

A plaintiff sued a defendant for illegal discrimination, claiming that the defendant fired him because of his race. At trial, the plaintiff called a witness, expecting her to testify that the defendant had admitted the racial motivation. Instead, the witness testified that the defendant said that he had fired the plaintiff because of his frequent absenteeism.

While the witness is still on the stand, the plaintiff offers a properly authenticated secret tape recording he had made at a meeting with the witness in which the witness related the defendant's admissions of racial motivation.

Is the tape recording admissible?

- A. No, because a secret recording is an invasion of the witness's Fourth Amendment right to privacy.
- B. No, because it is hearsay not within any exception.
- C. Yes, as evidence of the defendant's racial motivation and to impeach the witness's testimony.
- D. Yes, but only to impeach the witness's testimony.

Explanation:

Witness's prior inconsistent statement

Use	Applicability	Methods of introduction
Impeachment	Always admissible to discredit witness's trial testimony	Examining witness about prior statement
Substantive evidence	Admissible to prove truth only if excluded or excepted from hearsay	Introducing extrinsic evidence if: witness can address & opposing party can question witness about statement <i>or</i> justice so requires

Prior inconsistent statements are statements made by a witness in the past (eg, admissions of racial motivation) that are inconsistent with the witness's current testimony (eg, claims of frequent absenteeism). These statements can be **used to impeach** a witness on a material issue by:

examining the witness about the statement* *or*

introducing the statement through **extrinsic evidence** if (1) the witness has an opportunity to **explain or deny**—and the opposing party has the opportunity to **question the witness** about—the statement or (2) justice so requires.

Here, the plaintiff seeks to introduce the witness's prior inconsistent statement through a secret tape recording. Since the witness is available to address that statement and the defendant can cross-examine her about it, this extrinsic evidence is admissible to impeach the witness's testimony **(Choice B)**.

However, prior inconsistent statements are typically subject to the **rule against hearsay**, which bars the admission of out-of-court statements offered to prove the truth of the matter asserted therein. As a result, these statements **cannot be used as substantive evidence** unless they are **excepted or excluded** from hearsay. Since there is no indication that the witness's prior statement falls into an exception or exclusion, it cannot be used to prove that the defendant was racially motivated **(Choice C)**.

*A party need not show or disclose the contents of a prior inconsistent statement to a witness before questioning the witness on the inconsistency. But the party must, on request, show the statement or disclose its contents to an adverse party's attorney.

(Choice A) The Fourth Amendment right to privacy protects the witness from unreasonable *government* intrusions (eg, warrantless searches and seizures)—not the *plaintiff's* secret recording.

Educational objective:

A prior inconsistent statement can be used to impeach a witness, but it cannot be used as substantive evidence unless it is excepted or excluded from the rule against hearsay.

References

Fed. R. Evid. 613, 801(d)(2) (admissibility of prior inconsistent statements).

Fed. R. Evid. 802 (rule against hearsay).

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