Sexual Harassment in the Workplace: Should You Secretly Record It?

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If you are experiencing sexual harassment, discrimination or retaliation at work, it can be tempting to try to catch a harasser in the act by secretly recording the misconduct using a cell phone or other device. But, what are the advantages and disadvantages of recording co-workers or managers? Are there possible legal issues? Is having a recording the best possible evidence to prove harassment? The answers to these questions are not as simple as they might seem, and will depend very much on your unique circumstances.

Do You Need Everyone's Permission to Record? Maybe—Wiretapping Laws Vary By State

Do not simply record every conversation or meeting that you have at work, even if you believe that a lot of your interactions are subtly tinged with hostility. Most states have wiretapping laws that set rules about whether people need the permission of others to legally record them. For example, New York is a "single-party consent" state, meaning that in New York you can record conversations in which you are participating without asking the other people in the conversation for permission.

However, not all states have a "single-party" law like New York's, and you can violate wiretapping laws in some other states if you do not get permission from everyone who is part of the conversation (these laws are sometimes called "two-party consent" laws, though they require the consent of *everyone* who is being recorded). For example, California (Cal. Penal Code § 632), Pennsylvania (Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C.S. §§ 5703-04), Florida (Florida Security of Communications Act, Florida Statute § 934.03), and Massachusetts (Mass. Gen. Laws Ann. ch. 272, § 99) have laws that require that everyone in a conversation give consent to legally allow recording. For this reason, people must be especially careful about recording phone calls, because even if you are sitting in New York on a call, if the other people on the call are in different states with "two-party consent" laws, you might violate those other state laws.

The Federal Wiretap Act (18 U.S.C. § 2511) also may prohibit a recording if the recording is being made in a private place where the other people in the conversation have a reasonable expectation to privacy. In addition, taking video of others introduces further potential legal issues. For these reasons, you should get legal advice before recording others without their permission.

In general, you should not record conversations that you are not a part of, and such an "eavesdropping" recording would violate even laws like New York's "single-party consent" law.

Check Your Company's Employee Handbook to Find Out Whether Your Employer Specifically Prohibits Recording Conversations

Check your company's employee handbook and other policies for any pertinent workplace rules before making any recordings. Recording harassing behavior (or attempting to) might be considered

"protected" activity under the law if it is being done to vindicate an employee's legal right to address discrimination, harassment or retaliation. However, if the recording goes beyond what is necessary to protect your rights, such as recording conversations that do not relate to your allegations, then the act of recording may not be protected under the law and could instead give your employer a reason to discipline or even fire you.

If you take handwritten or typed notes, or make a written complaint to Human Resources or the Legal department (especially if someone else corroborates the incident) immediately or very soon after the improper conduct, that can serve as powerful evidence of harassment or other misconduct and could be just as effective as a recording.

What If Someone Asks, "Are You Recording This?"

If someone asks you if you are recording him or her, and you are in fact recording them, you should acknowledge that you are (unless you sincerely fear physical harm) to ensure that there is an accurate record of the meeting or conversation. Of course, admitting that you are recording could hurt your relationship with the other person, and also likely will put them and possibly others on guard when speaking with you (which could be a good thing by putting people on their "best behavior," although it could also quickly end the meeting).

The bottom line is that you do not want to create a recording that can hurt your own credibility because it contains a false statement by yourself when the recording was originally intended to document the questionable conduct of others.

What Else Can I Do to Prove that the Harassment Happened?

You should carefully and quickly document any harassment and other mistreatment; a written record of the mistreatment prepared right after the event is powerful evidence of what happened, and will support what you have to say later. Save any relevant messages or documents (including things like receipts), and if you do not have them in your possession you can try printing or taking screenshots or photos of emails, texts or instant messages, and also should take photos of any injuries or places where events happened. Write down and record what happened in notes or an email, or make a written complaint to the company as soon as possible after the incident or behavior happens.

In fact, you have an obligation to preserve evidence of anything you believe you may have a legal claim about, and saving such evidence and keeping an ongoing log or journal of the misconduct can greatly strengthen your ability to address the problem. Before making a complaint, however, you should think about who you trust at the company to best handle and respond to your complaint, and also should strongly consider seeking guidance from an attorney, especially if you believe your complaint may not be handled appropriately.

If You Are Being Harassed, Talk with an Attorney and Report the Harassment

If you are experiencing harassment or other mistreatment that is causing you to consider recording someone at work or outside of work, it is very likely that the situation is already serious enough that you should talk with an attorney about your situation and also report the offending conduct to someone with

authority at the company.

If you are very confident that you will be able to record egregious harassment (blatant sexual, racial or other discriminatory harassment) as it is happening, then a recording can be powerful evidence. However, it can be difficult to collect such “smoking gun” evidence, and many people end up recording hours of conversations that are not relevant to their case or legal claims. Recording others also can be risky because it can give your harasser or employer possible legal leverage against you because of obscure wiretapping laws or policies, and could also damage your work relationships or provide an employer with a pretext for discipline. The decision to record or not should be carefully thought out.

If you are experiencing harassment or other inappropriate conduct or treatment at work, you can talk about it with Lawrence M. Pearson or another attorney at Wigdor LLP at (212) 257-6800.

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