because the statement has independent legal significance"). *See, e.g.*, Howley v. Town of Stratford, 217 F.3d 141, 155 (2d Cir. 2000) ("[T]estimony by [plaintiff's] informants . . . that [an alleged harasser] had made [certain harassing] statements would not be hearsay since that testimony would be offered not to prove the truth of his statements but only to prove that he made them."); Moore v. Warden, London Corr. Inst., No. 1:11-CV-155, 2012 WL 748386, at *14 (S.D. Ohio Mar. 8, 2012) (declaring that "[t]he victim's testimony about messages Petitioner left for her is simply not hearsay, but proof of Petitioner's verbal acts of harassment and threat"), *report and recommendation adopted*, No. 1:11-CV-155, 2012 WL 1633597 (S.D. Ohio May 9, 2012). *Cf.* John F. Wirenius, *Actions as Words, Words as Actions: Sexual Harassment Law, The First Amendment and Verbal Acts*, 28 WHITTIER L. REV. 905, 907 (2007) (arguing that because it is more like an act than like communication, speech that creates a hostile work environment constitutes a "verbal act" and is thus not protected by the First Amendment).

190. *See Blomker*, 831 F.3d 1056 (8th Cir. 2016) (stating the elements of sexual harassment based on a hostile work environment theory). *See also* Ben Trachtenberg, *Confronting Coventurers: Coconspirator Hearsay, Sir Walter Raleigh, and the Sixth Amendment Confrontation Clause*, 64 FLA. L. REV. 1669, 1687 (2012) (providing as an example of a "verbal act" a conspirator's statement that proves the element of agreement in a conspiracy prosecution, such as "Yes, I will help you murder the old man and steal his money").

191. *See, e.g.*, N.L.R.B. v. Tex-Tan, Inc., 318 F.2d 472, 483–84 (5th Cir. 1963) (finding recorded statements made during a collective bargaining session not inadmissible hearsay in part because the recorded words were relevant "not to establish the truth of the things stated, but the fact that the words as such were spoken"); Norton v. Commonwealth, 890 S.W.2d 632, 635 (Ky. Ct. App. 1994) (finding it proper to admit recordings capturing a drug sale involving two criminal

Second, if the recording captures statements of a party to the litigation, or if it includes statements of an agent or representative of a party, that recording could be considered "not hearsay" under Federal Rule of Evidence 801(d)(2), which would be enough to withstand a hearsay challenge.[192] Recall that in *Whitney v. City of Milan*, the court rejected a hearsay challenge to a secret audio recording of a conversation between the plaintiff and her boss on this basis, stating that "[a]ny statements that [the City's employee, Chief] Fountain made during the telephone conversation are party-opponent admissions within the meaning of Fed. R. Evid. 801(d)(2) and are therefore nonhearsay statements."[193] The court found the plaintiff's end of the conversation "nonhearsay" as well to the extent they are considered "not for their truth, but rather to provide context to Fountain's end of the conversation."[194] As this case shows, a recorded statement of harassment by an employee of a party to the litigation would generally not be considered hearsay.[195]

This is not to suggest that a secretly recorded conversation will always survive a hearsay challenge. In a recent New York case, *Upstate Shredding, LLC v. Northeastern Ferrous, Inc.*,[196] a secret recording between a whistleblower and a party to the case was deemed inadmissible hearsay. The plaintiffs in this case were "corporations engaged in the purchase and processing of scrap metals[,]" and the defendants were scrap metal suppliers for the plaintiffs' business.[197] The secret recording at issue came about when Adam Weitsman, a party in the case, recorded a

---

defendants because the recordings "were evidence of the event itself, introduced for a non-hearsay purpose." Namely, as "evidence that the transaction or meeting did, in fact, occur and that the statements were, in fact, made" by the defendants). In the example above, assume further that Jessica responds with a statement indicating her disapproval, such as, "I am not comfortable with you making those kinds of comments about me at work." Here, this statement arguably would be hearsay if offered to prove that the comment was truly unwelcomed, an element of sexual harassment that Jessica must prove. Unlike the first statement, here the statement itself would be offered to prove the truth of its content—i.e., that Jessica truly was "not comfortable" with the comment at the time it was made.

192. *See* FED. R. EVID. 801(d)(2) (providing that certain admissions by party-opponents are excluded from the rule against hearsay). Such admissions are statements that seem to fit the general definition of hearsay from Rule 801(a)–(c), but the rules, by fiat, declare them not to be hearsay. FED. R. EVID. 801(a)–(c). In many states, these are recognized as hearsay but are labeled as exceptions to the rule against hearsay, thereby recognizing that these statements are, in fact, out-of-court statements that are offered for their truth.

193. Whitney v. City of Milan, No. 1:09-CV-01127-JDB-EGB, 2014 WL 11398537, at *6 (W.D. Tenn. Feb. 25, 2014).

194. *Id.*; *see* FED. R. EVID. 801(c)(2).

195. *See* FED. R. EVID. 801(d)(2)(D) ("A statement that meets the following conditions is not hearsay: . . . (2) An Opposing Party's Statement. The statement is offered against an opposing party and: . . . (D) was made by the party's agent or employee on a matter within the scope of that relationship and while it existed").

196. No. 3:12-CV-1015 LEK/DEP, 2016 WL 865299, at *14 (N.D.N.Y. Mar. 2, 2016).

197. *Id.* at *2.

conversation he had with a whistleblower who had unveiled defendants' scheme to defraud the plaintiffs.[198] Importantly, the whistleblower was not employed by any party to the litigation; rather, he was a truck driver for a third party company who happened to have information regarding the alleged fraudulent scheme.[199] Accordingly, since the recording contained out-of-court statements offered to prove the truth of the matters contained therein (such as the details of the fraudulent scheme), the court deemed the recording inadmissible under Rule 801(d)(2).[200]

In the end, the critical difference between *Upstate Shredding, LLC*, which found a secret recording inadmissible, and *Whitney*, which reached the opposite result, is the identity of the out-of-court declarant. Only in *Whitney* was the out-of-court declarant an employee of the defendant, which made the statement "not hearsay" under Rule 801(d)(2)(D).

C. Authentication

For a secretly recorded conversation to be admissible, it must be authenticated.[201] Generally speaking, "[t]his requirement 'does not erect a particularly high hurdle' for a proponent to clear."[202]

To determine whether a recording is properly authenticated, courts will often apply Federal Rule of Evidence 901(a).[203] Under Rule 901(a),

198. *See id.* at *1–2 (describing the whistleblower's original report of the fraudulent scheme); *id.* at *5, *13 (describing the identity of the whistleblower). *See also id.* at *12 (noting that "[f]or the purposes of the [instant] [m]otion . . . Plaintiffs rely on four groups of evidence from the FBI materials . . . [including] the statements of an Ontario Trucking driver ('Ontario Trucking Whistleblower') in an FBI 302 statement and a recorded conversation between the Whistleblower and [Adam] Weitsman"). In essence, the scheme consisted of an alleged arrangement between the defendant supplier and plaintiffs' former employees where the amount of scrap metal that was being delivered to plaintiffs was being deliberately overstated. *See id.* at *2. *See also* Upstate Shredding, LLC v. Ne. Ferrous, Inc., No. 3:12-CV-1015 LEK/DEP, 2014 WL 4883024, at *1–2 (N.D.N.Y. Sept. 30, 2014) (describing the scheme in detail).

199. *See Upstate Shredding, LLC*, 2016 WL 865299, at *13–14 (describing the whistleblower as an individual who worked for Ontario Trucking).

200. Recall that to be admissible under Rule 801(d)(2)(D), the out-of-court statements at issue must be "made by the party's agent or employee on a matter within the scope of that relationship and while it existed." FED. R. EVID. 801(d)(2)(D). In this case, however, the plaintiffs failed to show that the whistleblower was an agent of the defendant, and otherwise failed to identify any other applicable hearsay exception. *See Upstate Shredding, LLC*, 2016 WL 865299, at *13–14.

201. Whitney v. City of Milan, No. 1:09-CV-01127-JDB-EGB, 2014 WL 11398537, at *4 (W.D. Tenn. Feb. 25, 2014).

202. United States v. Hall, 20 F.4th 1085, 1104 (6th Cir. 2022).

203. *See, e.g.*, United States v. Murdock, 699 F.3d 665, 670 (1st Cir. 2012) (involving authentication of a recorded telephone call); Smith v. City of Chicago, 242 F.3d 737, 741 (7th Cir. 2001) (involving authentication of an audio tape recording, similar to *Murdock*, and stating that "[i]n determining authenticity we follow Fed.R.Evid. 901(a), which requires 'evidence sufficient to support a finding that the matter in question is what its proponent claims'").

to authenticate an item of evidence, "the proponent must produce evidence sufficient to support a finding that the item is what the proponent claims it is."[204] One way to accomplish this is through testimony from a witness with knowledge of the conversation that the item is what it is claimed to be.[205] When the plaintiff herself is a participant in the recorded conversation, this can often be done by having the plaintiff "testify that the recording is a fair and accurate reproduction of the sounds she made or heard."[206] As for other speakers in the recorded conversation, "[i]f the witness heard the speaker before and is familiar with the speaker's voice, she can testify as to the identity of the speaker based on her own personal knowledge."[207]

The *Whitney* case, for example, involved an audio recording of a telephone conversation between Whitney and her boss, Chief Fountain.[208] To satisfy this requirement, Whitney produced her own affidavit stating that the audio recording at issue is "an accurate and true recording of [a] conversation between [her] and Chief Fountain."[209] This sworn statement of Whitney, a participant in the conversation, [was] sufficient to authenticate the recording."[210]

"If there is no witness capable of testifying as to the original sound," as in a workplace with continual or round-the-clock audio surveillance that happens to capture evidence of harassment, the proponent can authenticate the recording "by having the person[] who placed the recording device in position testify as to its [operation] and establish a chain of custody for the recording."[211] "When laying the foundation in this second manner, the [proponent] should also plan on qualifying the equipment, and potentially the operator of the equipment, as capable and reliable for making accurate reproductions."[212]

In this context, courts will consider several nonexclusive factors when determining the admissibility of recorded conversations.[213] These fac-

---

204. FED. R. EVID. 901(a).

205. FED. R. EVID. 901(b)(1).

206. Rychlak, *supra* note 9, at 3.

207. *Id. See also Hall*, 20 F.4th at 1104 (stating that "[t]o admit 'an opinion as to the identity of a speaker,' the offering party simply needs to show 'that the identifier has heard the voice of the alleged speaker at any time'"; the court added that if this identification is doubtful, "this doubt merely goes to the weight to be given to the [identifier's] testimony, not to the admissibility of the recordings if the identifier has at least 'minimal exposure' to the voice").

208. Whitney v. City of Milan, No. 1:09-CV-01127-JDB-EGB, 2014 WL 11398537, at *4 (W.D. Tenn. Feb. 25, 2014).

209. *Id.*

210. *Id.*

211. *See* Rychlak, *supra* note 9, at 4.

212. *Id.*

213. United States v. Oslund, 453 F.3d 1048, 1054 (8th Cir. 2006).

tors, derived from the oft-cited case *United States v. McKeever*,[214] include the following:

> (1) the recording device was capable of recording the events offered in evidence; (2) the operator was competent to operate the device; (3) the recording is authentic and correct; (4) changes, additions, or deletions have not been made in the recording; (5) the recording has been preserved in a manner that is shown to the court; (6) the speakers on the tape are identified; and (7) [depending on the type of case,] the conversation elicited was made voluntarily and in good faith, without any kind of inducement.[215]

As courts have noted, "[t]hese factors are useful to determine if a 'tape's substance and the circumstances under which it was obtained [provide] sufficient proof of its reliability.'"[216] Courts have further recognized that "the technology related to recording devices has greatly advanced since *McMillan* was decided" in the 1950s.[217] Accordingly, these factors are merely "guidelines to be viewed in light of specific circumstances, not a rigid set of tests to be satisfied."[218] In the end, "if the totality of the circumstances surrounding the recordings satisfies the court as to their reliability, even if not every factor is explicitly and completely met, admission is proper."[219]

D. The Best Evidence Rule

The best evidence rule represents another potential objection to a secretly recorded conversation. This rule provides that "[a]n original writing, recording, or photograph is required in order to prove its content," with certain exceptions.[220] "An 'original' of a . . . recording means the . . . recording itself or any counterpart intended to have the same effect by the person who executed or issued it."[221] In this context, when an employee records a conversation at work, the employee would typically be in possession of their initial original recording, and would normally proffer the original without the force of a rule requiring it.[222]

---

214. 169 F. Supp. 426, 430 (S.D.N.Y. 1958), *rev'd on other grounds*, 271 F.2d 669 (2d Cir. 1959).

215. United States v. Webster, 84 F.3d 1056, 1064 (8th Cir. 1996). *See also* United States v. Haire, 806 F.3d 991, 996 (8th Cir. 2015) (applying these factors to wiretapped phone conversations).

216. *Oslund*, 453 F.3d at 1054.

217. *Id.* at 1054–55.

218. *Id.* at 1055. *See also* United States v. Clark, 986 F.2d 65, 68 (4th Cir. 1993) ("[T]he government was not required to meet every *McMillan* [factor]. [The] factors, while helpful, merely 'provide guidance to the district court when called upon to make rulings on authentication issues.'"); *Haire*, 806 F.3d at 996 (noting that "these *McMillan* factors are merely helpful guidelines and must be viewed in light of the circumstances rather than rigidly applied").

219. *Oslund*, 453 F.3d at 1057.

220. FED. R. EVID. 1002.

221. FED. R. EVID. 1001(d).

222. GRAHAM C. LILLY, PRINCIPLES OF EVIDENCE 421 (4th ed. 2006).

One exception makes a duplicate recording "admissible to the same extent as the original unless a genuine question is raised about the original's authenticity or the circumstances make it unfair to admit the duplicate."[223] In permitting the admission of a reliable "duplicate," the rule drafters recognized the accuracy of most reproductions in the modern technological era.[224] As such, "the principal impact of the Best Evidence Rule [today] is to exclude oral testimony about the contents of a . . . record[ing], not to exclude duplicates."[225] As cases like *Whitney* demonstrate, "[t]he best evidence rule should not bar a typical audio recording."[226]

E. Other Evidentiary Issues

As discussed, a secret audio recording will likely be admissible if it is relevant and a proper foundation is laid for its admission.[227] Nevertheless, there are a number of additional evidentiary issues that may arise with secret recordings. For example, although admissibility is typically not an issue with a partially inaudible recording or one that reproduces only a portion of a conversation, such a recording may be inadmissible if the partial inaudibility or omission is so substantial as to make the recording untrustworthy.[228]

In one case, a New York court refused to admit an audio recording into evidence on the basis that the recording was so inaudible and indistinct that the jury would have to speculate concerning its content.[229] In another similar case, the court found it erroneous to admit a recorded conversation that had been intentionally partially erased.[230] In another case, an employment discrimination plaintiff was unable to admit

---

223. FED. R. EVID. 1003.

224. LILLY, *supra* note 222, at 418.

225. *Id.*

226. Rychlak, *supra* note 9, at 18.

227. *See* F. M. English, Annotation, *Admissibility of Sound Recordings in Evidence*, 58 A.L.R. 2d 1024, § 2 (1958) ("[I]t is now almost universally held that sound recordings, if relating to otherwise competent evidence, are admissible providing a proper foundation is laid for their admission.").

228. *See* United States v. Bryant, 480 F.2d 785, 790 (2d Cir. 1973) (citing Monroe v. United States, 234 F.2d 49, 55 (D.C. Cir. 1956)) ("Unless the unintelligible portions are so substantial as to render the recording as a whole untrustworthy the recording is admissible, and the decision should be left to the sound discretion of the judge."); Norton v. Commonwealth, 890 S.W.2d 632, 636 (Ky. Ct. App. 1994) (in admitting audiotapes of a drug transaction, finding "the inaudible portions [of the recorded conversation] are not so substantial as to render the recordings untrustworthy as a whole"). *See also* English, *supra* note 227, § 2; Rychlak, *supra* note 9, at 2–3 (noting that "an audio recording is properly excluded when it is so inaudible and indistinct that the jury must speculate as to what is being said").

229. Lauro v. Bradley, 696 N.Y.S.2d 336, 337 (N.Y. App. Div. 1999) (affirming the trial court's evidentiary ruling on this basis).

230. Cassetta Frank, Inc. v. P.G.C. Assocs, 694 N.Y.S.2d 102, 103 (N.Y. App. Div. 1999).

surreptitious recordings he had made using a tiny microcassette recorder hidden in his sock.[231] According to the court, "[t]he resulting tapes are mostly garbled, often unintelligible, and suffer from an excess of background noise."[232] The recordings also had "serious problems of continuity because, either through editing or recorder malfunction, there are numerous blank spots on each tape."[233] As a result, the court found "serious issues . . . concerning whether changes, additions, or deletions have been made[,]" making the tapes inadmissible.[234]

In a case going the other way on this issue, *Passantino v. Johnson & Johnson Consumer Products, Inc.*, plaintiff Jennifer Passantino successfully introduced a recording she had made of a conversation with her company's vice president, John Hogan.[235] The recording, which was used to impeach Hogan as a witness, showed that Hogan had lied about an issue relating to Passantino's retaliation claim against the company.[236] On appeal, the company argued that because its copy of the recording was unclear, it was error to admit Passantino's copy.[237] Rejecting the argument, the court found the objectionable statement "essentially identical" to a similar statement made in a different, uncontested portion of the tape.[238] "Thus, the jury would have heard Hogan's false . . . statement regardless of which version of the tape was used."[239]

Aside from concerns regarding inaudibility and unfair editing, a recording's admissibility may depend on whether it contains privileged communications or prejudicial matter.[240] In other cases, the manner in which a recording was made may raise constitutional or statutory admissibility issues, including under the wiretapping laws discussed in the next Part.[241]

---

231. McAlinney v. Marion Merrell Dow, Inc., 992 F.2d 839, 842 (8th Cir. 1993).

232. *Id.*

233. *Id.*

234. *Id.*

235. Passantino v. Johnson & Johnson Consumer Prods., Inc., 212 F.3d 493, 499, 501–04, 508 (9th Cir. 2000).

236. *Id.* at 507–08.

237. *Id.* at 507.

238. *Id.* at 508.

239. *Id.*

240. *See* Rychlak, *supra* note 9, at 19; English, *supra* note 227, § 8 (discussing cases involving inclusion of irrelevant or prejudicial matter). Under Federal Rule of Evidence 403, "[a] court may exclude relevant evidence if its probative value is substantially outweighed by a danger of one or more of the following: unfair prejudice, confusing the issues, misleading the jury, undue delay, wasting time, or needlessly presenting cumulative evidence." FED. R. EVID. 403.

241. *See* Rychlak, *supra* note 9, at 17, 19 (discussing these issues).

IV. ADMISSIBILITY OF SECRET RECORDINGS UNDER WIRETAP LAWS

Even if the Federal Rules of Evidence do not make a recording inadmissible, that recording might still be inadmissible under a wiretap law. In essence, wiretap laws prohibit individuals from recording conversations without the consent of at least one participant in the conversation. Two major types of wiretap laws exist: two-party consent laws and one-party consent laws. As this Part shows, when an employee secretly records workplace conversations, this will typically violate a two-party consent law, which generally requires the consent of all parties to a conversation, but will usually not violate a one-party consent law.[242]

A. One-Party Consent Laws

Wiretap laws exist under both federal and state law. The Federal Wiretap Act, a one-party consent law, allows a conversation to be recorded if (a) the person making the recording is an actual participant in the conversation, or (b) someone else records a conversation with consent of one of the conversation's participants.[243] Analogous state laws—including those in Texas, Indiana, and Ohio—have similar requirements.[244]

---

242. *See* Kainen & Myers, *supra* note 26, at 102 (recognizing that "[e]mployers have successfully pursued state statutory claims [under state wiretap laws] against employees who record conversations at work without the consent of all parties").

243. *See* 18 U.S.C. § 2511(2)(d). *See also* Jesse Harlan Alderman, *Police Privacy in the iPhone Era?: The Need for Safeguards in State Wiretapping Statutes to Preserve the Civilian's Right to Record Public Police Activity*, 9 FIRST AMEND. L. REV. 487, 493 (2011) (stating that "Title III is a one-party consent statute"). The Federal Wiretap Act generally prohibits individuals from "intentionally intercept[ing] . . . any wire, oral, or electronic communication" without some applicable statutory exception). *See* 18 U.S.C. § 2511(1)(a); Briggs v. Am. Air Filter Co., 630 F.2d 414, 416–17 (5th Cir. 1980). The statute defines "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation . . . ." 18 U.S.C. § 2510(2). Given this definition, a person who alleges their oral communication was intercepted in violation of the Federal Wiretap Act must show that they expected their conversations were not subject to interception, and that their expectation was justified under the circumstances. Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). In addition, the statute defines "intercept" to mean "the aural or other acquisition of the contents of any wire, electronic, or oral communication through the use of any electronic, mechanical, or other device," 18 U.S.C. § 2510(4), thus evidencing a particular concern for the capture of certain communications through technological means. *See* Greenfield v. Kootenai Cnty., 752 F.2d 1387, 1388 (9th Cir. 1985) (citing S. REP. No. 1097, 90TH CONG., 2D SESS., *as reprinted in* 1968 U.S.C.C.A.N. 2112, 2113) ("The Federal Wiretap Act is designed to prohibit 'all wiretapping and electronic surveillance by persons other than duly authorized law enforcement officials engaged in the investigation of specified types of major crimes.'").

244. *See* TEX. PENAL CODE ANN. § 16.02(c)(4) (West 2023) (providing an affirmative defense when "a person not acting under color of law intercepts a wire, oral, or electronic communication, if: (A) the person is a party to the communication; or (B) one of the parties to the communication has given prior consent to the interception"); Alameda v. State, 235 S.W.3d 218, 222 (Tex. Crim. App. 2007) (recognizing that "the federal wiretap statute is substantively the same as the Texas [wiretap] statute"); IND. CODE ANN. § 35-31.5-2-176 (West 2023); State v. Lombardo, 738 N.E.2d

As relevant here, under a one-party consent law, a conversation can be lawfully recorded without obtaining the consent of *all* persons to the conversation.[245] Moreover, a one-party consent law typically allows one *participant* in a conversation to record a conversation without informing other participants of the recording and regardless of whether they would consent to the recording.[246] As such, a one-party consent law would typically not be violated when an employee secretly records a workplace conversation in which he or she participates.[247]

653, 658–59 (Ind. 2000) (discussing the Indiana Wiretap Act); OHIO REV. CODE ANN. § 2933.52(B)(4) (West 2023).

245. *See, e.g.*, 18 U.S.C. § 2511(2)(d) (stating that "[i]t shall not be unlawful . . . for a person not acting under color of law to intercept a wire, oral, or electronic communication where such person is a party to the communication or where one of the parties to the communication has given prior consent to such interception unless such communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State").

246. *See* Jake Tracer, *Public Officials, Public Duties, Public Fora: Crafting an Exception to the All-Party Consent Requirement*, 68 N.Y.U. ANN. SURV. AM. L. 125, 133 (2012). *See also* United States v. Fears, 450 F. Supp. 249, 252 (E.D. Tenn. 1978) (applying the Federal Wiretap Act and stating, "[e]ach party to a conversation, telephonic or otherwise, takes the risk that the other party may divulge the contents of that conversation, and should that happen, there has been no violation of the right of privacy"); United States v. Largent, 545 F.2d 1039, 1043 (6th Cir. 1976) (finding that "the court did not err in admitting into evidence the tapes of recorded telephone conversations between Michael and Largent, as Michael had consented thereto").

247. Under the Federal Wiretap Act, the ability to record based on one-party consent is not absolute. *See* Caro v. Weintraub, 618 F.3d 94, 99–100 (2d Cir. 2010) (discussing the legislative history of the statute). Rather, the one-party consent rule does not apply if the "communication is intercepted for the purpose of committing any criminal or tortious act in violation of the Constitution or laws of the United States or of any State." 18 U.S.C. § 2511(2)(d); *Caro*, 618 F.3d at 99–100. When a person records a conversation to gather evidence for use in litigation, this may or may not trigger this exception. On the one hand, when a person records a conversation to gather evidence for what they reasonably believe to be a legitimate discrimination or harassment claim, that individual would not normally have any criminal or tortious objective, hence no violation of the Federal Wiretap Act would occur. *See* Meredith v. Gavin, 446 F.2d 794, 796–98 (8th Cir. 1971) (finding no wiretap violation where claims manager of an insurance company recorded conversation "to keep accurate records of all conversations with claimants"). On the other hand, when an employee surreptitiously records a workplace conversation without the other party's consent, that action could constitute the tort of intrusion upon seclusion, and it is an open question whether the tort of intrusion is itself the type of "tortious purpose[]" contemplated by 18 U.S.C. § 2511(2)(d). *See Caro*, 618 F.3d at 99–100. Under the prevailing view, "a cause of action under § 2511(2)(d) requires that the interceptor intend to commit a crime or tort independent of the act of recording itself," but liability for the tort of intrusion upon seclusion in this circumstance is based on that very act. *See id.* at 100–01. In the end, therefore, surreptitiously recording a workplace conversation will typically not violate a one-party consent law. *But see* Phillips v. Bell, 365 F. App'x 133, 142–43 (10th Cir. 2010) (suggesting that the tortious purpose of "invasion of privacy" could satisfy the requirements of the Federal Wiretap Act, 18 U.S.C. § 2511(2)(d), if supported by sufficient factual allegations).

B. Two-Party Consent Laws

To provide greater protection against secret recordings, states may enact a two-party consent law, which about a dozen states have done.[248] Under a two-party consent law, *all parties* to a conversation must consent to the recording for it to be lawful.[249] If this does not occur, the employee runs the risk of being sued for wiretap violations. In *Coulter v. Bank of America*,[250] for example, Bank of America employee Christopher Coulter covertly recorded dozens of conversations with his supervisors and coworkers, many of which occurred in one-on-one meetings in private offices.[251] After Coulter's covert actions were discovered during the midst of a sexual harassment lawsuit he had filed, the bank and eleven employees filed a cross-complaint against Coulter for violation of the California Privacy Act, which generally prohibits recording a confidential communication without the consent of *all* parties to the communication.[252] When the dust settled, the trial court granted summary adjudication to the defendants on their Privacy Act claims and awarded $132,000 in damages, or $3,000 for each of Coulter's forty-four specific wiretap violations.[253]

---

248. *See* Allison B. Adams, *War of the Wiretaps: Serving the Best Interests of the Children?*, 47 FAM. L.Q. 485, 491–92 (2013) (noting that every state except Vermont has enacted its own wiretap statute, and that at least eleven of those state laws are two-party consent laws). *See* FLA. STAT. § 934.03(1) (2023) (generally prohibiting the interception of any wire, oral, or electronic communication); McDade v. State, 154 So. 3d 292, 297 (Fla. 2014) (discussing Florida's two-party consent exception set forth in § 934.03(2)(d)); California Invasion of Privacy Act (CIPA), CAL. PENAL CODE §§ 630–638 (West 2024); WASH. REV. CODE § 9.73.030(1)(b) (2023) (making it generally "unlawful . . . to intercept, or record any . . . [p]rivate conversation, by any device . . . without first obtaining the consent of all the persons engaged in the conversation"); MD. CODE ANN., CTS. & JUD. PROC. § 10-402(c)(3) (West 2023) (making it generally "lawful . . . for a person to intercept a wire, oral, or electronic communication where the person is a party to the communication and where all of the parties to the communication have given prior consent to the interception"); 720 ILL. COMP. STAT. ANN. 5/14-2 (West 2023); Mingo v. Roadway Express, Inc., 135 F. Supp. 2d 884, 892 (N.D. Ill. 2001) (noting that "[u]nder the Illinois Eavesdropping Act, a person is prohibited from recording any part of a conversation without the consent of all the parties to the conversation").

249. *See Mingo*, 135 F. Supp. 2d at 892.

250. 33 Cal. Rptr. 2d 766 (Ct. App. 1994).

251. *See id.* at 768–69 (summarizing conversations).

252. *Id. See* CAL. PENAL CODE § 632(a) (West 2024) (as of January 1, 2017, this provision states: "A person who, intentionally and without the consent of all parties to a confidential communication, uses an electronic amplifying or recording device to eavesdrop upon or record the confidential communication, whether the communication is carried on among the parties in the presence of one another or by means of a telegraph, telephone, or other device, except a radio, shall be punished by a fine not exceeding two thousand five hundred dollars ($2,500) per violation, or imprisonment in a county jail not exceeding one year, or in the state prison, or by both that fine and imprisonment.").

253. *Coulter*, 33 Cal. Rptr. 2d at 768.

C. Wiretap Laws that Make Secret Recordings Inadmissible

Coulter's case provides a sobering reminder to employees who secretly record conversations for evidence-gathering purposes and shows that this type of surveillance may do more harm than good. Of course, whether an individual like Coulter should be liable for a wiretap violation is distinct from the question of whether the recordings themselves should be admissible to help prove claims like harassment or discrimination. Reflecting a public policy that seeks to discourage wiretap violations, some state wiretap laws make any such recording flatly inadmissible in any judicial proceeding.[254]

The Illinois wiretap law, for example, provides that "[a]ny evidence obtained in violation of this [law] is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings."[255] Based on this statute, in *Mingo v. Roadway Express, Inc.*,[256] the United States District Court for the Northern District of Illinois refused to admit a recording of a termination interview made by a plaintiff in a sexual harassment suit.

Likewise, New Jersey's wiretap law allows "[a]ny aggrieved person in any trial, hearing, or proceeding in or before any court or other authority of this State [to] move to suppress the contents of any intercepted wire, electronic or oral communication . . . on the grounds that . . . [t]he communication was unlawfully intercepted."[257] If the motion is granted, the contents of the intercepted communication are deemed inadmissible.[258]

---

254. *See, e.g.*, FLA. STAT. § 934.01(2) (2023) ("In order to protect effectively the privacy of wire and oral communications, to protect the integrity of court and administrative proceedings, and to prevent the obstruction of intrastate commerce, it is necessary for the Legislature to define the circumstances and conditions under which the interception of wire and oral communications may be authorized and to prohibit any unauthorized interception of such communications and the use of the contents thereof in evidence in courts and administrative proceedings."). *But see* Shan Sivalingam, *Suing Based on Spyware? Admissibility of Evidence Obtained from Spyware in Violation of Federal and State Wiretap Laws:* O'Brien v. O'Brien *as a Paradigmatic Case*, 3 SHIDLER J.L. COM. & TECH. 1, 3 (2007) (noting that "the Federal Wiretap Act and the parallel state anti-interception statutes [often] do not require the exclusion from evidence of intercepted electronic communications").

255. 720 ILL. COMP. STAT. ANN. 5/14-5 (West 2023). The statute makes an exception for "any criminal trial or grand jury proceeding brought against any person charged with violating" the wiretap law. *Id.* It also states that "[n]othing in this Section bars admission of evidence if all parties to the private conversation or private electronic communication consent to admission of the evidence." *Id.*

256. 135 F. Supp. 2d 884, 891–92 (N.D. Ill. 2001).

257. N.J. STAT. ANN. § 2A:156A-21 (West 2023).

258. *See id.* (stating that "[i]f the motion is granted, the entire contents of all intercepted wire, electronic or oral communications obtained during or after any interception which is determined to be in violation of this act under subsection a., b., or c. of this section, or evidence derived therefrom, shall not be received in evidence in the trial, hearing or proceeding"). *See also* Stark v. S. Jersey Transp. Auth., No. A-1758-11T2, 2014 WL 2106428, at *9–14 (N.J. Super. Ct. App. Div. May

Other states have wiretap laws that make unlawfully obtained recordings inadmissible in any judicial proceeding, including Florida, California, Delaware, Maryland, New York, Utah, Washington, and West Virginia.[259] Florida's two-party consent wiretap law, for example, makes secret recordings inadmissible when those recordings are made without the consent of all participants under circumstances where a person being secretly recorded can reasonably expect privacy in those conversations.[260] In a broadly worded rule, the Florida admissibility statute provides:

21, 2014) (finding employee's surreptitious recording of a seemingly private conversation in a disciplinary action against employee illegal under the New Jersey Wiretapping and Electronic Surveillance Control Act, so as to justify exclusion of the recording in employees' action for unlawful retaliation).

259. FLA. STAT. § 934.06 (2023) (making inadmissible evidence obtained in violation of the Florida wiretapping statute); CAL. FAM. CODE § 2022(a) (West 2024) ("Evidence collected by eavesdropping in violation of Chapter 1.5 (commencing with Section 630) of Title 15 of Part 1 of the [California] Penal Code is inadmissible."); DEL. CODE ANN. tit. 11, § 2404 (West 2023) ("Whenever any wire or oral communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee or other authority of this State or a political subdivision thereof if the disclosure of that information would be in violation of this chapter."); MD. CODE ANN., CTS. & JUD. PROC. § 10-405(a) (West 2023) (providing generally that "whenever any wire, oral, or electronic communication has been intercepted, no part of the contents of the communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of this State, or a political subdivision thereof if the disclosure of that information would be in violation of this subtitle"); N.Y. C.P.L.R. § 4506 (McKinney 2024) (stating that "[t]he contents of any overheard or recorded communication, conversation or discussion, or evidence derived therefrom, which has been obtained by conduct constituting the crime of eavesdropping . . . may not be received in evidence in any trial, hearing or proceeding before any court or grand jury, or before any legislative committee, department, officer, agency, regulatory body, or other authority of the state, or a political subdivision thereof"); UTAH CODE ANN. § 77-23a-10(11)(a)(i) (West 2023) (stating, in relevant part, that "[a]ny aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, the state, or a political subdivision may move to suppress the contents of any intercepted wire, electronic, or oral communications, or evidence derived from any of them, on the grounds that: (i) the communication was unlawfully intercepted"); WASH. REV. CODE § 9.73.050 (West 2023) (stating that "[a]ny information obtained in violation of [the Washington state wiretap law] . . . shall be inadmissible in any civil or criminal case in all courts of general or limited jurisdiction in this state, except with the permission of the person whose rights have been violated in an action brought for damages under the provisions of RCW 9.73.030 through 9.73.080, or in a criminal action in which the defendant is charged with a crime, the commission of which would jeopardize national security"); W. VA. CODE ANN. § 62-1D-6 (West 2023) (providing that "evidence obtained in violation of the provisions of [West Virginia Wiretapping and Electronic Surveillance Act] shall not be admissible in any proceeding"), *ruled unconstitutional on other grounds in* Yurish v. Sinclair Broad. Grp., Inc., 866 S.E.2d 156, 166 (W. Va. 2021).

260. *See* FLA. STAT. § 934.03(1) (2023) (generally prohibiting the interception of any wire, oral, or electronic communication); *id.* § 934.02(2) (defining "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation and does not mean any public

> Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence in any trial, hearing, or other proceeding in or before any court, grand jury, department, officer, agency, regulatory body, legislative committee, or other authority of the state, or a political subdivision thereof, if the disclosure of that information would be in violation of this chapter.[261]

In one case applying this statute, *McDade v. State*,[262] the Florida Supreme Court ruled that a minor's secret recordings of conversations between herself and her stepfather were not admissible, even though their contents proved the stepfather had sexually abused her. In finding the statute violated, the court found that McDade reasonably expected privacy in the recorded conversations because they occurred in his bedroom, the recording device was hidden from view, and the communication involved a private conversation.[263] The *McDade* court applied the admissibility statute strictly, finding that the law did not make any exceptions for a circumstance where one party was committing a crime.[264] Other courts have applied these statutes in similar ways.[265]

Notably, Florida's exclusionary rule applies only if the person being recorded can reasonably expect privacy in the conversation.[266] On this issue, courts examine a number of factors, including the location of the

---

oral communication uttered at a public meeting or any electronic communication"). *See also id.* § 934.03(2)(d) (noting an exception for situations in which all parties to the conversation have consented).

261. *Id.* § 934.06. The statute provides a limited exception for the use of such recordings as evidence in cases of prosecution for the underlying wiretap violation itself. *See id.* ("The prohibition of use as evidence provided in this section does not apply in cases of prosecution for criminal interception in violation of the provisions of this chapter.").

262. 154 So. 3d 292, 298 (Fla. 2014).

263. *Id.* In another recent case, *Woliner v. Summers*, the Eleventh Circuit Court of Appeals considered whether a medical doctor could reasonably expect privacy in a recorded conversation between the doctor and the mother of a deceased patient. Woliner v. Summers, 796 F. App'x 649, 652 (11th Cir. 2019). Because the conversation at issue took place in the doctor's private office and did not follow the doctor's detailed protocol for recording conversations with patients, the court held that there were genuine issues of material fact about whether the doctor could reasonably expect privacy in that conversation. *See id.* at 652–54.

264. *McDade*, 154 So. 3d at 297–99.

265. *See, e.g.*, Marin v. King Cnty., 378 P.3d 203, 210–11 n.10 (Wash. Ct. App. 2016) (applying the Washington state wiretap law, including the admissibility rule set forth in WASH. REV. CODE § 9.73.050, and finding an employee's conversations with his supervisor "private" and therefore inadmissible in the employee's discrimination lawsuit).

266. Under the statute, "no part of the contents of [an intercepted oral] communication . . . may be received in evidence in any trial . . . *if the disclosure of that information would be in violation of this chapter*." FLA. STAT. 934.06 (2023) (emphasis added). However, no such statutory violation would occur if the speaker being recorded has no reasonable expectation of privacy in the recorded conversation. *See* FLA. STAT. § 934.02(2) (2023) (defining "oral communication" as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation"). For this reason, the Florida Supreme Court has held that "for an oral conversation to be protected under section 934.03 the

conversation, the nature of communication, and the manner in which the communication was made.[267] By analogy, this Article's proposed exclusionary rule would apply only when the employer has a no-recording policy in place and only when employees have been notified of the policy in advance of any improper recording activity, requirements that solidify expectations of privacy in workplace conversations and provide notice of the unauthorized activity. As discussed in Part VI, in this particular scenario, it would generally be reasonable to expect employees to comply with the employer's stated policy, and any violation of that policy should be grounds for excluding the evidence obtained from that violation in most instances.[268] Before turning to that argument, the next Part outlines the competing arguments regarding whether an employee's secret workplace recordings should be admissible against an employer with a no-recording rule.

V. Secret Workplace Recordings: The Competing Policies

Although the Federal Rules of Evidence would not normally bar the admission of employees' secret workplace recordings, those rules, being general in nature and broadly applicable to a variety of evidentiary issues, were not specifically designed to address this particular evidence. Thus, whether such recordings *should* be admissible against an employer with a no-recording rule, and whether those recordings should otherwise be used against an employer in earlier stages of litigation, are policy questions with complex competing arguments. Section A of this Part provides arguments for why such recordings should be considered by courts, and Section B presents the competing arguments on this issue.

A. Arguments for the Use of Secret Recordings in Litigation

Numerous arguments suggest that courts and factfinders should be permitted to examine an employee's secret recording purporting to document evidence of harassment, discrimination, or retaliation.

---

speaker must have an actual subjective expectation of privacy, along with a societal recognition that the expectation is reasonable." State v. Smith, 641 So. 2d 849, 852 (Fla. 1994).

267. State v. Caraballo, 198 So. 3d 819, 820–21 (Fla. Dist. Ct. App. 2016). Other factors include the intent of the speaker asserting statutory protection at the time the communication was made; the purpose of the communication; the conduct of the speaker; the number of people present; and the contents of the communication. *Woliner*, 796 F. App'x at 651.

268. While there are many factors that may impact an employee's expectation of privacy in conversations at work, it would generally be reasonable for an individual to expect their co-workers to comply with their employer's no-recording policy when it applies.

First, admissibility of an item of evidence is itself governed primarily by the rules of evidence. And under Federal Rule of Evidence 402, relevant evidence is generally admissible, with limited exceptions.[269] Accordingly, if a recording is relevant in the case at hand, it should be admissible, absent some applicable rule providing otherwise.[270]

Second, assuming a recording is relevant and reliable, recorded conversations can assist a factfinder in determining the truth, especially where a recording's contents rebut an employer's defense or argument.[271] The *Deltek* case noted previously is one example.[272] In that case, employee Dinah Gunther alleged she was fired for her whistleblowing activities, whereas her employer, Deltek, claimed she was fired for being "confrontational" and "demanding" in a meeting that Gunther secretly recorded.[273] But after listening to Gunther's recording, the ALJ rejected Deltek's characterization of the meeting and found that it was a pretext to conceal Deltek's true motive, leading to liability for retaliation.[274] Without Gunther's secret recording, it would have been more difficult for Gunther to rebut her employer's account, as the alternative explanations for Gunther's termination would have amounted to a "he said, she said" situation. Accordingly, this case shows that an employee's secret recording can facilitate the discovery of truth in an adversarial proceeding. And if truth is what we are after, what matters most is that evidence of that truth was obtained and is available, not necessarily *how* it was obtained.[275]

Third, recordings may be more trustworthy, or of more aid to the factfinder, than the testimony of human witnesses.[276] In the criminal context, the United States Supreme Court has declared that courts "should [not] be too ready to erect constitutional barriers to relevant and probative

---

269. FED. R. EVID. 402.

270. *See, e.g.*, Cadillac of Naperville, Inc. v. N.L.R.B., 14 F.4th 703, 713 (D.C. Cir. 2021) (applying the Federal Rules of Evidence and concluding that a secret recording is "'plainly relevant' to the unfair labor practice claims at issue[,]" making it admissible in the absence of any other challenge to admissibility under the Federal Rules of Evidence), *cert. denied*, 142 S. Ct. 2650 (2022).

271. *Cf.* FED. R. EVID. 102 ("These rules should be construed so as to administer every proceeding fairly, eliminate unjustifiable expense and delay, and promote the development of evidence law, to the end of ascertaining the truth and securing a just determination.").

272. Deltek, Inc. v. Dep't of Lab., 649 F. App'x 320 (4th Cir. 2016); *see supra* Part II.A.

273. *Id.* at 322, 325.

274. *See id.* at 325–26. As the Fourth Circuit noted in its opinion, rather than being disruptive and confrontational during the meeting in question, the recorded conversation offered by Gunther proved that she was actually "calm, quiet, and . . . polite." *Id.* at 329. In short, because Gunther's secret recording rebutted her employer's explanation for her termination, the ALJ's finding of pretext was affirmed. *Id.*

275. *Cf.* Lamb, *supra* note 22, at 1133 (arguing that secret recordings provide powerful and persuasive evidence of domestic violence and that "[w]hen cases come down to 'he-said, she-said,' a recording can prove a damning tiebreaker. . . . to a judge's finding of domestic violence").

276. English, *supra* note 227, § 2 n.3 (citing cases).

evidence which is also accurate and reliable[,]" adding that "[a]n electronic recording will many times produce a more reliable rendition of what a defendant has said than will the unaided memory of a [witness to the conversation] . . . ."[277] The Oregon Supreme Court has similarly recognized that "a recording has value as evidence which is frequently wanting in [other evidence], for it reproduces the very words used by the person making the statement in his own voice and with all the added meaning and significance that comes from inflection, emphasis, and the other attributes of speech."[278] In short, between the testimony of a witness recounting the contents of a conversation and a recording that documents that conversation word-for-word, the recording itself is usually the best evidence available.[279]

Fourth, there is arguably a difference between having one's conversations captured by a *hidden* surveillance device without anyone's knowledge or consent, on the one hand, and openly revealing one's thoughts, comments, and observations to another person—even if that other individual happens to be recording that conversation.[280] As one scholar has observed, "[t]he theory is that the contents of the mind, deliberately revealed to another person, are willingly shared, while the secret eye or ear, possibly electronically enhanced, bypasses [expectations of privacy] to spirit the evidence away."[281] Accordingly, when a person speaks openly to another in a workplace setting—as when a supervisor makes sexually charged comments to a subordinate employee at work while others might overhear those remarks—that person cannot reasonably expect their words to remain private, and it should not matter that the subordinate employee is equipped with a recording device.[282] What matters is

277. United States v. White, 401 U.S. 745, 753 (1971).

278. State v. Reyes, 308 P.2d 182, 196 (Or. 1957).

279. *See* State v. Heineman, 65 N.E.3d 287, 303 (Ohio Ct. App. 2016) (stating that "[a]n audio recording made contemporaneously with events is always the best evidence of that event").

280. *See* Kent Greenawalt, *The Consent Problem in Wiretapping & Eavesdropping: Surreptitious Monitoring with the Consent of a Participant in a Conversation*, 68 COLUM. L. REV. 189, 208–09 (1968) (noting the following observation of the New York State Joint Legislative Committee to Study Illegal Interception of Messages: "We submit that a specific wrong is committed by the man who secretly listens to or overhears a conversation to which he is not a party; a quite different act is committed by a man who makes or authorizes a secret recording of a conversation to which he is a party.").

281. H. Richard Uviller, *Evidence from the Mind of the Criminal Suspect: A Reconsideration of the Current Rules of Access and Restraint*, 87 COLUM. L. REV. 1137, 1151 (1987).

282. *Cf. White*, 401 U.S. at 752 (noting that "[i]f the law gives no protection to the wrongdoer whose trusted accomplice is or becomes a police agent, neither should it protect him when that same agent has recorded or transmitted the conversations which are later offered in evidence to prove the State's case"); McDade v. State, 114 So. 3d 465, 471–72 (Fla. Dist. Ct. App. 2013), *decision quashed*, 154 So. 3d 292 (Fla. 2014) (Altenbernd, J., concurring) ("Under the [reasonable expectation of privacy] test, I conclude that in 2011 a person who regularly and consistently abused a teenager in a bedroom of their shared home had no reasonable expectation that their conversations

that the words were spoken. And the supervisor, the real wrongdoer, cannot complain if their words are later played back to others.

Finally, even though there are many legitimate reasons why an employer might wish to ban secret workplace recordings by employees as described in the Introduction, those reasons would not include a desire to sidestep otherwise meritorious claims of harassment, discrimination, or retaliation. Moreover, if an employer implements a no-recording rule solely for this reason, this alone would not be a legitimate reason for banning such workplace surveillance. Rather, it would serve only to perpetuate a culture of harassment without fear of legal consequence. Stated differently, while it may be legitimate for an employer to discipline an employee for violating a no-recording rule designed to protect legitimate employer interests, invoking that same employee misconduct to also bar otherwise legitimate claims of employer illegality is another matter. In short, while employees deserve punishment for violating legitimate workplace rules, employers deserve to be held accountable for their own wrongful actions, and in some cases the only way to ensure such accountability is through recorded evidence.[283]

B. Arguments Against the Use of Secret Recordings in Litigation

There are numerous arguments against the use of secret recordings in litigation. First, from a privacy standpoint, most people would not want to work in an environment where they knew their daily conversations with co-workers and others could be recorded, but allowing such recordings to be used in court only incentivizes this activity.[284] For this reason, making such recordings inadmissible would help protect the right to conversational privacy that legislatures in many states have already deemed worthy of protection.[285]

---

about the abuse would never be recorded. In this modern digital world, any such adult should have expected that eventually a teenage victim would record such conversations in self-defense.").

283. *Cf.* Howard M. Wasserman, *Orwell's Vision: Video and the Future of Civil Rights Enforcement*, 68 MD. L. REV. 600, 601–07 (2009) (summarizing cases where video and audio recordings were used as critical evidence in civil rights disputes involving public and police interactions).

284. *See* WVIT, Inc. v. Gray, No. CV 950547689S, 1996 WL 649334, at *3 (Conn. Super. Ct. Oct. 25, 1996) (stating that "it is neither the content of the speech involved nor the location of the encounter which makes Gray's alleged [secret recordings] highly offensive[,]" as "[t]he conduct alleged would be highly offensive no matter where it occurred and no matter what it related to[,]" adding that "[i]t is the fact of surreptitiously monitoring a fellow employee in and of itself that constitutes the intrusion on that employee's privacy").

285. In California, for example, the legislature declared that "the invasion of privacy resulting from the continual and increasing use of [electronic eavesdropping] devices and techniques has created a serious threat to the free exercise of personal liberties and cannot be tolerated in a free and civilized society." CAL. PENAL CODE § 630 (West 2024). For this reason, the California legislature made evidence obtained in violation of its wiretapping law inadmissible. *See* CAL. FAM. CODE §

Second, it is important for courts to protect the right of employers to prevent secret workplace recordings in the first place, which can be grounded in a number of legitimate employer objectives.[286] But again, allowing such recordings to be used in court—despite the fact that they were obtained in violation of an employer's no-recording rule—undermines these efforts. Simply put, when a court allows an employee to use a secret workplace recording in litigation against their employer, despite having obtained that recording in violation of the employer's no-recording rule, this incentivizes employees to disregard legitimate employer policies and undermines the employer's right to enact such policies in the first place.

Third, while employees might expect to be recorded by *employers*—particularly where such employer surveillance is open and obvious—most employees generally expect their daily workplace interactions will not be recorded by co-workers.[287] This is supported by the view of most jurists, who do not look favorably upon such workplace espionage.[288]

2022(a) (West 2024) ("Evidence collected by eavesdropping in violation of Chapter 1.5 (commencing with Section 630) of Title 15 of Part 1 of the [California] Penal Code is inadmissible."); *see also* CAL. PENAL CODE § 630 (West 2024) ("The Legislature by this chapter intends to protect the right of privacy of the people of this state.").

286. *See supra* notes 11–17 and accompanying text.

287. *See WVIT, Inc.*, 1996 WL 649334, at *4 (recognizing that "employees do have a reasonable expectation that discussions will not be secretly recorded by fellow employees with whom they are chatting"); Vasyliv v. Adesta, LLC, No. CV106011737S, 2010 WL 5610901, at *3 (Conn. Super. Ct. Dec. 20, 2010) (finding plaintiff had stated a valid invasion of privacy claim when he alleged that he was secretly recorded while he was involved in a private conversation with another employee). Regarding surveillance by employers, invasion of privacy claims involving video surveillance by employers will often depend on the location of the surveillance and the expectations of privacy that might reasonably exist in the case at hand. *Compare* Melder v. Sears, Roebuck and Co., 731 So. 2d 991, 1001 (La. Ct. App. 1999) (rejecting invasion of privacy claim brought by department store employee who claimed his privacy was invaded by video cameras routinely used to monitor customers as they shopped), *and* Vega-Rodriguez v. P.R. Tel. Co., 110 F.3d 174, 180 (1st Cir. 1997) (rejecting Fourth Amendment challenge to employer's video surveillance and noting that "the employer acted overtly in establishing the video surveillance: [it] notified its work force in advance that video cameras would be installed and disclosed the cameras' field of vision"), *with* Doe by Doe v. B.P.S. Guard Servs, Inc., 945 F.2d 1422, 1427 (8th Cir. 1991) (upholding invasion of privacy claim brought by models who were secretly videotaped while changing clothes behind curtained area at a fashion show), *and* Rosario v. United States, 538 F. Supp. 2d 480, 493–98 (D.P.R. 2008) (finding employees could reasonably expect not to be covertly videotaped in a locker-break room intended to be used by a limited number of employees where there was no advance notice of such surveillance).

288. *See supra* notes 34–43 and accompanying text. For obvious reasons, judges themselves seek to protect the confidentiality of private conversations and discussions of sensitive legal issues in their own chambers. *See* Comment, *The Law Clerk's Duty of Confidentiality*, 129 U. PA. L. REV. 1230, 1230 (1981) (noting that "[p]reserving the confidentiality of judges' work has been 'an honored tradition among law clerks'"); Laurence H. Tribe, *Trying California's Judges on Television: Open Government or Judicial Intimidation?*, 65 A.B.A. J. 1175, 1178 (1979) ("Nobody can seriously doubt that judges would be unable to perform their delicate mission of assuring equal justice under law if their thought processes and confidential deliberations could be subjected routinely to

As the Seventh Circuit Court of Appeals has declared, "[a]lthough Title VII . . . 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."[289]

Fourth, rather than engage in such workplace espionage, an employee who believes they have been the victim of discrimination or harassment could gather evidence in other ways.[290] As the Sixth Circuit Court of Appeals has declared, rather than recording conversations, an employee "might have taken notes of the conversations, obtained the same information through legal discovery, or simply asked her interlocutors for permission to record."[291] In some cases, arranging for a witness to be present or nearby might also be an effective alternative.

LOL!

Fifth, secret workplace recordings can be taken out of context. Imagine a workplace full of sexual innuendo, where both males and females frequently make sexually charged remarks to one another at work.[292] While vulgar, this is not actionable sexual harassment.[293] But when taken out of context, an isolated remark captured on tape might be perceived as unlawful. As one employment lawyer notes, even when secret recordings are admitted into evidence, "decision-makers often place little weight on them because they are considered unreliable—the party recording is often very careful about what they say while trying to manipulate the other party into saying something that would implicate them."[294] In addition, "a recording also may not be representative of all the conversations that the parties have had on a particular topic."[295]

Sixth, as Judge Posner pointed out in his dissenting opinion in *Magyar*, there is always the possibility that an employee's secret recording is nothing more than an act of "litigation planning" once the employee realizes they are about to lose their job.[296] In *Irrera v. Humpherys*, for

---

public gaze and official censure."). Thus, it is no surprise that jurists would not look favorably upon secret workplace recordings.

289. Argyropoulos v. City of Alton, 539 F.3d 724, 733–34 (7th Cir. 2008).

290. Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 481 (6th Cir. 2012).

291. *Id.*

292. *See, e.g.*, Loftin-Boggs v. City of Meridian, 633 F. Supp. 1323, 1326–27 (S.D. Miss. 1986) (rejecting sexual harassment claim in part because "[t]he context presented [in plaintiff's workplace] is one of vulgar and unprofessional conduct by all, including plaintiff[,]" adding that "[w]hile the situation was certainly not an effective working environment, it also was not the hostile environment prohibited by Title VII"), *aff'd*, 824 F.2d 971 (5th Cir. 1987).

293. *See id.*; *see also* Faragher v. City of Boca Raton, 524 U.S. 775, 788 (1998) (noting that the "standards for judging hostility are sufficiently demanding to ensure that Title VII does not become a 'general civility code'").

294. *Secretly Recording Conversations at Work*, *supra* note 9.

295. *Id.*

296. Magyar v. Saint Joseph Reg'l Med. Ctr., 544 F.3d 777 (7th Cir. 2008) (Posner, J., dissenting).

example, the plaintiff's sheer number of secret recordings and their seemingly strategic nature suggests that they were made specifically with an eye towards a subsequent lawsuit against the school.[297]

Finally, when an employee secretly records conversations to gather evidence of harassment or discrimination, this will likely only backfire on the employee.[298] For one, employees who secretly record workplace conversations will almost certainly be terminated for violating their employer's no-recording rule, especially since such rules are becoming more common, and courts will usually not overturn those terminations.[299] Employees who secretly record conversations may also face civil liability or criminal penalties for wiretap violations,[300] and they may be found liable in tort for invasion of privacy.[301] Further still, these employees will often find courts unreceptive to claims of retaliation due to their unreasonable opposition activities,[302] and they may have harassment claims dismissed for attempting to gather evidence by recording conversations rather than promptly reporting the harassment to their employer.[303] In *Coulter v. Bank of America*,[304] for example, one employee's attempt to gather evidence of harassment through recording conversations resulted in the dismissal of his claims and the imposition of a damages award against him exceeding $100,000. For these reasons, it is often unwise to secretly record workplace conversations to prove claims of discrimination or harassment, and the rules of evidence should not incentivize this activity.

VI. PROPOSAL

Perhaps the strongest argument for considering the contents of secret recordings in litigation is their potential to assist a factfinder in determining the truth, especially in cases like *Deltek* where a recording directly undermines a party's defense or argument. Nevertheless, employers have many legitimate reasons for adopting a no-recording policy, but these efforts are undermined when courts consider the contents of a recording obtained in violation of employer policy. In the end, a balance must be struck between permitting employers to establish reasonable workplace policies and enforcing employee rights to be free

297. *See* Proposed Amended Complaint and Jury Demand Doc., Irrera v. Univ. of Rochester, No. 6:15-cv-06381 (W.D.N.Y. Oct. 26, 2015).

298. *See* McAllister, *supra* note 20, at 539–42.

299. *See* cases cited *supra* note 19.

300. *See* cases cited *supra* note 21.

301. *See* cases cited *supra* note 22.

302. *See supra* notes 36–42.

303. *See* cases cited *supra* note 24.

304. 33 Cal. Rptr. 2d 766, 767 (Ct. App. 1994).

from discrimination and harassment. This Part seeks to implement that balance through proposed admissibility standards for employees' secret workplace recordings.

A. Proposed General Rule of Exclusion

As noted, employees who secretly record conversations will usually not escape unscathed, as they will likely be terminated for their misconduct and may face a variety of other harmful consequences, such as liability for tort and wiretap law violations. In addition, the individuals whose conversations are secretly recorded may feel that their privacy has been violated, and other co-workers would suffer from knowing such covert surveillance has occurred. Employers too might suffer real harm.

Given the negative impact secret recordings may have on the recording individual, co-workers, and employers, this Article questions whether employees' secret recordings should continue to have evidentiary value, particularly in workplaces with a no-recording rule. Indeed, if employees knew that such recordings could not be considered as evidence, the primary incentive for gathering evidence in this manner would be eliminated and the conversational privacy generally expected at work would be preserved. In addition, fewer employees would suffer the employment repercussions and associated legal fallout from violating no-recording rules and would be encouraged to gather evidence in other ways. Accordingly, to deter employees from secretly recording workplace conversations, this Article proposes that Congress amend the federal employment discrimination laws to provide that recordings obtained in violation of an employer's no-recording rule are not admissible against employers for claims brought pursuant to those laws and may not be considered by courts in ruling on dispositive motions in such cases.[305]

This proposed amendment could be modeled from the wiretap laws discussed in Part V.C. that make recordings obtained in violation of those laws inadmissible in court. The Illinois wiretap law provides a good example. That law provides that "[a]ny evidence obtained in

305. This proposal applies to the following laws: Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1) (making it unlawful for an employer "to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin"); Age Discrimination in Employment Act of 1967 (ADEA), 29 U.S.C. § 623(a) (making it generally unlawful for an employer to discriminate on the basis of age); Americans with Disabilities Act of 1990 (ADA), 42 U.S.C. § 12112(a) (making it generally unlawful for an employer to discriminate on the basis of disability).

violation of this [law] is not admissible in any civil or criminal trial, or any administrative or legislative inquiry or proceeding, nor in any grand jury proceedings . . . ."[306]

Following this legislative approach, Congress could amend the federal employment discrimination laws by including a similar admissibility provision in those laws. This proposed amendment could be worded as follows:

> Whenever any workplace conversation has been intercepted in violation of an employer's no-recording rule, any evidence obtained as a result of that violation may not be received in evidence in any federal or state court, including in any trial in such court and in any administrative or legislative inquiry or proceeding, for claims arising under this statute. In addition, no court or administrative agency may consider the contents of such recordings when ruling on dispositive motions for claims brought pursuant to this statute.

In essence, this proposed amendment would ensure that recordings obtained in violation of an employer's no-recording rule are not admissible for discrimination, harassment, and retaliation claims arising under federal law and may not be considered by courts in ruling on dispositive motions in such cases (with a limited exception discussed below). In this way, the primary incentive for secretly recording workplace conversations would be eliminated and conversational privacy in the workplace would be preserved.

As noted, the proposal outlined above would apply specifically to employers that have adopted a no-recording rule. This is an important limitation. For one, this limitation puts the burden on the employer to establish a no-recording rule and to inform their employees of this policy. This, in turn, will help ensure fair notice to employees who might be tempted to record workplace conversations by clarifying that such activity may result in employee discipline, including termination. To ensure fair notice, this Article thus proposes that the proposed exclusionary rule apply only when the employer's no-recording policy is clear and conspicuous and only when the offending employee has been notified of the policy in advance of their improper recording activity. Ideally, this would include a signed acknowledgement on the part of the employee indicating that they were provided the policy and agreed to its terms.[307] This proposed statutory language might be worded as follows:

---

306. 720 ILL. COMP. STAT. ANN. 5/14-5 (2023). The statute makes an exception for "any criminal trial or grand jury proceeding brought against any person charged with violating" the wiretap law. *Id.* It also states that "[n]othing in this Section bars admission of evidence if all parties to the private conversation or private electronic communication consent to admission of the evidence." *Id.*

307. An employment-at-will disclaimer in an employee handbook or manual provides a useful analogy. "In general, an at-will employee may be terminated at any time for any reason or for no reason, with or without cause." Hessenthaler v. Tri-Cnty. Sister Help, Inc., 616 S.E.2d 694, 697

The exclusionary rule outlined in this section will apply only when

i. the employer's no-recording rule or policy is clear and conspicuous;
ii. employees have been notified of the policy in advance of any prohibited recording activity; and
iii. employees have executed a signed acknowledgement indicating that they were provided the policy and agreed to its terms.

B. Proposed Exception to General Exclusionary Rule

If adopted, this Article's proposed exclusionary rule would incentivize employers to adopt no-recording rules by precluding judicial consideration of recordings obtained in violation of those rules. Nevertheless, it would be unfair to permit employers to take advantage of this exclusionary rule by ignoring legitimate complaints of harassment or discrimination, safe in the knowledge that any recorded evidence of such wrongdoing could never be used in court. Accordingly, this Article further proposes a limited exception to the proposed exclusionary rule in cases where the recordings were made after the employer failed to take appropriate corrective action in response to the recording individual's complaints of harassment or discrimination.[308] In that event—when an employee notifies their employer of harassment or discrimination and

---

(S.C. 2005). "But when an employee's at-will status has been altered by the terms of an employee handbook, an employee [who is fired in violation of that handbook] may [sue] for wrongful discharge based on breach of contract." *Id.* To avoid this result, an employer can include a clear and conspicuous at-will disclaimer in their employee handbook or manual clarifying that any benefits described in that document are not intended to override the employee's at-will status. *See id.* at 698. Under South Carolina law, an employee handbook, manual, or similar document issued by an employer "shall not create an express or implied contract of employment if it is conspicuously disclaimed[,]" which generally requires the disclaimer to "be in underlined capital letters on the first page of the document and signed by the employee." S.C. CODE ANN. § 41-1-110 (2023). In short, an employer policy that is conspicuous and signed by the employee will ensure that the employee has received proper notice of the policy. *See id.*

308. As to what might constitute appropriate corrective action, one employment lawyer advises employers as follows:

> All complaints of discrimination, harassment, and retaliation should be taken seriously. Supervisors should refer all such complaints to HR. Upon learning about such a complaint, the company should promptly conduct a confidential investigation. An independent investigator (i.e., someone not directly involved and preferably outside of the employee's chain of command) should interview the complaining party, the alleged harasser, and any witnesses, collect witness statements, review applicable employment policies, and prepare an investigation report discussing the facts collected and the investigator's findings. If the investigation findings indicate the employee's complaint has merit, the company should take reasonable corrective and preventative measures to stop the harassment and prevent it from reoccurring, without retaliating against the employee.

Michael J. Lombardino, *The Perceived Erosion of the at-Will Employment Doctrine in Texas, and What Employers Can Do to Protect Themselves*, 35 CORP. COUNS. REV. 23, 48 (2016).

the employer fails to respond appropriately—the employer would forfeit their right to exclude recordings subsequently obtained to support those allegations. This exception places the burden on the employee to report unlawful activity internally, which in turn places the burden on the employer to take appropriate corrective action. If the employer fails to fulfill their obligation, the employee would then be permitted to record conversations to document their complaints without later having that evidence excluded.[309] For this exception to apply, however, the recordings must be relevant, in the sense that they tend to support the recording individual's previously reported claims of harassment or discrimination, and they must otherwise be admissible under applicable evidence rules.

While this proposed exception has the potential to incentivize secret workplace recordings, which this Article generally seeks to combat, it only does so in a narrow set of cases where an employer has failed to respond appropriately to complaints of harassment or discrimination. Moreover, this proposed admissibility exception will incentivize employers to take such complaints more seriously, and should encourage victims of harassment and discrimination to report that misconduct in the first place. As numerous legal scholars have observed, claims of harassment and discrimination often go unreported—either because of fear of retaliation or because they are often summarily dismissed by employers and courts.[310] Relatedly, scholars have observed that employ-

309. Because the formal complaint is an important prerequisite to establishing the right to record, from an evidentiary standpoint, the employee who reports such unlawful activity should obtain a written verification of their report or should document their report by follow-up email.

310. *See* Nicole Buonocore Porter, *Relationships and Retaliation in the #MeToo Era*, 72 FLA. L. REV. 797, 802–03 (2020) (stating that "by all accounts, reports of harassment are very low[,]" in part "because victims of harassment fear all types of retaliatory actions"); Ann C. McGinley, *Looking South: Toward Principled Protection of U.S. Workers*, 16 FIU L. REV. 741, 772–73 (2022) (reporting "social science evidence [showing] that between sixty-five percent and seventy-five percent of women who report and/or file a charge with the EEOC suffer retaliation"); Hnin N. Khaing, *Civil Rights in the Workplace: It's Time to Cut Out the Excess and Get to the Truth*, 30 AM. U. J. GENDER SOC. POL'Y & L. 321, 322–23 (2022) (citing two reasons why sexual harassment has remained "rampant" in our society: "(1) under reporting and (2) cover ups[,]" adding that "[b]oth relate to the way our legal system works"); Anne Lawton, *Between Scylla & Charybdis: The Perils of Reporting Sexual Harassment*, 9 U. PA. J. LAB. & EMP. L. 603, 616 (2007) (noting that "allegations of harassment often are met with skepticism" in part due to a cultural perception "that women either lie about harassment to gain some advantage in the workplace or are overly sensitive to normal workplace conduct"); Joseph A. Seiner, *Plausible Harassment*, 54 U.C. DAVIS L. REV. 1295, 1322–29 (2021) (summarizing the results of social science studies on sexual harassment and noting one study conducted by ABC News and *The Washington Post* involving 1,260 adults finding that "'among women who've personally experienced unwanted sexual advances in the workplace, nearly all, 95 percent, say male harassers usually go unpunished'"); Larry J. Pittman, *Arbitration and Federal Reform: Recalibrating the Separation of Powers Between Congress and the Court*, 80 WASH. & LEE L. REV. 893, 912 (2023) (noting that "it is widely believed that many sexual abuse and sexual harassment cases go unreported").

ers often escape liability on harassment claims even though their response to employee complaints appear inadequate.[311] Accordingly, this exception will encourage victims of harassment or discrimination to report the illegal behavior they experience while preserving a potentially potent form of evidence against employers that do not respond appropriately.

This proposed exception is also consistent with the general approach of the *Faragher-Ellerth* affirmative defense to harassment, which, when applicable, precludes employer liability for otherwise legitimate harassment claims.[312] To take advantage of the *Faragher-Ellerth* defense, an employer must prove both that (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer.[313] Under this rule, if an employee complains of harassment and the employer fails to promptly correct any harassing behavior, the employer loses the right to the *Faragher-Ellerth* defense and may become liable for the harassment.[314] In this particular scenario—a legitimate employee complaint followed by lack of corrective action on the part of the employer—it makes sense that an employer would also lose the right to object to relevant evidence that would support the employee's claim, particularly when that evidence is obtained after having notified the employer of the misconduct.

---

311. *See* M. Isabel Medina, *A Matter of Fact: Hostile Environments and Summary Judgments*, 8 S. CAL. REV. L. & WOMEN'S STUD. 311, 354 (1999) (discussing cases and concluding that "[l]ower courts will relieve employers of liability under the act as a matter of law even if they judge the employer's investigation into the complaints inadequate"). *See also* Susan Bisom-Rapp, *Sex Harassment Training Must Change: The Case for Legal Incentives for Transformative Education and Prevention*, 71 STAN. L. REV. ONLINE 62, 64 (2018) (recognizing that traditional sexual harassment training has proven ineffective at preventing discrimination and harassment and calling on courts to reevaluate legal doctrines that make training relevant to discrimination claims); Theodore F. Claypoole, *Inadequacies in Civil Rights Law: The Need for Sexual Harassment Legislation*, 48 OHIO ST. L.J. 1151, 1151 (1987) (arguing that Congress should enact new legislation directly providing a cause of action for sexual harassment that assigns liability both to the harassing employee and the employer).

312. *See* Faragher v. City of Boca Raton, 524 U.S. 775, 807–08 (1998).

313. Burlington Indus., Inc. v. Ellerth, 524 U.S. 742, 765 (1998); *Faragher*, 524 U.S. at 807.

314. *See* Frederick v. Sprint/United Mgmt. Co., 246 F.3d 1305, 1313 (11th Cir. 2001) (stating that "[b]oth elements [of the *Faragher-Ellerth* defense] must be satisfied for the defendant-employer to avoid liability, and the defendant bears the burden of proof on both elements"). *See, e.g.*, Wilburn v. Fleet Fin. Grp., Inc., 170 F. Supp. 2d 219, 229–30 (D. Conn. 2001) (finding employer failed to establish as a matter of law that it was entitled to the *Faragher-Ellerth* affirmative defense based on evidence that the employer did not disseminate its anti-harassment policy to employees); Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (before *Faragher* and *Ellerth* were decided, ruling for plaintiff on her sexual harassment claim because she was subjected to "sustained and non-trivial harassment," she complained of that harassment, and her employer made no significant effort to end the harassment even though it knew or should have been aware of the problem).

Consistent with the *Faragher-Ellerth* approach, the exception proposed in this Article places the burden on the employee to report unlawful activity to their employer as their first move, an event that will lead to internal resolution of the matter in the run-of-the-mill case, thereby precluding any need to record. But in the event the employer does not adequately respond to the employee's complaint, plaintiffs' counsel could then safely advise victims of harassment or discrimination to gather evidence through secret recordings. Finally, given the litigation dangers created by this proposed exception, employers would be encouraged to take complaints of discrimination or harassment more seriously.

C. Proposed Protection Against Wrongful Termination

To give the proposed exception outlined in the previous Section its full effect, this Article further proposes that Congress establish a statutory protection from wrongful termination for having made secret recordings in the narrow set of cases outlined in Section B. Specifically, this Article proposes an amendment to the retaliation provisions of the federal employment discrimination laws clarifying that recording conversations to gather evidence of harassment or discrimination constitutes reasonable opposition to discrimination in the narrow set of cases where an employer has failed to respond appropriately to employee complaints of harassment or discrimination, effectively overruling the cases discussed in Part II deeming such activity unreasonable.[315]

By way of background, the federal employment discrimination statutes outlaw discrimination in employment, and contain separate provisions making it unlawful to retaliate against employees for opposing or complaining of discrimination.[316] Retaliation claims typically require proof of three elements: (1) the plaintiff engaged in statutorily protected activity, (2) an adverse employment action occurred, and (3) a causal

---

315. *See supra* notes 37–42 and accompanying text.

316. *See generally Retaliation: Considerations for Federal Agency Managers*, U.S. EQUAL EMP. OPPORTUNITY COMM'N., https://www.eeoc.gov/retaliation [https://perma.cc/P2KL-48QB]. *See also* 42 U.S.C. 2000e-3(a) (making it unlawful under Title VII "for an employer to discriminate against any of his employees or applicants for employment . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter"); 29 U.S.C. § 623(d) (making it unlawful under the ADEA "for an employer to discriminate against any of his employees or applicants for employment . . . because such individual . . . has opposed any practice made unlawful by [the ADEA], or because such individual . . . has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or litigation under this chapter").

link existed between the protected activity and the adverse action.[317] Regarding the first requirement, courts divide protected activities into two distinct types, known as participation and opposition.[318] Activities that amount to participation in these statutes' "mechanisms of enforcement" include making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing involving allegations of discrimination.[319] Opposition activities include less formal complaints about discriminatory practices, such as opposing unlawful acts by a co-worker or refusing to obey an order believed to be unlawful under Title VII.[320]

The distinction between participation and opposition-based activities "is significant because federal courts have generally granted less protection for opposition than for participation in enforcement proceedings."[321] Under the participation clause, courts have extended "'exceptionally broad protections . . . to persons who have participated in any manner in Title VII proceedings[,]'"[322] such that anyone who engages in participation activities "is generally protected from retaliation."[323] For oppositional activity to trigger statutory protection, however, the *manner* of opposition must be reasonable.[324] The law does not protect unreasonable acts of opposition, and that unreasonable opposition itself "may be deemed an independent, legitimate basis" for an adverse employment action against the employee.[325]

---

317. *See* Abbt v. City of Houston, 28 F.4th 601, 610 (5th Cir. 2022) (involving Title VII retaliation claim); Wooten v. McDonald Transit Assocs., Inc., 788 F.3d 490, 496–97 (5th Cir. 2015) (involving ADEA retaliation claim); Foster v. Time Warner Ent. Co., L.P., 250 F.3d 1189, 1194 (8th Cir. 2001) (involving ADA retaliation claim).

318. *See* 42 U.S.C. 2000e-3(a).

319. *See id.*; Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 222 (N.J. 2010).

320. Niswander v. Cincinnati Ins. Co., 529 F.3d 714, 721 (6th Cir. 2008).

321. *Id.* at 720 (quoting Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989)).

322. *Id.* (quoting Johnson v. Univ. of Cincinnati, 215 F.3d 561, 582 (6th Cir. 2000)).

323. *Id.* at 721 (quoting *Booker*, 879 F.2d at 1312).

324. *See Univ. of Cincinnati*, 215 F.3d at 579. In addition, the employee's act of opposition must itself be based on "'a reasonable and good faith belief that the opposed practices were unlawful.'" *Id. See also* Rollins v. State of Fla. Dep't of L. Enf't, 868 F.2d 397, 401 (11th Cir. 1989) (stating that "to qualify for the protection of the statute, the manner in which an employee expresses her opposition to an allegedly discriminatory employment practice must be reasonable," a determination that "is made on a case by case basis by balancing the purpose of the statute and the need to protect individuals asserting their rights thereunder against an employer's legitimate demands for loyalty, cooperation and a generally productive work environment"); Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1139–41 (11th Cir. 2020) (discussing the requirement of reasonable opposition and noting that "an employee's oppositional conduct . . . can . . . lose its protected status . . . if the opposition is expressed in a manner that unreasonably disrupts other employees or the workplace in general").

325. *Rollins*, 868 F.2d at 401.