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Marc C. McAllister

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EMPLOYEE BEWARE: WHY SECRET WORKPLACE RECORDINGS ARE RISKY BUSINESS FOR EMPLOYEES

MARC CHASE MCALLISTER*

This Article examines the risks for employees when secretly recording workplace conversations. Although many employers flatly prohibit employees from secretly recording workplace conversations, case law contains dozens of examples of employees conducting such espionage. In the typical case, employees secretly record conversations to gather evidence to support claims of discrimination, harassment, or whistleblowing, but many of those individuals were likely unaware of the pitfalls associated with their clandestine activities. This Article uncovers various pitfalls for employees when secretly recording workplace conversations. These include being fired by their employer for violating its no-recording policy, finding courts unreceptive to claims of retaliation under the employment discrimination laws, having otherwise valid harassment claims dismissed for attempting to record evidence of harassment rather than timely reporting the matter to their employer, facing civil liability or criminal penalties for wiretap violations, and being found liable in tort for invasion of privacy. Given these numerous pitfalls, this Article concludes that employees should generally refrain from making secret workplace recordings and should seek to gather evidence in other ways.

* Marc McAllister is an Assistant Professor of Business Law at Coastal Carolina University. The author's recent articles have appeared in the *Boston College Law Review*, *Florida Law Review*, *Maryland Law Review*, *Washington and Lee Law Review*, and *Alabama Law Review*.

I. INTRODUCTION

Andrea is a recent college graduate in her first job at a large company. In the six months Andrea has been on the job, she has been repeatedly sexually harassed by her boss, who has escalated his harassment when Andrea has refused to "play along." Having reached her breaking point, Andrea decides to complain to higher-ups in the organization. Although Andrea knows she is protected from retaliation for making such complaints, she is worried that upper management will not believe her claims, especially since Andrea's boss is entrenched within the company. To bolster her claims and generate evidence for a potential lawsuit against her employer, Andrea is contemplating secretly recording her interactions with her boss before making any formal complaint. Before doing so, Andrea wants to know whether such workplace espionage poses any risks for her.[1] This Article addresses Andrea's concern and concludes

1. This hypothetical is adapted from cases like *Cornell v. Jim Hawk Truck Trailer, Inc.*, 297 F.R.D. 598 (N.D. Iowa 2013) (involving allegations similar to the hypothetical) and *Moray v. Novartis*

that while it may be tempting for employees with legitimate legal claims to gather evidence through secret recordings, the risks of conducting such surveillance far outweigh any potential benefits for employees.[2]

Given the proliferation of the #MeToo movement and the recording capabilities of modern cell phones, the reality is that many employees are now covertly recording conversations at work.[3] In one recent example, Omarosa Manigault Newman, a White House aide under President Donald Trump, released a secret recording that allegedly proved she was offered a high-paying job in exchange for her silence about her White House tenure.[4] Omarosa also claims to have many other interesting tidbits on tape.[5] Given the ease in which workplace conversations can be recorded and the significant employer interests at stake, many employers have enacted rules that prohibit employees from secretly recording conversations at work, with penalties up to and including termination.[6]

Pharm. Corp., Civil Action No. 3:07-cv-1223, 2009 WL 82471, at *11 (M.D. Tenn. Jan. 9, 2009) (involving a whistleblower retaliation claim where 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 that [her employer] would believe her if the company had access to the tape"), *aff'd*, 345 F. App'x 144 (6th Cir. 2009).

2. Despite the numerous pitfalls associated with secretly recording workplace conversations, there are times when an employee's secret workplace recordings can benefit the employee. For an example of a case where an employee's secret recordings led to liability in a class action discrimination lawsuit against the employer, see *Roberts v. Texaco, Inc.*, 979 F. Supp. 185, 189–91 (S.D.N.Y. 1997) (discussing the impact of an employee's surreptitious recordings).

3. *See infra* Section II.A.

4. John Wagner, *Omarosa Manigault Newman Releases Secret Recording of $15,000-a-month Job Offer from Lara Trump*, WASH. POST (Aug. 16, 2018), https://www.washingtonpost.com/politics/omarosa-manigault-newman-releases-secret-recording-of-15000-a-month-job-offer-from-lara-trump/2018/08/16/1b4ad7ea-a179-11e8-8e87-c869fe70a721_story.html [https://perma.cc/7HS4-DMZT].

5. Darlene Superville, *Omarosa has 'Treasure Trove' of Tapes, Videos, Texts to Back Her Anti-Trump Book*, USA TODAY (Aug. 17, 2018), https://www.usatoday.com/story/life/people/2018/08/17/omarosa-has-treasure-trove-evidence-support-book-reports-ap/1024530002/ [https://perma.cc/8LFV-PPS6].

6. *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 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, 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 Capitol, 964 F. Supp. 2d 81, 89, 96–97 (D.D.C. 2013) (involving violation of a rule prohibiting the use of recording devices at work), *aff'd*, No. 14-5287, 2015 WL 5209639 (D.C. Cir. July 16, 2015). *See generally* Doug Chartier, *Do Employers Have the Green Light to Install No-Recording Policies?*,

Cases like Andrea's and Omarosa's raise numerous legal questions for both employers and employees.[7] While the employer side of the equation merits its own analysis, this Article examines the potential benefits and risks for employees when secretly recording workplace conversations. Specifically, this Article considers the following questions:

- As a general matter, can an employee be disciplined by their employer for violating their employer's policy against secretly recording workplace conversations?
- Under what circumstances could an employee's secret recording be protected activity under the National Labor Relations Act (NLRA)?
- Are recordings protected activity if the employee's purpose is to gather evidence to support a whistleblowing claim or a charge of discrimination or harassment?
- When an employee secretly records workplace conversations, could the employee face civil liability or criminal penalties for violating a federal or state wiretap law?
- Could secretly recording workplace conversations lead to civil liability under the tort of intrusion upon seclusion?

Before examining these issues, Part II summarizes the types of technologies that can be used to record workplace conversations and provides examples of employer rules prohibiting such recordings, referred to in this Article as "no-recording" rules or policies. Part III considers the first question identified above by examining whether employees can be disciplined by employers for recording workplace conversations in violation of a no-recording rule. Part IV considers no-recording policies under the NLRA, including whether the statute permits such policies and to what extent the law protects specific instances of recording. Part V examines cases where employees have secretly recorded conversations to gather evidence to support charges of discrimination, harassment, or whistleblowing, and whether being terminated for such recordings can lead to a valid retaliation claim against the employer. Shifting to potential employee liability, Part VI considers whether secret workplace recordings could violate federal or state wiretap laws, and Part VII examines whether an employee could be sued in tort for such conduct.

L. WEEK (Aug. 27, 2018), https://www.lawweekcolorado.com/article/do-employers-have-the-green-light-to-install-no-recording-policies/ [https://perma.cc/28WL-CULT] ("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.").

7. For employers, issues include the extent to which employees can be lawfully prohibited from secretly recording workplace conversations, including whether such conduct might constitute statutorily protected activity.

Part VIII concludes by summarizing the myriad of pitfalls for employees who secretly record workplace conversations. Briefly stated, these pitfalls include the possibility of being disciplined by an employer for violating the employer's no-recording policy,[8] finding courts unreceptive to claims of retaliation under the employment discrimination laws due to the employee's clandestine activities,[9] having otherwise valid harassment claims dismissed for recording conversations rather than timely reporting the harassment,[10] facing civil liability or criminal penalties for wiretap violations,[11] and being found civilly liable under the tort of intrusion upon seclusion.[12] Given these pitfalls, this Article concludes that employees should generally refrain from making secret workplace recordings and should seek to gather evidence against their employers in other ways.

II. THE MODERN WORKPLACE: SECRET RECORDINGS AND NO-RECORDING RULES

This Section summarizes the types of technologies that can be used to record conversations at work and provides examples of employer rules prohibiting such recordings.

A. Common Recording Methods

There are numerous means of recording conversations. In one recent case, for example, an employee "surreptitiously used a pen with a tiny digital voice recorder" to record conversations.[13] Employees have also used small handheld digital recorders, tape recorders hidden within their clothing, and even dictaphone machines.[14] In one case, an employee made recordings over a three-year period using "an unsophisticated digital voice recorder" that he would place in his pocket and leave on "until the time ran out," at which point he

8. *See infra* Part III.

9. *See infra* Section V.A.

10. *See infra* Section V.C.

11. *See infra* Part VI.

12. *See infra* Part VII.

13. Allen Smith, *Employees Secretly Record Managers for Litigation*, SHRM (Aug. 8, 2018), https://www.shrm.org/resourcesandtools/legal-and-compliance/state-and-local-updates/pages/secret-recordings.aspx [https://perma.cc/694E-FDAR].

14. *See* Benjamin v. Citationshares Mgmt., LLC, ARB Case No. 12-029, at 3–4, 2013 WL 6385831, at *3–4 (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 v. Gavin, 446 F.2d 794, 796 (8th Cir. 1971) (involving a telephone conversation recorded with a dictaphone machine).

would "either shut it off and start over, or if there was something recorded that he thought was interesting, take it home and download it onto his computer."[15]

Perhaps the most common method of recording conversations is through smartphones.[16] As smartphones have become prevalent, employees are recording work conversations much more frequently than in the past.[17] Such recordings are often made by those who are contemplating suing their employers, and may include talks with co-workers, meetings with supervisors, and discussions with executives and human resources personnel.[18] According to one attorney, secret recordings are "definitely on the increase," not only in whistleblower cases but also to support discrimination claims and in retaliation cases.[19] Nevertheless, the law on this issue is not "fully developed," and will likely get increased attention as secret recordings increase.[20]

B. No-Recording Policies

As this Article shows, employees enjoy very limited protection against being punished for secret recordings.[21] Accordingly, lawyers and human resources professionals often recommend that employers prohibit secret

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15. Smith v. Emp. Sec. Dep't, 226 P.3d 263, 265 (Wash. Ct. App. 2010) (cleaned up).

16. *See* Sarah Clowater, *Secretly Recording Conversations at Work: Risky Business*, NELLIGAN L. (Aug. 7, 2019), https://nelliganlaw.ca/blog/secretly-recording-conversations-at-work/ [https://perma.cc/KJ5N-ZJK6] ("Most people these days have a smartphone in their pocket and/or a tablet in their bag. As such, it should come as no surprise that employees are increasingly recording conversations with colleagues or managers in the workplace in secret. It is easy to do this without the other person's knowledge by simply setting your device to record mode before entering a meeting."); Ronald J. Rychlak, *Sound in the Courtroom: Audio Recordings at Trial*, 39 AM. J. TRIAL ADVOC. 1, 1 (2015) ("[V]irtually everyone today has a recording device, such as a cell phone, on their person."); 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).

17. *See* Smith, *supra* note 13 (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/NUD2-8SP6] ("Over 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.").

18. Smith, *supra* note 13.

19. *See id.* (reporting the comments of Edward Ellis, an employment attorney in Philadelphia with Littler).

20. *See id.*

21. *See infra* Part IV (discussing conflicting and ever-changing rulings under the NLRA); Part V (discussing whether secret workplace recordings are protected activity under employment discrimination and whistleblowing laws).

recordings to promote open communication among co-workers.[22] Depending on the employer's business, an employer may have a range of legitimate reasons for prohibiting secret workplace recordings. These include:

- Protecting the private nature of workplace communications;[23]
- Preventing the erosion of trust and employee morale that can result from secret recordings;[24]
- Protecting the confidentiality of sensitive employment-related issues that may arise in disciplinary meetings and workplace investigations;[25]
- Protecting other confidential or sensitive business information, including customer data;[26]
- Protecting trade secrets and similar proprietary information;[27] and
- Preventing the negative publicity that may stem from the release of such recordings, especially those that lack

22. *See* Chartier, *supra* note 6 (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 13; Maria Webber, *Recording Conversations at Work*, CITRUSHR (Nov. 4, 2019), https://citrushr.com/blog/hr-headaches/recording-conversations-at-work/ [https://perma.cc/VEY5-TCKA] ("Our advice is to lay out your stance on recordings within your employee handbook . . . .").

23. *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).

24. *See, e.g.*, Clowater, *supra* note 16 ("Secret recordings . . . would likely impair relationships and foster an environment of mistrust in the workplace."); Moray v. Novartis Pharm. 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) ("[T]he surreptitious tape recording of one's supervisors may implicate confidentiality and employee trustworthiness concerns to such an extent that immediate disciplinary would be justified.").

25. Tracy M. Evans, *The Perks and Pitfalls of No-Recording Policies in the Workplace*, SAXON, GILLMORE & CARRAWAY, P.A., (Aug. 29, 2016), https://www.saxongilmore.com/the-perks-and-pitfalls-of-no-recording-policies-in-the-workplace/ [https://perma.cc/4RHZ-ERQ4].

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

27. *See BMW Mfg. Co.*, 2020 WL 7338076, at *3–4; Hoffman v. Netjets Aviation, Inc., ARB Case No. 09-021, at 2, 2011 WL 1247208, at *2 (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").

context.[28]

Along with these legitimate employer interests, adopting a no-recording policy is generally good advice for employers because whether an employer has a no-recording policy in place can make a difference in a wrongful termination case.[29]

Case law is replete with examples of no-recording policies.[30] In *Hudson v. Blue Cross Blue Shield of Alabama*, an employee was terminated for violating her company's no-recording rule, which declared:

> In order to protect the privacy of its associates, subscribers, and providers; the confidentiality of medical information; and the communications between patients, physicians, and other health care providers, the use of cameras, tape recorders, or other audio-visual equipment in any Company facility is not allowed without prior approval of the Company President and/or the Vice President of Human Resources.[31]

One recent decision of the National Labor Relations Board (NLRB), *BMW Manufacturing Company*, involved an employer's no-recording policy stating that employees must "[n]ot use personal recording devices within BMW MC facilities and not use business recording devices within BMW MC facilities without prior management approval."[32] According to testimony in that case, this policy "protects the company's brand and confidential and proprietary information, including new design technology, trade secrets and new car models . . . from being recorded, photographed, or publicly disseminated."[33] The NLRB upheld this rule because the employer's legitimate interests served

28. *See* Evans, *supra* note 25 ("Recordings by employees are likely to be conducted on a biased, selective basis, and could have a negative effect on client relations and public perception.").

29. *See, e.g.*, Deltek, Inc. v. Dep't of Lab., 649 F. App'x 320, 332–33 (4th Cir. 2016) (finding employer liable for retaliation for terminating an employee for having complained of securities law violations, and finding the absence of an employer policy prohibiting surreptitious recordings dispositive as to whether employer would have terminated employee for such conduct); *cf.* Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 227 (N.J. 2010) (adopting a multi-factor test for the related issue of whether an employee's act of taking documents from their employer to support a discrimination claim is protected activity, including whether the employer has enacted "a clearly identified company policy on privacy or confidentiality that the employee's [action] has violated").

30. *See supra* Section II.B.

31. *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). The policy further states that any violation will "subject the associate to disciplinary action up to and including discharge." *Id*.

32. *BMW Mfg. Co*., 2020 WL 7338076, at *3.

33. *See id*. at *24 (attached decision of Administrative Law Judge, Donna A. Dawson).

by the rule far outweighed the rule's adverse impact on employees' exercise of their NLRA rights.[34]

A similar case involved NLRA challenges to rules found in the employee handbook of a Las Vegas casino and hotel.[35] One of those rules, which the NLRB has also ratified, stated as follows: "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)."[36] Other employers have enacted similar no-recording policies that flatly ban any and all secret workplace recordings by employees.[37]

As opposed to such outright bans on secret recordings, some employers have enacted no-recording policies that are more specific. For example, in direct response to concerns that confidential proprietary business information shared with employees in training meetings might become public due to secret audio recordings, one employer implemented a policy prohibiting its employees from recording in-person or telephone communications "by, between, or among" other employees "relating in any way to [the employer's] business," presumably exempting purely personal conversations from the employer's no-recording ban.[38]

III. TERMINATIONS FOR VIOLATING AN EMPLOYER'S NO-RECORDING RULE

Generally speaking, employers have freedom to enact reasonable workplace rules, including no-recording policies, that are fitting and

34. *See id*. at *4; *see also Boeing Co.*, 365 N.L.R.B. No. 154, at 19, 2017 WL 6403495, at *19 n.89 (Dec. 14, 2017) (overruling the Board's decision in *Caesars Entertainment*, 362 N.L.R.B. No. 1690, at 1694, 2015 WL 5113232, at *5 (Aug. 27, 2015), which had found that an employer's no-camera rule and no-recording rules were unlawful).

35. Caesars Ent., 362 N.L.R.B. No. 1690, at 1690, 2015 WL 5113232, at *1 (Aug. 27, 2015).

36. *Id.* at *3. The NLRB initially struck down this rule as overbroad. *Id.* at *4. However, this decision was later overruled after the NLRB adopted a new framework for analyzing such rules in 2017. *See BMW Mfg. Co*., 2020 WL 7338076, at *3–4 n.10.

37. *See, e.g.*, Moray v. Novartis Pharm. Corp., No. 3:07-cv-1223, 2009 WL 82471, at *2 (M.D. Tenn. Jan. 9, 2009) (involving a no-recording policy flatly prohibiting employees from recording "the conversation of another employee without his or her full knowledge and consent"), *aff'd*, 345 F. App'x 144 (6th Cir. 2009); Mohamad v. Dallas Cnty. Cmty. Coll. Dist., No. 3:10-CV-1189-L-BF, 2012 WL 4512488, at *8 (N.D. Tex. Sept. 28, 2012) (involving an employer's policy that "[s]ecret recordings are strictly prohibited unless authorized in writing by [the employer's] legal counsel").

38. Hoffman v. Netjets Aviation, Inc., ARB Case No. 09-021, at 3, 2011 WL 1247208, at *3 (Mar. 24, 2011). The policy added that failure to comply with the policy would "result in discipline, up to and including discharge." *Id.*

appropriate to their business.[39] In many workplaces, particularly those with written no-recording policies, the act of secretly recording a conversation can amount to misconduct, with penalties up to and including termination.[40]

Employers can adopt and enforce no-recording rules even in states where wiretapping laws make it lawful to record a conversation with the consent of only one participant to the conversation, such as the person making the recording.[41] In addition, violating an employer's no-recording policy can be

39. *See* Ingram v. Pre-Paid Legal Servs., Inc., 4 F. Supp.2d 1303, 1313–14 (E.D. Okla. 1998) ("While [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. . . . [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"). *See generally* 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.").

40. *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, *16 (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* 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, 92 (1997) (noting that some courts have upheld employers' rights to discipline employees for surreptitiously recording conversations); Webber, *supra* note 22 ("[I]f an individual makes a recording in secret without asking, or after [their employer] denied them permission, this will [typically] be seen as misconduct, and could even amount to gross misconduct justifying dismissal."); Clowater, *supra* note 16 ("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.").

41. *See* Kathryn Vasel, *Should You Secretly Tape Conversations with Your Boss?*, CNN BUSINESS (Sept. 30, 2018), https://www.cnn.com/2018/09/30/success/legal-to-record-conversations-boss-office/index.html [https://perma.cc/GE4C-L8E2] ("[J]ust because you can legally record a conversation [under a one-party consent law], doesn't mean you should. Some companies have policies against recording in the workplace, which means you can get fired even if you get the legally required consent."); Jacob M. Monty, *Texas Employers May Limit or Prohibit Audio Recording in the Workplace*, TEX. EMP. L. LETTER, June 2018, at 1, 2 ("While the law [in a one-party consent state like Texas] generally permits employees to record conversations in public workplaces, Texas employers do not have to allow workplace recordings. Texas' 'one-party consent' law allows individuals to legally make secret recordings of conversations they are part of, but employers have the authority to implement

grounds for termination, regardless of whether the recorded content supports some other viable claim by the offending employee, such as sexual harassment, discrimination, or whistleblower retaliation.[42] 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."[43] "It's like cutting off your nose to spite your face."[44]

As discussed in Part V, when an employee who has complained of discrimination or harassment is later terminated for violating a no-recording rule, this will often generate retaliation claims against employers. In these cases, the employee will typically claim their employer's enforcement of its no-recording policy is actually a pretext to conceal its true retaliatory motive.[45] To the extent such claims are successful, this could effectively dampen the enforcement of no-recording policies.[46] But as this Article shows, proving pretext in this context is extremely difficult, and courts are generally unwilling to ratify workplace espionage as a form of self-help.[47] In the end, these cases send a strong signal to employers that no-recording policies are lawful, and show that their enforcement will typically not be overturned.[48] In some specific situations, however, no-recording policies might give way to employee rights. The next Part addresses one of those situations involving the NLRA.

IV. NO-RECORDING POLICIES UNDER THE NLRA

Although no-recording policies are generally lawful and can be enforced against offending employees with limited judicial oversight, such policies

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policies that limit or prohibit recordings in the workplace."); *Mohamad*, 2012 WL 4512488, at *2, *7–11 (rejecting disparate treatment discrimination claim and upholding termination of employee for having secretly recorded conversations with his superior, even though Texas law permitted such recordings).

42. *See infra* Part V; *see also, e.g.*, *Moray*, 2009 WL 82471, at *12 (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).

43. Vasel, *supra* note 41 (reporting the comments of Kristin Alden, an employment attorney in Washington, DC).

44. *Id.*

45. *See infra* Section V.A.

46. *Cf.* Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 233 (N.J. 2010) (Albin, J., dissenting) (in the related case of an employee taking documents from their employer to support their discrimination claim, arguing that the majority's opinion, finding such conduct to be protected activity in certain instances, "may encourage unscrupulous behavior" and "may leave a business powerless to discharge a disloyal employee").

47. *See infra* Section V.A.

48. *See infra* Section V.A.

might conflict with certain employee rights. This Part addresses how no-recording policies interact with NLRA-protected activities, including concerted actions designed to improve employee working conditions.[49]

The NLRA was enacted in 1935 as part of President Roosevelt's New Deal legislation.[50] Its goals were to encourage collective bargaining and to curtail employment practices that were thought to harm the general welfare of workers.[51] The heart of the NLRA is Section 7, which states that "[e]mployees shall have the right[s] to" form a union, to bargain collectively, and to join together "in other concerted activities for the purpose of . . . mutual aid or protection."[52] Section 8(a)(1) of the NLRA, in turn, makes it unlawful for employers to "interfere with, restrain, or coerce employees in the exercise of the [Section 7] rights."[53] Thus, "an employer violates section 8(a)(1) if it discharges an employee for engaging in concerted activity for the purpose of mutual aid or protection."[54]

Although often tied to union activities, the NLRA is not limited to unionized workplaces.[55] Rather, as the statute states, it is illegal for an employer to "interfere with" or "restrain" employees in their right to "engage in other concerted activities for the purpose of . . . mutual aid or protection."[56] This latter prohibition covers a surprisingly wide range of activities.[57] For example,

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49. *See* 29 U.S.C. § 157; *see also* Eastex, Inc. v. NLRB, 437 U.S. 556, 565–66 n.15 (1978) ("[T]he 'mutual aid or protection' clause [of the NLRA] protects employees from retaliation by their employers when they seek to improve working conditions through resort to administrative and judicial forums.").

50. Zev J. Eigen & Sandro Garofalo, *Less Is More: A Case for Structural Reform of the National Labor Relations Board*, 98 MINN. L. REV. 1879, 1879 (2014).

51. *See* 29 U.S.C. § 151 (describing the objectives of the NLRA); *see also* NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 33–34 (1937) (discussing the NLRA's objectives).

52. 29 U.S.C. § 157.

53. 29 U.S.C. § 158(a)(1).

54. Mohave Elec. Co-op., Inc. v. NLRB, 206 F.3d 1183, 1188 (D.C. Cir. 2000).

55. 29 U.S.C. § 151; *see also* NLRB v. Washington Aluminum Co., 370 U.S. 9, 15 (1962); MCPC, Inc. v. NLRB, 813 F.3d 475, 483 (3d Cir. 2016) ("The [NLRB] has the authority to broadly construe 'concerted activity' and has interpreted the term to cover not only the union and pre-union efforts of groups of employees seeking to protect their rights but also certain actions undertaken by individuals in the unionized and non-unionized workplace."); Thomas Bean, *NLRA Preemption of State Law Actions for Wrongful Discharge in Violation of Public Policy*, 19 U. MICH. J.L. REFORM 441, 445 (1986) ("[S]ection 7 protection is not limited to unionized workers or organizational activities, and employees retain their protection under the 'mutual aid or protection' clause when they seek to improve their lot as employees outside the immediate employee-employer relationship.").

56. 29 U.S.C. § 157.

57. *See Boeing Co.*, 365 N.L.R.B. No. 154, at 19, 2017 WL 6403495, at *3 (Dec. 14, 2017) (listing examples of employer policies that have been struck down under the NLRA, including rules requiring employees to "work harmoniously" or conduct themselves in a "positive and professional manner").

the NLRA prohibits employers from retaliating against employees who complain to management about some aspect of their working conditions, such as excessive workloads or poor ventilation in the workplace.[58] Overbroad employer policies that would "reasonably tend to chill employees in the exercise of their Section 7 rights" might also violate the NLRA.[59] In one case, for example, an employer's "no hats" policy was struck down because employees could interpret the policy to prevent the wearing of hats with union logos or other protected messages.[60]

The NLRA is administered by the NLRB—a five-member Board whose members are appointed by the President of the United States for five-year terms.[61] As such, the NLRB's priorities often shift when the Board majority shifts from Democrat to Republican, and vice-versa.[62] The NLRB's changing political dynamic has had perhaps its most dramatic effect in cases considering whether a particular workplace rule violates § 8(a)(1) by "chilling a reasonable employee in the exercise of [their] Section 7 rights."[63] As summarized in the subsections to follow, the NLRB's approach to this issue has toggled back and forth between (A) an employee-friendly approach that examines *solely* how a reasonable employee would construe a particular workplace rule without regard to the employer's objectives in imposing the rule, resulting in the rule's invalidation if there is any conceivable impact on Section 7 rights, and (B) a more balanced approach that examines both the nature and extent of the potential impact on employees' NLRA rights along with the employer's legitimate justifications for the rule.[64]

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58. *See, e.g., MCPC, Inc.*, 813 F.3d at 486 (finding employee complaints about excessive workloads protected by the NLRA); NLRB v. Oakes Mach. Corp., 897 F.2d 84, 89 (2d Cir. 1990) ("[C]oncerted activity to protest the discharge of a supervisor . . . or to effect the discharge or replacement of a supervisor . . . may be 'protected' . . . .").

59. *See* Three D, LLC v. NLRB, 629 F. App'x 33, 38 (2d Cir. 2015) (applying this rule to strike down overbroad employer internet policies).

60. World Color (USA) Corp., 197 L.R.R.M. (BNA) 1258, 2013 WL 3964783, at *II.C. (July 31, 2013).

61. 29 U.S.C. § 153(a); *see also US: NLRB Poised to Revise Workplace Rules Test*, HERBERT SMITH FREEHILLS, LLP (March 14, 2022), https://hsfnotes.com/employment/2022/03/14/us-nlrb-poised-to-revise-workplace-rules-test/ [https://perma.cc/L2PY-LH2Q].

62. *See* HERBERT SMITH FREEHILLS, LLP, *supra* note 61; *see also* Eigen & Garofalo, *supra* note 50, at 1887–93 (discussing the NLRB's "practice of flip-flopping its positions on important industrial relations issues with each change in the White House").

63. *See* T-Mobile USA, Inc. v. NLRB, 865 F.3d 265, 270 (5th Cir. 2017) ("[T]he 'appropriate inquiry' is whether T-Mobile's rules for workplace conduct violate § 8(a)(1) by chilling a reasonable employee in the exercise of his or her Section 7 rights.").

64. *See Boeing Co.*, 365 NLRB No. 154, at 19, 2017 WL 6403495, at *4 (Dec. 14, 2017); *see also* Eigen & Garofalo, *supra* note 50, at 1889 (recognizing that the NLRB has "flip-flopped in its

A. No-Recording Rules Under the Any Conceivable Impact Standard

In considering whether a workplace rule violates the NLRA, courts typically apply what is known as the two-part *Lutheran Heritage* framework.[65] Under this framework, one must first consider "whether the rule explicitly restricts activities protected by Section 7."[66] If it does, the rule is unlawful.[67] If the rule does not explicitly restrict Section 7 activity, one must then consider the following three possibilities, any of which could lead to a violation of Section 8(a)(1): (i) whether employees would reasonably construe the rule's language to prohibit Section 7 activity; (ii) whether the rule was promulgated in response to union activity; and (iii) whether the employer has applied the rule to restrict the exercise of Section 7 rights.[68]

No-recording policies typically raise the issue of whether employees would reasonably construe the policy's language to prohibit Section 7 activity. Similar to the "no hats" case, no-recording policies have been struck down during times when the NLRB has employed a more employee-friendly approach to this issue, one that examines if the policy in question has any conceivable impact on Section 7 rights.

In one Fifth Circuit Court of Appeals case from 2017, *T-Mobile USA, Inc. v. NLRB*, employers T-Mobile and Metro PCS (collectively, "T-Mobile") adopted a policy generally providing that "employees may not tape or otherwise make sound recordings of work-related or workplace discussions."[69] T-

interpretation of what kinds of activities constitute 'other concerted activities for . . . mutual aid or protection' under Section 7 of the Act," adding that "[w]hile Republican-controlled Boards have interpreted this protection narrowly, Democratic Boards have applied the protection to a broad range of non-union-related employee activism").

65. *See Boeing Co.*, 2017 WL 6403495, at *1.

66. Martin Luther Mem'l Home, Inc., 343 N.L.R.B. 646, at 646, 2004 WL 2678632, at *1 (Nov. 19, 2004) (emphasis omitted) ("Lutheran Heritage").

67. *Id.*

68. *Id.* at *2.

69. T-Mobile USA, Inc. v. NLRB, 865 F.3d 265, 269 (5th Cir. 2017). T-Mobile's full policy provides:

> To prevent harassment, maintain individual privacy, encourage open communication, and protect confidential information employees are prohibited from recording people or confidential information using cameras, camera phones/devices, or recording devices (audio or video) in the workplace. Apart from customer calls that are recorded for quality purposes, employees may not tape or otherwise make sound recordings of work-related or workplace discussions. Exceptions may be granted when participating in an authorized [T-Mobile] activity or with permission from an employee's Manager, HR Business Partner, or the Legal Department. If an exception is granted, employees may not take a picture, audiotape, or videotape others in the workplace without the prior notification of all participants.

Id. at 269–70.

Mobile's policy was deemed to violate the NLRA "because it would discourage workers from engaging in protected activity."[70] According to the Fifth Circuit: "The [recording] ban, by its plain language, encompasses any and all photography or recording on corporate premises at any time without permission from a supervisor. This ban is . . . stated so broadly that a reasonable employee . . . would interpret it to discourage protected concerted activity, such as [an] employee photographing a wage schedule posted on a corporate bulletin board," which can trigger NLRA protection.[71] In short, because "a reasonable T-Mobile employee . . . would read the language of the recording policy as plainly forbidding a means of engaging in protected activity," the policy violated the NLRA, and this was true regardless of whether the policy, on the whole, was supported by a legitimate business objective.[72]

In another 2017 case, *Whole Foods Market Group, Inc. v. NLRB*, the Second Circuit Court of Appeals found, similar to *T-Mobile*, that when no-recording policies "prohibit[] all recording without management approval, employees would reasonably construe the language to prohibit recording protected by Section 7."[73] As the *Whole Foods* Court declared, "despite the stated purpose of Whole Foods' policies—to promote employee communication in the workplace— . . . the policies' overbroad language could 'chill' an employee's exercise of her Section 7 rights because the policies as written are not limited to controlling those activities in which employees are not acting in concert."[74]

B. No-Recording Rules Under the Boeing Standard

As noted, the courts in *T-Mobile* and *Whole Foods* focused on the "reasonably construe" prong of the *Lutheran Heritage* test, and considered whether the rule at issue violated the NLRA by "chilling a reasonable employee in the exercise of his or her Section 7 rights."[75] When those cases were decided

70. *Id.* at 274.

71. *Id.*

72. *Id.* at 275.

73. Whole Foods Mkt. Grp. v. NLRB, 691 F. App'x 49, 51 (2d Cir. 2017) (internal marks omitted). Regarding such protected activity, the court noted that "[a]s written, those policies prevent 'employees recording images of employee picketing, documenting unsafe workplace equipment or hazardous working conditions, documenting and publicizing discussions about terms and conditions of employment, or documenting inconsistent application of employer rules' without management approval." *Id.*

74. *Id.*

75. *See T-Mobile USA, Inc.*, 865 F.3d at 270 ("[T]he 'appropriate inquiry' is whether T-Mobile's rules for workplace conduct violate § 8(a)(1) by chilling a reasonable employee in the exercise of his

in 2017, those courts—consistent with the NLRB's approach at that time—focused on the "single inquiry" of whether an employee "would reasonably construe" a rule to prohibit some potential Section 7 activity, without balancing that potential interference against the employer's justifications for the rule.[76] In December 2017, however, the NLRB in *Boeing* overruled this aspect of the *Lutheran Heritage* framework and adopted a new standard that considers both a rule's potential effect on NLRA rights and the employer's legitimate justifications for the rule.[77] *Boeing* articulated this new approach as follows:

> [W]hen evaluating a facially neutral policy, rule or handbook provision that, when reasonably interpreted, would potentially interfere with the exercise of NLRA rights, the Board will evaluate two things: (i) the nature and extent of the potential impact on NLRA rights, *and* (ii) legitimate justifications associated with the rule.[78]

In *Boeing*, the NLRB added that it would perform this analysis "consistent with the Board's 'duty to strike the proper balance between . . . asserted business justifications and the invasion of employee rights in light of the Act and its policy[]' . . . ."[79] In order to provide guidance to employers, the Board further noted that it would place its decisions on challenged rules into one of three categories:[80]

> - Category 1 will include rules that the Board designates as lawful to maintain, either because [either (a)] the rule, when reasonably interpreted, does not prohibit or interfere with the exercise of NLRA rights; or [(b)] the potential adverse impact on protected rights is outweighed by justifications associated with the rule. . . .
> - Category 2 will include rules that warrant individualized scrutiny in each case as to whether the rule, when reasonably interpreted, would prohibit or interfere with the exercise of

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or her Section 7 rights."); *Whole Foods Mkt. Grp.*, 691 F. App'x at 50 ("In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1), the appropriate inquiry is whether the rules would reasonably tend to chill employees in the exercise of their Section 7 rights.").

76. *See Boeing Co.*, 365 N.L.R.B. No. 154, at 19, 2017 WL 6403495, at *3 (Dec. 14, 2017) (noting that the Administrative Law Judge in this case "gave no weight to Boeing's security needs for the rule," and describing the *Lutheran Heritage* standard as a flawed "single-minded consideration of NLRA-protected rights, without taking into account any legitimate justifications associated with policies, rules and handbook provisions").

77. *See id.* at *5.

78. *Id.* at *4 (emphasis in original).

79. *Id.* (emphasis omitted).

80. *See id.* at *15 n.74 (noting the Board's "special responsibility to give parties certainty and clarity" regarding what rules are, and are not, lawful to maintain); AT&T Mobility, LLC, 370 N.L.R.B. No. 121, at 7, 2021 WL 1815083, at *7 (May 3, 2021) (same).

> NLRA rights, and if so, whether any adverse impact on NLRA-protected conduct is outweighed by legitimate justifications.
>
> - Category 3 will include rules that the Board will designate as *unlawful* to maintain because they would prohibit or limit NLRA-protected conduct, and the adverse impact on NLRA rights is not outweighed by justifications associated with the rule. An example of a Category 3 rule would be a rule that prohibits employees from discussing wages or benefits with one another.[81]

Importantly, these categories are not part of the actual *Boeing* test.[82] Rather, the categories represent a classification of results from the NLRB's decisions and are intended to "provide . . . greater clarity and certainty to employees, employers and unions."[83]

In *Boeing* itself, the NLRB considered Boeing's no-camera rule that prohibited employees from using camera-enabled devices to capture photos and videos without a valid business need and an approved camera permit.[84] Applying its new framework, the NLRB found that Boeing's no-camera rule "may potentially affect the exercise of Section 7 rights, but this adverse impact is comparatively slight," given that "[t]he vast majority of images or videos blocked by the policy do not implicate any NLRA rights."[85] The NLRB further deemed this slight adverse impact "outweighed by substantial and important justifications" underlying the no-camera rule, including compelling employer interests in safeguarding proprietary secrets and classified information stemming from Boeing's federal defense contracts.[86] Accordingly, the NLRB concluded that Boeing's no-camera rule did not violate Section 8(a)(1).[87]

In 2021, the NLRB applied its new *Boeing* standard for evaluating facially neutral policies to AT&T's Privacy in the Workplace policy, which forbade employees from recording conversations with co-workers without advance approval from the employer's legal department.[88] The *AT&T* case involved an AT&T employee, Marcus Davis, who served as a union steward for the

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81. *Boeing Co.*, 2017 WL 6403495, at *4.

82. *Id.* at *4; *see also AT&T Mobility, LLC*, 2021 WL 1815083, at *3.

83. *Boeing Co.*, 2017 WL 6403495, at *5; *AT&T Mobility, LLC*, 2021 WL 1815083, at *3.

84. *Boeing Co.*, 2017 WL 6403495, at *6.

85. *Id.* at *21–22.

86. *See id.* at *17 (discussing these employer interests).

87. *Id.* at *18.

88. *AT&T Mobility, LLC*, 2021 WL 1815083, at *1. In its entirety, AT&T's no recording policy stated: "Employees may not record telephone or other conversations they have with their co-workers, managers or third parties unless such recordings are approved in advance by the Legal Department, required by the needs of the business, and fully comply with the law and any applicable company policy." *Id.*

Communications Workers of America, Local 2336, at five of AT&T's Washington D.C. area stores.[89] An employee of one of those stores sought Davis's assistance to file a grievance alleging that AT&T had targeted him for termination.[90] At the employee's request, Davis accompanied the employee to a disciplinary meeting, which Davis recorded.[91] Upon suspicion that Davis had recorded the meeting in violation of AT&T's no-recording rule, Area Sales Manager Andrew Collings met with Davis and notified him that recording conversations violated AT&T's policy, adding that he "did not want anyone held accountable for not following policy."[92]

In analyzing the lawfulness of AT&T's no-recording rule, the NLRB noted that *Boeing* had placed Boeing's no-camera rule into Category 1(b), as a rule that is categorically lawful to maintain, as opposed to Category 2, which "warrant individualized scrutiny in each case."[93] The NLRB also pointed to *Boeing*'s discussion of a similar case, *Caesars Entertainment*, which involved both a no-camera rule and a no-recording rule.[94] As with Boeing's no-camera rule, *Boeing* placed the *Caesars Entertainment* no-recording rule into category 1(b), also designating the rule as categorically lawful.[95] After stating that "the classification *Boeing* contemplates is a 'classification of *types* of rules,' "[96] the *AT&T* Board thus determined that "no-recording rules *as a type* belong in Category 1(b)," making such rules categorically lawful under the NLRA.[97]

The Board reinforced its decision declaring no-recording rules categorically lawful by further noting that AT&T's no-recording policy "has a comparatively slight impact on employees' Section 7 rights," as "the vast majority of conversations covered by the Policy bear no relation to Section 7 activity."[98] Moreover, the Board noted, "employees remain free to speak to each other about working conditions or other protected Section 7 topics, despite the . . . prohibition on recording those conversations."[99] On the other side of the

89. *Id.*

90. *Id.*

91. *Id.*

92. *Id.* at *2.

93. *Id.* at *3.

94. *Id.* The key rule in *Caesars Entertainment* provided: "Cameras, any type of audio visual recording equipment and/or recording devices may not be used unless specifically authorized for business purposes (e.g. events)." 362 N.L.R.B. 1690, at 1690, 2015 WL 5113232, at *4 (Aug. 27, 2015).

95. *See Boeing Co.*, 365 N.L.R.B. No. 154, at 19 n.89, 2017 WL 6403495, at *22 n.89 (Dec. 14, 2017).

96. *AT&T Mobility, LLC*, 2021 WL 1815083, at *4 (emphasis in original).

97. *Id*. (emphasis in original).

98. *Id*. at *5.

99. *Id.*

balance, AT&T has "strong business justifications" for its no-recording policy.[100] Specifically, AT&T has federal law duties to safeguard customer information and the content of customer communications, interests that are "pervasive and compelling."[101] Accordingly, "[o]n this basis as well," AT&T's no-recording policy is "a lawful work rule [that is] appropriately placed into *Boeing* Category 1(b)."[102]

Having determined that no-recording policies are categorically lawful to maintain, the Board went on to consider whether Davis's employer unlawfully applied its policy in the case at hand.[103] Specifically, the Board considered "whether union steward Davis was engaged in protected union activity when he recorded the termination meeting of a bargaining unit employee, and if so, whether [his employer] unlawfully applied the [no-recording policy] by threatening Davis with being 'held accountable' for any future violations of the rule."[104]

On this issue, AT&T argued that the overall lawfulness of the rule itself is dispositive—in other words, that "because [its p]olicy is lawfully maintained under *Boeing*, its enforcement, even to restrict Davis's union activity, is also lawful."[105] Rejecting this argument, the Board declared that "[w]hether an employee engages in protected activity by making a workplace recording depends on the facts and circumstances of the particular case."[106] And here, Davis was "acting in his capacity as union steward when he . . . recorded the termination meeting of a bargaining unit employee; he was policing the parties' collective-bargaining agreement and preserving evidence for use in a possible grievance."[107] Just as importantly, the Board concluded that the employer's legitimate objectives in enacting the no-recording ban, including the need to safeguard customer information, were not "implicated" in this particular case.[108] Rather, "the meeting Davis recorded was held for the sole purpose of effecting a discharge decision . . . and [AT&T] does not contend that private customer information . . . was or was likely to be mentioned in the course of that meeting."[109] Accordingly, the Board found that Davis was engaged in

100. *Id*.
101. *Id.* (citing 47 U.S.C. § 222; 47 C.F.R. §§ 64.2001–64.2012 (2017)).
102. *Id.*
103. *Id.* at *5.
104. *Id.*
105. *Id.*
106. *Id.* at *6.
107. *Id.*
108. *Id.*
109. *Id.*

protected union activity when he recorded the termination meeting, notwithstanding that this act violated a lawful workplace rule.[110]

Finally, even though AT&T's no-recording rule had been applied to restrict the exercise of Section 7 rights on the part of Davis, the Board clarified that this unlawful application would not completely invalidate the rule.[111] Rather, just like the "reasonably construe" prong of the *Lutheran Heritage* test must consider the employer's justifications for its rule, the "applied to restrict" prong must do so as well.[112] And given AT&T's strong interest in adopting its no-recording rule, the rule remained lawful to maintain.[113] As such, the primary remedy for an employee like Davis who successfully challenges his employer's application of a lawful workplace rule is not the rule's invalidation, but rather to obtain an order "commanding the employer to cease and desist from applying its rules to restrict employees from exercising their Section 7 rights" and requiring the posting of a notice revealing the NLRA violation.[114]

In sum, *AT&T* makes two key determinations for employees. First, *AT&T* ruled that no-recording policies are categorically lawful to maintain under the NLRA.[115] On this point, *AT&T* shows that the Board will no longer invalidate a no-recording rule simply because the rule "might" possibly chill or dissuade an employee from exercising his Section 7 rights.[116] This more employer-friendly approach is important because courts generally give great deference to the NLRB's rulings and interpretations of the NLRA.[117] Accordingly, one

110. *Id.* In addition, the Board concluded that AT&T unlawfully applied its no-recording policy when Collings told Davis that he "did not want anyone held accountable for not following policy," as this statement "amounted to a threat that some unspecified adverse action would be taken against Davis if he were again to engage in protected union recording activity." *Id.*

111. *Id.* at *7.

112. *See id.*

113. *See id*. at *10 ("Unlawfully applying a lawful rule to interfere with Section 7 rights remains a violation of Section 8(a)(1) of the Act and should be enforced as such. . . . [H]owever, applying an otherwise-lawful rule to restrict the exercise of Section 7 rights ought not render such a rule unlawful to maintain, and we hold that it does not do so.").

114. *Id.* at *9 (emphasis omitted).

115. *Id.* at *5.

116. Shannon Kane, *Have You Been Omarosa'd? Lawfully Prohibiting Recordings of Your Conversations*, HR DAILY ADVISOR (Nov. 30, 2018), https://hrdailyadvisor.blr.com/2018/11/30/have-you-been-omarosad-lawfully-prohibiting-recordings-of-your-conversations%EF%BB%BF/ [https://perma.cc/BRK7-KWT4].

117. *See* Eastex, Inc. v. NLRB, 437 U.S. 556, 569–70 (1978) (applying a deferential approach in reviewing NLRB rulings); T-Mobile USA, Inc. v. NLRB, 865 F.3d 265, 271 (5th Cir. 2017) (stating that the Fifth Circuit Court of Appeals will "defer to the Board's interpretation of the NLRA 'so long as it is rational and consistent with the Act' "); *see also* NLRB v. Caval Tool Div., 262 F.3d 184, 188 (2d Cir. 2001) ("This court reviews the Board's legal conclusions to ensure that they have a reasonable

would expect that cases like *T-Mobile* and *Whole Foods* might be decided differently by courts today.[118]

Second, *AT&T* determined that, while lawful, no-recording policies can be unlawfully applied to interfere with Section 7 rights, such as when a union employee records a conversation to preserve evidence in a possible grievance.[119] On this as-applied aspect, *AT&T* illustrates that "[w]hether an employee engages in protected activity by making a workplace recording depends on the facts and circumstances of the particular case."[120] A similar case from 2020, *ADT, LLC & International Brotherhood of Electrical Workers, Locals 46 & 76*,[121] reinforces this fact-specific approach.

As in *AT&T*, the NLRB in *ADT* also considered whether an employer unlawfully applied its no-recording policy in a unionized workplace.[122] *ADT* involved the termination of two ADT employees for having recorded captive-audience meetings their employer held for employees in the runup to a union decertification election.[123] One of those employees, Patrick Cuff, was one of

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basis in law. In so doing, we afford the Board 'a degree of legal leeway.' We are 'mindful that decisions based upon the Board's expertise should receive, pursuant to longstanding Supreme Court precedent, 'considerable deference.' ") (internal citations omitted); Cadillac of Naperville, Inc. v. NLRB, 14 F.4th 703, 714 (D.C. Cir. 2021) (applying a "deferential" standard when reviewing "the substance of [an NLRB] decision," and noting that "[a]lthough we 'accord considerable deference' to the Board's policy judgments, we must set aside a decision that rests on an error of law, is unsupported by substantial evidence, or 'departs from established precedent without a reasoned explanation' "), *cert. denied*, 142 S. Ct. 2650 (2022); Whole Foods Mkt. Grp., Inc. v. NLRB, 691 F. App'x 49, 50 (2d Cir. 2017) ("We consider whether the Board's determination is supported by substantial evidence and is in accordance with law."); *id*. at 51 ("The Board's finding that recording, in certain instances, can be a protected Section 7 activity was reasonable. So too was its finding that, because Whole Foods' no-recording policies prohibited all recording without management approval, 'employees would reasonably construe the language to prohibit' recording protected by Section 7.") (internal citations omitted).

118. The Board shifted to a Democrat-majority in August 2021. HERBERT SMITH FREEHILLS, LLP, *supra* note 61. Not surprisingly, in January 2022, the NLRB announced that it was once again considering revising its approach to analyzing the legality of workplace rules under the NLRA and invited interested parties to submit their positions by March 7, 2022. *Id.* The NLRB's revised standard will likely again focus on employee policies that might sweep in protected NLRA activity—such as a policy prohibiting "offensive" conduct towards co-workers; a policy prohibiting conduct that "impedes harmonious interactions and relationships;" and a policy stating "be respectful of others and the Company"—all of which were struck down by the previous Democrat-majority Board. *Id.* At least as far as the NLRB is concerned, similarly broad "no recording" policies are likely to be struck down once again, now that the pendulum has swung back to a Democrat-majority. *Id.* Courts, in turn, will likely follow this same approach.

119. *AT&T Mobility, LLC*, 2021 WL 1815083, at *2.

120. *Id.* at *6.

121. 369 N.L.R.B. No. 23, 2020 WL 591740 (Feb. 5, 2020).

122. *Id*. at *1.

123. *Id.*

two union stewards at the ADT location at issue.[124] When ADT announced that it would hold two separate captive-audience meetings on January 9, 2018, one at 7:00 a.m. and the other at 9:00 a.m., Cuff suspected that the pro-union and anti-union technicians had been scheduled for different meetings.[125] After Cuff learned that he and the other union steward, J.D. Wilson, were scheduled to attend the same meeting, he asked manager Steve Foster to permit one of the union stewards to attend each meeting.[126] Foster denied the request, and the meetings went forward as scheduled.[127]

At the first captive-audience meeting, a dyslexic employee, Mohammed Mansour, whose primary language is Somali, used his cell phone to record the meeting.[128] Because of his dyslexia and his English language issues, Mansour decided to record the meeting to get a better understanding of what was being discussed so he could be more informed on the issues.[129] The second meeting was attended by about 20 employees, including Cuff, who secretly recorded the entire two-hour meeting "with the intention of trying to compare what was said during the [two meetings]."[130]

Thereafter, ADT management determined that each employee had violated the company's no-recording policy, which stated, in relevant part, "[a]udio or video recording of coworkers or managers is prohibited where . . . such recording occurs without explicit permission from all parties involved in those states with laws prohibiting nonconsensual recording."[131] According to the ADT officer in charge of employee discipline, James Nixdorf, "it was pretty clear that the conduct [of Cuff and Mansour] violated our [no-recording] policy" because they each admitted having made the recordings without consent, and this occurred in Washington "where there's a two-party consent law."[132] Because Nixdorf believed each employee had violated both Washington law and ADT policy, he terminated both employees.[133]

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124. *Id.*

125. *Id.*

126. *Id.*

127. *Id.*

128. *Id.*

129. *Id.*

130. *Id.*

131. *Id.*

132. *Id.* Nixdorf is described as ADT's director of labor relations, responsible for negotiating and administering all of ADT's collective-bargaining agreements throughout the United States and Canada. Nixdorf is also responsible for implementing and approving any discipline involving employees covered by a collective-bargaining agreement. *Id.*

133. *Id.*

Thereafter, Administrative Law Judge John T. Giannopoulos issued a decision, which the NLRB affirmed, finding the secret recordings protected by Section 7 of the NLRA.[134] The ALJ's Order noted that during the two meetings in question, ADT was "presenting its position to employees and attempting to persuade them to vote the Union out."[135] Mansour—who had never been in a union, is dyslexic, and whose second language is English—"was simply documenting the meeting in order to study [ADT's] position, so he could make an educated choice when voting to either retain or decertify the Union."[136] Finding Mansour's activity protected by the NLRA, the ALJ reasoned:

> Say a single employee checked out a library book about unions so he could study the issues and make an informed choice in an upcoming representation/decertification election. If an employer or union discriminated against the employee simply because he checked out the book and wanted to study whether unionization suited his particular situation so as to make an informed choice at the ballot box . . . it would be protected. Here, Mansour was documenting the meeting, where the benefits/pitfalls of continued unionization was discussed, so he could study the matter and make an informed choice on the issue. I find his actions protected by Section 7.[137]

Next, the ALJ determined that Cuff's recording was also protected by Section 7.[138] Here, the ALJ noted that Cuff recorded his meeting because of his concern that the information ADT was going to share at the two meetings would be different, and ADT had denied his request to have a union steward in both meetings.[139] Moreover, prior to these meetings, Cuff and others had been debating the decertification issue via email, and after Cuff had acquired both recordings he emailed his coworkers and informed them that the first meeting was anti-union and suggested that this was the reason ADT kept the union stewards out of the meeting.[140] "In these circumstances," the ALJ reasoned, "Cuff's actions in recording the captive-audience meeting were clearly in support of the Union's efforts to counter whatever arguments [ADT] was advancing regarding the decertification election and constitute union activities protected by Section 7 of the Act."[141]

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134. *Id.*
135. *Id.*
136. *Id.*
137. *Id.*
138. *Id.*
139. *Id.*
140. *Id.*
141. *Id.*

Finally, the ALJ concluded that when Cuff and Mansour recorded the captive-audience meetings, neither violated Washington's two-party consent law because that law "protects only private conversations," and here the "subject matter of the meetings was unionization, the Union, and the decertification petition/election," which "are not private matters."[142] In short, the recordings were not prohibited by Washington's two-party consent law and consequently did not violate ADT's no-recording policy.[143] As such, ADT violated Section 8 of the NLRA by terminating these employees for their recordings.[144] Accordingly, the ALJ ordered ADT to reinstate each terminated employee "and make them whole for any loss or earnings and other benefits suffered as a result of [their termination]," including the payment of backpay and search-for-work expenses.[145]

For employees, the takeaway from *AT&T* and *ADT* is that no-recording policies do not in and of themselves violate the NLRA. Nevertheless, such policies cannot be lawfully enforced against employees who wish to record workplace conversations in furtherance of their NLRA rights, even if, as in *AT&T*, the secret recording would seemingly implicate the employer's lawful no-recording rule.[146] Outside the context of union or collective bargaining activities, it is important to recall that the NLRA typically requires "concerted activity"—that is, conduct undertaken by employees in order to initiate, induce, or prepare for group action.[147] Given the lack of concerted action, a single employee's act of recording a workplace conversation in order to gather evidence to support that individual's claim of discrimination or harassment

142. *Id.* (quoting State v. Babcock, 279 P.3d 890, 894 (Wash. Ct. App. 2012)).

143. *Id.*

144. *Id.*

145. *Id.* In addition, ADT was ordered "to expunge from its files any references to the unlawful suspension and discharge issued to Mohammed Mansour and Patrick Cuff, and notify them . . . that this has been done and that these unlawful employment actions will not be used against them in any way." *Id.*

146. *See* AT&T Mobility, LLC, 370 N.L.R.B. No. 121, at 7, 2021 WL 1815083, at *5 (May 3, 2021) ("Davis was engaged in protected union activity when he recorded the termination meeting, notwithstanding that his act of recording contravened a lawful workplace rule.").

147. *See* Meyers Indus., Inc., 268 N.L.R.B. No. 493, at 493–97, 1984 WL 35992, at *1–6 (Jan. 6, 1984) (discussing the NLRA's concerted action requirement); MCPC, Inc. v. NLRB, 813 F.3d 475, 483 (3d Cir. 2016) (discussing the NLRB's definition of "concerted action" under *Meyers II*); *see also* NLRB v. City Disposal Sys. Inc., 465 U.S. 822, 830 (1984) (recognizing that while the term "concerted activit[y]" is not defined in the NLRA, "it clearly enough embraces the activities of employees who have joined together in order to achieve common goals"); Williams v. Watkins Motor Lines, Inc., 310 F.3d 1070, 1071–72 (8th Cir. 2002) ("[The NLRA] gives employees the right to engage in concerted activities for the purposes of mutual aid and protection," which "contemplates a context where employees are organizing or have organized, and need to be protected from retaliatory measures by their employer.").

would not trigger NLRA protection.[148] For that particular issue, the question becomes whether such conduct amounts to protected activity under some other statute, including the federal employment discrimination laws. The next Part addresses that issue.

V. SURREPTITIOUS RECORDINGS TO SUPPORT DISCRIMINATION, HARASSMENT, OR WHISTLEBLOWING CLAIMS

When an employee has experienced workplace harassment or discrimination, or if they fear an impending act of retaliation for having opposed or reported unlawful conduct in the workplace, they may attempt to record workplace conversations to gather evidence for their claim.[149] If that recording violates a company policy, the employee might then be fired for that misconduct.[150]

When a complaint of unlawful activity against an employer is followed by an adverse employment action, including a termination for violating an employer's no-recording rule, the employee will often argue that the adverse employment action was an act of retaliation for their complaint.[151] Section A of

148. *See Watkins Motor Lines*, 310 F.3d at 1072 (stating that the "concerted action" component of the NLRA "requires some sort of group activity; individuals acting on their own behalf are not engaged in concerted activity"); *MCPC, Inc.*, 813 F.3d at 486 (concluding that "the relevant precedent from our Court and the Board reflects that the benchmark for determining whether an employee's conduct falls within the broad scope of concerted activity is the intent to induce or effect group action in furtherance of group interests."). To be sure, Section 7 of the NLRA requires not just "concerted action," but also activity that is "protected" by the statute. Under Section 7, "[c]oncerted activity is protected . . . as long as it is undertaken 'for the purpose of collective bargaining or other mutual aid or protection," 29 U.S.C. § 157, including actions "intended to improve conditions of employment." *MCPC, Inc.*, 813 F.3d at 486. *See also* NLRB v. Oakes Mach. Corp., 897 F.2d 84, 88 (2d Cir. 1990) ("A violation of § 8(a)(1) is established if (1) the employee's activity was concerted; (2) the employer was aware of its concerted nature; (3) the activity was 'protected' by the act; and (4) the discharge or other adverse personnel action was motivated by the protected activity.").

149. *See, e.g.*, Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 474–75 (6th Cir. 2012) (noting that after plaintiff began opposing what she believed to be unlawful employment practices, she recorded conversations at work "to create evidence for a possible lawsuit"); Whitney v. City of Milan, No. 1:09-cv-01127-JDB-egb, 2014 WL 11398537, at *9 (W.D. Tenn. Feb. 25, 2014) (noting that after plaintiff reported that she had been sexually harassed by the City Mayor, she attempted to obtain proof of the harassment by secretly employing an audio recording device); Cornell v. Jim Hawk Truck Trailer, Inc., 297 F.R.D. 598, 599, 602 (N.D. Iowa 2013) (noting that the plaintiff in a sexual harassment suit often "discreetly record[ed] her conversations [with her harasser] using a hidden audio recorder" in order to generate evidence for her claims).

150. *See supra* notes 39–48 and accompanying text.

151. *See generally* U.S. EQUAL EMP. OPPORTUNITY COMM'N., RETALIATION: CONSIDERATIONS FOR FEDERAL AGENCY MANAGERS, https://www.eeoc.gov/retaliation [https://perma.cc/2KZ4-BCME] (discussing retaliation claims and recognizing that "[t]he EEO laws

this Part examines such retaliation claims under the employment discrimination laws. Section B examines retaliation claims under whistleblowing laws. Finally, Section C examines the unique effect of such evidence-gathering activities on hostile work environment claims.

A. Discrimination-based Retaliation Claims Tied to No-Recording Policy Violations

Although employers may generally discipline employees for secretly recording workplace conversations, it is important to consider whether employment discrimination laws protect employees from such discipline when they record conversations to obtain evidence to support a charge of discrimination or harassment, particularly after such a charge has been made, when allegations of retaliation are commonplace. As this Section shows, courts typically reject such retaliation claims.

The federal employment discrimination statutes not only outlaw discrimination in employment, but also retaliation for opposing or complaining of discrimination. Title VII of the Civil Rights Act of 1964, for example, prohibits employers from retaliating against employees for having opposed discriminatory activity, for having filed a formal claim of discrimination under Title VII, or for having participated in a Title VII investigation or proceeding.[152] Other employment discrimination statutes, including the Age Discrimination in Employment Act (ADEA) and Americans with Disabilities Act (ADA), have similar anti-retaliation provisions.[153]

Whether brought under Title VII, the ADEA, or some other law, retaliation claims typically require proof of three elements: "(1) that the plaintiff engaged in activity protected by [the statute], (2) that an adverse employment action occurred, and (3) that a causal link existed between the protected activity and

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prohibit punishing job applicants or employees for asserting their rights to be free from employment discrimination including harassment," and noting that this type of " 'protected activity' . . . can take many forms") (last visited Mar. 30, 2023).

152. *See* 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").

153. *See* 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").

the adverse action."[154] For the initial protected activity requirement, courts typically divide protected activities into two distinct types: participation and opposition.[155] Activities that amount to participation in Title VII's "mechanisms of enforcement" include making a charge, testifying, assisting, or participating in any manner in an investigation, proceeding, or hearing involving allegations of discrimination.[156] Opposition activities include less formal complaints about seemingly discriminatory practices, refusing to obey an order believed to be unlawful under Title VII, and opposing unlawful acts by a co-worker.[157]

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."[158] Under the participation clause, courts have extended "exceptionally broad protections . . . to persons who have participated in any manner in Title VII proceedings,"[159] such that anyone who engages in participation activities "is generally protected from retaliation."[160] For oppositional activity to trigger statutory protection, however, the *manner* of opposition must be reasonable.[161]

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154. Abbt v. City of Houston, 28 F.4th 601, 610 (5th Cir. 2022) (involving Title VII retaliation claim); *see also* 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); Fry v. Rand Constr. Corp., 964 F.3d 239, 244–45 (4th Cir. 2020) (involving FMLA retaliation claim), *cert. denied*, 141 S. Ct. 2595 (2021); Webner v. Titan Distrib., Inc., 267 F.3d 828, 835 (8th Cir. 2001) (alleging retaliation for asserting right to workers' compensation benefits).

155. *See* 42 U.S.C. § 2000e-3(a); Gogel v. Kia Motors Mfg. of Ga., Inc., 967 F.3d 1121, 1134 (11th Cir. 2020) ("The first part of [Title VII's] anti-retaliation provision is known as the 'opposition clause' and the second part as the 'participation clause.' ").

156. *See* 42 U.S.C. § 2000e-3(a); Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 233 (N.J. 2010).

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

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

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

160. *Id*. at 720–21 (quoting Booker v. Brown & Williamson Tobacco Co., 879 F.2d 1304, 1312 (6th Cir. 1989)).

161. *See* Johnson v. Univ. of Cincinnati, 215 F.3d 561, 579 (6th Cir. 2000). 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*.; s*ee also* Rollins v. State of Fla. Dep't of L. Enf't, 868 F.2d 397, 401 (11th Cir. 1989) ("[T]o 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. This determination . . . 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

Acts of opposition that are unreasonable are not protected by Title VII, and that unreasonable opposition itself "may be deemed an independent, legitimate basis" for an adverse employment action against the employee.[162] Accordingly, this Section addresses whether recording workplace conversations to document perceived discrimination or harassment is reasonable or unreasonable opposition.[163] In addition, this Section addresses the related question of whether firing an employee for violating a no-recording policy is actually a pretext to mask the employer's real retaliatory motive for having made such complaints.[164]

Courts have mostly ruled for employers on these issues. For example, in *Argyropoulos v. City of Alton*, after employee Christina Argyropoulos complained of sexual harassment, she recorded a meeting with her supervisors where she believed her complaints would be discussed.[165] When the employer discovered that Christina had recorded that meeting, an act that apparently violated the state's criminal wiretap law, she was immediately fired.[166] Thereafter, Christina claimed she was fired in retaliation for having complained of harassment.[167] Christina further argued that "because her aim was to obtain evidence of discrimination, she operated under the protective umbrella of Title VII—i.e., she engaged in statutorily protected activity—when she secretly recorded the meeting with her superiors."[168] Rejecting these arguments, the

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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").

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

163. *See, e.g.*, Shoaf v. Kimberly-Clark Corp., 294 F. Supp. 2d 746, 751–55 (M.D.N.C. 2003) (rejecting terminated employee's argument that his secret workplace recordings were protected activity under Title VII's opposition clause); Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 480–81 (6th Cir. 2012) (same). Whether secret workplace recordings should or should not be protected activity under the employment discrimination laws is worthy of its own analysis. Rather than address that issue, this Article more broadly examines the range of legal implications for employees in making such recordings.

164. *See, e.g.*, Mohamad v. Dallas Cnty. Cmty. Coll. Dist., No. 3:10-CV-1189-L-BF, 2012 WL 4512488, at *1–4 (N.D. Tex. Sept. 28, 2012) (describing a case where an employee who believed he had been the victim of discrimination and harassment secretly recorded conversations with his alleged harasser, filed an EEOC charge of discrimination, and was promptly terminated after seemingly admitting to the secret recordings during a meeting with his employer to discuss his EEOC charge).

165. Argyropoulos v. City of Alton, 539 F.3d 724, 729–30 (7th Cir. 2008).

166. *See id.* at 731 (citing 720 ILL. COMP. STAT. 5/14–2 (2006)). In a letter, 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.*

167. *Id.* at 732.

168. *Id.* at 733.

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."[169] As such, "the City's admission that the surreptitious recording was a significant factor in Argyropoulos's [termination is not] evidence of retaliation."[170]

A recent Sixth Circuit Court of Appeals case, *Jones v. St. Jude Medical S.C., Inc.*, is factually similar to *Argyropoulos*, and reaches a similar outcome. As in *Argyropoulos*, after plaintiff Chyrianne Jones began opposing what she believed to be unlawful employment practices, she recorded conversations at work "to create evidence for a possible lawsuit."[171] Because such recordings violated the company's no-recording policy, Jones was terminated.[172] Thereafter, Jones sued her employer, arguing that it retaliated against her for engaging in Title VII protected activities.[173] The district court granted summary judgment for the employer on Jones's retaliation claim, in part because she failed to prove her employer's explanation for her termination was a pretext to conceal unlawful retaliation.[174]

On appeal, Jones conceded that (1) her recordings violated company policy; (2) she recorded the conversations knowing she was violating company policy; and (3) the recordings would be a sufficient basis for her termination.[175] She argued, however, that there is an inference that her termination for making the recordings was pretextual.[176] She also argued that despite the company's no-recording policy, "her recordings [could not] provide a legitimate basis for her termination because they were protected activity under Title VII."[177] The court rejected both arguments.[178]

On the pretext issue, the court found that Jones "fail[ed] to call into question her violation of company policy and why the violation is not a legitimate reason for her termination;" rather, she "effectively concede[d] that her actions were a

169. *Id.* at 733–34.

170. *Id.* at 734.

171. Jones v. St. Jude Med. S.C., Inc., 504 F. App'x 473, 474–75 (6th Cir. 2012).

172. Jones's employer, St. Jude, "brought forth two alleged nonpretextual reasons for Jones' termination: (1) her failure to meet the requirements of a performance improvement plan; and (2) her recording of conversations in violation of St. Jude company policy." *Id.* at 477.

173. *Id.* at 473.

174. *Id.*

175. *Id.* at 479.

176. *Id.*

177. *Id.*

178. *Id.* at 479–81.

legitimate reason to fire her."[179] Applying the opposition clause, the court then reiterated that an employee may claim protection for activities opposed to alleged discrimination only if the manner of opposition is reasonable.[180] On that issue, Jones argued that her recordings were reasonable opposition because the recordings were not illegal (presumably, under a one-party consent law), did not breach confidential information, were not disruptive of business operations, and were not disseminated beyond the litigation.[181] Rejecting these arguments, the court found that the employer's recording policy was legitimate and that Jones had other ways of obtaining evidence to support her claims that would not have violated the employer's reasonable workplace rule.[182] Specifically, Jones "might have taken notes of the conversations, obtained the same information through legal discovery, or simply asked her interlocutors for permission to record."[183] As such, Jones's recordings were not protected activity.[184]

In another similar case, *Hudson v. Blue Cross Blue Shield of Alabama*, the Eleventh Circuit Court of Appeals rejected an employee's argument that firing her for violating the company's no-recording policy was merely a pretext to retaliate against her for having complained of a racially hostile work environment.[185] There, the plaintiff was unable to prove pretext 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.[186] Numerous other courts have reached

179. *Id.* at 480.

180. The court noted that Jones's recordings could only fall within Title VII's opposition clause because Jones made many of the recordings well before she filed a formal charge of discrimination with the EEOC. *Id.* at 480. When evaluating whether an employee has engaged in legitimate opposition activity, courts have applied a balancing test that requires the employee's conduct to be reasonable under the circumstances. *See supra* note 161.

181. *Jones*, 504 F. App'x at 481. Jones was employed in Ohio, which has a one-party consent law. *See* OHIO REV. CODE ANN. § 2933.52(B)(4) (LexisNexis 2022).

182. *Jones*, 504 F. App'x at 481.

183. *Id.*

184. *Id.*

185. Hudson v. Blue Cross Blue Shield of Ala., 431 F. App'x 868, 869–70 (11th Cir. 2011).

186. *Id.*

similar rulings, both on the question of pretext,[187] and on whether recording conversations to gather evidence for a potential lawsuit is protected activity.[188]

B. Retaliation Claims Based on Whistleblowing Activity

As noted, Title VII and other employment discrimination laws prohibit retaliation against employees who complain about conduct they believe is unlawful.[189] Whistleblower laws also protect employees from retaliation for

187. *See, e.g.*, Hartigan v. Utah Transit Auth., 595 F. App'x 779, 781–82 (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., 105 F.3d 646 (4th Cir. 1997) (unpublished table decision) (finding employee's dismissal for secretly recording a meeting in defiance of a supervisor's order a legitimate nondiscriminatory reason that was not proven 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 after he filed discrimination complaints with the EEOC, because his employer fired him for surreptitiously recording conversations with his supervisors in violation of Maryland's two-party consent law), *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, 1307, 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. Dall. 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).

188. *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) ("While 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 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).

189. *See supra* notes 151–53 and accompanying text.

reporting certain types of illegal behavior.[190] One example is the Occupational Safety and Health Act (OSH Act), which prohibits discrimination and retaliation against individuals who bring safety issues to the attention of their employers or the federal agency charged with administering the statute, the Occupational Safety and Health Administration (OSHA).[191]

In addition to OSH Act claims, OSHA has authority to protect whistleblowers for over twenty federal laws that fall within safety-related categories.[192] One of those laws is the Wendell H. Ford Aviation Investment and Reform Act for the 21st Century (AIR 21), which protects certain aviation industry employees from retaliation for reporting aviation safety concerns.[193] One recent retaliation case arising under AIR 21, *Benjamin v. Citationshares Management, LLC*, demonstrates how whistleblower protections can be

190. *See* Peter S. Menell, *Tailoring A Public Policy Exception to Trade Secret Protection*, 105 CALIF. L. REV. 1, 31 (2017) ("[M]any whistleblower laws protect employees from retaliation for reporting alleged violations of law to the government."); Gerard Sinzdak, *An Analysis of Current Whistleblower Laws: Defending A More Flexible Approach to Reporting Requirements*, 96 CALIF. L. REV. 1633, 1637–38 (2008) (discussing different types of whistleblower laws and noting that "federal whistleblower laws . . . only protect reports of very specific types of employer wrongdoing—namely, violations of a limited number of federal laws," whereas "state whistleblower laws . . . generally cover reports of a violation of any statute or regulation"); Mark A. Rothstein, *Wrongful Refusal to Hire: Attaching the Other Half of the Employment-at-Will Rule*, 24 CONN. L. REV. 97, 113 (1991) ("The Federal Whistleblower Protection Act (applicable to federal employees), and state whistleblower laws (often applicable to both public-sector and private-sector employees), prohibit retaliation against individuals who have reported suspected violations of various federal and state laws.").

191. 29 U.S.C. § 660(c); *see also* OCCUPATIONAL SAFETY & HEALTH ADMIN., EMPLOYER RESPONSIBILITIES, http://osha.gov/as/opa/worker/employer-responsibilities [https://perma.cc/3DPL-ENRZ] (last visited Mar. 30, 2023).

192. *See* U.S. DEP'T OF LABOR, THE WHISTLEBLOWER PROTECTION PROGRAM, https://www.whistleblowers.gov [https://perma.cc/W7B9-B25J] (last visited Mar. 30, 2023); *see also* OCCUPATIONAL SAFETY & HEALTH ADMIN., THE WHISTLEBLOWER PROTECTION PROGRAM: WHISTLEBLOWER STATUTES SUMMARY CHART, https://www.whistleblowers.gov/sites/wb/files/2021-06/Whistleblower_Statutes_Summary_Chart_FINAL_6-7-21.pdf [https://perma.cc/CCZ2-46QL] (listing those statutes) (last visited Mar. 30, 2023). One of those statutes, the Federal Rail Safety Act (FRSA), protects railroad employees from discharge or other discrimination in retaliation for, in relevant part, reporting hazardous safety conditions or refusing to work when confronted by a hazardous safety condition. *See* 49 U.S.C. § 20109(b)(1); Mercier v. U.S. Dep't of Lab., Admin. Rev. Bd., 850 F.3d 382, 388 (8th Cir. 2017). To assert a whistleblower claim under the FRSA, a plaintiff must show that (1) he engaged in a protected activity; (2) the railroad employer knew or suspected that he engaged in a protected activity; (3) he suffered an adverse action; and (4) the protected activity was a contributing factor in the adverse action. *Mercier*, 850 F.3d at 388.

193. Wendell H. Ford Aviation Investment and Reform Act for the 21st Century, H.R. 1000, 106th Cong. 1999). *See* OCCUPATIONAL SAFETY & HEALTH ADMIN., *supra* note 192; *see also* Benjamin v. Citationshares Mgmt., L.L.C., ARB Case No. 12-029, at 1–5, 2013 WL 6385831, at *1–3 (Nov. 5, 2013) (involving retaliation claim arising under the whistleblower protection provisions of AIR 21).

triggered by an employee's act of secretly recording a meeting likely to involve retaliation for whistleblower activity.[194]

The plaintiff in *Benjamin*, pilot Robert Benjamin, flew passenger jets for CitationAir from 2004 until he was terminated in March 2009.[195] During Benjamin's employment, FAA regulations required pre-flight inspections of all planes, which were often performed by the pilot in command (PIC) with the assistance of the second in command (SIC).[196] On March 20, 2009, Benjamin began a tour of duty as SIC with Val Riordan as PIC.[197] The next day, after mechanics deemed Benjamin's plane safe to fly, Riordan and Benjamin conducted their own pre-flight inspection and observed a defect with the plane's left landing gear strut.[198] Because this defect could impact the plane's landing ability, they decided to report it.[199]

Thereafter, Benjamin reported the defect to Kurt Sexauer, the company's Chief Pilot, who agreed that the aircraft should be grounded.[200] Sexauer then removed Benjamin from the flight, and the company summoned Benjamin to its headquarters to discuss the matter "face-to-face."[201]

Based on Benjamin's prior experiences with management over similar safety complaints, being called to this meeting under these circumstances made him fear he would be disciplined.[202]

The following day, March 22, Benjamin filed an Aviation Safety Action Program (ASAP) report with the company's Vice President of Safety, alleging that "the indirect pressure being put on the Chief Pilots to keep these plains [sic] flying is putting us all in a dangerous spot when we feel we can't write up an unforeseen [safety issue] at departure."[203] He added that this "will cause crews to fly broken airplanes and put [us] in a dangerous and unsafe situation."[204] After filing this report, Benjamin was suspended.[205] He spent that day in his hotel room and "expected to be fired."[206]

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194. *See Benjamin*, 2013 WL 6385831, at *5–7.

195. *Id.* at *1.

196. *Id.*

197. *Id.* at *2.

198. *Id.*

199. *Id.*

200. *Id.*

201. *Id.*

202. *See id.* at *6; *see also id.* at *8 (summarizing previous, similar incidents between Benjamin and management).

203. *Id.* at *2.

204. *Id.*

205. *See id.* at *6 (suggesting Benjamin was suspended for filing this report).

206. *Id.* at *2.

Benjamin met with Sexauer on March 24.[207] Two other managers attended the meeting, including a Human Resource Department employee, whose presence "reinforced" in Benjamin's mind the likelihood of being disciplined.[208] During the meeting, Benjamin hid a small digital audio recorder in his pocket.[209] When the recorder began noisily malfunctioning, Sexauer asked Benjamin why he was recording the meeting, and Benjamin responded that he was afraid Sexauer would yell at or intimidate him.[210] At that point, Sexauer terminated Benjamin's employment.[211]

Shortly after his termination, Benjamin filed a claim with OSHA alleging that he was suspended and called to a disciplinary meeting as unlawful retaliation for his "protected activity of raising legitimate safety concerns."[212] He also alleged that he was fired because "he sought to expose the Company's unlawful intimidation of its employees during that disciplinary meeting."[213] After OSHA and an Administrative Law Judge (ALJ) dismissed his claim, Benjamin appealed to the Department of Labor's Administrative Review Board ("the Board").[214]

The Board applied AIR 21's whistleblower protection provision, which provides, in relevant part:

> No air carrier . . . may discharge an employee or otherwise discriminate against an employee . . . because the employee . . . provided . . . to the employer . . . information relating to any violation or alleged violation of any . . . provision of Federal law relating to air carrier safety . . . .[215]

As the Board noted, unlawful "retaliation" under AIR 21 includes not only an adverse employment action, such as termination, but also "intimidat[ion]" and "threat[s]" for having reported safety-related issues.[216] According to the Board, to prove unlawful retaliation under this statute, an employee must prove by a preponderance of the evidence that his statutorily "protected activity," such

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207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.*

211. *Id.* "Several days later, Benjamin received a letter notifying him that CitationAir terminated his employment effective March 24, 2009." *Id.*

212. *Id.*

213. *Id.*

214. *Id.* at *1–2.

215. 49 U.S.C. § 42121(a)(1).

216. *Id.*; *see also* Hoffman v. Netjets Aviation, Inc., ARB Case No. 09-021, at 5, 2011 WL 1247208, at *3 (Mar. 24, 2011) (citing 29 C.F.R. § 1979.102(b)) ("An employer . . . violates AIR 21 if it intimidates, threatens, restrains, coerces, or blacklists an employee because of protected activity.").

as providing information related to air safety, was "a contributing factor" to the alleged unfavorable employment action.[217] If the employee satisfies this contributing factor standard, "the [employee] is entitled to relief unless the [employer] demonstrates by clear and convincing evidence that it would have taken the same unfavorable action in the absence of the protected activity."[218]

Benjamin claimed that he engaged in the following protected activities: (1) initially reporting his concern about the landing gear to Sexauer; (2) filing his ASAP report alleging pressure to ignore safety defects; and (3) attempting to record safety-related conversations or evidence of retaliation during his termination meeting.[219] In response, CitationAir argued that Benjamin's wrongful attempted recording, plus initially lying about his attempt to record his termination meeting, were non-protected activities that justified his termination.[220]

The Board sided with Benjamin.[221] The Board first addressed Benjamin's initial report about the landing gear to Sexauer. According to the Board:

> [A]n employee engages in protected activity any time he or she provides . . . information related to a violation or alleged violation of an FAA requirement or any federal law related to air carrier safety, so long as the employee's belief of a violation is subjectively and objectively reasonable.[222]

Here, that standard was met because in reporting the plane's defective landing gear, Benjamin was raising an issue that "directly related to the plane's ability to land properly," and the fact that management agreed with his concern showed that it was reasonable.[223]

The Board reached the same conclusion with respect to the ASAP report, given that it expressly raised concerns about safety and pressure from management that "could cause crews to fly broken planes."[224]

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217. *Benjamin*, 2013 WL 6385831, at *3; *see also* 49 U.S.C. § 42121(b)(2)(B)(iii).

218. *Benjamin*, 2013 WL 6385831, at *3; *see also* 49 U.S.C. § 42121(b)(2)(B)(iii)–(iv).

219. *Benjamin*, 2013 WL 6385831, at *4.

220. *Id.* CitationAir also argued that the ASAP report was not protected activity because it allegedly "did not include any allegations that CitationAir violated an order, regulation, or FAA standard." *Id.*

221. *Id.* at *1.

222. *Id.* at *4 (citing 49 U.S.C. § 42121(a)(1)). The Board further noted that the fact that management agrees with an employee's safety concern does not negate its protected nature; rather, it is evidence that the employee's disclosure was objectively reasonable. *Id.*

223. *Id.* at *5.

224. *Id.*

Finally, the Board addressed whether Benjamin's attempted recording was protected activity.[225] Here, the Board noted that AIR 21's retaliation law encompasses actions that "intimidate, threaten, restrain, coerce, blacklist, discharge or in any other manner discriminate against any employee" because that employee has engaged in protected activity.[226] According to the Board, "if Benjamin held a reasonable belief of retaliation at the [termination] meeting"—including retaliation in the form of discipline, intimidation, threats, or coercion—"then his attempted recording of such retaliation was protected activity."[227] Finding this standard met, the Board reasoned:

> Everyone agreed that the plane should be grounded to fix the landing gear strut. Yet, only Benjamin was pulled off the assignment and called to headquarters for a meeting about this incident. While waiting for the meeting to occur, Benjamin filed his March 22nd ASAP report in which he stated that CitationAir was subjecting him to "indirect pressure" to avoid writing up maintenance issues and fly "broken planes." These findings establish that Benjamin reasonably believed that the imminent meeting at headquarters was "indirect pressure" to discourage pilots from "writing up maintenance issues." Therefore, . . . Benjamin's attempt to record the "yelling" he expected [during his termination meeting] was a protected attempt to document the unlawful intimidation he raised in his March 22nd ASAP.[228]

To support this conclusion, the Board noted that this was not Benjamin's first safety complaint.[229] In April 2008, for example, Benjamin reported an issue with lights on a plane's cabin door steps, which caused a flight delay and led to a disciplinary meeting that resulted in a "final warning" and admonition that Benjamin's job was in jeopardy.[230] In the Board's view, Benjamin's prior experiences with management regarding similar complaints likely "contributed to his concern of possible whistleblower retaliation at the [termination] meeting."[231] Accordingly, the Board held that Benjamin's attempted recording constituted protected activity.[232]

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225. *Id.*
226. *Id.* at *6 (citing 29 C.F.R. § 1979.102(b)).
227. *Id.*
228. *Id.* at *7.
229. *Id.* at *8.
230. *Id.*
231. *Id.*
232. *Id.*

Finally, the Board considered whether Benjamin's protected activities were the cause of his adverse employment actions, including his termination.[233] As the Board noted, under AIR 21, a complainant must simply prove by a preponderance of the evidence that his protected activity was "a contributing factor" to the alleged unfavorable employment action.[234] Finding that standard met based on the "undisputed facts" of the case, the Board reversed the ALJ's dismissal of the case and remanded for the ALJ to determine whether CitationAir could prove a defense to liability, and, if not, the amount of Benjamin's damages.[235]

As *Benjamin* shows, federal whistleblower laws may protect an employee's act of secretly recording a conversation the employee reasonably believes will involve unlawful whistleblower retaliation, such as a meeting during which the employee expects to be coerced into refraining from whistleblowing activities.[236] Simply put, attempting to document an expected act of whistleblower retaliation may be protected activity. Indeed, two years before *Benjamin*, the Board declared that, under proper circumstances, "the lawful taping of conversations to obtain information about safety-related conversations is protected activity and should not subject an employee to any adverse action."[237]

The secret recording in *Benjamin*'s case was deemed "protected activity" because, in the Board's words, it represented "a protected attempt to document

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233. *Id.*

234. *Id.* at *3 (citing 49 U.S.C. § 42121(b)(2)(B)(iii)).

235. *Id.* at *8. Regarding the potential defense to liability, the Board noted that "[t]he burden now shifts to CitationAir to demonstrate by clear and convincing evidence that it would have taken the same personnel actions absent the protected activity." *Id.* at *10; *see also id*. at *3 (citing 49 U.S.C. § 42121(b)(2)(B)(iv)). According to the Board, "that is [arguably] an impossible burden in this case" because Benjamin's reported safety concern "was the single catalyst for the adverse actions taken against him." *Id.* at *10. Nevertheless, the Board "le[ft] open the question of whether the statute permits CitationAir to meet its burden under AIR 21 by showing with clear and convincing evidence that it would have taken the same action based solely on non-retaliatory and legitimate reasons, rather than proving what it would have done if protected activity had never occurred." *Id.* Earlier in its opinion, the Board noted that Benjamin reasonably believed he would be fired at the meeting on March 24th, which was scheduled in response to his protected safety-related reports, and he was in fact fired at that meeting immediately after Sexauer learned of his recording, which was also deemed protected activity. *See id.* at *7. Recognizing the likelihood of the ALJ finding no "non-retaliatory and legitimate reason" to suspend and terminate Benjamin, the Board declared that, on remand, the ALJ should be prepared to determine Benjamin's damages if CitationAir could not meet its burden. *Id.* at *10.

236. *See id.* at *3; *see also* Evans, *supra* note 25 ("[F]ederal whistleblower statutes may provide protection to employees who, in good faith, record conversations and activities they believe to be unlawful activities.").

237. Hoffman v. Netjets Aviation, Inc., ARB Case No. 09-021, at 9, 2011 WL 1247208, at *5 (Mar. 24, 2011) (first citing Melendez v. Exxon Chems. Am., ARB Case No. 96-051, at 18 (July 14, 2000); and then citing Mosbaugh v. Ga. Power Co., ARB Case No. 96-067, at 7–8 (Nov. 20, 1995)).

the unlawful intimidation" previously raised by Benjamin (specifically, in his March 22nd ASAP), and Benjamin reasonably believed similar acts of intimidation would occur during the recorded meeting.[238] Consistent with this ruling, as one attorney notes, "Administrative review board decisions have taken a broad view of what is protected activity under various whistleblower statutes, and have consistently held that recording for this purpose is a protected activity."[239] As Section A shows, however, courts have repeatedly rejected this protected activity claim in retaliation cases involving allegations of employment discrimination or harassment, even though the plaintiffs in those cases were likewise attempting to document what they reasonably believed to be unlawful employment actions.[240] Although the exact source of this disconnect is unclear, this differing treatment on the protected activity issue likely stems from the courts' unique desire to limit retaliation claims under the federal employment discrimination laws.[241]

When comparing retaliation claims arising under Title VII and AIR 21, *Benjamin* further reveals the critical role of the causation standard that governs a particular retaliation claim. Under AIR 21, a plaintiff can prevail on a

238. *Benjamin*, 2013 WL 6385831, at *4.

239. Evans, *supra* note 25.

240. *See supra* Section V.A.

241. This disconnect can be partially explained by the courts' unwillingness to extend blanket protection to all types of opposition activity under the federal employment discrimination laws. *See* Quinlan v. Curtiss-Wright Corp., 8 A.3d 209, 223 (N.J. 2010) ("In evaluating whether an employee has engaged in legitimate opposition activity [under the federal employment discrimination laws], courts employ a balancing test. . . . [that] seeks to 'balance the purpose of the Act to protect persons engaging reasonably in activities opposing . . . discrimination, against Congress' equally manifest desire not to tie the hands of employers in the objective selection and control of personnel.' . . . [F]ederal courts have . . . held that employees are not privileged to act in a manner that is unduly 'disorderly' or 'disruptive' to the employer's conduct of its business."). This disconnect can also be partially explained by the Supreme Court's desire to eliminate frivolous Title VII retaliation claims, leading to its adoption of a heightened causation standard for such claims. As the Court recently explained, "The proper interpretation and implementation of [42 U.S.C.] § 2000e–3(a) and its causation standard have central importance to the fair and responsible allocation of resources in the judicial and litigation systems," which "is of particular significance because claims of retaliation are being made with ever-increasing frequency." Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 358 (2013). When *Nassar* was decided in 2013, the number of retaliation claims filed with the EEOC had nearly doubled in the previous 15 years—from just over 16,000 in 1997 to over 31,000 in 2012—making it the second most common Title VII claim behind race discrimination. *Id*. According to *Nassar*, a causation standard that is too lax "could contribute to the filing of frivolous claims, which would siphon resources from efforts by employers, administrative agencies, and courts to combat workplace harassment," and could make it "far more difficult to dismiss dubious claims at the summary judgment stage." *Id.* This would also "raise the costs, both financial and reputational, on an employer whose actions were not in fact the result of any discriminatory or retaliatory intent," which would "be inconsistent with the structure and operation of Title VII." *Id.* at 358–59.

retaliation claim simply by proving by a preponderance of the evidence that their protected activity was "a contributing factor" to an adverse employment action.[242] A "contributing factor" is "any factor which, alone or in combination with other factors, tends to affect in any way the outcome of the decision."[243] Under the contributing factor standard, "a complainant need not show that protected activity was the only or most significant reason for the unfavorable personnel action, but rather . . . that the [employer's] 'reason, while true, is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected' activity."[244] In Benjamin's case, for example, Benjamin was terminated for attempting to record his termination meeting, a seemingly legitimate basis for termination.[245] However, that meeting would have never occurred, and Benjamin would not have felt compelled to record the meeting, had it not been for his whistleblowing activities, making those whistleblowing activities a contributing factor in his termination.[246]

Retaliation claims under the employment discrimination laws are much more difficult to prove.[247] To prove retaliation in that context, the plaintiff must show that "the desire to retaliate was *the* but-for cause of the challenged employment action," as opposed to "*a* but-for cause."[248] Under this standard,

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242. *Benjamin*, 2013 WL 6385831, at *3; 49 U.S.C. § 42121(b)(2)(B)(iii).

243. Hoffman v. Netjets Aviation, Inc., ARB Case No. 09-021, at 7, 2011 WL 1247208, at *4 (Mar. 24, 2011) (quoting Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed Cir. 1993)).

244. *Id*. (quoting Walker v. Am. Airlines, Inc., ARB Case No. 05-028, at 18, 2007 WL 1031366, at *15 (Mar. 30, 2007)).

245. *Benjamin*, 2013 WL 6385831, at *3.

246. *See id.* at *10 (explaining that Benjamin's reported safety concern "was the single catalyst for the adverse actions taken against him").

247. *See* Deltek, Inc. v. Dep't of Lab., Admin. Rev. Bd., 649 F. App'x 320, 329 (4th Cir. 2016) (explaining that the Administrative Procedure Act, which governs Sarbanes–Oxley whistleblower retaliation claims, incorporates the "contributing factor" standard, which is "a 'broad and forgiving' one" for employees, "distinctly more protective of plaintiffs than the familiar *McDonnell Douglas* framework applied in Title VII cases"; and noting further that an employee "could satisfy this 'rather light burden' by showing that her protected activities 'tended to affect [her] termination in at least some way,' whether or not they were a 'primary or even a significant cause' of the termination"); Araujo v. N.J. Transit Rail Operations, Inc., 708 F.3d 152, 159 (3d Cir. 2013) (noting "that the AIR–21 burden-shifting framework . . . is much easier for a plaintiff to satisfy than the *McDonnell Douglas* standard," which is intentional); *see also* Lively v. WAFRA Inv. Advisory Grp., Inc., 6 F.4th 293, 304 (2d Cir. 2021) (noting that the ADEA includes an antiretaliation provision with "no meaningful difference" to the Title VII antiretaliation provision, and determining that ADEA retaliation claims likewise require "proof that the unlawful retaliation would not have occurred in the absence of the alleged wrongful action or actions of the employer") (quoting Univ. of Tex. Sw. Med. Ctr. v. Nassar, 570 U.S. 338, 360 (2013)).

248. *Nassar*, 570 U.S. at 352 (emphasis added); Mollet v. City of Greenfield, 926 F.3d 894, 896–97 (7th Cir. 2019). Title VII's antiretaliation provision makes it unlawful for an employer "to

"a plaintiff . . . must prove . . . that 'the adverse action would not have happened without the [protected] activity,' " even if "factors other than the protected activity . . . contribute[d] to bringing about an adverse action."[249] As such, an alleged retaliatory action "is not regarded as a cause of an event if the particular event would have occurred without it."[250] If a firing, for example, would have occurred despite the employee's protected activity—perhaps because of the employee's history of poor performance—that firing cannot lead to Title VII liability for retaliation.[251] "In other words, even if a plaintiff's protected conduct is a substantial element in a defendant's decision to terminate an employee," or a motivating factor in that decision, "no liability for unlawful retaliation arises if the employee would have been terminated even in the absence of the protected conduct."[252] Under these principles, if a case analogous

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discriminate against any of his employees . . . 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." 42 U.S.C. § 2000e-3(a).

249. *Mollet*, 926 F.3d at 897 (quoting Carlson v. CSX Transp., Inc., 758 F.3d 819, 828 n.1 (7th Cir. 2014).

250. *See Nassar*, 570 U.S. at 347 (including this rule as "the background against which Congress legislated in enacting Title VII, and . . . the default rules it is presumed to have incorporated, absent an indication to the contrary in the statute itself"); *see also id*. at 349 (describing the "motivating factor" test as "a lessened causation standard" than the but-for causation standard).

251. Forbis v. Exeter Fin., LLC, No. 3:20-CV-2007-C, 2022 WL 577900, at *4 (N.D. Tex. Jan. 24, 2022); *see also* Beard v. AAA of Mich., 593 F. App'x 447, 451 (6th Cir. 2014) (rejecting a retaliation claim on this basis because the employee "was well on the path to termination by July 2010 when he first accused [his employer] of discrimination," and recognizing that "[a]n employee cannot allege discrimination like a protective amulet when faced with the possibility that his preexisting disciplinary problems could lead to his termination"); DeBose v. Univ. of S. Fla. Bd. of Trs., 811 F. App'x 547, 557–58 (11th Cir. 2020) (rejecting retaliation claim for similar reasons), *cert. denied*, 141 S. Ct. 2518 (2021); Bodoy v. N. Arundel Hosp., 945 F. Supp. 890, 898–99 (D. Md. 1996) (dismissing retaliation claim for similar reasons), *aff'd*, 112 F.3d 508 (4th Cir. 1997); Redlin v. Grosse Pointe Pub. Sch. Sys., 921 F.3d 599, 615 (6th Cir. 2019) (quoting Seoane-Vazquez v. Ohio State Univ., 577 F. App'x 418, 428 (6th Cir. 2014)) ("[A] defendant will be entitled to summary judgment [on a Title VII retaliation claim] '[s]o long as [nondiscriminatory] factors were sufficient to justify [its] ultimate decision.' ").

252. Long v. Eastfield Coll., 88 F.3d 300, 305 n.4 (5th Cir. 1996). Under Title VII, the Supreme Court has specifically rejected the argument that the desire to retaliate need only be "a motivating factor for—and not necessarily the but-for factor in—the challenged employment action." *Nassar*, 570 U.S. at 352, 360; *see also id.* at 349 (describing the "motivating factor" test as "a lessened causation standard" than the but-for causation standard). Under the contributing factor standard, by contrast, if a plaintiff's protected conduct is a factor in a defendant's decision to terminate an employee, the contributing factor standard is met, even if the plaintiff's protected activity is not "the but-for cause" of that decision in the sense contemplated by Title VII. Hoffman v. Netjets Aviation, Inc., ARB Case No. 09-021, at 7, 2011 WL 1247208, at *4 (Mar. 24, 2011) (quoting Marano v. Dep't of Just., 2 F.3d 1137, 1140 (Fed Cir. 1993) (stating that "[a] contributing factor is 'any factor which, alone or in

to Benjamin's were to arise under Title VII—as when an employee is called to a meeting for having complained of harassment—once the complaining employee hits record on his secret recording device, being fired for that independently wrongful action would effectively preclude any subsequent Title VII retaliation claim.[253]

In the end, these differing causation standards matter because they make it more difficult for plaintiffs to prove Title VII retaliation claims as compared to whistleblower retaliation claims.[254] When coupled with the fact that secretly recording workplace conversations is generally not protected activity under Title VII, retaliation claims based on no-recording violations under Title VII become extremely difficult to prove.

C. Gathering Evidence Through Recordings and the Faragher-Ellerth *Affirmative Defense for Hostile Work Environment Claims*

When an employee believes they have been the victim of harassment but the employee is not ready to come forward with a formal charge due to a lack of evidence or perceived lack of evidence, they may be tempted to record conversations to secure additional evidence for their claim. Despite its obvious appeal, recording conversations for evidence-gathering purposes in this particular context might prove self-defeating. This is because, by attempting to gather evidence to support a harassment charge rather than reporting that harassment immediately, the employee might find their harassment claim blocked by the *Faragher-Ellerth* affirmative defense.[255]

Title VII of the Civil Rights Act of 1964 makes it unlawful "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."[256] The phrase "terms, conditions, or privileges of

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combination with other factors, tends to affect in any way the outcome of the decision' "); *see also id.* (stating that the contributing factor standard is met if "the [employer's stated] 'reason . . . is only one of the reasons for its conduct, and another [contributing] factor is the complainant's protected' activity").

253. *See supra* Section V.A.

254. *Nassar*, 570 U.S. at 349 (describing the "motivating factor" test as "a lessened causation standard" than the but-for causation standard).

255. This defense was created by the Supreme Court in *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742, 764–65 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775, 780 (1998). *Faragher* and *Ellerth* involved hostile environment claims premised on sexual harassment. Several courts have held that *Faragher* and *Ellerth* apply to other types of hostile environment claims, including race-based claims. *See* Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186–87 n.9 (4th Cir. 2001) (citing cases reflecting "the developing consensus . . . that the holdings [in *Faragher* and *Ellerth*] apply with equal force to other types of harassment claims under Title VII").

256. 42 U.S.C. § 2000e–2(a)(1).

employment" includes requiring people to work in a discriminatorily hostile work environment.[257]

An employer may be liable to an employee for an actionable hostile environment created by a supervisor with authority over the employee.[258] An employer is strictly liable for a supervisor's harassment when the supervisor takes a tangible employment action against the victim, including "firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits."[259] In harassment cases where there has been no tangible employment action, as in the common scenario where an employee is subjected to a hostile work environment without experiencing any adverse employment action, an employer may raise an affirmative defense, subject to proof by a preponderance of the evidence.[260] This defense, known as the *Faragher-Ellerth* affirmative defense, requires proof of two elements: (1) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (2) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.[261]

Showing that a harassed employee failed to utilize their employer's complaint procedure in a timely manner will normally satisfy the second element of the *Faragher-Ellerth* defense.[262] This standard was met in a recent case involving a race-based harassment claim, *McKinney v. G4S Government Solutions, Inc.*, when an employee who experienced a racially hostile work

257. Harris v. Forklift Sys., Inc., 510 U.S. 17, 21 (1993); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 73 (1986) (finding hostile work environment based on sex actionable under Title VII).

258. *Ellerth*, 524 U.S. at 765.

259. *See* Vance v. Ball State Univ., 570 U.S. 421, 429 (2013). "[A]n employee is a 'supervisor' for purposes of vicarious liability under Title VII if he or she is empowered by the employer to take tangible employment actions against the victim"—i.e., to effect a "significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." *Id.* at 424, 429.

260. *Ellerth*, 524 U.S. at 765.

261. *Id.* No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment. *Id.*

262. *See id.* ("[P]roof that an employee failed . . . to use any complaint procedure provided by the employer . . . will normally suffice to satisfy the . . . second element of the defense."); *see also* Lissau v. S. Food Serv., Inc., 159 F.3d 177, 182 (4th Cir. 1998) (quoting Faragher v. City of Boca Raton, 524 U.S. 775, 808 (1998)) ("[A]ny evidence that [the employee] failed to utilize [the company's] complaint procedure 'will normally suffice to satisfy [its] burden under the second element of the defense.' ").

environment did not immediately report such harassment, but instead began recording workplace conversations in preparation for filing suit.[263]

In that case, John McKinney sued his employer, G4S Government Solutions, Inc. ("G4S"), asserting Title VII hostile work environment and retaliation claims, for racist incidents occurring from 2011 to 2013.[264] G4S hired McKinney in September 2005 to work as a Security Officer at the Radford Army Ammunition Plant (the "RFAAP"), where G4S provided security-related services.[265] After racial slurs were made to McKinney in 2011 and 2012, incidents of particular concern occurred on May 23, 2013.[266] In the first incident, the highest-ranking supervisor in McKinney's workplace, Project Manager Shawn Lewis, was seen laughing with others near McKinney's office.[267] Lewis then informed McKinney that there was a noose hanging inside a cabinet, and he directed McKinney to get rid of it.[268] As McKinney was walking away with the noose, janitor Joe Roth walked by and said, "I know what to do with that. I can use that around my house."[269] Roth lived near many African-Americans, and McKinney interpreted Roth's comment to refer to using the noose on his African-American neighbors.[270] Later that day, another incident occurred where Lewis and another employee, in McKinney's presence, used a white sheet to form a triangle-shaped cylinder that looked like a KKK hood.[271]

McKinney recorded his conversations with Lewis after these incidents, and subsequently disclosed that he had over thirty hours of audio recordings from other conversations dating back to October 2012.[272] At the time, G4S had a policy prohibiting racial discrimination and harassment that directed an employee to "immediately" report harassment to his "supervisor, a manager, or the Corporate Human Resources Department."[273] Rather than making a proper complaint under this policy, on May 24, 2013, McKinney reported the previous day's incidents to Lieutenant Colonel Byron Penland, the highest-ranking

263. 711 F. App'x 130, 132–33, 137 (4th Cir. 2017).
264. *See id.* at 132–33.
265. *Id.* at 132.
266. *Id.*
267. *Id.*
268. *Id.* at 132–33.
269. *Id.* at 133.
270. *Id.*
271. *Id.*
272. *Id.*
273. *Id.*

Army officer at RFAAP.[274] G4S then investigated those incidents, resulting in Lewis's termination one month later.[275]

Applying the *Faragher-Ellerth* affirmative defense, the court first found that G4S exercised reasonable care in preventing and promptly correcting harassment by adopting an adequate anti-harassment policy and promptly investigating the incidents involving McKinney on May 23, 2013.[276] In addition, the court found that McKinney unreasonably failed to take advantage of G4S's preventive or corrective opportunities based on his "fail[ure] to utilize [the company's] complaint procedure" in a timely manner.[277] According to the court, McKinney did not "immediately" report the racial slurs from 2011 and 2012, and he did not report the May 2013 incidents to his "supervisor, a manager, or the Corporate Human Resources Department," as G4S's policy required, "even though he began to record his workplace conversations in an attempt to prepare to file suit."[278] In the court's view, "[f]ailure to report harassment because of a generalized fear of retaliation or belief in the futility of reporting harassment deprives the employer of an opportunity to take corrective action and does not justify the failure to report *or the decision to gather evidence by recording workplace interactions*."[279] As such, the court determined that G4S was entitled to the *Faragher-Ellerth* affirmative defense.[280]

As *McKinney* shows, when an employee believes they have been the victim of harassment, secretly recording workplace conversations to gather evidence of such harassment, rather than promptly reporting the harassment, might prove self-defeating under the *Faragher-Ellerth* affirmative defense. In this Article's opening hypothetical involving Andrea, recording conversations out of fear that one's allegations will be ignored, rather than reporting that misconduct immediately, could lead a court to dismiss any subsequent harassment suit against the employer. As *McKinney* states, "[f]ailure to report harassment because of a . . . belief in the futility of reporting harassment deprives the employer of an opportunity to take corrective action and does not justify . . . the decision to gather evidence by recording workplace interactions."[281] As such,

274. *Id.*
275. *See id.* at 133–34.
276. *See id.* at 135, 137 n.6.
277. *Id.* at 137 (internal quotation marks omitted).
278. *Id.* at 137.
279. *Id.* (emphasis added).
280. *Id.*
281. *Id.*

this is yet another danger employees face when secretly recording workplace conversations.[282]

VI. WIRETAP VIOLATIONS FOR SECRETLY RECORDING WORKPLACE CONVERSATIONS

Aside from being unable to prove the pretext requirement for retaliation claims or the employer liability element of harassment claims, employees who record workplace conversations in apparent anticipation of a lawsuit against their employer may find themselves personally liable for those actions—whether in tort or for having violated a wiretap law. This Part examines potential liability under the two major types of wiretap laws: two-party consent laws and one-party consent laws. As this Part shows, the act of secretly recording workplace conversations will typically violate a two-party consent law, which requires the consent of all parties to a conversation, and may or may not violate a one-party consent law depending on the law's specific requirements.[283]

A. One-Party Consent Laws

The Federal Wiretap Act is a one-party consent law.[284] Under this type of law, a conversation can be lawfully recorded without obtaining the consent of

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

283. *See* 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, 102 (1997) (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").

284. 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) ("Title III is a one-party consent statute."). The Federal Wiretap Act generally prohibits individuals from intentionally intercepting 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. Given this definition, a person whose oral communications were intercepted in violation of the Federal Wiretap Act must show that they expected their conversations were not subject to interception, and such an expectation was justified under the circumstances. Walker v. Darby, 911 F.2d 1573, 1577 (11th Cir. 1990). Moreover, 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. 90-1097, *reprinted in* 1968 U.S.C.C.A.N. 2112, at 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.' ").

all persons to the conversation.[285] The Federal Wiretap Act, in particular, 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.[286] Analogous state laws—including those in Texas, Indiana, and Ohio—have similar requirements.[287]

As relevant here, a one-party consent law typically allows one *participant* in a conversation to record a conversation without informing others in the conversation of the recording.[288] As such, a one-party consent law would usually not be violated when an employee secretly records a workplace conversation in which he or she participates.

With that said, a participant to a conversation does not always have the legal right to record that conversation under a one-party consent law.[289] For example, under the Federal Wiretap Law, the 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."[290] 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

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285. *See* 18 U.S.C. § 2511(2)(d) ("It 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.").

286. *See id.*

287. *See* TEX. PENAL CODE ANN. § 16.02(c)(4) (2019) (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 § 35-31.5-2-176 (2012); State v. Lombardo, 738 N.E.2d 653, 658–59 (Ind. 2000) (discussing the Indiana Wiretap Act); OHIO REV. CODE ANN. § 2933.52(B)(4) (LexisNexis 2022).

288. United States v. Fears, 450 F. Supp. 249, 252 (E.D. Tenn. 1978) (applying the Federal Wiretap Act and stating that "[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").

289. *See* Caro v. Weintraub, 618 F.3d 94, 99 (2d Cir. 2010) (discussing the legislative history of the Federal Wiretap Act).

290. 18 U.S.C. § 2511(2)(d).

of the Federal Wiretap Act would occur.[291] Under this view of the statute (and analogous state laws), surreptitiously recording a workplace conversation is typically not unlawful.[292] On the other hand, and as the next Section shows, when an employee surreptitiously records a workplace conversation without the other party's consent, that action could constitute the tort of intrusion upon seclusion.[293] Moreover, 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). According to the prevailing view, it is not.[294] 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.[295] In short, because "[i]nvasion of privacy through intrusion upon seclusion . . . is a tort that occurs through the act of interception itself," this tort will not typically generate a Wiretap Act violation.[296] In the end, therefore, surreptitiously recording a workplace conversation will typically not violate a one-party consent law.

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291. *See generally Caro*, 618 F.3d at 99–100 ("Merely intending to record . . . is not enough [to violate the Federal Wiretap Act]. If, at the moment he hits 'record,' the offender does not intend to use the recording for criminal or tortious purposes, there is no violation. But if, at the time of the recording, the offender plans to use the recording to harm the other party to the conversation, a civil cause of action exists under the Wiretap Act."). *See also* 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," and later made the recording available as evidence at a workmen's compensation hearing); *id.* at 798 ("A party to a conversation may testify to that conversation. He may protect himself and his credibility by recording the entire conversation, unless his purpose is . . . to commit or attempt a criminal or tortious act . . . ."). As originally enacted, Section 2511(2)(d) declared that an unlawful interception would occur if the person doing the recording did so "for the purpose of committing any other injurious act." That clause, however, was later removed from the statute. *See* Electronic Communications Privacy Act of 1986, Pub. L. No. 99-508, 100 Stat. 1848, 1850.

292. *See Caro*, 618 F.3d at 99–100.

293. *See infra* Part VII.

294. *See Caro*, 618 F.3d at 99–100.

295. *See id.* at 100.

296. *Id.* at 101. Other circuits appear to have implicitly recognized invasion of privacy as a tort that could provide the necessary intent to bring a recording within the purview of the Wiretap Act. *See, e.g.*, Deteresa v. Am. Broad. Cos., 121 F.3d 460, 467 n.4 (9th Cir. 1997) (stating that for a plaintiff's Federal Wiretap Act claim to survive summary judgment by satisfying the requirements of 18 U.S.C. § 2511(2)(d), the plaintiff "had to come forward with evidence to show that [the defendant] taped the conversation for the purpose of violating [a state wiretap law], for the purpose of invading her privacy, for the purpose of defrauding her, or for the purpose of committing unfair business practices."); Phillips v. Bell, 365 F. App'x 133, 141 (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

As a one-party consent law, the Federal Wiretap Act provides a minimum level of protection against being secretly recorded, and states are free to provide greater protection within their state.[297] This is generally done by enacting a two-party consent law, which about a dozen states have done.[298] Under a two-party consent law—such as those adopted in Florida, California, Washington, and Maryland—*all parties* to a conversation must consent to the recording for it to be lawful.[299]

One example of an employee found in violation of a two-party consent law for their secret workplace recordings is *Coulter v. Bank of America*.[300] The plaintiff in that case, "amateur sleuth" Christopher Coulter, was employed by Bank of America as an automatic teller machine technician.[301] In anticipation of a lawsuit he would later file claiming sexual harassment and other claims, Coulter used two hidden tape recorders to covertly record dozens of conversations with his supervisors and coworkers, many of which occurred in one-on-one meetings in private offices.[302]

Coulter later sued the bank and several employees.[303] During discovery, Coulter turned over seventeen tapes containing 160 secretly recorded conversations with bank employees.[304] The bank and eleven employees then filed a cross-complaint against Coulter for violation of the California Privacy Act, which, in relevant part, prohibits eavesdropping or intentionally recording a confidential communication without the consent of *all* parties to the

297. *See* 68 AM. JUR. 2D *Searches and Seizures* § 342 (2022) (citing cases).

298. *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).

299. *See* FLA. STAT. § 934.03(1) (2022) (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 FLA. STAT. § 934.03(2)(d) (2010)); California Invasion of Privacy Act (CIPA), CAL. PENAL CODE §§ 630–638 (Deering 2022); WASH. REV. CODE § 9.73.030(1)(b) (2022) (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(3) (LexisNexis 2022) (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 . . . .").

300. 28 Cal. App. 4th 923 (1994).

301. *Id.* at 924–25.

302. *See id.* at 926–27 (summarizing conversations).

303. *Id.* at 925.

304. *Id.*

communication.[305] After dismissing Coulter's claims, 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.[306]

As relevant in *Coulter*, section 632(a) of the Privacy Act prohibits "intentionally, and without the consent of all parties to a confidential communication, us[ing] an electronic amplifying or recording device to eavesdrop upon or record the confidential communication."[307] The statute defines a "confidential communication" as

> any communication carried on in circumstances as may reasonably indicate that any party to the communication desires it to be confined to the parties thereto, but exclud[ing] a communication made . . . in any [] circumstance in which the parties to the communication may reasonably expect that the communication may be overheard or recorded.[308]

Coulter disputed that the conversations at issue were intended to be confidential based on his belief that the participants knew the substance of their conversations would be passed on to others at the Bank.[309] Rejecting Coulter's argument, the court declared that "[t]he test of confidentiality [under the statute] is objective," such that "Coulter's subjective intent is irrelevant."[310] Moreover, "[a] communication must be protected if either party reasonably expects the communication to be confined to the parties."[311] This standard was met in this case because the recorded individuals submitted declarations stating they believed the conversations to be private, most conversations were held in private offices with no one else present, and the individuals recorded believed

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305. *Id.* at 925; *see also* CAL. PENAL CODE § 632 (Deering 2017) (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.").

306. *Coulter*, 28 Cal. App. 4th at 925.

307. CAL. PENAL CODE § 632(a) (Deering 2017). A person who violates this law "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." *Id*.

308. CAL. PENAL CODE § 632(c) (Deering 2017). Troyer v. Yerba Mate Co., No. 3:20-cv-06065, 2021 WL 534362, at *1 (N.D. Cal. Feb. 13, 2021).

309. *Coulter*, 28 Cal. App. 4th at 927 (emphasis omitted).

310. *Id.* at 929.

311. *Id.*

no one else was listening in on their conversations.[312] Accordingly, the conversations were protected, and the judgment against Coulter was upheld.[313]

VII. TORT LIABILITY FOR SECRET WORKPLACE RECORDINGS

Although wiretap violations arising from the surreptitious recording of conversations are statutory claims, courts permit plaintiffs to also bring tort claims for the same conduct.[314] For over a century, the invasion of the right to privacy has been recognized as a distinct tort.[315] Courts have recognized four distinct invasion of privacy tort claims:[316] intrusion upon seclusion (intrusion),[317] public disclosure of truthful but private facts about an individual,[318] placing a person in a "false light" by unreasonable and highly

312. *Id.* at 929–30; *see also id.* at 925–26.

313. *Id.* at 930; *see also* Greenberg v. Broadcom Corp., No. G050557, 2015 WL 5568636, at *1–2 (Cal. Ct. App. Sept. 22, 2015) (on facts "virtually identical" to *Coulter*, affirming judgment against terminated employee for violating the Invasion of Privacy Act, CAL. PENAL CODE § 630, *et seq*., and awarding damages totaling $145,000 for twenty-nine recorded conversations).

314. Wall v. Canon Sols. Am., Inc., No. 17-CV-4033-DDC-GEB, 2017 WL 3873755, at *3 (D. Kan. Sept. 5, 2017) ("Although [the Connecticut wiretap law, Conn. Gen. Stat. Ann. § 52-570d] is a statutory claim, a person also can bring an action to obtain a remedy under the common law for invasion of privacy under the same facts asserted to support the statutory claim."); *cf.* Caro v. Weintraub, 618 F.3d 94, 101 (2d Cir. 2010) (recognizing that Connecticut's tort of intrusion upon seclusion may occur through the simple act of the recording itself, making it identical to a wiretap violation based on the same act).

315. *See* Pavesich v. New England Life Ins. Co., 50 S.E. 68, 69 (Ga. 1905) (discussing the development of the right to privacy); 60 A.L.R.7th Art. 7 (originally published in 2021); *see also* Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193, 198 (1890) ("The common law secures to each individual the right of determining, ordinarily, to what extent his thoughts, sentiments, and emotions shall be communicated to others. . . . [E]ven if he has chosen to give them expression, he generally retains the power to fix the limits of the publicity which shall be given them.").

316. These claims are derived from the RESTATEMENT (SECOND) OF TORTS § 652A (AM. L. INST. 1977). *Wall*, 2017 WL 3873755, at *3.

317. *See, e.g.*, Koeppel v. Speirs, 808 N.W.2d 177, 180–81 (Iowa 2011) (involving a tort of intrusion claim based on an employer's placement of a hidden video camera in the employee restroom at work).

318. This tort involves publication of information that would be highly offensive to a reasonable person and not of legitimate public interest. In one case, for example, a plaintiff employee sued her former employer under this tort when the former employer posted an interoffice memo about the plaintiff's termination on a bulletin board visible to numerous employees. Payton v. City of Santa Clara, 183 Cal. Rptr. 17, 17–18 (Cal. Ct. App. 1982).

objectionable publicity,[319] and appropriating the name or likeness of another for one's own commercial use or benefit.[320]

The tort of intrusion upon seclusion—or more simply, the tort of intrusion—is often used to challenge work-related privacy intrusions.[321] This tort typically requires a plaintiff to prove that (1) the defendant intentionally intruded upon the employee's solitude, seclusion, or private affairs, and (2) the defendant's infringement would severely or highly offend a reasonable person.[322] Along with these elements, courts usually also require the plaintiff to show that they reasonably expected privacy in the case at hand, without which there can be no tortious intrusion.[323]

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319. "To prevail on a claim of 'false light,' a plaintiff 'must show that a highly offensive false statement was publicized by [defendants] with knowledge or in reckless disregard of [its] falsity.' " Taha v. Bucks Cnty., 9 F. Supp. 3d 490, 493 (E.D. Pa. 2014) (first alteration in original) (quoting Santillo v. Reedel, 634 A.2d 264, 266 (Pa. Super. Ct. 1993)); *see, e.g.*, *id*. at 493–94 (finding sufficient "false light" claim against company based on plaintiff's allegations that company selectively published his expunged arrest record and mugshot on its website in order to falsely portray him as a criminal).

320. Here, liability arises from the use of the name or likeness of a public figure absent consent. RESTATEMENT (SECOND) OF TORTS § 652C (AM. L. INST. 1979).

321. *See* RESTATEMENT OF EMP. L. § 7.06 (AM. L. INST. 2015) (stating that at least forty-one states and the District of Columbia have recognized the tort of intrusion, and noting that over thirty states have applied the tort in the employment context); *see, e.g.*, Sunbelt Rentals, Inc. v. Victor, 43 F. Supp. 3d 1026, 1033–34 (N.D. Cal. 2014) (stating that California recognizes four categories of the tort of invasion of privacy, and discussing a tort of intrusion claim based on an employer's search of an employee's cell phone); Koeppel v. Speirs, 808 N.W.2d 177, 181 (Iowa 2011) (involving a tort of intrusion claim challenging an employer's act of installing a hidden video camera in the employee restroom); K-Mart Corp. Store No. 7441 v. Trotti, 677 S.W.2d 632, 636–37 (Tex. App. 1984) (involving a tort of intrusion claim challenging an employer's search of an employee's locker).

322. *See* Ehling v. Monmouth-Ocean Hosp. Serv. Corp., 872 F. Supp. 2d 369, 373 (D.N.J. 2012) (applying New Jersey law); *K-Mart Corp. Store No. 7441*, 677 S.W.2d at 636 ("[I]n Texas, an actionable invasion of privacy by intrusion must consist of an unjustified intrusion of the plaintiff's solitude or seclusion of such magnitude as to cause an ordinary individual to feel severely offended, humiliated, or outraged."); WVIT, Inc. v. Gray, No. CV 950547689S, 1996 WL 649334, at *3 (Conn. Super. Ct. Oct. 25, 1996) ("[R]eported decisions in Connecticut and elsewhere have required that a plaintiff must allege an intrusion that would be highly offensive to a reasonable person.").

323. 60 A.L.R.7th Art. 7. According to some courts, the first element of the tort "requires an intentional intrusion into a matter the plaintiff has a right to expect privacy," making it necessary to consider the threshold question of reasonable expectation of privacy. *Koeppel*, 808 N.W.2d at 181; *see also Sunbelt Rentals, Inc.*, 43 F. Supp. 3d at 1033 (stating that under the first element of the tort of intrusion, "the defendant must intentionally intrude into a place, conversation, or matter as to which the plaintiff has a reasonable expectation of privacy"). According to other courts, an infringement upon one's privacy cannot be highly offensive if there is no reasonable expectation of privacy in the first place. *See* Acosta v. Scott Labor LLC, 377 F. Supp. 2d 647, 649–52 (N.D. Ill. 2005) (analyzing an employee's intrusion claim by considering whether the employee could reasonably expect privacy in videotaping occurring at work and, upon finding he could not, stating that it need not address whether the alleged privacy intrusion was "highly offensive"); Deteresa v. Am. Broad. Cos., 121 F.3d 460, 465

In audio surveillance cases, courts have determined that employees may or may not reasonably expect privacy in their conversations at work, depending on the overall context.[324] Factors include the location of the surveillance,[325] whether the speaker "may reasonably expect that the communication may be overheard or recorded,"[326] whether someone could in fact easily overhear the conversation, the identity of the intruder, and the means of intrusion.[327] When a reasonable expectation of privacy exists, a highly offensive intrusion into those conversations can result in tort liability.[328]

Interception of employee conversations, whether done by an employer or an employee, may constitute a tortious invasion of privacy, particularly if the conversations are personal in nature and are made under circumstances where the employee would expect privacy in those conversations.[329] In one case, an employer surreptitiously intercepted employee phone calls on a line employees believed to be private, despite the employer's stated policy of intentionally leaving that particular line "untaped to allow for personal calls."[330] In upholding the employees' tort of intrusion claim, the court declared that "[t]he placing of a recording device in an area where one has a reasonable expectation of

(9th Cir. 1997) ("While what is 'highly offensive to a reasonable person' suggests a standard upon which a jury would properly be instructed, there is a preliminary determination of 'offensiveness' which must be made by the court . . . . If the undisputed material facts show no reasonable expectation of privacy or an insubstantial impact on privacy interests, the question of invasion may be adjudicated as a matter of law.") (internal marks omitted).

324. *See* Kadoranian v. Bellingham Police Dep't, 829 P.2d 1061, 1067 (Wash. 1992) (discussing Washington's two-party consent law, which protects "private" conversations, and stating that "[t]o determine whether or not a telephone conversation is private, the court must consider the intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case").

325. *See* Friedman v. Martinez, 231 A.3d 719, 732 (N.J. 2020) ("The tort [of intrusion] is [often] tied to the placement of a surveillance device in an area reasonably expected to be private.").

326. *Cf.* Reynolds v. City & Cnty. of S.F., 576 F. App'x 698, 703 (9th Cir. 2014) (finding employee had no reasonable expectation of privacy in telephone conversation he had at work because he took the call at his desk in an open workspace when coworkers were present, the call was work-related, and he discussed the call with a present coworker after he hung up).

327. *See* Sanders v. Am. Broad. Co., 978 P.2d 67, 77 (Cal. 1999) ("[I]n the workplace, as elsewhere, the reasonableness of a person's expectation of visual and aural privacy depends not only on who might have been able to observe the subject interaction, but on the identity of the claimed intruder and the means of intrusion.").

328. *See Friedman*, 231 A.3d at 732.

329. *See* Ali v. Douglas Cable Commc'ns, 929 F. Supp. 1362, 1382 (D. Kan. 1996) ("[A] reasonable person could find it highly offensive that an employer records an employee's personal phone calls in the circumstances where the employer did not discourage employees from making personal calls at their desks and did not inform the plaintiff employees that their personal calls would be recorded") (collecting cases).

330. Amati v. City of Woodstock, 829 F. Supp. 998, 1001 (N.D. Ill. 1993).

privacy . . . ruins the privacy [that was expected]."[331] In another case, by contrast, the court concluded that an employee had no reasonable expectation of privacy in a telephone conversation he had at work because he took the call at his desk in an open workspace when coworkers were likely to be present, the call was work-related, and he discussed the call with a coworker after he hung up.[332]

As with Fourth Amendment reasonable expectation of privacy analysis, key factors for tort of intrusion claims include both the location of the surveillance and the method of intrusion, including whether sophisticated technology is employed.[333] According to the New Jersey Supreme Court, "[t]he tort [of intrusion] is [often] tied to the placement of a surveillance device in an area reasonably expected to be private."[334] In *Kohler v. City of Wapakoneta*, for example, a federal court determined that the placement of a tape recorder inside a women's bathroom stall could result in a viable intrusion claim because the device in question "had access to sounds that might not be perceived outside the stall;" in addition, while using the stall, the plaintiff "thought she was alone and that no one was present to perceive her activity."[335] But overall context matters, including the manner in which conversations are captured.[336] As stated by the Eleventh Circuit Court of Appeals, "[T]here is a difference

331. *Id.* at 1010.

332. Reynolds v. City & Cnty. of S.F., 576 F. App'x 698, 703 (9th Cir. 2014). Along these lines, in the context of discussing a wiretap claim that required proof of a "confidential communication," the United States District Court for the Northern District of California reached opposite outcomes on two separate telephone conversations the plaintiff had surreptitiously recorded. Abdel v. Ikon Off. Sols., Inc., No. C-05-1685, 2006 WL 2474331, at *13 (N.D. Cal. Aug. 25, 2006). For the first conversation, the court found a wiretap violation with respect to a conversation that was recorded without the other person's knowledge or any reason to believe the conversation was being recorded or overheard. *Id.* For the second conversation, the court found a genuine issue of fact on whether the recorded individual reasonably expected that his conversation would be overheard based on evidence that the recorded individual "customarily took his calls on speaker phone, left his door open, and often conducted telephone conversations while others were in his office." *Id.*

333. *See* Marc Chase McAllister, *Cell Phone Searches by Employers*, 99 NEB. L. REV. 937, 945–46 (2021) (discussing the most significant factors affecting whether an employee may reasonably expect privacy).

334. Friedman v. Martinez, 231 A.3d 719, 732 (N.J. 2020).

335. Kohler v. City of Wapakoneta, 381 F. Supp. 2d 692, 704 (N.D. Ohio 2005) (emphasis omitted).

336. Under Fourth Amendment law, the manner of investigation can be critical. *See, e.g.*, United States v. Jones, 565 U.S. 400, 416 (2012) (Sotomayor, J., concurring) ("I do not regard as dispositive the fact that the government might obtain the fruits of GPS monitoring through lawful conventional surveillance techniques."); Kyllo v. United States, 533 U.S. 27, 34–36 (2001) (striking down warrantless police use of a thermal imaging device to scan the outside of a suspect's home, and recognizing that searches conducted through sophisticated technologies are fundamentally distinct from those that are not).

between . . . having a reasonable expectation of privacy in personal conversations taking place in the workplace and having a reasonable expectation that those conversations will not be intercepted by a device which allows them to be overheard . . . in another area of the building."[337]

While tort of intrusion claims are often brought against employers, courts have permitted such claims against employees as well.[338] In one case, *Wall v. Canon Solutions America, Inc.*, after employee Sammy Wall sued his employer, Canon Solutions of America (CSA) for wage violations, CSA brought two counterclaims against him: one based on Connecticut's wiretap law and the other grounded in tort.[339] CSA alleged that Wall unlawfully recorded communications and invaded its privacy when Wall and his counsel recorded telephone conversations with CSA's agent, Anthony Marino.[340] Although the court's opinion focused on the wiretap claim, the court recognized that "recording private phone conversations without all parties' consent is an unreasonable intrusion upon the seclusion of another," and that this tort claim can be "based on the same facts" as a claimed wiretap violation.[341]

Likewise, in *Vasyliv v. Adesta, LLC*, the court refused to dismiss an employee's tort of intrusion claim based on his allegation that another employee had secretly recorded their conversation (through a video recording device).[342] In upholding the claim, the court declared: "A secret video recording of a private conversation can certainly be considered an intrusion upon one's seclusion or their private affairs or concerns."[343]

In another similar case, *WVIT, Inc. v. Gray*, an employer filed a two-count complaint against its employee, Cheryl Gray, for surreptitiously recording

337. Walker v. Darby, 911 F.2d 1573, 1579 (11th Cir. 1990) (discussing a claim brought pursuant to 18 U.S.C. § 2510 *et seq*, which prohibits, among other things, the interception of an oral communication).

338. *See, e.g.*, *Kohler*, 381 F. Supp. 2d at 703–04 (denying summary judgment to defendant on intrusion claim brought by employee against employer for its placement of a tape recorder behind a trash can in a toilet stall of the women's bathroom).

339. Wall v. Canon Sols. Am., Inc., No. 17-CV-4033-DDC-GEB, 2017 WL 3873755, at *1 (D. Kan. Sept. 5, 2017). CSA's wiretap claim was based on an alleged violation of CONN. GEN. STAT. § 52-570d (generally prohibiting the recording of "an oral private telephonic communication" without the consent of "all parties to the communication"). Although CSA's Answer also asserted an invasion of privacy claim, CSA voluntarily dismissed this claim without prejudice. *Id.* at *1.

340. *Id.* at *2.

341. *Id.* at *3.

342. Vasyliv v. Adesta, LLC, No. CV106011737S, 2010 WL 5610901, at *3 (Conn. Super. Ct. Dec. 20, 2010).

343. *Id.*

conversations she had with co-workers.[344] Count one alleged a violation of Connecticut's two-party consent wiretap law, while the second count involved a tort of intrusion claim.[345] On the intrusion claim, Gray argued that the recorded conversations at issue related to business activities, rather than any private affairs, making the tort of intrusion inapplicable.[346] Rejecting this argument, the court noted that while employees might not reasonably expect their business-related discussions with fellow employees to remain protected from disclosure to their employer, they "do have a reasonable expectation that discussions will not be secretly recorded by fellow employees with whom they are chatting."[347] In addition, the court declared that "it is neither the content of the speech involved nor the location of the encounter which makes Gray's alleged conduct highly offensive," as "[t]he conduct alleged would be highly offensive no matter where it occurred and no matter what it related to."[348] "It is the fact of surreptitiously monitoring a fellow employee in and of itself that constitutes the intrusion on that employee's privacy under the circumstances of this case."[349]

VIII. SECRET WORKPLACE RECORDINGS: A SUMMARY OF THE LEGAL IMPLICATIONS FOR EMPLOYEES

This Article has addressed the question posed in the Introduction by sexual harassment victim, Andrea, who wondered whether secretly recording her interactions with her boss carried any risks for her. As this Article has shown, such workplace espionage is risky business for employees, and the risks to employees will often outweigh any actual benefits.

As the case examples in this Article demonstrate, when an employee violates a no-recording policy, which are commonplace, they will likely be disciplined by their employer for their misconduct.[350] Moreover, courts have ruled that violating an employer's no-recording policy can justify an employee's termination, regardless of whether the recorded content supports

344. WVIT, Inc. v. Gray, No. CV 950547689S, 1996 WL 649334, at *1 (Conn. Super. Ct. Oct. 25, 1996).

345. *Id.* Count one alleged a violation of CONN. GEN. STAT. § 52-570d (1995). *Id.* (prohibiting the recording of "an oral private telephonic communication" without the consent of "all parties to the communication").

346. *Id.* at *2.

347. *Id.* at *4.

348. *Id.* at *3.

349. *Id.*

350. *See supra* notes 165–188 and accompanying text.

the employee's claim of harassment or discrimination.[351] In addition, employers can enforce no-recording rules even in states where wiretap laws permit the recording of a conversation with the consent of only one participant.[352] In short, no-recording policies are generally lawful and can be enforced against offending employees with limited judicial oversight.

Beyond potential employer discipline, employees face additional dangers for surreptitious workplace recordings.[353] For example, employees who engage in such workplace espionage may find themselves personally liable for those actions under wiretap laws.[354] Indeed, secretly recording workplace conversations will typically violate a two-party consent law, which exist in over ten states, and could potentially violate a one-party consent law, depending on the law's specific requirements.[355] In addition, when an employee secretly records workplace conversations, that action could lead to liability under the tort of intrusion, even if that tort claim is based on the same facts as an accompanying wiretap claim.[356]

Aside from the personal liability an employee might face for secret workplace recordings, an employee who seeks to preserve evidence of sexual harassment or discrimination through secret recordings will likely see their efforts backfire.[357] For hostile work environment claims, in particular, secretly recording workplace conversations to gather evidence of harassment—rather than promptly reporting the harassment—might prove self-defeating under the *Faragher-Ellerth* affirmative defense. As the Fourth Circuit Court of Appeals has declared, "Failure to report harassment [immediately] . . . deprives the employer of an opportunity to take corrective action and does not justify the

351. *See, e.g.*, Boeing Co., 365 N.L.R.B. No. 154, at 19, 2017 WL 6403495, at *22 (Dec. 14, 2017).

352. *See supra* note 41.

353. Employees face additional dangers beyond those discussed in this Article. *See, e.g.*, 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, 110–13 (1997) (arguing that, in some states, an employee's surreptitious recordings could result in a claim against the employee for violating the implied covenant of good faith and fair dealing in the employment relationship, and noting that an employee who secretly records workplace conversations "can certainly be said to have breached a [common law] duty of loyalty" towards their employer).

354. *See supra* Part VI.

355. *See id.*; *see also* Adrian R. Bacon, Todd M. Friedman & Thomas E. Wheeler, *This Call May Be Monitored or Recorded*, 74 CONSUMER FIN. L.Q. REP. 180, 184 n.16 (2020) (noting the number of states that have adopted one-party consent laws and two-party consent laws).

356. *See supra* notes 338–349 and accompanying text.

357. *See supra* Section V.C.

failure to report or the decision to gather evidence by recording workplace interactions."[358]

Retaliation claims under employment discrimination laws are another area where secretly recording conversations can prove self-defeating for employees. As this Article has shown, courts have been unreceptive to employee arguments that secret recordings are protected activity under the anti-retaliation provisions of the employment discrimination laws.[359] In addition, courts have routinely rejected the argument that being fired for violating a no-recording policy is evidence of retaliation, even when such a firing occurs after the employee complains of discrimination.[360] According to the Seventh Circuit Court of Appeals, "Title VII . . . does not grant the aggrieved employee a license to engage in . . . workplace espionage in order to gather evidence of discrimination."[361] According to most courts, being fired for such "inappropriate workplace activities" is not evidence of retaliation.[362]

Secretly recording workplace conversations has only proven beneficial for employees in cases arising under the NLRA or whistleblower laws.[363] While the NLRB currently views no-recording policies as categorically lawful under the NLRA, the Board has clarified that those rules can be applied unlawfully, particularly when they are enforced against employees who record workplace conversations in furtherance of their NLRA rights.[364] In addition, in contrast to court rulings under the employment discrimination laws, the NLRB has determined that secret recordings can amount to protected activity, "depend[ing] on the facts and circumstances of the particular case," where the purpose of the recording is to *document or preserve evidence of retaliation*.[365] As the Board's decision in *AT&T* indicates, when an employee secretly records a meeting for the purpose of "preserving evidence for use in a possible grievance" under a collective-bargaining agreement, that recording could be protected NLRA activity, even if that act violates an employer's otherwise lawful no-recording rule.[366] Likewise, as *ADT* indicates, when an employee

358. McKinney v. G4S Gov't Sols., Inc., 711 F. App'x 130, 137 (4th Cir. 2017).

359. *See supra* Section V.A.

360. *See supra* Section V.A.

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

362. *See supra* Section V.A.

363. *See supra* Part IV.

364. *See* AT&T Mobility, LLC, 370 N.L.R.B. No. 121, at 3, 2021 WL 1815083, at *3 (May 3, 2021). Under recent NLRB precedent, such rules currently fall within *Boeing* Category 1(b), as a rule that is categorically lawful to maintain (as opposed to Category 2, which "warrant individualized scrutiny in each case"). *Id.* at *3.

365. *Id.* at *6.

366. *Id.*

secretly records a meeting for the purpose of making an informed decision on a union vote or to help counter their employer's arguments against a union's certification, the recording could be protected NLRA activity.[367]

As under NLRB precedents, a secret recording may also be protected activity under federal whistleblower laws when the recording is made for evidence preservation purposes.[368] Similar to *AT&T*, the DOL's Administrative Review Board ruled in *Benjamin* that when an employee reasonably believes a meeting will involve unlawful retaliation, consisting of intimidation or discipline for recent safety reports, "then [the] attempted recording of such retaliation [i]s protected activity."[369] As the Board stated in that case, an employee's "attempt to record [retaliatory actions during such a meeting is] a protected attempt to document the unlawful" retaliation previously alleged.[370] In the end, it is an open question whether secretly recording workplace conversations for evidence-gathering purposes should be protected activity for *all* statutory-based retaliation claims, regardless of their statutory source, but currently employees who assert retaliation claims under the federal employment discrimination laws should expect little sympathy from courts.

In summary, employees who secretly record workplace conversations may incur swift and severe discipline from their employer if that action violates their employer's no-recording policy, they can have otherwise valid harassment claims dismissed for taking matters into their own hands and not timely reporting the harassment, they can be found civilly liable under the tort of intrusion, they can be sued or face criminal penalties for wiretap violations, and they will likely find courts unreceptive to their claims of retaliation under the employment discrimination laws. Although employees may find pockets of protection under whistleblower laws and the NLRA, employees should generally refrain from making secret workplace recordings and should seek to gather evidence in other ways.

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367. ADT, LLC, 369 N.L.R.B. No. 23, at 7–8, 2020 WL 591740, at *1 (Feb. 5, 2020).

368. *See supra* notes 189–237 and accompanying text.

369. Benjamin v. Citationshares Mgmt., LLC, ARB Case No. 12-029, at 8, 2013 WL 6385831, at *6 (Nov. 5, 2013).

370. *Id*. at *7.