

## **PRIVACY IN THE WORKPLACE AND CONDUCTING AN INTERNAL INVESTIGATION**

IS WHAT GOES ON BEHIND CLOSED DOORS REALLY PRIVATE?

### The Developing Law and Practical Applications

Employers and their employees often have very different views when it comes to the subject of workplace privacy. Employers often believe that anything that goes on in the office is subject to review and scrutiny by the employer. This belief, at times, relates to employee use of the office phones, computers, office space and office resources. Employers often take the position that once an employee arrives at work, anything that the employee does is directly related to job performance and is therefore subject to the employer's oversight.

Employees, on the other hand, usually have certain expectations of privacy when they are at work. They sometimes believe that the websites that they visit (either during work time or on breaks), their e-mails, or the contents within their desks should be off-limits to the employer's eyes. If they are taking a break, they should be permitted to say or do anything, in the privacy of their own workspace, without constant monitoring of the employer's watchful eye.

Opinions also differ concerning off-duty activities of employees. Some employers believe that what employees do, even on their own time, directly impacts the work environment and the employer's business reputation. Employees often believe whatever they choose to do on their own time is none of the employer's business.

Not surprisingly, these differing views of employee privacy can lead to confusion, misunderstanding, and even animosity in the workplace. The following is a summary of the law<sup>1</sup> in theory and in practice concerning privacy and the workplace.

Pennsylvania recognizes a cause of action for invasion of privacy. The common law tort of invasion of privacy is based upon the Restatement (Second) of Torts, §652B. There is also a right of privacy which has been recognized by the courts as flowing from both the United States and Pennsylvania Constitutions. However, the constitutional provisions generally only apply to governmental intrusion into peoples' private lives, as opposed to private intrusion, as is the case in most at-will employment situations.

As the law and regulations change regarding the scope of employee privacy, there are some basic underlying principles that an employer should follow and an employee should expect from his or her employer. Most of these principals are lessons that were learned when most adults were young children and if both the employer and employee were to follow these simple rules of conduct, there would be much less conflict and litigation.

1. Be honest. From the employer's perspective, clearly communicate to the employees what they can expect in terms of privacy. Employers should communicate to employees what is theirs and what is the employers'. If employees are going to be subject to searches, monitoring, drug testing or other screenings, they should be told that up front and should have the opportunity to either accept those terms of employment or seek employment elsewhere.

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<sup>1</sup> This article will address primarily Pennsylvania law as it applies to at-will employees. If you are in need of information concerning the law of another state or jurisdiction, specific legal counsel should be sought from a practitioner in the relevant venue.

2. Be consistent. Inconsistency and surprise are friends to neither employer nor employee. If people know what to expect and are treated the same as all other similarly situated employees, they will be less likely to feel that they are being treated unfairly. Rarely do employees who feel they have been treated fairly sue their employers.

3. Make sure that employer and employee are on the same page and that there is a meeting of the minds. If the employer has policies that affect employee privacy, make sure the employees are provided with a copy of the policy and have them acknowledge, in writing, that they have received and understand the policy.

4. Be discrete. Keep private matters of employees private. If an investigation of an employee's conduct is warranted, conduct the necessary investigation, document as appropriate, and advise the affected employee of the results. The results of the investigation and potential adverse employment action should not be publicly disclosed and should be kept confidential to the extent possible.

5. Don't do anything shameful. A litigious person is often times an unhappy person who feels unjustly put upon. Generally, people will not sue someone they respect. One way to keep respect is to maintain a high standard of ethical conduct. In other words, don't do anything in the workplace, that you would be ashamed or embarrassed to truthfully describe to your spouse, parents or children.

The law in the area of employee privacy has developed as a result of advances in technology and changing attitudes toward the scope of employee privacy. Generally, statutes and court decisions interpreting them are brought about as a result of conduct on the part of employers or employees, which is seen by legislators to be in need of special

protection. There is the general common law that protects the right of privacy of all individuals. However, based upon the actions of both employees and employers, legislators have often felt the need to provide additional protections to both employer and employee, as well as guidance, concerning the scope of employee privacy.

In recent history, due to advances in technology, legislation has been enacted to protect the vast amount of personal information which is generally available. The amount of personal information that can be acquired on any particular individual seems to grow everyday and the ease with which employers can access this information is also constantly expanding. However, the law is slow to catch up with technology and it is unlikely that that will change anytime soon. As new technology takes hold in the workplace, it can be expected that new legislation, and/or interpretation of the common law, will follow.

## Screening Job Applicants

Depending upon the nature of the employer's business, the employer may have the desire, or even a duty, to screen prospective employees. Employees who may be involved in the care and/or treatment of children or the elderly, for example, may need to be thoroughly screened prior to employment based upon statutory obligations imposed upon the employer. See, e.g., Older Adults Prospective Services Act, 35 P.S. §10211, et seq. The same is true in large part in the healthcare, law enforcement and transportation fields. Screenings may involve reference checks, criminal record checks, credit checks, drug testing and/or the evaluation of motor vehicle records.

Reference checks are often the easiest and least controversial screenings when it comes to privacy concerns, due to the simple fact that employees will usually voluntarily provide the name of a reference with whom the prospective employer may communicate. It is generally expected that prospective employers are contacting references to inquire about the prospective employee's character and/or work history. Usually, employees volunteer the information to the prospective employer, and as a result, the employee should expect that the employer will contact the reference to acquire this information. The result is that there is a limited expectation of privacy under this circumstance.

As with most other issues concerning employee privacy, the employer should limit its inquiry to questions meant to produce relevant information to the job in question. General questions regarding the prospective employee's work ethic, efficiency, reliability, and attendance are all acceptable lines of inquiry. Any questions concerning the prospective employee's personal life and/or habits should be limited, unless it is particularly relevant to the job at issue. Any information acquired during reference

checks must not be used to discriminate against potential candidates and should be kept confidential.

Credit checks and other background checks are permissible, however, there are certain statutory pitfalls of which employers must be mindful.

The Fair Credit Reporting Act (FCRA) 15 U.S.C. §1681 et seq.

The FCRA governs background reports prepared by third parties such as professional screening companies and credit bureaus. Under the FCRA, a background report is known as a “consumer report” if prepared by someone an employer hires to obtain information about a job applicant. A consumer report can be any type of background screening report about a job applicant. A consumer report is not restricted to just credit reports. Employers seeking such reports on job applicants must be mindful of the procedural requirements of the FCRA.

Another type of consumer report under the FCRA is called an “investigative consumer report”, which is based upon interviews with anyone other than the applicant, about the applicant's character, general reputation, personal characteristics or mode of living. For example, if a background agency goes beyond verifying factual information, like dates of employment, the information generated becomes an investigative consumer report.

Under the FCRA, a “consumer report” is any written, oral or other communication of any information by a consumer credit reporting agency bearing on a consumer’s credit worthiness, credit standing, credit capacity, character, general reputation, personal characteristics, or mode of living which is used or expected to be used or collected in whole or in part for the purpose of serving as a factor in establishing the consumer’s eligibility for....employment purposes. 15 U.S.C. §1681a(d)(B). “Employment purposes” means a report used for the purpose of evaluating a consumer for employment, promotion, reassignment or retention as an employee.

A “consumer report” can be obtained by an employer only if the employer certifies to the reporting agency that:

1. A clear and conspicuous disclosure has been made in writing to the job applicant prior to procuring the report in a document that consists solely of the disclosure, that a consumer report may be obtained for employment purposes; 15 U.S.C. §1681b(b)(2)(A).
2. The job applicant has authorized the employer, in writing, to obtain a consumer report; 15 U.S.C. §1681b(b)(2)(B).
3. The employer will comply with the requirements of the law if an adverse action is taken against the job applicant; 15 U.S.C. §1681b(b)(3).
4. The information from the consumer report will not be used in violation of any Federal or State equal employment opportunity law or regulation. 15 U.S.C. §1681b(1)(A)(ii).

An employer taking adverse action against a potential employee based in whole or in part upon information from a consumer report shall first provide the applicant with a copy of the report and a description in writing of the rights of the consumer as proscribed by the Federal Trade Commission. 15 U.S.C. §1681b(b)(3) .

After an adverse action is taken by an employer, the employer must:

1. Provide oral, written or electronic notice of the adverse action to the affected person;
2. Provide that person with the name, address and telephone number of the reporting agency that provided the report;
3. Provide a statement that the reporting agency did not make the decision to take the adverse action and is unable to provide the person with specific reasons why the adverse action is taken;
4. Provide the person with notice of the right to obtain a free copy of the consumer report;
5. Provide the person with notice of the right to dispute the accuracy or completeness of any information in a consumer report furnished by the agency. 15 U.S.C. §1681m(a)(1)-(3).



“Adverse action” is a denial of employment or any other decision for employment purposes that adversely affects any current or prospective employee. 15 U.S.C. §1681a(k)(1)(B)(ii).

“Investigative consumer reports” are based upon personal interviews with a consumer’s friends, neighbors and acquaintances and cannot be used to inquire into areas which would violate any federal or state equal employment opportunity laws or regulations. 15 U.S.C. §1681(d)(d).

An “investigative report” cannot be requested or obtained unless:

1. It is clearly and accurately disclosed to the consumer that an investigative report including information as to his character, general reputation, personal characteristics and mode of living, whichever are applicable; may be obtained;
2. The disclosure to the consumer is made in a writing provided to the consumer not later than three days after the report was first requested;
3. The person requesting the report includes a statement informing the consumer of his right to request additional information related to the type of investigation sought. 15 U.S.C. §1681d(a)(1).

Any person who requests or obtains an “investigative report” shall upon the written request of the consumer, make a complete and accurate disclosure of the nature and scope of the investigation. The disclosure must be in writing and mailed or delivered to the consumer not later than five days after receipt of the request for disclosure or such report was first requested, whichever is later. 15 U.S.C. §1681(d)(b).

See, Kelchner v. Sycamore Manor Health Center, 2005 W.L. 503774 (3d Cir. Pa.) (FCRA did not prohibit employer from seeking authorization to procure employee's credit report in the future in order to investigate theft, fraud and other dishonesty if and

when the need arose and the employer wasn't prohibited under the FCRA from taking adverse action against an employee who refused to authorize the employer to procure a consumer report).

## Drug Testing

Many employers have instituted drug and alcohol testing policies. This testing often involves urinalysis. Under certain circumstances, the employer's urinalysis program could violate the employee's protected privacy rights. The way that the program is conducted could be overly intrusive. Additionally, urinalysis "can reveal a host of private medical facts about an employee, including whether she is epileptic, pregnant or diabetic." Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992).

In Borse, the court explained that with respect to urine collection, if the employer monitors the collection of urine to make sure that the employee does not adulterate it, this may very well fall within the definition of intrusion into a person's right of seclusion.

The United States Supreme Court has stated:

There are few activities in our society more personal or private than the passing of urine. Most people describe it by euphemisms if they talk about it at all. It is a function traditionally performed without public observation; indeed, its performance in public is generally prohibited by law as well as social custom.

Skinner v. Railway Labor Executives Assoc., 489 U.S. 602 (1989). The Borse court recognized that if the method of collection fails to give due regard to the employee's privacy, it could constitute a highly offensive invasion of privacy.

The results of the urinalysis could provide the employer with very sensitive health information under certain circumstances. "A reasonable person might well conclude that submitting urine samples to tests designed to ascertain 'this type of health information constitutes a highly offensive invasion of privacy.'"

The Borse court went on to say that the same principles apply to searches of employees' personal property. "If the search is not conducted in a discrete manner, or if it

is done in such a way as to reveal personal matters unrelated to the workplace, the search might well constitute a tortious invasion into the employee's privacy." Borse, 963 F.2d at 621.

In the case of Ney v. Axelrod, 723 A.2d 719 (Pa. Super. 1999), a job applicant who was not hired due to a positive drug test filed suit against the laboratory and doctor who performed the pre-employment drug screening. The court went out of its way to address the concept of "loss of employment advancement and opportunity," where the plaintiff has not passed the final stages of the hiring process. The court stated:

[I]t has always been the rule that an the employer may be selective about the persons he employs as long as he does not discriminate among applicants.

Id. at 722 - 23. The court also cited two cases in which the trial courts failed to recognize an exception to the at-will doctrine where the plaintiff was not hired because the prospective employee failed a blood or urine test. Id.

## Evaluating Performance and Investigating Misconduct

Employers face difficult choices concerning the treatment of employees as adults who deserve respect and privacy if the employer has reason to believe that an employee may have engaged in inappropriate conduct. In most workplaces, there are general rules regarding what conduct is and is not acceptable or appropriate. Depending on the size and/or the nature of the employer's business, there may be very detailed policies and procedures in place regarding employee conduct. Additionally, in order to protect the employer's business interests and/or trade secrets, the employer may have a need to keep a close eye on what employees are doing at their desks or work stations and what information they are conveying to those outside of the company.

These days, many employees have, at least, a phone, desk, and computer at their disposal on the employer's premises. Many employers find that lost productivity due to misuse of these resources costs them countless dollars. Employees can send personal e-mails, make personal calls and search the internet without limit. Certainly, employers have an interest in making sure that employees are not accessing inappropriate websites or sending inappropriate e-mails on company time. As a result, the employer may wish to keep tabs on employee activity.

With respect to phone calls, employers must be sure that they are not recording conversations of others without their consent. In Pennsylvania, it is illegal to record another person's conversation without consent. See, Pennsylvania Wire Tapping and Electronic Surveillance Control Act, 18 Pa.C.S. §5701, et seq.; Electronic Communication Privacy Act of 1986, 18 U.S.C. §2511, et seq. Monitoring employee

phone calls and computer usage of e-mail may also be an invasion of employee privacy if the employee has a reasonable expectation of privacy.

The easiest way to avoid improper surveillance is to clearly convey to employees that there should be no expectation of privacy, depending upon the level of surveillance the employer wants to pursue. For example, if the employer wishes to record phone conversations of employees to assess performance or determine misconduct, before any conversation is recorded, both the employee and the third party should be clearly advised that the conversation may be recorded. There should be evidence that both parties were advised of the potential recording, on the recording itself. Not only does this type of message obtain at least implied consent of all parties to the recording of the conversation, but it also eliminates any expectation of privacy on the part of the speakers.

Employers should consider obtaining an acknowledgement from employees before they begin employment that acknowledges that employee phone calls may be monitored and that they consent to the monitoring. Without such a signed consent and/or statement that conversations will be recorded, it is not generally a good idea for employers to listen in on employee phone calls. The employee can easily make an argument that he/she had a reasonable expectation of privacy and any reasonable adult would find it highly offensive for their employer to be monitoring their calls without the employee's knowledge. If the employer expects some misuse of the phone by the employee, and wants to monitor the employee, the best approach is to clearly and honestly inform the employee of the employer's intentions and expectations and advise the employee of exactly what the employer intends to monitor.

The United States Court of Appeals for the Third Circuit has clearly stated that an employer may access employee e-mails without violating state or federal law. See, Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3d Cir. 2004). A court has also held that an at-will employee may be terminated for transmitting inappropriate and unprofessional comments over the employer's e-mail system, without violating public policy, and therefore, committing wrongful discharge. Smyth v. Pillsbury Co., 914 F.Supp. 97 (E.D. Pa. 1996). See also, Oaster vs. Unemployment Compensation Board of Review, 705 A.2d 507 (Pa. Cmwlth. 1998). (Employee e-mail suggesting her refusal to perform certain tasks in order to sabotage supervisor and disparaging remarks regarding the supervisor constituted willful misconduct to justify denial of benefits following termination.)

In the Fraser case, an at-will insurance agent sued his ostensible employer for alleged violation of the Electronic Communications Privacy Act (ECPA), breach of contract, wrongful termination and bad faith. Nationwide claimed that Fraser was terminated due to disloyalty by contacting Nationwide competitors and offering customer information.

When Nationwide learned that Fraser might be sending trade secrets to its competitors, it searched its e-mail server for Fraser's e-mails. Fraser brought suit under the ECPA, 18 U.S.C. §2510, et seq., and a corresponding Pennsylvania statute, 18 Pa.C.S.A. §5702, et seq. The trial court granted summary judgment in favor of Nationwide.

The Fraser court determined that Nationwide did not violate the ECPA (or the corresponding state statute which is interpreted in the same manner) because it did not

"intercept" an electronic transmission since it merely viewed stored information that had already been sent. The holding of the court was that there was no prohibition on an employer viewing e-mails stored on the employer's server. The court also held that Fraser failed to present any evidence of wrongful discharge. Fraser did not make a claim for invasion of privacy in his complaint.

An at-will employee brought a wrongful discharge claim against his employer for viewing his e-mails in Smyth v. Pillsbury Co., 914 F.Supp. 97 (E.D. Pa. 1996). In the Smyth case, the employer had repeatedly told his employees that it would not view employee e-mail and that it would remain privileged and confidential. Despite these assurances, the employer viewed Smyth's private e-mails and terminated Smyth for inappropriate and unprofessional comments. Smyth had referred to sales management and made threats to "kill the backstabbing bastards" and referred to the holiday party as the "Jim Jones Kool-Aid Affair."

Smyth claimed that the termination violated public policy. The court disagreed. The court held that there is no public policy exception to the at-will doctrine for invasion of privacy.

The court explained its decision in the following manner:

In the first instance, unlike urinalysis and personal property searches, we do not find a reasonable expectation of privacy in e-mail communications voluntarily made by an employee to his supervisor over the company e-mail system, notwithstanding any assurances that such communications would not be intercepted by management. Once plaintiff communicated the alleged unprofessional comments to a second person (his supervisor) over the e-mail system which was apparently utilized by the entire company, any reasonable expectation of privacy was lost. Significantly, the defendant did not require plaintiff, as in the case of an urinalysis or personal property search, to disclose information about himself. Rather, plaintiff voluntarily



communicated the alleged unprofessional comments over the company e-mail system. We find no privacy interests in such communications.

Smyth, 914 F.Supp. at 101. Obviously, the court made a distinction between information concerning the employee himself and general information conveyed, voluntarily, to another. The court also held that even if it would have found an expectation of privacy, it still would have dismissed the claim because there was nothing highly offensive about the employer reviewing communications on its e-mail system. Accordingly, there appears to be no expectation of privacy and no public policy against employer monitoring of its e-mail system.

When it comes to searches of the workplace, the general rules applicable to employee privacy apply. As a starting point, if the employer decides that it is going to search an employee's workplace, there should be some legitimate business reason for doing so. For example, an employer has a legitimate interest in protecting its trade secrets. The employer may have a statutory duty to protect its clients, customers or employees at large. The employer may also decide to search the workplace during an investigation following a report of some wrongdoing on the part of one of its employees. See, Simpson vs. Unemployment Compensation Board of Review, 450 A.2d 305 (Pa. Cmwlth. 1982). (Employee was properly discharged for refusing to follow the employer's policy by opening his lunch bucket upon leaving the premises to check for stolen tools since searches by private parties do not involve state or federal constitutional issues but, rather involve a balancing of the employee's obligations to the employer with the employee's common law personal and property rights.)

As a general rule, before conducting a search of any kind, the employer should evaluate the situation and analyze whether the proposed search involves an area or location in which the employee has a reasonable expectation of privacy. Next, the employer should take steps to ensure that the search is reasonable, confidential and does not involve intrusion into an area in which a reasonable person would be highly offended by the intrusion.

As has been stated elsewhere herein, one of the easiest ways for an employer to conduct a legitimate investigation is to remove, unequivocally, any expectation of privacy in the area of the proposed search, before the search is undertaken. For example, the employer may want to create and disseminate a policy to its employees regarding searches and/or privacy in the workplace.

If the employer makes it clear to its employees that they should not consider their desks, computers or office space as their private property, off limits to the employer, a search of those areas at a later date is, on its face, much more reasonable than it would be if the employer had not notified the employees.

Another approach would be to ask for the employee's permission and/or consent to search the proposed area. This, too, removes the element of a highly offensive search, assuming that permission is granted.

Whatever approach the employer chooses to take, searches should be conducted fairly, reasonably, and uniformly throughout the workplace. There should be a documented, legitimate business reason for conducting a search and the results of the search should not be disclosed to anyone without a bona fide need to know the results. The employer should take steps to ensure that it is not taking any action that would create

a reasonable perception on the part of the employee that he or she is being treated unfairly or disparately from other similarly situated employees.

Employees may not be required to submit to polygraph tests as a condition of employment or continuation of employment under Pennsylvania law. Title 18 Pa.C.S. §7321 provides:

- (a) A person is guilty of a misdemeanor of the second degree if he requires as a condition for employment or continuation of employment that an employee or other individual shall take a polygraph test or any form of a mechanical or electrical lie detector test.
- (b) Exception – The provisions of subsection (d) of this section shall not apply to employees or other individuals in the field of public law enforcement or who dispense or have access to narcotics or dangerous drugs.

However, the statute does not prohibit the employer from asking the employee to voluntarily take a polygraph test. The United Parcel Service asked one of its employees to voluntarily take a polygraph test and the employee agreed. See, King v. United Parcel Service, 15 Pa. D. & C.4<sup>th</sup> 538 (1992). In the King case, the employee signed an agreement and a consent form before taking the test. The documents signed by the employee specifically stated that the test was not required as a condition of employment, released all parties from all claims related to the test, and authorized release of the test results to interested parties. The King court noted that all of the evidence in the case supported the employer's claim that the test was taken voluntarily. The court also pointed out that the plaintiff's termination had nothing to do with the polygraph test. Instead, the termination was based upon the plaintiff's subsequent refusal to provide information

concerning another UPS employee. As a result, the court dismissed plaintiff's wrongful discharge claim.

Employers should be cautioned that even if they secure consent or release from the employee to perform a lie detector test, this does not mean that the employer is necessarily immune from suit. If the employee can establish that the consent or release was procured under compulsion, duress or threat of job termination, the release or consent may be found to be invalid. As a practical matter, the potential benefit to the employer of conducting a polygraph test on an employee may very well be outweighed by the cost of potential litigation thereafter, if the employee is ultimately terminated, even if the employer obtains a consent and/or release from the employee. See, Polsky vs. Radio Shack, 666 F.2d 824 (3d Cir. 1981). (A release from liability for violation of the statutory prohibition on polygraph and lie detector testing is invalid if the release is required to obtain or continue employment.)

The safest way to avoid criminal or civil liability related to lie detector tests is obviously to avoid using them unless an employee fits within one of the exceptions identified in 18 Pa.C.S. §7321(b). Otherwise, the employer should have some clear evidence that the employer's consent was completely voluntary and that there was no threat to the employee's employment if the employee chose to withhold consent and refused to take the test.

Employers may not use psychological-stress evaluators, an audio-stress monitor or a similar device which measures voice waves or tonal inflections to judge the truth or falsity of oral statements without the consent of the person whose statement is being

tested. See, 18 Pa.C.S. §7507. Essentially, the same rules would apply to these devices as if they were polygraph examinations.

### Privacy Issues in Formal Complaint Procedures and Litigation

An employer may need to conduct an investigation following any formal complaint lodged by one of its employees against another employee related to some form of improper or inappropriate conduct, or the suspicion of such conduct on the part of the employer. If an investigation of an employee leads to an adverse employment action in one form or another; i.e., reduction in pay, demotion, transfer to a less favorable job or termination, the adversely affected employee may decide to file a complaint with a state or federal administrative agency or file suit in either state or federal court.

If an employee files a formal complaint which requires an investigation, the employer should quickly, confidentially and thoroughly investigate the alleged complaint. As the subject of investigations is set forth herein later, it will not be discussed here at length. Generally, once an investigation is conducted, a decision should be made and reported to those involved as quickly as possible. The results of any investigation should remain confidential and information should not be provided to anyone who does not have a direct interest in the outcome of the investigation.

Quite often, complaints and litigation rest upon a foundation in the form of a feeling by an employee that he or she has been treated unfairly. In the employment arena, employee perception is paramount. The employee may feel that all of the blood, sweat and tears that he or she has given to his or her employer meant nothing to the paternalistic, nosey employer. These feelings of mistreatment, be they rational or not, often lead to the courthouse steps and a hefty bill for legal expenses.

As will be discussed in more detail in the section of materials on *Employment At-Will*, if an employee does not enter into a specific written contract with the employer, the

employee is deemed to be an at-will employee. This means that neither party is bound to one another and each is free to end the relationship, or change the terms of the relationship, at any time, for any reason. As long as the employer does not violate any state or federal law, and does not unlawfully discriminate against the employee, the employer is free to fire, demote, or change the terms of the employment situation with the employee, without explanation or reason. Similarly, the employee can simply decide that he or she does not want to work for the employer any longer and he or she can sever ties at any time without explanation or advanced notice.

While employment at-will is the general rule, not unlike most rules, there are numerous exceptions to the at-will employment doctrine that can be used by employees who feel they have not been treated fairly by the employers. The most common claims made by employees against employers are wrongful discharge and invasion of privacy.

A wrongful discharge claim is based upon a narrow exception to the general at-will employment doctrine. There must be some public policy that trumps the general rule. For example, an employee cannot be terminated for (1) refusing to commit a crime; (2) complying with a statutorily imposed duty; and (3) an employee cannot be terminated if the employer is prohibited from doing so by statute. See, Fraser v. Nationwide Mut. Ins. Co., 352 F.3d 107 (3d Cir. 2004). Additionally, an employee cannot be fired for filing a workers' compensation claim or reporting wrongdoing under the Pennsylvania Whistleblower Law. (See, Shick v. Shirey, 716 A.2d 1231 (Pa. 1998); and Denton v. Silverstream Nursing and Rehabilitation Center, 739 A.2d 571 (Pa. Super. 1999).)

A claim of invasion of privacy in the workplace is based upon Pennsylvania common law. The Pennsylvania Supreme Court has adopted the Restatement (Second) of Torts §652B definition of invasion of privacy which states:

One who intentionally intrudes, physically or otherwise, upon the solitude or seclusion of another or his private affairs or concerns, is subject to liability to the other for invasion of his privacy if the intrusion would be highly offensive to a reasonable person.

Smyth v. Pillsbury Co., 914 F.Supp. 97 (E.D. Pa. 1996), quoting, Restatement (Second) of Torts. The intrusion must be substantial and highly offensive to a reasonable person.

Frequently, if suit is initiated based upon a claim that an employer violated an employee's privacy, the suit will allege both wrongful discharge and invasion of privacy. If the plaintiff makes allegations sufficient to get beyond the pleading stage of litigation, the defense will often rely upon the reasonable, and hopefully fair, treatment that plaintiff received, as well as, a lack of a reasonable expectation of privacy on the part of the employee. The employee is required to show that the employer's invasion into his or her private affairs was unreasonable and would also be highly offensive to any reasonable person in order to prevail.

Claims of discrimination based upon an employee's protected class status often involve, at least tangentially, privacy issues. Many times, the employee will be terminated for inappropriate conduct. The employee may feel that the employer's pre-termination search and investigation resulted in disparate treatment. The employee may allege that he or she was a target of an unfair investigation on the part of the employer and similarly situated employees, outside of plaintiff's protected class, were not subject to the same scrutiny/invasion of privacy.



Litigation in employment cases is often expensive. There are usually numerous witnesses and voluminous documents in the form of personnel files of interested employees, company policies and investigative materials. The cases often involve factual disputes which make obtaining summary judgment somewhat difficult, particularly in state courts. Nonetheless, cases involving common law claims (such as wrongful discharge and invasion of privacy) involve less financial risk to the employer due to the fact that there is usually no basis for a claim of attorney's fees.

Once the plaintiff files a complaint in court, claiming invasion of privacy, the plaintiff has essentially placed his or her actions, and/or otherwise private matters, at issue before the public at large. Once the plaintiff puts the matter at issue, the expectation of privacy is gone and what would otherwise be considered private information may now be disclosed during the course of discovery, the filing of dispositive motions and trial.

## How to Lawfully Conduct an Internal Investigation

The investigative process may require immediate, corrective or preemptive action on the part of the employer in response to a formal complaint made by an employee or a suspicion of wrongdoing on the part of an employee. If the investigation is commenced as a result of an employee complaint, the complaining party should not be involuntarily transferred, or otherwise burdened, to ensure no perceived retaliation. If the employer has an anti-harassment or anti-retaliation policy, all persons involved in the investigation should be reminded of the employer's policies and should be assured that the matter will be investigated promptly and thoroughly.

If there is a dispute about whether or not the accusations are correct or true, a fact-finding investigation may be necessary. The person(s) conducting any interviews should be qualified and objective. The alleged wrongdoer should not have supervisory authority over the investigator and should not be involved in the investigation, except as a witness. If the alleged wrongdoer is a high-level administrative employee, the employer should consider hiring an outside, independent investigator. If this is the case, the investigator should agree, before the investigation is begun that he/she will comply with the employer's policies and procedures and will maintain employee privacy and confidentiality throughout the investigation .

The investigator should interview the person making the complaint, the alleged wrongdoer, and third parties who could reasonably be expected to have relevant information. When interviewing the parties and witnesses, the investigator should refrain from offering his or her opinion.

Interviews should be conducted in a private, confidential setting. The person being interviewed should be apprised of the role of the interviewer and should be asked to review the investigator's notes following the interview. Inquiries should be made in the form of questions designed to elicit relevant information (who, what, when, where and why).

The investigator should make a detailed record of the interview, including the date, time, location and contents of the interview. It is often just as important to conduct a prompt, fair investigation that is thoroughly documented as it is to determine whether inappropriate conduct did, or did not occur.

If the employer decides that a recording of the investigation is necessary, the employer should obtain unequivocal consent of all parties prior to making any recording. If the investigation involves monitoring employee behavior as it occurs, the investigator must be mindful of reasonable expectations of privacy on the part of the employees. As was mentioned previously, the employer may review e-mail communications contained on its server without invading employee privacy.

Once all of the evidence has been gathered, interviews are finalized and credibility issues are resolved, management should make a determination as to whether inappropriate or unacceptable behavior has occurred. A determination may be made by the investigator, or by the management official who reviews the investigator's report. In some cases, it may be impossible to determine whether there was any unacceptable behavior. In any event, those involved should be informed of the results of the investigation. It should also be stressed that the employer will not tolerate any retaliation against the accuser, whether or not the investigation revealed any unacceptable conduct.

Throughout the investigation process, any personal information gathered should be kept confidential. The information should be distributed only to those with a bona fide need to know.

## Fair Credit Reporting Act

Amendments to the Fair Credit Reporting Act (FCRA), signed into law on December 4, 2003, allow employers more freedom with respect to conducting investigations regarding employees suspected of misconduct related to employment. This legislation is referred to as The Fair and Accurate Credit Transaction Act (FACT).

The FACT Act amended the FCRA to exclude from its coverage certain communications involving investigations of employee misconduct. The FACT Act excludes from the definition of “consumer reports” certain communications made to employers relating to investigations of suspected employee misconduct relating to employment and investigations into compliance with federal, state, or local laws and regulations, the rules of self-regulatory organizations, or any preexisting written policies of an employer.

Under the FACT Act, an authorized written disclosure is no longer required prior to conducting an investigation of an employee suspected of misconduct relating to employment. See, 15 U.S.C. §1681a(x).

Note that this change does not alter the requirement that disclosure and authorization would still be required for the purpose of investigating an employee’s credit worthiness, credit standing or credit capacity. See, 15 U.S.C. §1681a(x)(1)(c).

Any report generated in connection with an investigation of misconduct may not be provided to any person except the employer or agent of the employer; any federal or state officer, agency or department, or any officer, agency or department of a unit of general local government; to any self-regulatory organization with regulatory authority over the activities of the employer or employee; or as otherwise required by law.

Under the FACT Act, if an adverse action is taken against an employee based on what would otherwise be considered a consumer report or investigative consumer report, the employee is entitled to a summary of the nature and substance of the communication upon which the adverse action is based. The employer may exclude from the disclosure the sources of the information acquired solely for use in preparing the report. 15 U.S.C. §1681a (x)(2).

## The Effect of the NLRB Decision I *Epilepsy Foundation*

In *Epilepsy Foundation of Northeast Ohio*, 331 NLRB No. 676 (2000) the NLRB held that if an employee, who may be subject to discipline, wants another employee present as a witness during an investigatory interview, the employee has a right under Section 7 of the National Labor Relations Act to make the request and have a co-employee present.

That decision was overruled by the NLRB on June 9, 2004. The NLRB (by a 3 - 2 vote), ruled that employees who work in a non-unionized workplace are not entitled under Section 7 of the NLRA to have a co-worker accompany them to an interview with their employer, even if the affected employee reasonably believes that the interview might result in discipline. *IBM Corp.*, 341 NLRB No. 148 (2004). In *IBM*, whose employees were not represented by a union, the company denied three employees' requests to have a co-worker present during the investigatory interviews about a former employee's allegations that they engaged in harassment. An NLRB Administrative Law Judge, applying *Epilepsy Foundation*, found that IBM violated Section 8(a)(1) of the Act by denying the employees' requests for the presence of a co-worker. Upon review, a Board majority reversed *Epilepsy Foundation*.

The NLRB's *IBM* decision allows non-union employers once again to conduct their workplace investigations without interference from co-employee witnesses. This should help employers better maintain the confidentiality of information disclosed in workplace investigations.

On December 16, 2004, the NLRB issued a ruling in *Wal-Mart Stores, Inc. and United Food and Commercial Workers Int'l Union, AFL-CIO*, 343 NLRB No. 127

(2004). In Wal-Mart, managers attempted to interview an employee accused of misconduct. The employee requested that one of his own witnesses be present for the interview. Wal-Mart would not allow the employee's witness to attend and the accused employee was ultimately terminated. The NLRB held that while employees do not have the right to bring a witness to investigatory interviews, employees cannot be disciplined for asking for such representation.