

RECORDED CONVERSATIONS

Court upholds firing of public safety officer based on secret recordings

by Jeff Sloan and Elina Tilman
Renne Sloan Holtzman Sakai, LLP

A high-ranking public safety officer employed by the California Department of Justice (DOJ) intimidated, threatened, and assaulted a former subordinate employee with whom he had a consensual relationship in an effort to conceal their affair. During the DOJ's criminal investigation, the victim secretly recorded conversations with the officer, securing important admissions the DOJ then used in a dismissal action rather than in a criminal proceeding.

The California Court of Appeal concluded that recordings made at the direction of law enforcement during criminal investigations are exempt from California's prohibition against surreptitious tape recording and that they may be admitted in civil, criminal, and administrative hearings.

Secretly recorded blackmail

William Telish was a law enforcement officer and a high-level manager for the DOJ. In 2006, he began a consensual sexual relationship with a subordinate employee, L.D. In 2007, rumors of their relationship surfaced, which Telish vehemently denied. When he learned that L.D. revealed their relationship to several coworkers, he demanded that she recant her statements and threatened to reveal sexually explicit photographs he had taken of her if she failed to comply. In 2008, L.D. went to work for the Placentia Police Department.

In October 2009, while at L.D.'s home, Telish looked through her cell phone and accused her of being involved with other men. A struggle for the phone ensued, and Telish pinned L.D. down while he continued to examine her phone.

In December 2009, L.D. told her boss, Placentia Police Chief James Anderson, about Telish's October 2009 assault and 2007 threats to expose nude photographs of her if she didn't cooperate in concealing their affair. Anderson reported L.D.'s statement to the DOJ deputy director and the Orange County district attorney.

In January 2010, the DOJ launched a criminal investigation after determining that Telish could be charged with witness intimidation and false imprisonment. As part of its investigation, it asked L.D. to secretly record her conversations with Telish to help establish his culpability. In February 2010, she successfully recorded Telish admitting that he had pinned her down.

The district attorney declined to prosecute. However, the DOJ had also launched a separate administrative investigation into Telish's actions, conducted by its employment office. In July 2010, the DOJ dismissed Telish for various misconduct, including intimidating and physically assaulting L.D. and threatening to release the nude photographs.

Can recordings be used in noncriminal disciplinary proceedings?

California public-sector employees have strong procedural protections against dismissal. Telish had three administrative opportunities to protest his employer's action—a predischarge meeting (known as a *Skelly* hearing), an appeal to a hearing officer after dismissal occurred, and a further appeal to the State Personnel Board (SPB). In each instance, Telish argued that the secret recordings could be used only in a criminal proceeding, not an administrative one. That argument was rejected at the *Skelly* and hearing officer stages. It was accepted at the third stage—before the SPB—but even then the SPB decided there was other evidence to substantiate dismissal.

After the superior court (the fourth level of review) upheld Telish's discharge and the use of the secret recordings, Telish appealed to the California Court of Appeal, which affirmed the trial court's ruling. The court explained that the Invasion of Privacy Act prohibits one party to a conversation from recording it without the other's consent.

Specifically, Government Code § 632 states that every person who intentionally and without the consent of all the parties to a "confidential communication" records the communication will be punished by a fine and/or imprisonment. "Confidential communication" is loosely defined as any information either party desires to remain private. Section 632 then requires exclusion of all evidence obtained in violation of the law in any proceeding.

The court further observed, however, that Section 633 creates an exception—permitting an individual acting at the direction of a law enforcement officer to record a confidential communication. The court determined that the exception was triggered in this case because L.D. secretly recorded multiple telephone conversations with Telish at the direction of a law enforcement officer who was conducting a criminal investigation of Telish on behalf of the DOJ. The court disagreed with Telish's contention that the criminal investigation was a "sham" because the criminal investigation came before and was separate from the administrative investigation, which was conducted by the DOJ's employment office.

The court further concluded that any recording that was obtained in compliance with Section 633 may be used in any other proceeding—criminal, civil, or

administrative—because the legislature didn't restrict its use. Despite that conclusion, it cautioned that employers do not have free rein to use secret recordings.

First, the court emphasized that an employer may not secretly record its own employees to conduct an internal investigation and then use the secret recording as a basis for discipline. For example, in an earlier case, a female employee accused a coworker/police officer of sexual harassment. In investigating the complaint, the police captain directed the employee to secretly record her conversation with the officer. The recording was inadmissible in a subsequent disciplinary hearing because it wasn't obtained in the course of a criminal investigation but rather as part of the employer's internal investigation of the sexual harassment claim.

Second, the court emphasized that an employer can't use unconstitutionally seized evidence in an administrative disciplinary proceeding as a basis to discipline or dismiss an employee. *Telish v. California State Pers. Bd.* (California Court of Appeal, 2nd Appellate District, 3/10/15).

Bottom line

To protect the valuable right of privacy, the California Penal Code generally prohibits surreptitious tape recording. However, a narrow exception allows such recordings if they are made under the direction of law enforcement. This case clarifies that a recording properly made at law enforcement's direction can later be used in criminal, administrative, or civil proceedings.

If Telish hadn't been such an unsavory character and his serious misconduct hadn't been so brazen, this case could have gone the other way. Secret tape recording at law enforcement's direction isn't lawful if it's a "sham" strategy, concocted to use the secret tape recording for administrative purposes. The DOJ secured secret tapes through a criminal investigation that went nowhere and then used them in its own administrative investigation to dismiss Telish. In a case with a more sympathetic plaintiff, a court might have concluded that the employer was misusing its authority as a law enforcement agency to gain evidence for a dismissal.

A related practice pointer: The Penal Code prohibition against surreptitious tape recording doesn't prevent an employer from requiring employees to participate in tape-recorded interviews—even over their objection—as long as it informs them that the interview is being recorded. Unlike some states, California doesn't require mutual consent to legitimize tape recording—it requires only disclosure.

The authors can be reached at Renne Sloan Holtzman Sakai LLP in San Francisco, jsloan@rshslaw.com and etilman@rshslaw.com. ♣