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The Idaho Supreme Court Upholds Industrial Commission's Findings that Employee Committed Misconduct Through Secret and Unauthorized Tape Recording

By Robert A. Berry

Employer investigations usually follow after a disgruntled employee raises issues or files a complaint. One of the most important aspects to such an investigation is that confidentiality be maintained. Unfortunately, not all employees may feel the same way. Some may disregard the confidentiality provisions and secretly tape record aspects of an investigation. Current Idaho law seems to support such actions. Idaho is a one-consent state, meaning that only one party to a conversation must consent to the recording of a conversation. Despite this, the Idaho Supreme Court recently ruled that in the context of employee investigations, secret recordings qualify as misconduct in connection with employment. The case serves as guidance for human resources when such situations may occur.

Factual Overview: Chapman v. NYK Line North America, Inc.

Merrie Chapman was discharged from her position with NYK Line in July 2007 for failure to cooperate with a workplace investigation. The investigation was the result of a complaint filed by Chapman in June 2007, which alleged that she was subjected to a hostile work environment.

Chapman was scheduled for a workplace investigation interview with an attorney hired by NYK Line. Prior to the meeting, Chapman purchased a tape recording device. She put batteries and a blank tape into the recorder, and placed it in her purse. At the beginning of the meeting, Chapman asked if she could record the meeting. The attorney said no, explaining that, in her experience, recording impairs productive discussion and creates greater risk of breach of confidentiality. The attorney indicated that the interview would not proceed unless Chapman agreed not to record the interview. Chapman agreed, although she pulled out a pad of paper and pen for taking notes. The attorney again reminded her of the importance of confidentiality while the investigation was active and open.

The interview began, but a loud beep occurred approximately two hours into the interview. The attorney inquired into the source of the beep. Chapman pulled the tape recorder from her purse, and denied that she had been recording the interview. The attorney listened to the tape and confirmed with Chapman that the voices on the tape were their own.

After the interview, the attorney compiled a report summarizing her opinion of the investigation. She expressed deep concern about Chapman's integrity and honesty. She believed Chapman had significantly impaired the investigation with her conscious decision to ignore their agreement regarding recording. She was also troubled by her belief that Chapman chose to cover up one dishonest act with another. She relayed her experience to the HR Manager that tape recording of management meetings is viewed as a significant breach of trust or violation of a company directive. The attorney viewed the conduct by Chapman to be quite serious, and opined that she felt

termination of employment was warranted. Chapman was terminated on July 19, 2008, for “being untruthful and for failure to comply with an investigation.”

Intermediate Review of Chapman’s Claim for Unemployment Benefits

On July 20, 2008, Chapman filed for and was awarded unemployment benefits. NYK Line challenged the award. The award was reversed by the appeals examiner who found that Chapman’s dishonesty and breach of trust qualified as misconduct in connection with employment. Specifically, the appeals examiner found that Chapman intentionally recorded the meeting in violation of her agreement with counsel and, therefore, compromised the employment-related investigation. Chapman appealed to the Industrial Commission, and requested a hearing to present additional evidence, which request was denied. She then appealed to the Idaho Supreme Court, maintaining that the recording was accidental and unintentional and that the recorder was activated when she reached into her purse for a piece of gum.

Appeal to the Idaho Supreme Court

The Idaho Supreme Court upheld the Industrial Commission’s findings. The important aspect of the decision is that it upheld the Industrial Commission’s decision that Chapman failed to comply with an investigation, which was grounds for immediate termination.

Your Word: Still Valuable Currency

Chapman’s “word” was central to the Idaho Supreme Court’s decision. The Court found that Chapman specifically agreed not to record the interview. Her failure to keep her word was viewed as jeopardizing the integrity of the interview and, as a result, the investigation. Further, such action was viewed as particularly troubling given that it was Chapman’s complaints—her words—that initiated the investigation.

The other factor considered and upheld by the Supreme Court was that Chapman intentionally recorded the interview. Chapman claimed that the tape recorder had a voice (or noise) activation feature, and that it was activated when she made noise rummaging through her purse. Despite such claims of inadvertence, the Court and Commission could not reconcile Chapman’s statement on the beginning of the tape, stating “Ok, I am recording now,” which immediately preceded the conversation between counsel and Chapman.

Unauthorized Recordings of Investigations are Grounds for Termination

In upholding the Industrial Commission’s decision, the Idaho Supreme Court recognized that employers have a reasonable right to request that interviews not be recorded. As mentioned earlier, this likely stems from the sensitive and confidential nature of such proceedings. Given this, recording without authorization becomes an act that constitutes a failure to comply with the investigation. Such dishonesty and breach of trust qualifies as misconduct, and renders an employee ineligible for unemployment benefits.

The Dissent: Wiggle Room for Employees

The dissent noted that the company had no rule prohibiting the secret recording of an interview or meeting. Instead, the rule prohibiting the secret recording came from the attorney conducting the interview. For this reason, the dissent faulted the majority’s opinion, because the rule prohibiting the secret recording was not a rule or standard of behavior on behalf of the employer. Therefore, in the dissent’s view, Chapman could not have violated an employer standard.

The dissent also cited to Idaho law allowing recording of an oral conversation with only the consent of one party. The dissent acknowledged that an employer could implement a policy forbidding such practice, but again indicated that such a policy had not been implemented in the first place by NYK Line.

Lessons to Be Learned

The *Chapman* opinion is important since it recognizes that employer investigations should not be recorded. It provides that employees who record an interview without authorization may be lawfully and rightfully terminated. With these holdings in mind, there are some practical steps that should be taken to address potential situations like the one that occurred in *Chapman*.

- The employer should implement a policy, rule or standard forbidding or prohibiting the secret recording of interviews or meetings. The advantage of adopting such a practice is that it circumvents Idaho's one-consent law, and puts employees on notice that such actions are not condoned. Should an employee violate such a policy, rule, or standard, the actions would constitute misconduct.
- If an employee has raised several issues at work or filed a complaint, be forthright at the very beginning of an interview. State that recording an interview without authorization is not allowed. Indicate that such action constitutes a failure to comply with the investigation and may constitute separate grounds for termination. Absent such a warning, or any employer policy against secret recordings, an employee's recording may otherwise not be grounds for misconduct