



LAW OFFICE
OF
LARRY L. CRAIN

LEGAL MEMORANDUM

Larry L. Crain, Esq.
General Counsel
Professional Educators of Tennessee

This memorandum shall address the legal right of a teacher who is directed to attend a meeting with an administrator to tape record the meeting as a means of preserving an evidentiary record of the events which occur during the meeting. It shall be assumed, for purposes of this memorandum, that the teacher's attendance at the meeting is mandatory, and the meeting is one in which either the teacher's terms or conditions of employment, or potential disciplinary measures are potential topics of discussion. As a corollary to this issue, this memorandum shall also address the right of a public employee to have a representative or witness present during such a meeting, and, in the event such an accommodation is denied by the employer, his or her right to decline attending the meeting.

I. A Public Employee Has A Legally Recognized Right To Tape Record A Meeting Which Involves Confrontation Over An Employment-Related Issue.

This issue frequently arises in the context of an employee's right to conceal a tape recording device for the purpose of preserving the details of a conversation with a supervisor. Framed in this manner, the legal issue is does an employee, concerned about workplace harassment or intimidation, have a protected right to surreptitiously tape-records conversations with a supervisor? Title VII of the Civil Rights Act of 1964 prohibits "retaliation" against an employee for "assisting or participating" in the investigation of his complaints of workplace discrimination. *42 U.S.C. section 2000e-3(a)*. An employee must show that he engaged in "protected activity," and that an adverse employment action may result.

If recording workplace conversations is a protected activity, then an employer might be liable for punishing an employee for this conduct. At least one federal court has ruled that secretly tape-recording workplace conversations can be a protected activity. In *Heller v. Champion International Corp.*, 891 F.2d 432 (2d Cir. 1989), the plaintiff, Irwin Heller, learned that he was

about to be demoted. Heller, who was allegedly concerned about age discrimination, decided to tape-record future meetings with his supervisor.

After Heller was demoted, he confided in two co-workers that he had recorded the meeting. Heller also stated he had consulted with an attorney regarding the right to tape record the conversation. One of these co-workers betrayed Heller's confidence to his supervisor. Heller was terminated shortly thereafter. He then filed claims for age discrimination and breach of an employment contract.

The court rejected the employer's argument that an employee would never be justified in tape-recording conversations with his superiors and discussing a possible lawsuit. The court further concluded that under the circumstances, Heller's conduct might have been "justified" in light of his belief that he was gathering evidence in support of a possible age discrimination claim.

Courts are often guided in their determination of this issue from decisions analyzing similar types of conduct, such as secretly copying confidential personnel documents. These decisions balance the employee's right to collect evidence against the employer's interests in confidentiality, loyalty, maintaining employee morale and an efficient workplace. The analysis, which is necessarily fact-specific, focuses on whether the employee's conduct was justified under the circumstances.

The facts have tipped the balance in favor of the employee in most of these cases. For example, in *Grant v. Hazelett Strip-Casting Corp.*, 880 F.2d 1564 (2d Cir. 1989), Walter Grant had a personality conflict with his supervisor, the president of the company. Grant accepted a position with less day-to-day contact with the president and also agreed to help find his replacement. When Grant asked the president what type of candidate he was interested in, the president responded, "a young man, between 30 and 40." After consulting an attorney, Grant prepared a memo reciting these qualifications, including the candidate's age. Grant then submitted the memo to the president who reviewed it, filled in the salary range and signed it. Grant was subsequently terminated for refusing to destroy the memo. He sued for age discrimination and retaliation.

The jury found in Grant's favor on the retaliation claim. However, the district court granted the employer's motion for judgment notwithstanding the verdict. The district court held that Grant's conduct was not a protected activity, explaining that it "amounted to nothing more than a self-serving attempt to entrap his employer into the appearance of engaging in age discrimination, where no such discrimination existed." The Second Circuit reversed, holding that the jury could have believed that Grant was attempting to gather evidence for a future lawsuit. The court explained that "the jury could have concluded that Grant's memo did not create the appearance of discrimination but as Grant testified, merely documented a discriminatory practice that already existed."

Similarly, courts have found that an employer cannot demand that an employee refrain from tape recording a meeting where the employee's rights to certain benefits may be conditioned on his attendance and participation in the meeting. For example, in *Hewson v. Asker's Thrift Shop*, 814 P.2d 424 (Ida. 1991), the Idaho Industrial Commission concluded as a matter of law that a claimant did not have a constitutional or statutory right to tape record the requested medical evaluation. Because she had not raised the issue at any time during the hearing process, the Commission

summarily dismissed claimant's argument that she had a constitutional right to record the exam. The Commission determined as a matter of law that the use of a tape recorder would inject an unnecessarily adversarial atmosphere in the medical examination, would increase the adversarial nature of a contested worker's compensation claim, and would open the door to untold other legal and practical problems. The Commission concluded that allowing an employee to tape record the evaluation would not be in the best public policy of this the state. The court reversed citing to an earlier opinion in which it held that an employee had the right to have present such attendants, reasonably limited as to number, as she may desire present during an examination. The court expressly stated: "Accordingly, as a matter of law we hold that Hewson's requesting and properly using a small audio recording device is not unreasonable. We recognize that in some instances the improper use of a tape recording device may constitute an obstruction, however, given the facts in this case it is clear that there was no obstruction and the request was not unreasonable." *Id.* at 429.

Based on these cases, if an employer intends to punish or retaliate against an employee for tape-recording workplace conversations - as opposed to punishing the employee for disobeying instructions not to use his tape recorder at work - the employer should consider whether the employee had a good reason for tape-recording the conversations, whether the conversations involved confidential matters, whether the employee's behavior was disruptive, what the employee did with the information (i.e., whether the employee shared it with other employees and, if so, whether he had a valid reason for doing so) and whether state law prohibits this type of activity. Currently, there is no prohibition in Tennessee statute or case law which prohibits such activity on the part of a public employee.¹

2. A Public Employee Has The Right To Have A Witness Or Legal Representative Present During Any Investigational Meeting Involving The Employee's Terms Or Conditions Of Employment.

In Tennessee, the right of a teacher to select a representative of their choosing is protected by statute. Tenn. Code Ann. § 49-5-603 provides, in relevant part, as follows:

Professional employees have the right to self-organization, to form, join or be assisted by organizations, to negotiate through representatives of their own choosing, and to engage in other concerted activities for the purpose of professional

¹ This proposition presumes that at least one of the participants to the conversation, which may be the employee himself, has consented to the tape recording of the conversation. The use of electronic surveillance to intercept a third party conversation is expressly forbidden under Tennessee's wiretap law, Tenn. Code Ann. § 39-13-601.

negotiations or other mutual aid or protection; provided, that professional employees also have the right to refrain from any or all such activities.

This statute confers upon a teacher the right to select their own professional organization to assist them in negotiations with their employer and this includes the right to have legal counsel provided by that organization.

In addition, a public employee has the right to have an impartial witness of their choice present at any investigational meeting in which the employee's terms or conditions of employment are a topic of discussion. *ITT Lighting Fixtures, Div. of ITT Corp. v. N.L.R.B.*, 719 F.2d 851 (6th Cir. 1983); *E.I. duPont de Nemours & Co. v. NLRB*, 707 F.2d 1076 (1983). Such a request has been held to constitute concerted activity by an employee. "We repeat that we do not foreclose the possibility that a request for a fellow employee may be found concerted in a nonunion setting." This protection applies to nonunion employees as well as union employees, *see NLRB v. Washington Aluminum Co.*, 370 U.S. 9 [82 S.Ct. 1099, 8 L.Ed.2d 298] (1962). Hence, an employer's refusal to allow an employee the right to have a witness present during an investigational meeting may give rise to a claim of retaliation, and may excuse the employee's decision to forego attendance at such a meeting without a witness present.