OPINION NO. 94-097

Syllabus:

1. A court of common pleas, acting as an employer, may implement a workplace policy that prohibits classified employees of the court from tape recording meetings that involve other employees or clients of the court without first obtaining the express consent of the court administrator; provided, however, that consent of the court administrator should be precluded in any situation where the recording would violate the provisions of R.C. 2933.52.

2. When the court administrator knows that a court employee is tape recording a meeting involving other employees and clients of the court, and such recording is otherwise lawful pursuant to R.C. 2933.52, the court administrator is neither required to give notice, nor precluded from giving notice, to other participants in the meeting.

3. If a classified employee of a court of common pleas secretly tape records a meeting involving other employees or clients of the court, in violation of a workrule prohibiting such taping, the tape may be used as the basis for discipline of the employee who made the recording, provided neither the workrule itself nor the manner of enforcing the rule discriminates on the basis of a protected status or employee activity.

4. If, in the absence of an express workrule governing such conduct, a classified employee of a court of common pleas secretly tape records a meeting involving other employees or clients, the tape may be used as the basis for discipline of the employee who made the secret recording, if the facts of the particular instance evidence a cause for discipline or discharge as provided in R.C. 124.34 and the imposition of the discipline does not discriminate on the basis of a protected status or employee activity.

5. If a classified employee of a court of common pleas secretly tape records a meeting involving other employees, the tape may be used as a basis for

discipline of an employee whose misconduct is documented on the secret recording unless the tape is excluded from use as evidence pursuant to R.C. 2933.62-.63 on the grounds that the recording violates the provisions of R.C. 2933.52; additionally, use or disclosure by the court of a recording known to have been made in violation of R.C. 2933.52 may subject the court to criminal and civil liability.

To: Anthony G. Pizza, Lucas County Prosecuting Attorney, Toledo, Ohio
By: Lee Fisher, Attorney General, December 30, 1994

You have requested an opinion regarding the authority of the Lucas County Court of Common Pleas to regulate the audio tape recording of meetings involving court employees or clients in situations where a court employee asks to tape record a meeting, or where a court employee has secretly tape recorded a meeting. In some of these situations, the employee who undertakes the recording is a participant in the meeting and in other situations is not.[1] The court administrator has further informed a member of my staff that the employees involved are classified employees who are not covered by a collective bargaining agreement, but who are subject to the provisions of R.C. 124.34 with respect to discharge and discipline. The court has a progressive discipline policy which requires that a supervisor meet with an employee being disciplined; the policy also provides that a secretary may take notes of such a meeting.

The court administrator has asked your assistance in developing a policy that addresses the audio tape recording of meetings or conversations by employees. Although it is beyond the scope of a formal opinion to attempt to formulate a workplace policy for the court, it is possible to discuss legal limitations that should be considered in the development of such a policy. To that end, this opinion will address the following questions presented to you by the court administrator: [2]

1. May a court of common pleas implement a workplace policy that prohibits the audio tape recording by an employee of any meeting (whether between

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[1] Examples given by the court administrator tended to involve disciplinary issues. Employees have asked to record or have secretly recorded disciplinary counselling meetings with their supervisors. Also, employees have secretly recorded meetings or conversations between other employees or another employee and a client, which meetings did not involve the taping employee as a participant, in order to attempt to document misconduct by one or more of the participants or to attempt to document that the taping employee had been subjected to disparate discipline with respect to similar conduct. *See generally* 3 Ohio Admin. Code 124-9-11 (allowing evidence of disparate treatment in disciplinary appeals to the Personnel Board of Review).

[2] You have not asked, and this opinion does not address, who is responsible for the promulgation and enforcement of workplace policies for a court of common pleas. The administrative structure of such courts varies from county to county. *See, e.g.*, R.C. 2301.03. Various statutes authorize courts of common pleas or specific judges to employ or appoint personnel. *See generally* 1992 Op. Att'y Gen. 92-009. In particular, the position of court administrator is authorized by R.C. 2301.12(E). For purposes of discussing a workplace policy regarding tape recording, this opinion assumes that such a policy has been or will be properly adopted by the court and that duties with respect to its implementation have been or will be properly delegated to the court administrator or other appropriate officer of the court.

two individuals or a large group) without the express consent of the Court Administrator, regardless of the purpose for the taping?

2. When the court knows that an individual is tape recording a meeting, is it necessary to inform other participants in the meeting of the recording?

3. If an employee secretly tape records a meeting with other employees, may the tape be used as the basis for taking corrective action, either against the employee who made the secret recording, or against an employee whose misconduct is documented on the secret recording?

Authority of a Public Employer Generally

A public employer has the right to maintain the efficiency and effectiveness of governmental operations, to discipline and discharge employees for just cause, and to manage the work force effectively, subject only to such limitations as may be imposed by a collective bargaining agreement, civil service laws, or any substantive law governing a particular matter. *See* R.C. 4117.08(C) (specifically stating that the collective bargaining statutes do not impair these management rights of a public employer); *see generally* 1 Pub. Personnel Admin. (P-H) ¶¶ 8271-78 (Nov. 12, 1974). In the situation you have described, the authority of the court of common pleas with respect to its employees is not affected by any collective bargaining agreement. Accordingly, to the extent that a policy prohibiting or regulating the audio tape recording of meetings by employees falls within the management rights of the court as an employer and is not otherwise limited by the civil service laws or by any substantive law governing such recording activities, the court has authority to implement such a policy.

Law Governing Monitoring of Communications

The monitoring of communications is governed by the "eavesdropping law," codified at R.C. 2933.51 and related sections.[3] R.C. 2933.52 states, in pertinent part:

> (A) *No person* purposely *shall* do any of the following:
>
> (1) *Intercept*, attempt to intercept, or procure any other person to intercept or attempt to intercept *any* wire or *oral communication*.
>
> ....
>
> (3) Disclose, or attempt to disclose, to any other person the contents, or any evidence derived from the contents, of any wire or oral communication, knowing or having reason to know that the contents, or evidence derived from the contents, was obtained through the interception of the wire or oral communication in violation of sections 2933.51 to 2933.66 of the Revised Code.
>
> (B) This section *does not apply* to any of the following:
>
> ....

[3] These statutes are substantially similar to the provisions of the federal "wiretap law" enacted by Title III, §802 of the Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-35, 82 Stat. 214 (1968) (codified as amended at 18 U.S.C. §§ 2510 - 2521 (1988 and Supp. V 1993)). *See State v. Thomas*, Nos. 88 CA 22, 88 CA 29, 1989 Ohio App. LEXIS 2658, at *8 (Washington County June 28, 1989) (noting the similarity between the Ohio and federal statutes and relying on federal case law for analysis of the analogous Ohio provisions), *jurisdictional motion overruled*, 46 Ohio St. 3d 707, 545 N.E.2d 1280 (1989), *cert. denied*, 493 U.S. 1077 (1990).

> (4) *A person who is not a law enforcement officer* and who intercepts a wire or oral communication, *if the person is a party to the communication* or if one of the parties to the communication has given the person prior consent to the interception, and if the communication is not intercepted for the purpose of committing any criminal offense or tortious act in violation of the laws of the United States or this state or for the purpose of committing any other injurious act.... (Emphasis added.)

The following pertinent definitions are set out in R.C. 2933.51:

> (B) "Oral communication" means any human speech that is used to communicate by one person to another person.
>
> (C) "Intercept" means the aural acquisition of the contents of any wire or oral communication through the use of any interception device.
>
> (D) "Interception device" means any electronic, mechanical, or other device or apparatus that can be used to intercept a wire or oral communication.

Pursuant to R.C. 2933.52(C), a violation of R.C. 2933.52 constitutes a third degree felony. In addition, "[a]ny person whose wire or oral communications are intercepted, disclosed, or used" in violation of R.C. 2933.52 has a civil cause of action against the violator. R.C. 2933.65.

The definitions of the terms "oral communication," "intercept," and "interception device" in R.C. 2933.51 are broad enough to include the audio tape recording of meetings and conversations between court employees and clients. A court employee is a "person" and is, therefore, prohibited from intercepting oral communications under R.C. 2933.52(A)(1). *See* R.C. 1.59(C) ("'person' includes an individual"). Under the circumstances described in your request, however, a court employee is not a law enforcement officer or a person acting under color of law, and is thus subject to the exception provided in R.C. 2933.52(B)(4) for interception of oral communications to which such person is a party.

The effect of these provisions is to protect oral communications from intrusions by private parties in much the same manner that the Fourth Amendment protects oral communications from intrusions by the government.[4] A court employee may not tape record a conversation or meeting to which that employee is not a party unless that employee acquires the consent of at least one of the parties involved. *See* R.C. 2933.52(A)(1) and (B)(4).[5] An

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[4] Law enforcement officers, acting without a warrant, may not secretly record a private conversation to which they are not parties. *See Katz v. United States*, 389 U.S. 347 (1967) (warrantless use of tape recorder outside phone booth to "overhear" and record conversation violated Fourth Amendment right of privacy). However, when a private participant in a conversation consents to secret law enforcement monitoring or a law enforcement officer who is also participant in a conversation is secretly recording the conversation, no constitutional right of privacy protects the other parties to the conversation, because "[w]hen one man speaks to another he takes all the risks ordinarily inherent in so doing, including the risk that the man to whom he speaks will make public what he heard." *Id.* at 589 n.† (White, J., concurring) (listing cases involving secret taping by participants as examples of cases unaffected by the reasoning of the majority opinion, which dealt with third party monitoring); *see also State v. Geraldo*, 68 Ohio St. 2d 120, 429 N.E.2d 141 (1981), *cert. denied*, 456 U.S. 962 (1982).

[5] At least one Ohio appellate court has interpreted R.C. 2933.52 as prohibiting nonparticipant interceptions only in situations where the participants to the communication have

employee may, however, tape any conversation or meeting to which that employee is a party without obtaining the consent of any of the other participants as long as the tape recording is not made for an illegal or tortious purpose. *See* R.C. 2933.52(B)(4). *Cf. Employment Coordinator* ¶¶EP-22,610 to 614 (Clark Boardman Callaghan March 21, 1994) (discussing effect of federal wiretap law on monitoring of employees by an employer); *see generally* Edwin R. Render and Robert D. McClure, *A Recent Sixth Circuit Debate. Surreptitious Monitoring by a Participant in a Conversation: Does Title III Impose Liability Even if the Recording Is Never Divulged?*, 22 Toledo L. Rev. 427, 436 (1991) (discussing issues involved in monitoring of conversations by persons who are not law enforcement officers).

Civil Service Law Governing the Right of a Public Employer to Discipline and Discharge Employees

In the situation you have described, the authority of a court of common pleas to discipline or discharge its classified employees is governed by R.C. 124.34, which governs the reasons for and procedures by which a classified employee may be disciplined or discharged and provides certain appeal rights. R.C. 124.34 states in pertinent part:

> The tenure of every officer or employee in the classified service of the state and the counties ... shall be during good behavior and efficient service and no such officer or employee shall be reduced in pay or position, suspended, or removed, except ... for incompetency, inefficiency, dishonesty, drunkenness, immoral conduct, insubordination, discourteous treatment of the public, neglect of duty, violation of such sections or the rules of the director of administrative services or the commission, or any other failure of good behavior, or any other acts of misfeasance, malfeasance, or nonfeasance in office.

Additionally, R.C. 124.34 provides classified officers and employees with certain procedural and appeal rights in discharge and disciplinary proceedings.

Pursuant to R.C. 124.34, a classified civil service employee is subject to discipline or discharge only for causes provided in the statute. *See Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. 532 (1985); *Sutton v. Cleveland Bd. of Educ.*, 726 F. Supp. 657 (N.D. Ohio 1989), *app. dismissed*, 886 F.2d 330 (6th Cir. 1989); *Anderson v. Minter*, 32 Ohio St. 2d 207, 211, 291 N.E.2d 457, 460 (1972) ("the General Assembly has provided, in effect, that even suspensions for five days or less should be made only for cause"); *Jackson v. Kurtz*, 65 Ohio

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a reasonable expectation of privacy. *See State v. Bidinost*, No. 62925, 1993 Ohio App. LEXIS 3097, at *23-24 (Cuyahoga County June 17, 1993) ("[t]hose who use a medium of communication which exposes their conversations to those other than the one person to whom they are speaking, take the risk that third parties may overhear their conversation"), *jurisdictional motion allowed*, 67 Ohio St. 3d 1512, 622 N.E.2d 659 (1993) (oral arguments heard Nov. 16, 1994, decision pending). The definition of oral communication at R.C. 2933.51(B) does not expressly contain such a limitation, however. In comparison, the term "oral communication" under federal law is expressly defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation," 18 U.S.C. § 2510(2). A justifiable expectation that a communication is not subject to interception has been interpreted to mean a reasonable expectation of privacy. *See, e.g., United States v. Pui Kan Lam*, 483 F.2d 1202, 1206 (2d Cir. 1973), *cert. denied*, 415 U.S. 984 (1974).

App. 2d 152, 416 N.E.2d 1064 (Hamilton County 1979). The language of R.C. 124.34 has been construed to encompass discipline for violations of reasonable workrules or administrative policies that are uniformly applied. *See, e.g., Turner-Brannock v. Ohio Bureau of Employment Services*, 15 Ohio App. 3d 134, 137, 472 N.E.2d 1131, 1134 (Clermont County 1984) (R.C. 124.34 encompasses concept of discipline for "failure to accept, obey, or comply with an established system or set of rules and regulations"); *In re Removal of Bronkar*, 53 Ohio Misc. 13, 18, 372 N.E.2d 1345, 1348 (C.P. Montgomery County 1977) (highway patrolman can be discharged for violation of rules and regulations of the State Highway Patrol). Pursuant to 3 Ohio Admin. Code 124-9-08(D), indictment for or allegation of a criminal offense, standing alone, is not a basis for discipline under R.C. 124.34, although the same facts that support an indictment, if proved independently in a disciplinary proceeding, may support discipline for one of the causes stated in R.C. 124.34. Actual conviction of a crime, however, is conclusive evidence of each of the elements of that crime. 3 Ohio Admin. Code 124-9-08(A). Thus, evidence of conviction of a crime may be admitted in a disciplinary action if a connection is established between the crime and the allegations contained in the disciplinary order. 3 Ohio Admin. Code 124-9-08(B)-(C).

First Question: Permissibility of a Policy that Prohibits Employees from Recording Meetings Without the Consent of the Court Administrator

The first question presented by your request is whether the court may prohibit the tape recording by an employee of any meeting (whether between two individuals or a large group), regardless of the purpose for the taping, unless the employee first obtains the express consent of the court administrator. The tape recording of meetings and conversations in the workplace can have identifiable effects on the operation of the workplace. In some situations, the paramount interest may be the creation of an accurate record of what transpired; in other situations, where free and frank discussion is desired, the presence of a recorder may inhibit those present from participating fully. *See, e.g., N.L.R.B. v. Bartlett-Collins Co.*, 639 F.2d 652, 656 (10th Cir. 1981) (listing the negative effects of permitting tape recording of a bargaining session), *cert. denied*, 452 U.S. 961 (1981). Additionally, court employees work with each other and with clients in a setting that may involve confidential, privileged communications and taping such conversations may violate specific privileges. *See. e.g., Everson v. Montgomery County Prosecutor*, No. 93-REM-09-0546 (State Personnel Board of Review March 4, 1994) (employee discharged for surreptitious taping in intake area of prosecutor's office). Widespread surreptitious recording also can be destructive of morale. *See, e.g. Maciareillo v. Summer*, 973 F.2d 295 (4th Cir. 1992) (police officers discharged for surreptitious tapes made in the process of conducting their own private investigation of misconduct by another officer), *cert. denied*, 113 S. Ct. 1048 (1993). Thus, the management rights of the court include the right to exercise control over by whom and under what circumstances recordings of employee meetings and conversations may be made.

In considering limitations on the right of the court to regulate the tape recording of meetings and conversations occurring in the workplace, it first may be noted that the tape recording of meetings and conversations by a third party, absent consent of an actual party involved, violates R.C. 2933.52(A)(1). If the court administrator were to consent to an employee request to record a meeting or conversation to which that employee is not a party, the court itself might be implicated in the violation, and subject to the possible imposition of criminal and civil penalties. Thus, no policy regarding tape recording should permit the court administrator to approve or consent to recordings that violate R.C. 2933.52(A)(1). A policy that prohibits third party recordings entirely, however, or that requires consent of the participants before such recordings can be made, would be consistent with R.C. 2933.52(A)(1). *Cf.*

Employment Coordinator ¶EP-22,612 (suggesting that, in situations where an employer wishes to monitor employee conversations, employees be informed in writing of the manner of such interceptions and that each employee acknowledge in writing that such interception may take place).

Pursuant to R.C. 2933.52(B)(4), the surreptitious tape recording of a meeting or conversation by a participant is not unlawful. However, the statute does not provide a participant any absolute right to make such recordings. Nor does any "right to tape" accrue to employees by virtue of the fact that some of the meetings involved are disciplinary in nature. A classified civil service employee has neither a constitutional nor a statutory right to have a stenographic record or tape recording made of a pretermination disciplinary meeting. *See Local 4501, Communications Workers of America v. Ohio State Univ.*, 49 Ohio St. 3d 1, 550 N.E.2d 164 (1990), *cert. denied*, 497 U.S. 1025 (1990). It follows that such an employee also has no right to make a secret recording of pretermination or lower level disciplinary meetings. Accordingly, a policy prohibiting an employee from recording a meeting in which that employee is a participant, unless the employee first obtains the consent of the court administrator, or a policy providing that notes may be taken only by a secretary, is consistent with both civil service law and the provisions of R.C. 2933.52.

Second Question: Need for Notice to Employees Being Tape Recorded

The provisions of R.C. 2933.52, when read as a whole, require only that one party to a particular communication needs to consent to the interception of that communication. Thus, in situations where the taping employee is a participant in the recorded communication, there is no requirement of notice to or waiver by other participants. Nothing in the law, however, prohibits the court from giving notice to other employees that a meeting or conversation is being taped by a participating employee.

In situations where the taping employee is not a party to the recorded meeting and is attempting to record secretly, the recording is a violation of R.C. 2933.52. As stated previously, the court administrator should not permit such recordings in any circumstance. If, however, the court acquires knowledge that such prohibited recording activity has been occurring, notice to the participants might serve to minimize any responsibility that might otherwise attach to the court from the prohibited interception.

Third Question: Permissibility of Using a Tape Recording of a Meeting or Conversation for Disciplinary Purposes

Use as Evidence of Misconduct by the Employee Whose Communication Was Recorded

The use or disclosure of the contents of any oral communication known to have been obtained by an interception prohibited under R.C. 2933.52 is a separate violation of the statute, independent of the interception itself. *See* R.C. 2933.52(A)(3). Thus, whether or not the court, as an employer, was responsible for the interception, the court is prohibited from disclosing or using the contents of the recording if the court knows or has reason to know the recording was obtained unlawfully. *See Employment Coordinator* ¶22,613. Such use or disclosure might subject the court to the penalties imposed by R.C. 2933.52(C) and R.C. 2933.65. R.C. 2933.62(A) further provides:

> No part of the contents, and no evidence derived from the contents, of any intercepted wire or oral communication shall be received in evidence in any trial,

> *hearing, or other proceedings, in or before any* court, grand jury, department, officer, agency, regulatory body, legislative committee, or other *authority of this state* or of a political subdivision of this state, if the disclosure of that information is in violation of sections 2933.51 to 2933.66 of the Revised Code.

See also R.C. 2933.63 (providing for procedures for filing a motion to suppress such evidence). As previously discussed, a secret tape recording made by an employee who was not a party to the recorded oral communication is a violation of R.C. 2933.52(A)(1). Thus, even if the tape reveals misconduct on the part of a participating employee, the tape may not be used as evidence in a disciplinary proceeding. R.C. 2933.52(A)(1). *But see State v. Estes*, No. CA92-06-010, 1993 Ohio App. LEXIS 537, *8 (Preble County Feb. 1, 1993) (holding, without consideration of R.C. 2933.62-.63, that although a violation of R.C. 2933.52 may give rise to criminal penalties, there is no basis for the exclusion of evidence, because no violation of constitutional rights is involved).

If the interception that produces the evidence of misconduct does not violate R.C. 2933.52, use of the recording is not prohibited by R.C. 2933.52(C) or R.C. 2933.12(A). Thus, use of a tape recording of an oral communication as evidence in a disciplinary hearing will not subject the court to civil or criminal penalties, if the taping employee was a party to the taped communication. The fact that the recording may have been made in violation of a workrule does not mean that the recording cannot be used as evidence in disciplinary proceedings. *Cf. Kettering v. Hollen*, 64 Ohio St. 2d 232, 235, 416 N.E.2d 598, 600 (1980) (violation of state law does not require exclusion of evidence gained thereby when no constitutional right is violated, absent a legislative requirement of exclusion). The general rule, applicable in the absence of any specific prohibition, is that an audio recording is admissible as evidence if it is "authentic, accurate and trustworthy." *State v. Gotsis*, 13 Ohio App. 3d 282, 283, 469 N.E.2d 548, 551 (Lorain County 1984); *accord State v. Rodriquez*, 66 Ohio App. 3d 5, 15-16, 583 N.E.2d 384, 391 (Wood County 1990). *See also United States v. Segines*, 17 F.3d 847, 854 (6th Cir. 1994); *United States v. Robinson*, 707 F.2d 872, 876 (6th Cir. 1982), *cert. denied*, 112 S. Ct. 1209 (1992). Accordingly, tape recordings that do not violate the provisions of R.C. 2933.52 may be used as evidence in disciplinary proceedings, subject to the general evidentiary standard for the use of audio tapes that they must be "authentic, accurate and trustworthy." *See, e.g., State Employment Relations Bd. v. Tiffin Developmental Center*, No. 89-ULP-02-01016, 8 Ohio Pub. Employee Rep. (LRP) ¶1320, 1991 OPER (LRP) LEXIS 1897 (S.E.R.B. Hearing Officer March 20, 1991) (secret tape recording made by a civil service employee of a conversation between himself and a supervisor admitted as evidence in unfair labor practice hearing when proper foundation establishing authenticity and credibility was laid). *See generally* 3 Ohio Admin. Code 124-9-01 (adopting the rules of evidence that prevail in civil actions in Ohio courts of general jurisdictions for use in hearings before the State Personnel Board of Review).

Use of a Tape Recording as Basis for Discipline of Employee Who Made Recording

Secret recordings made by an employee have been the basis for discharge or discipline in both the public and private sector, even in the absence of any express workplace rule governing such recordings. The following cases are illustrative of the issues that arise in such proceedings.

In *Everson v. Montgomery County Prosecutor*, Case No. 93-REM-09-0546 (State Personnel Bd. of Review March 4, 1994), the Personnel Board of Review upheld the discharge

of an employee who secretly placed a tape recorder in the intake area of the county prosecuting attorney's office. The purpose of the secret recording was to document the high noise level of the area. Upon learning of the recording, the employee was discharged despite an otherwise good work record. The prosecuting attorney stated that the reasons for discharge were that the employee had violated R.C. 2933.52(A)(1) and also had violated the trust and confidence of the office's clients. The Personnel Board of Review held that the secret recording was a failure of good behavior for purposes of R.C. 124.34 and, further, that removal was an appropriate discipline, because "the infringement on conversation without approval and possible violations of client's privileges and confidentiality cannot be tolerated in any law office setting.... even for apparent good intentions." *Everson*, slip op. at 4.

In the case of *Maciariello v. Sumner*, 973 F.2d 295 (4th Cir. 1992), two police officers conducted their own secret investigation of misconduct by another officer, without going through official channels. Part of this investigation involved secretly taping a conversation between one of the investigating officers and a judge. The officers were demoted for "unprofessional and devious conduct," including, in particular, the secret recording of the conversation with the judge. *Id.* at 299. The officers asserted that their demotion was an unlawful retaliation for First Amendment activity. The court held that while conversations, both between the officers themselves and with the judge, regarding the officers' suspicions were protected speech, the actual investigation and surreptitious taping did not constitute speech. The officers were not demoted for stating their suspicions, but for the taping and for failure to report their suspicions to the proper authorities. *Id.* at 299. In discussing the police department's interest in curbing such activity, the court stated:

> A police department has an undeniable interest in discouraging unofficial internal investigations. If personal investigations were the usual way for an officer to check out suspicious activities of a fellow officer, the effect on efficiency and morale could be very disrupting, and the effectiveness of the police force might deteriorate.... [O]fficers with personal hostilities could become preoccupied with personal investigations of one another. Esprit de corps could collapse ....

Id. at 300. Thus, *Maciariello* demonstrates quite vividly the legitimate interest that a public employer has in controlling surreptitious taping by its employees.

Another case involved a private sector employee who had made secret tape recordings of disciplinary meetings with his supervisors. *Heller v. Champion Int'l Corp.*, 891 F.2d 432 (2d Cir. 1989). The employee, who was fearful of some adverse employment action based on his age, had taped these meetings in order create an accurate record for litigation purposes if necessary. *Id.* at 433. The employer claimed to have initiated the disciplinary actions on the basis of poor performance and ultimately to have discharged the employee because of the secret taping. The jury found that there was no age discrimination, but that the employer had breached an implied contract of employment. The trial court set the verdict aside, reasoning that by the "deceptive, thoroughly unprofessional conduct" of secretly taping the meetings with his supervisors, the employee had breached the same implied contract and was justifiably discharged. *Id.* at 434. In reversing, the circuit court noted that there was no definitive contract language governing secret recording. Accordingly, the issue of whether the employee's conduct was in fact deceptive and unprofessional was a matter for the jury. The court refused to accept, as a matter of law, "the proposition that an employee would never be justified in tape-recording conversations with his superiors, and observed that, since 29 U.S.C. § 623(d) prohibits

discharge of an employee who participates "in any manner" in an age discrimination investigation, the employee's conduct might have been justified. *Id.* at 436.[6]

Like the employees in *Everson* and *Heller,* classified employees of a court of common pleas are not employees who can be discharged at will. Classified employees may be disciplined and discharged only as provided in R.C. 124.34. R.C. 124.34, however, does not expressly refer to surreptitious tape recording. Thus, in the absence of a specific workrule or administrative policy governing such conduct, the court, as an employer, would have to demonstrate in each case how the surreptitious recording fit within the terms of R.C. 124.34. In situations where the recording is an unlawful interception under R.C. 2933.52, evidence of a conviction under those statutes would be admissible in disciplinary proceedings pursuant to 3 Ohio Admin. Code 124-9-08(A)-(C). A specific workrule governing secret recording of conversations would bring nonconforming conduct within the purview of R.C. 124.34, since violation of a workrule is itself a cause for discipline.

A clear and uniformly applied policy could also serve to avoid the difficulties presented when a secret tape recording has some arguable connection with a protected employee activity. As noted by the court in *Heller*, federal law protects employees from retaliation for certain activities related to age discrimination claims. Other state and federal statutes provide similar protection to employees engaged in various types of labor activism, such as union organizing, opposition to specific types of discrimination, or enforcement of safety standards. As noted in one overview of employment law,

> [a] nonexhaustive list of such statutes includes National Labor Relations Act, 29 USC 158(a)(4); Fair Labor Standards Act, 29 USC 215(a)(3); Title VII of the Civil Rights Act of 1964, 42 USC 200e-3(a); Age Discrimination in Employment Act (ADEA), 29 USC 623(d), Employee Retirement Income Security Act (ERISA), 29 USC 1140; Occupational Safety and Health Act (OSHA), 29 USC 660(c); Ohio Civil Rights Act, RC 4112.02(I); Ohio's Minimum Fair Wage Standards Act, RC 4111.13(B); and Ohio's "Whistleblower Protection Act," RC 4113.51 to RC 4113.53.

Bradd N. Siegal and John M. Stephen, *Ohio Employment Practices Law* ¶1504, at 299 n.56 (Banks-Baldwin Ohio Handbook Series 1991).

It is not within the scope of this opinion to conduct a comprehensive examination of employment law. The development of a policy regarding secret recording of meetings by court employees should include a careful review of statutes such as those listed above to determine their applicability to the court as a public employer. In order to avoid any perception that the purpose of the policy may be a disguised effort to interfere with protected employee activity, it might be wise to articulate, as part of the policy itself, the legitimate employment purposes that the court hopes to accomplish through the policy. Bear in mind, however, that in specific situations, an employee can rebut an employer's articulated nondiscriminatory reason for discipline or discharge with evidence showing that similarly situated employees have been treated differently under the same policy or rule. *See, e.g., Mitchell v. Toledo Hospital*, 964 F.2d 577 (6th Cir. 1992) (nurse disciplined for misuse of hospital property was unable to establish that employees of different race were treated differently for similar offenses); *Craig v. Celeste*, 646

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[6] Having decided the case on other grounds, however, the court did not actually rule on whether Heller's discharge was prohibited by federal age discrimination law.

F. Supp. 47 (S.D. Ohio 1986) (civil service employee, who was discharged for making political contribution in violation of R.C. 124.57, was reinstated on basis of evidence that lesser discipline had been given in similar situation which was distinguishable only by the race, sex, and political affiliation of the other employee). Thus, care should be taken not only in the development of the policy, but also in its implementation, in order to insure that the policy is enforced in an evenhanded, nondiscriminatory manner.

Conclusion

As initially stated, it is not the function of this opinion to determine either the specific content of a workplace policy governing secret taping of meetings by court employees or the wisdom of having such a policy. Such matters are left to the sound discretion of the court as an employer. The above discussion is an effort to highlight some of the issues and legal limitations that the court should consider in the development and adoption of a policy.

In answer to your specific questions, therefore, it is my opinion and you are hereby advised, that:

1. A court of common pleas, acting as an employer, may implement a workplace policy that prohibits classified employees of the court from tape recording meetings that involve other employees or clients of the court without first obtaining the express consent of the court administrator; provided, however, that consent of the court administrator should be precluded in any situation where the recording would violate the provisions of R.C. 2933.52.

2. When the court administrator knows that a court employee is tape recording a meeting involving other employees and clients of the court, and such recording is otherwise lawful pursuant to R.C. 2933.52, the court administrator is neither required to give notice, nor precluded from giving notice, to other participants in the meeting.

3. If a classified employee of a court of common pleas secretly tape records a meeting involving other employees or clients of the court, in violation of a workrule prohibiting such taping, the tape may be used as the basis for discipline of the employee who made the recording, provided neither the workrule itself nor the manner of enforcing the rule discriminates on the basis of a protected status or employee activity.

4. If, in the absence of an express workrule governing such conduct, a classified employee of a court of common pleas secretly tape records a meeting involving other employees or clients, the tape may be used as the basis for discipline of the employee who made the secret recording, if the facts of the particular instance evidence a cause for discipline or discharge as provided in R.C. 124.34 and the imposition of the discipline does not discriminate on the basis of a protected status or employee activity.

5. If a classified employee of a court of common pleas secretly tape records a meeting involving other employees, the tape may be used as a basis for discipline of an employee whose misconduct is documented on the secret recording unless the tape is excluded from use as evidence pursuant to

R.C. 2933.62-.63 on the grounds that the recording violates the provisions of R.C. 2933.52; additionally, use or disclosure by the court of a recording known to have been made in violation of R.C. 2933.52 may subject the court to criminal and civil liability.