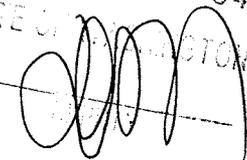


 ORIGINAL

FILED
COURT OF APPEALS
OCT 12 PM 12:54
STATE OF WASHINGTON
BY 

NO. 37492-7-II

WASHINGTON STATE COURT OF APPEALS
DIVISION TWO

DAVID N. SMITH,
Petitioner,

vs.

STATE OF WASHINGTON
EMPLOYMENT SECURITY DEPARTMENT,

Defendants.

PETITIONER'S REPLY BRIEF

Clayton Ernest Longacre
Of Longacre Law Inc.
Counsel for Petitioner
569 Division Street, Suite F
Port Orchard, WA 98366
(360) 876-7290

TABLE OF CONTENTS

| | <u>Page</u> |
|--|-------------|
| TABLE OF CASES | ii |
| I. SUMMARY OF ARGUMENT | 1 |
| II. ARGUMENT | 2 |
| A. The Commissioner's finding that Petitioner recorded private conversations was not supported by substantive evidence | 2 |
| B. Petitioner Did not Show a Willful Disregard of the Employer's Interest by Purposefully Refusing to Follow His Supervisor's Reasonable Directive | 8 |
| C. The Petitioner's actions did not amount to deliberate deception and do not qualify as misconduct. | 9 |
| D. Petitioner was not aware that he violated a reasonable rule of his employer. | 11 |
| E. The Petitioner's actions did not demonstrate carelessness or negligence indicating disregard of the employer's interest | 13 |
| F. Respondent failed to prove actual or potential harm. . . | 14 |
| G. Retaliation and pretext discharge are relevant matters . | 15 |
| V. CONCLUSION | 16 |

TABLE OF CASES

| | <u>Page</u> |
|--|-------------|
| <i>Holmes v. Burr</i> , 486 F.2d 55 (9th Cir. 1973) | 4 |
| <i>Kardorianian v. Bellingham Police Dept.</i> , 119 Wn. 2d 178 (1992). | 5 |
| <i>Macey v. Washington</i> , 110 Wash. 2d 308, 320, 752 P.2d 372 (1988) | 15 |
| <i>Rathbun v. United States</i> , 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957) | 4 |
| <i>State v. Clark</i> , 129 Wash. 2d 211, 225-226 (1996) | 6 |
| <i>State v. Slemmer</i> , 48 Wn. App. 48, 53 (1987) | 6 |
| <i>State v. Wojtyna</i> , 70 Wash. App. 689, 695-696 (1993). | 6 |
| <i>United States v. Cosby</i> , 500 F.2d 405 (9 th Cir. 1974) | 4 |
| <i>U.S. v. McIntyre</i> , 582 F.2d 1221(9 th Cir. 1978). | 3 |
| <i>United States v. White</i> , 401 U.S. 745, 28 L. Ed. 2d 453, 91 S. Ct. 1122 (1971) | 4 |
| <i>Walker v. Darby</i> , 911 F.2d 1573 (11 th Cir. 1990) | 3 |

TABLE OF STATUTES AND CODES

| | |
|--|-----------|
| 18 U.S.C. § 2511(2)(c) and (d) | 4 |
| Rev. Code Wash. 9.73.030 | 13 |
| Rev. Code Wash. 50.04.293 | 10, 14-15 |
| Rev. Code Wash. 50.04.294(2)(c). | 9 |
| Rev. Code Wash. 50.04.294(2)(f). | 11 |
| Rev. Code Wash. 50.04.294(4). | 12 |
| WAC 192-150-200(1) and (2) | 13 |

I. SUMMARY OF ARGUMENT

The Petitioner in his opening brief identified five specific parts of the Commissioner's Findings II thru IV that were not supported by substantial evidence. Respondent's Brief responds with a bare conclusion proclaiming that "the findings are supported by substantial evidence." [Respondent's Brief at 14] The Respondent does reference four places in the Commissioner's Record that present facts indicating that the Petitioner secretly recorded conversations in connection with his employment without the consent of the parties recorded. However, the issue is whether these conversations were private conversations, because if they were not private conversations, then the recordings were not illegal; and if they were not illegal, then there was no misconduct. If you review Section C of the Respondent's Brief you will find no reference or allegation that the conversations were "private".

There are two issues that are the Achilles Heels of the Respondent's claims of misconduct. The first is whether the conversations that the Petitioner recorded were private conversations. The second is the uncertainty of Mr. Casteel about the content of the instruction that the Petitioner is alleged to have deliberately disobeyed.

In this rebuttal brief we shall first explain why the Commissioner's finding that Mr. Smith unlawfully recorded private conversations without consent are not supported by

substantial evidence. Thereafter, we shall rebut each statutory claim of misconduct as set forth in the Respondent's Brief point by point. Mr. Casteel's confusion regarding his instructions to Smith regarding the laptop PC will be addressed therein.

II. ARGUMENT

A. The Commissioner's finding that Petitioner recorded private conversations was not supported by substantive evidence.

The Respondent missed the mark at the evidentiary hearing because Respondent failed to present sufficient evidence to establish that a "private" conversation was recorded without consent. In order to support the allegation, the Respondent needed to present evidence to show one specific instance where Mr. Smith recorded a private conversation without consent. The Respondent failed to present any evidence regarding the element of privacy. Consequently, the Commissioner's Finding that Mr. Smith violated the Privacy Act is not supported by substantial evidence.

Respondent argues that the conversations with co-workers that Mr. Smith recorded at work were private because an employee has a reasonable expectation of privacy in his or her work place that is protected by the United States Constitution. However, the federal case law cited in support of this claim is misconstrued and completely off point. [Respondent's Brief at 24-26] The Respondent relies primarily on two cases decided by the Ninth

Circuit Court of appeals: *U.S. v. McIntyre*, 582 F.2d 1221(9th Cir. 1978) and *.Walker v. Darby*, 911 F.2d 1573 (11th Cir. 1990). In the *McIntyre* case, police investigators used electronic surveillance devices to covertly eavesdrop on an assistant police chief's conversations in his office. In the *Darby* case, postal inspectors covertly used hidden electronically devices to intercept a worker's conversations at his workstation. In both of these cases, the Ninth Circuit held that the persons subject to surveillance had a reasonable expectation of privacy at their workplace and that the recordings were a violation of the subjects' Rights under the Fourth Amendment of the US Constitution, as well as, a violation of the Omnibus Crime Act.

These cases miss the mark because they are eavesdropping cases and not participant monitoring cases. Eavesdropping occurs when a third party that is not a party to a conversation listens in on a conversation without consent using electronic interception. Participant monitoring occurs when a party to a conversation records the conversation without the other party's or parties' knowledge and consent. The United States Supreme Court has held that citizens do not have a reasonable expectation of privacy to conversations with respect to the other participants in a conversation. A participant may record the conversation without the knowledge or consent of the other participants. *Rathbun v.*

United States, 355 U.S. 107, 78 S. Ct. 161, 2 L. Ed. 2d 134 (1957)
See also: United States v. White, 401 U.S. 745, 28 L. Ed. 2d 453, 91 S. Ct. 1122 (1971); *Holmes v. Burr*, 486 F.2d 55 (9th Cir. 1973); and *United States v. Cosby*, 500 F.2d 405 (9th Cir. 1974). Participant monitoring is also authorized by the Omnibus Safe Streets and Crime Control Act of 1968 [codified at 18 U.S.C. § 2511(2)(c) and (d)].

The U.S. Supreme Court has held that there is no reasonable expectation in a participant monitoring situation because a person who is party to a conversation receives information that is voluntarily disclosed to them by the other party. Once this information is voluntarily disclosed the other participant(s) may lawfully disclose the information to third parties. Since one does not have a reasonable expectation of privacy with respect to the information disclosed to another participant, there is no reason why they should not be allowed to record the conversation. *United States v. White*, supra, 401 U.S. at 751. Whereas, with respect to eavesdropping, the eavesdropper is not a party to the conversation and, therefore, the participants should have a reasonable expectation of privacy unless the conversation occurred in a public place or a location where third parties could be expected or anticipated to overhear the conversation.

The Respondent misconstrues the federal case to assert that one has a reasonable expectation of privacy in one's workplace per se, but the determination as to whether or not a conversation is "private" is not a federal or Constitutional issue. It is a statutory question that must be determined on a case by case basis, pursuant to the Privacy Act. It is the "intent or reasonable expectations of the participants as manifested by the facts and circumstances of each case" that controls whether a particular conversation is private. (Emphasis added) *Kadoranian v. Bellingham Police Dept.*, 119 Wn.2d 178, 190, 829 P.2d 1061 (1992).

The Commissioner's decision reversing the Administrative Law Judge's decision is not supported by substantive evidence because the Respondent failed to present sufficient evidence regarding any particular conversation to support a determination regarding whether the conversation was a private conversation.

The Respondent tries to overcome this by proclaiming that:

The Commissioner determined that the secret recordings Mr. Smith deliberately made of his conversations with co-workers, superiors, and the public constituted disqualifying misconduct pursuant to RCW 50.20.066(1). Comm'r Rec. at 356-359. State law clearly prohibits the secret recording or private conversations that occur in the workplace and in private homes.

[Respondent's Brief at 26] This bare conclusion is a presumption inferred from the prior paragraph where the Respondent cites the Ninth Circuit eavesdropping cases that are completely off point.

The Respondent uses these cases to infer that employees have a reasonable expectation of privacy at their workstations and in their offices per se regardless of the circumstances. The Respondent also infers that a person has a reasonable expectation to privacy with respect to participant monitoring that occurs within their residence or domicile (without citing any authority in support). This is simply a misrepresentation of Constitutional law.

In any case, the conversations did not occur in the co-worker's offices. They occurred in the Mr. Smith's office and he was their supervisor. Employees do not have a reasonable expectation of privacy when called into their supervisor's office to discuss their performance or work related matters because one may reasonably expect this information to be discussed later with other parties.

A person has no reasonable expectation of privacy in a conversation that takes place at a meeting where one who attended could reveal what transpired to others. *State v. Clark*, 129 Wash. 2d 211, 225-226 (1996); *State v. Slemmer*, 48 Wn. App. 48, 53 (1987). When any person may turn out to be the recipient of information resulting from a communication, that communication is not private. *State v. Wojtyna*, 70 Wash. App. 689, 695-696 (1993). Work related matters generally are not private since the content of the conversations may be discussed with other third

parties such as other coworkers, supervisors, other department personnel or the county commissioners, etc.

Likewise, no specific evidence was presented at the evidentiary hearing or entered into the Commissioner's Record pertaining to the content and circumstances surrounding any conversations with private parties. As stated in the opening brief, the Petitioner routinely met with citizens to receive complaints and request for services. A citizen making a complaint or a request for services does not have an expectation of privacy because these matters routinely need to be discussed with the Petitioner's superiors, directors of other county departments and/or the Kitsap County Commissioners.

This Court should affirm the Initial Order that was entered by the Administrative Law Judge that presided over the evidentiary hearing with respect to the issue of privacy. The ALJ stated in his conclusions of law that:

11. . . . the evidence presented in this case does not establish that the claimant recorded "private" conversations without consent in violation of this statute.

12. The claimant's recording of his conversations with members of the public he came in contact with in the course of his work were not "private" communications, as the persons with whom he spoke knew his position with the county and they were providing information to him about something the county was planning to do or that they were asking the county to do. To act on the information they provided to him, he would by necessity have to relay to others what these persons had told him.

13. The evidence presented does not establish that the conversations the claimant had with other employees of Kitsap County constituted "private" communications. The claimant's communications with co-workers would involve work, and information that would have to be shared with others.

14. In this case, the undersigned concludes misconduct has not been established. The evidence does not establish the claimant's recording of conversations without consent or notice constituted a violation of RCW 9.73.030. The conversations recorded were not "private" conversation. . . .

[See the Initial Order at page 6. (CR 335)]

The Commissioner's decision reversing the ALJ is not supported by substantial evidence because the Respondent failed to present any evidence that a private conversation was recorded without consent. Whereas, the Petitioner presented evidence that the conversations at the office and in the field were work related.

B. Petitioner Did not Show a Willful Disregard of the Employer's Interest by Purposefully Refusing to Follow His Supervisor's Reasonable Directive.

The Respondent has misrepresented the testimony Mr. Casteel gave at the evidentiary hearing. The Respondent claims that Mr. Casteel instructed Mr. Smith not to delete or remove "anything." Whereas, Randy Casteel testified that he was not sure whether he told Mr. Smith not to delete "any files" or "anything." CR at 34.

Petitioner did not remove any files. He removed a program that was his property. He also had only 1 license for the program. Therefore, it could only be placed on one computer at a time. This

program converted audio tapes into digital audio files. Audio files conform to industry standards and the audio files were left on the computer in standard audio file format. The files were intact and could be accessed to review.

Mr. Smith testified that he was ordered not to remove any files and that he did not remove any files. There obviously is confusion regarding Mr. Casteel's instruction since Mr. Casteel is uncertain about what he said. Mr. Smith believes he complied with his superior's instruction. His testimony regarding his state of mind indicates that he did not "deliberately" or "willfully" violate an order of his employer. In any case, due to Mr. Casteel's confusion about what he said, the Respondent did not meet its burden of proof regarding the content of the instruction. The Respondent cannot claim that Mr. Smith violated an order if the witness that gave the order is confused about what he said.

C. The Petitioner's actions did not amount to deliberate deception and do not qualify as misconduct.

RCW 50.04.294(2)(c) states:

With respect to claims that have an effective date on or after January 4, 2004: . . . (2)The following acts are considered misconduct because the acts signify a willful or wanton disregard of the rights, title, and interests of the employer or a fellow employee. These acts include, but are not limited to: (c) Dishonesty related to employment, including but not limited to deliberate falsification of company records, theft, deliberate deception, or lying;

Misconduct is defined in RCW 50.04.293 which states that:

"[M]isconduct" means an employee's act or failure to act in willful disregard of his or her employer's interest where the effect of the employee's act or failure to act is to harm the employer's business.

The Respondent's claim of misconduct due to deliberate deception lacks merit for the following reasons:

- The constitutional rights of coworkers and Kitsap County were not violated by Mr. Smith's recordings because one does not have a reasonable expectation to privacy with respect to participant monitoring.
- No one's rights or interests under the Privacy Act were violated because, as stated above, there is no proof that any of the conversations were private conversations.
- Kitsap County was not harmed because the tapes were never disclosed to anyone by Petitioner and he returned them to Kitsap County upon request.
- The county never presented any proof to show how it was specifically harmed by the recordings. Respondent can not substantiate that "the effect of the employee's act or failure to act [was] to harm the employer's business" which is a necessary element of misconduct as set forth by RCW 50.04.293.

D. Petitioner was not aware that he violated a reasonable rule of his employer.

RCW 50.04.294(2)(f) states that misconduct “includes violation of a company rule if the rule is reasonable and if the claimant knew or should have known of the existence of the rule.” The Respondent argues that the County had a Rule because at some time in the past Mr. Casteel claims Mr. Smith attended a training camp where an unidentified instructor stated that “it was against the law to record a conversation without the consent of the person being recorded.” [Respondent’s Brief at 27]

This argument lacks merit for the following reasons:

- Instructors at training camps do not have the authority to spontaneously create Kitsap County policy on their own initiative by means of oral proclamation.
- The policy was never ratified by the Kitsap County Commissioners or anyone delegated authority to enact such and the rule was never published and properly noticed.
- Several co-workers testified at the evidentiary hearing that they were unaware of such a policy and many stated they also recorded conversations without consent at work.
- Petitioner testified he had no knowledge of any rule and was advised by an attorney that his recording of work related matters as a county supervisor was lawful.

- The alleged instructor's "rule was a misrepresentation of the Privacy Act because the act does not require consent to record a conversation unless it is a private conversation.

Consequently, the existence of a county rule is not supported by substantial evidence. Mr. Smith did not knowingly or recklessly violate "the rule" due to inadequate notice and because Mr. Smith reasonably relied upon legal advice received from his attorney that his conduct was lawful.

In the alternative, the Respondent argues that the county "does not need a policy stating that employees are required to comply with State law." The Respondent argues that "all citizens are expected to know and comply with state law" and that engaging in deliberate acts that are illegal constitutes misconduct." *Id.* at 28. This is not true for two reasons: First, one must deliberately engage in an illegal act while working. Second, engaging in a deliberate illegal act at work while performing one's duties as an employee is not misconduct -- it is gross misconduct. See: RCW 50.04.294(4).

Nevertheless, this issue is moot because the Respondent failed to present any evidence at the evidentiary hearing that the Petitioner ever recorded a private conversation.

E. The Petitioner's actions did not demonstrate carelessness or negligence indicating disregard of the employer's interest.

Again the Respondent argues that petitioner criminally violated the Privacy Act RCW 9.73.030. As shown above, it has not been shown that the Petitioner violated the Privacy Act.

The citizens Petitioner spoke in the field knew of his position with the county and were providing information about something the County was planning to do or they were requesting the County to perform some service or action for them. In order to act on their requests, Petitioner would have to convey to others what these persons had told him.

Petitioner held a high level supervisory position. A supervisor does not have a position that indicates privilege or confidentiality such as priest, psychologist, doctor or union representative. Petitioner's conversations with employees as their supervisor would involve work and this information would routinely be shared with others. Likewise, conversations with other supervisors or the director were work related and would routinely be shared with others. Petitioner recorded work related conversations at the office and in the field for accuracy; because he knew it would be necessary to relay the information to others.

Accordingly, it has not been shown that Petitioner disregarded his employer's interests and, therefore, the issues of carelessness, negligence and/or his state of mind are not relevant.

F. Respondent Failed to Prove Actual or Potential Harm

With respect to all of the various claims of misconduct set forth in the Respondent's Brief, none of the claims are supported by evidence of harm to the employer as required by RCW 50.04.293 and by WAC 192-150-200(1) and (2) which both require that misconduct must be work related and result in harm or create the potential for harm to the employer's interests. The harm may be tangible, such as damage to equipment or property, or intangible, such as damage to the employer's reputation or a negative impact on staff morale etc. The Respondent failed to present an actual proof of harm to Kitsap County.

Mr. Smith did not disclose that he was recording conversations. Therefore, the "misconduct" was unknown to the public and could not have harmed the reputation of Kitsap County. Since the recording were made by Mr. Smith in his capacity as county supervisor performing public duties, the conversations recorded were information that would need to be conveyed to others. Therefore, the other participants knew or should have known the information conveyed was public information to be discussed with other persons.

Absent actual or potential harm to the employer there is no misconduct. RCW 50.04.293.

G. Retaliation and pretext discharge are relevant matters.

The issue of retaliation and pretext discharge are relevant to alleged violations of the Privacy Act. In addition to other reasons set forth above, Petitioner also recorded work related conversations because he hoped to catch his superiors unlawfully harassing and/or threatening him. Such conversations even if “private” are excluded from the Privacy Act which makes an exception for conversations which “convey threats of extortion, blackmail, bodily harm, or other unlawful requests or demands” RCW 9.73.030(2)(b)

In *Macey v. Washington* the Supreme Court noted in the dicta of the case that: “[H]onesty in the employment relationship is a reasonable expectation of both parties. Just as the employer should not escape the burdens of unemployment compensation by a pretext discharge, neither should the employee gain or continue employment upon a false premise.” *Macey v. Washington*, 110 Wash. 2d 308, 320, 752 P.2d 372 (1988).

Petitioner presented evidence of retaliation and pretext discharge in support of his theory of the case. The allegations of misconduct were not made in a timely manner because they are pretextual. The discharge occurred after Mr. Smith refused requests to file a false affidavit and perjury testimony on behalf of the county. Even if the alleged “misconduct” occurred (and we

deny it), the Respondent did not suffer any actual or potential harm. Moreover, testimony was presented that other coworkers also record conversations at work without consent and they have not been reprimanded or discharged. Mr. Smith was given no warnings prior to discharge. Mr. Smith should not be denied his unemployment benefits due to a pretext discharge by his employer.

III. IN CONCLUSION

Based upon the foregoing arguments, Petitioner respectfully requests that the Commissioner's determination be reversed.

Respectfully submitted on February 10th, 2009.

Longacre Law Office

By


Clayton E. Longacre, WSBA 21821
Attorney for Petitioner/Claimant

ORIGINAL

No. 37492-7--II

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

DAVID N. SMITH,
Petitioner

V.

STATE OF WASHINGTON EMPLOYMENT SECURITY DEPARTMENT,
Respondents

FILED
COURT OF APPEALS
DIVISION II
09 FEB 12 AM 11:31
STATE OF WASHINGTON
BY _____
DEPOSED

PROOF OF SERVICE

Longacre Law Office
Clayton Ernest Longacre
WSBA #21821
Attorney for Petitioner

569 Division Street, Suite F
Port Orchard, WA
Bremerton, WA 98366

PROOF OF SERVICE

I Clayton E. Longacre, the undersigned, hereby certify and declare under penalty of perjury under the state of Washington that the following statements are true and correct.

1. I am over the age of 18 years old and not a party to the above referenced action.

2. I hereby certify that I caused to be served a copy of

A. PETITIONER'S REPLY BRIEF;

Court of Appeals Number 37492-7-II,

and this Proof of Service to the following:

By Certified US Mail:

Jacquelyn Moore Aufderheide
Kitsap County Prosecutors Office
614 Division Street
Port Orchard, WA 98366

Zebular James Madison
Attorney General's Office
PO Box 2317
Tacoma, WA 98401-2317

Martin Frederick Muench
Attorney at Law
3307 SE Navigation Lane
Port Orchard, WA 98366-2889

And via Certified US Mail

Original and one copy to:

Court of Appeals, Division II
950 Broadway # 300
Tacoma, WA 98402
Ph: 1-235-593-2970
Fax: 1-253-593-2806

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 11th day of February, 2009.



Clayton Ernest Longacre