Employers Association of New Jersey
www.eanj.org
30 W. Mount Pleasant Ave., Suite 201, Livingston, NJ 07039
(973) 758-6800 Fax: (973) 758-6900

John J. Sarno, Esq.
President & General Counsel

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When Employees Tape Record Conversations with Supervisors

The National Labor Relations Board's recent decision in *Hawaii Tribune-Herald* (2011) addresses several issues of importance to employers. Among other things, the Board held that employees may secretly tape record meetings with their managers that they reasonably believe could result in discipline when (1) the employer has denied the employee the *Weingarten* right to union representation at the meeting; (2) the employer does not have a rule against taping; and (3) the taping does not violate state or local law.

Weingarten rights are derived from the case of *NLRB v. Weingarten, Inc.* (U.S. Supreme Court). Generally speaking, when a bargaining unit employee is to be interviewed by a management representative for the purpose of eliciting information concerning some act or conduct on his part, if the employee "reasonably believes" that some disciplinary action against him will result, he has the right, if he personally requests it, to have a representative present during the interview. Thereupon, the employer has the option of either (a) acceding to the request, or (b) dispensing with the interview and imposing whatever discipline is warranted, or (c) informing the employee that it will not proceed with the interview unless he waives his right to representation.

Whether *Weingarten* rights apply to nonunion shops has been hotly contested. In 1999, the NLRB reversed a prior decision that non unionized employees are entitled to assistance of a co-worker during an investigatory interview which the employee reasonably believes will lead to disciplinary action. Therefore, *Weingarten* rights apply only to employees in a union environment.

Whether employee tape recording conversations at work may be permissible under state law is unclear.

In New Jersey, it is not a crime to secretly tape record a conversation between two people. But that doesn't mean that an employee cannot be fired for disloyalty. But sometimes ven firing a disloyal employee can be tricky.

In 2010, the Supreme Court of New Jersey blurred the line between disloyalty and legally-protected activity. While an employer clearly has a right to conduct its business and a right to require loyalty of its employees the Court has seemingly adopted an approach that will insulate disloyal employee conduct under certain circumstances.

In *Quinlan v. Curtiss-Wright Corp.* held that an HR Director can use confidential personnel information to sue her employer.

In *Quinlan,* an executive director for human resources at Curtiss-Wright sued the employer under NJLAD after she was bypassed for promotion to vice president in favor of a male employee hired many years after her. Because of her role as executive director of human resources position Quinlan had access to the company's personnel records. The Employee Handbook contained an expressed confidentiality policy covering personnel records and Quinlan had signed a separate confidentiality agreement covering personnel records, and other company documents. Nevertheless, Quinlan copied more than 1,800 pages of personnel files, including salary records, and gave them to her lawyer.

When the employer learned of Quinlan's action after the lawsuit was filed and during the course of ordinary discovery proceedings, she was warned not to copy any more documents. Despite the warning, she copied the post-promotion evaluation of Kenneth Lewis, the person who was promoted instead ahead of Quinlan, and gave it to her lawyer.

While the Court found that Quinlan could be fired for theft of company documents adopted a complex six-factor test holding that the use of purloined documents can be justified if they are used to support a discrimination suit. This is a very abstract legal standard that the dissenting opinion thought impossible for any reasonable employer to follow. The majority found it significant that Quinlan had access to the documents as an ordinary part of her job. On the other hand, if the theft of the document was due to the employee's intentional acts outside of his or her ordinary duties, the balance will tip in the other direction in favor of the employer. Therefore, the employee who finds a document by rummaging through files or by snooping around in offices of supervisors or other employees will not be entitled those documents.

Also, the Court evaluated what the Quinlan did with the confidential documents. If the employee looked at it, copied it and shared it with an attorney for the purpose of evaluating whether the employee had a viable lawsuit against the employer or of assisting in the prosecution of a claim, this factor will favor the employee. On the other hand, if the employee copied the document and disseminated it to other employees not privileged to see it in the ordinary course of their duties or to others outside of the company, this factor will balance in the employer's favor.

What of instead of copying documents, Quinlan instead tape recorded a conversation with her boss about her job performance. If discovered, the *Quinlan* analysis suggests that she could be fired for disloyalty. Moreover, the tape recording would have been done outside the course of Quinlan's job duties, unlike the documents that she came across in the actual case.

The Equal Opportunity Commission takes the position that employee secret tape recordings are protected activity and such an action cannot form the legal basis for a discharge, at least in cases where the employee makes the recordings in an effort to prove illegal discrimination. Courts are split over whether secretly recording conversations with a supervisor can be protected activity under Title VII of the Civil Rights Act of 1964.

Title VII prohibits retaliation against an employee for "assisting or participating in the investigation of his or her complaints of workplace discrimination. In *Heller v. Champion International Corp.,* the Second Circuit Court of Appeals in New York ruled by a 2-1 vote that tape recording the boss in order to gather evidence of discrimination was protected and that employee could not legally be fired for such activity. According to the court, "surreptitious tape-recording, to be sure, represents a kind of 'disloyalty' to the company, but not necessarily the kind of disloyalty that under these circumstances would warrant dismissal as a matter of law."

Since *Quinlan* was also a retaliation claim (under the New Jersey Law Against Discrimination), it is likely that a New jersey court would apply the analysis of that case to a situation where an employee is fired for tape recording a conversation. The discharge would be in "legal" but the information obtained from that disloyal conduct may be used to further a discrimination case. Thus, New Jersey law, to a certain extent, encourages employees to take the big risk of being fired for disloyalty. Presumably, that risk would be based on the employee's belief that they have a valid discrimination case to bring against the employer after they are fired.

And what of the employer that finds out that an employee is tape recording conversations? While the disloyal employee could be fired, *Quinlan* requires caution and a counter strategy. In this situation, the small employer that is strapped and would rather not pay a lawyer is over its head. But the game has changed in New Jersey and the discharge of even disloyal employees has gotten a lot more complex.