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Straight to Video: Legality and Admissibility of Surreptitious Recordings in the Workplace

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When it comes to cameras in bedrooms, restrooms, fitting rooms, and other places where public policy and guttural instincts call for complete and inviolable privacy, New York's legislature has left little to question. Video recording in these locations is plainly prohibited under the General Business Law, the New York Labor Law, and the Penal Law.[1]

Legality Depends on the Specific Location

These protections extend into the workplace, but only as far as the above-described "statutorily-designated realms of privacy."[2] Recording in a workplace restroom may have criminal and civil consequences,[3] as it is statutorily prohibited and, in any event, the act is so "outrageous and extreme" as to give rise to emotional distress.[4] Outside the restroom, however, there is little to prevent surveillance in the workplace, surreptitious or otherwise.

To explain, New York does not recognize a common-law right to privacy.[5] Nor does it impose on employers a common-law duty to provide privacy in the workplace.[6]

Indeed, private sector employees in New York cannot even rely on the Fourth Amendment, as the constitutionally protected workplace privacy interest only applies when the government is the employer.[7]

Even where existing statutes apply, not every statute offers a private right of action for employees. In one case, for example, an employer was alleged to have violated General Business Law §395 for surreptitiously recording an employee who was changing her clothing in a shared office.[8] The employee argued that she was forced to change there due to her employer's failure to provide adequate female changing facilities, and that the employer was attempting to view her in a "discreet moment." In dismissing the employee's claims, the court noted that there is no private cause of action under General Business Law §395 and, in any event, an office is not among the "enumerated facilities" protected by statute.

Recent State Law on Electronic Surveillance

That is not to say, however, that anything goes when it comes to surveillance in the workplace. On November 8, 2021, New York's governor signed a bill requiring private employers to notify new employees of internet and communications monitoring, and to obtain their written acknowledgment of the notice upon hiring and once annually thereafter.[9] The amendment became effective on May 7, 2022, and applies to all private employers, regardless of size and type.

Courts Will Consider the Context

Moreover, when it comes to video surveillance, the manner and extent to which an employer surveils a given employee may face scrutiny in civil contexts. For instance, it has repeatedly been held that increased surveillance may constitute adverse employment action in the context of a claim for unlawful retaliation.[10] However, to succeed on these grounds, the plaintiff must show that the surveillance was performed because of her membership in a protected class.[11] In other words, the propriety of a given recording will depend heavily on context.

In one instance, the employer's installation of a hidden camera worked to its benefit. In that case, the court reasoned that the camera was one of several remedial steps taken by the employer to end the complained-of discriminatory conduct and that it weighed against the finding of a hostile work environment.[12]

In another instance, however, the employer's installation of a hidden camera had quite the opposite effect. There, a hotel employee alleged that a hidden camera was installed above his desk in retaliation for complaining about harassment, including vandalism of his workstation and locker. While the employer argued that the installation of a hidden surveillance camera for the purpose of observing an employee who complained of discrimination could never, in and of itself, be retaliatory as a matter of law, the court rejected that reasoning, and found in the employee's favor.[13]

Employers are not the only ones who may face consequences for surreptitious recordings. New York is a one-party consent state, meaning the recording is legal as long as the person recording is party to the conversation.[14] Moreover, certain anti-retaliation provisions in employment discrimination statutes offer an additional layer of protection for employees engaging in protected activity, i.e., documenting discriminatory conduct.[15]

Outside that context, however, the secret taping of a colleague or supervisor may indeed result in termination, especially where it violates company policy or intimidates coworkers.[16] And, in any event, courts often articulate an awareness of the potential for abuse of surreptitiously taped conversations by disgruntled employees.[17]

In one case, for instance, an employee alleging racial discrimination recorded incidents in which the organization's president made allegedly offensive statements. The jury found in her favor and awarded substantial damages, but the court then reduced the award in part because the plaintiff "prompted" or induced some of the discriminatory conduct to gather evidence.[18] In another case, the court affirmed a finding of the Worker's Compensation Board that, in the context of other evidence undermining his credibility, the claimant's surreptitious tape recording of conversations with his superiors was "suspect" and only further diminished the legitimacy of his testimony.[19]

The End Justifies the Means

That being said, surreptitious recordings are often used in court, and the relevance of the motives of whomever was behind the camera is outweighed by the value of a contemporaneous record.[20] This can be seen in the context of employment discrimination[21] and wrongful termination.[22]

This is hardly unexpected, since New York common law does not consider the means through which evidence was obtained. In other words, whether a video was made openly or surreptitiously will not, in and of itself, affect its admissibility.[23] This includes instances where a video is obtained by unethical or unlawful means.[24]

Videotapes are generally considered "visual statements" and, to that end, they are within the scope of CPLR 3101(e).[25] Moreover, they are subject to rules of evidence on hearsay,[26] regardless of whether made surreptitiously or otherwise.[27]

Interestingly, New York recently expanded the party admission exception to the hearsay rule in CPLR 4549.[28] Previously, an employee's hearsay statement was only admissible as a party admission where the employee had authority to speak on behalf of the employer, i.e., the "speaking agent rule" or "speaking authority rule." [29] Now, however, per CPLR 4549, an employee's statement is not hearsay if (1) offered against the opposing party and (2) made by the party's agent or employee on a matter within the scope of the relationship and while it existed.[30]

Advice to Practitioners

Moving forward, attorneys should bear these and other recent developments in mind, not only in determining when and where their clients can surveil their employees, but in advising their clients on setting policies relating to workplace privacy.

1. Gen. Bus. Law §395-b(2); Labor Law §203-C; Penal Law §250.45.
2. See *Clark v. Elam Sand & Gravel, Inc.*, 4 Misc. 3d 294, 296 (Sup. Ct., Ontario Co. 2004). New York State law also prevents employers from surreptitiously recording activities protected under the Labor Law, such as the formation of labor organizations or the pursuit of collective bargaining agreements.
3. See *Sawicka v. Catena*, 79 A.D.3d 848, 849–50 (2d Dept. 2010) ("unquestionably outrageous and extreme"); *Dana v. Oak Park Marina, Inc.*, 230 A.D.2d 204, 208 (4th Dept. 1997) (violation of GBL §395-b(2) provided basis for allegation of negligent infliction of emotional distress).
4. See *Id.* at 849–50.
5. *Messenger ex rel. Messenger v. Gruner Jahr Printing & Pub.*, 94 N.Y.2d 436, 441 (2000); *Thomas v. Ne. Theatre Corp.*, 51 A.D.3d 588, 589 (1st Dept. 2008).
6. *Clark*, 4 Misc. 3d at 296.
7. Peter M. Panken & Jeffrey D. Williams, *Employers Need to Observe Limits on Monitoring the Workplace and Reduce Privacy Expectations*, N.Y. St. B.J., Oct. 1999, at 26.
8. *Chanval Pellier v. Brit. Airways, Plc.*, No. 02-CV-4195 (DGT), at *13–14 (E.D.N.Y. Jan. 17, 2006).
9. Dillon, Danielle, *New York Will Require Employers to Notify Employees of Phone, Internet, and Email Monitoring*, Dec. 9, 2021, https://www.natlawreview.com/article/new-york-will-require-employers-to-notify-employees-phone-internet-and-email.
10. See *Chavis v. Wal-Mart Stores, Inc.*, 265 F. Supp. 3d 391, 402 (S.D.N.Y. 2017); *Bind v. City of New York*, No. 08- CV-11105 (RJH), at *10 (S.D.N.Y. Sept. 30, 2011).
11. *Dotson v. City of Syracuse*, No. 518-CV-750 (MAD/ATB), at *8 (N.D.N.Y. May 7, 2019) (plaintiff failed to show membership in protected class).
12. *Ciulla-Noto v. Xerox Corp.*, No. 09-CV-6451 (MAT), at *5 (W.D.N.Y. Dec. 5, 2012), aff'd, 563 F. App'x 791 (2d Cir. 2014).
13. *Mendez v. Starwood Hotels & Resorts Worldwide, Inc.*, 746 F. Supp. 2d 575, 580 (S.D.N.Y. 2010); see *Turley v. ISG Lackawanna, Inc.*, 774 F.3d 140, 161 (2d Cir. 2014); *but see Thomson v. Odyssey House*, 652 F. App'x 44, 46 (2d Cir. 2016); *Murray v. Town of N. Hempstead*, 853 F. Supp. 2d 247, 267 (E.D.N.Y. 2012).
14. *Gallegos v. Elite Model Mgmt. Corp.*, 1 Misc. 3d 907(A) (Sup. Ct., N.Y. Co. 2004), *aff'd as modified*, 28 A.D.3d 50, 807 N.Y.S.2d 44 (2005).
15. *Vosburgh v. Am. Nat. Red Cross*, No. 5:08-CV-0653 (LEK/TWD), at *12 (N.D.N.Y. Sept. 29, 2014), *citing Heller v. Champion Int'l Corp.*, 891 F.2d 432, 436 (2d Cir.1989); see *also Gallegos*, 1 Misc. 3d 907(A) at *6.
16. §6:31. Eavesdropping and "one-party consent" exemption—Use by employee—Recording communications with employers, 13A N.Y. Prac, Employment Law in New York §6:31 (2d ed.), *citing Rajcoomar v. Wal-Mart Stores E., L.P.*, No. 06-CV-6835 (CLB), at *5 (S.D.N.Y. Apr. 15, 2008), *aff'd*, 361 F. App'x 234 (2d Cir. 2010).
17. *Id.* (noting abuse by disgruntled employees as a "concern").
18. *Id.*, citing *Johnson v. Strive E. Harlem Emp. Grp.*, 990 F. Supp. 2d 435, 457 (S.D.N.Y. 2014).
19. See *Zeltman v. Infinigy Eng'g, PLLC*, 211 A.D.3d 1280, 1283 (3d Dept. 2022).
20. *Abromavage v. Deutsche Bank Sec. Inc.*, No. 18-CV-6621 (VEC), at *7 (S.D.N.Y. Mar. 19, 2021), *aff'd*, No. 21-668 (2d Cir. Sept. 21, 2022).
21. See *Fisher v. Mermaid Manor Home for Adults, LLC*, No. 14-CV-3461 (WFK), at *4 (E.D.N.Y. Dec. 16, 2016).
22. *In re Alegria*, 107 A.D.3d 1290, 1291–92 (3d Dept. 2013).
23. See *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 407–08 (Sup. Ct., Kings Co. 2003).
24. *Mena v. Key Food Stores Co-op., Inc.*, 195 Misc. 2d 402, 407–08 (Sup. Ct., Kings Co. 2003) (citing *Stagg v. New York City Health and Hospitals Corp.*, 162 A.D.2d 595 (2d Dept. 1990). Counsel's involvement in surreptitious recordings may, however, implicate ethical rules prohibiting lawyers from engaging in deceitful conduct. *Bacote v. Riverbay Corp.*, No. 16-CV-1599 (GHW), at *11 (S.D.N.Y. Mar. 10, 2017).
25. *Theisen v. Sunnen*, 186 A.D.2d 81, 81 (2d Dept. 1992), *lv. dismissed* 81 N.Y.2d 759 (1992); *Saccente v. Toterhi*, 35 A.D. 2d 692 (1st Dept. 1970); *Bogan v. Nw. Mut. Life Ins. Co.*, 144 F.R.D. 51, 56 (S.D.N.Y. 1992).
26. *Breezy Point Co-op., Inc. v. Cigna Prop. & Cas. Co.*, 868 F. Supp. 33, 36–37 (E.D.N.Y. 1994); *In re 650 Fifth Ave. & Related Properties*, No. 08 CIV. 10934 (KBF), at *2 (S.D.N.Y. June 5, 2017); *Quinche v. Gonzalez*, 94 A.D.3d 1075, 1075 (2d Dept. 2012).
27. *Hernandez v. Money Source Inc.*, No. 17-CV-6919 (GBB) (AYS), at *5 (E.D.N.Y. July 12, 2022); *UPS Store, Inc. v. Hagan*, No. 14-CV-1210 (WHP) at *4 (S.D.N.Y. Aug. 2, 2017); *Schindler v. Mejias*, 100 A.D.3d 1315, 1317 (3d Dept. 2012).
28. *Parcesepe v. Tops Markets, LLC*, No. 2019-50494, 2022 N.Y. Slip Op. 31689(U) at *5 (Sup. Ct., Duchess Co. 2022) (effective December 2021).
29. CPLR 4549; see *Loschiavo v. Port Auth. of N.Y. & N.J.*, 58 N.Y.2d 1040, 1041 (1983).
30. *Hasani v. Community Health Project, Inc.*, No. 150316/2019, at *1 (Sup. Ct., N.Y. Co.. Nov. 23, 2022).

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