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**PRIVACY RIGHTS BASICS:  
New Challenges in an Electronic Age**

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## I. INTRODUCTION

This chapter provides an overview of privacy law in the workplace. The chapter begins with a discussion of the three separate legal foundations of privacy protection - the common law; Constitutional protections; and statutes. The chapter then analyzes information privacy issues - i.e., what information an employer may (or must) gather or disclose about an employee. The chapter then focuses on behavioral and associational privacy issues - primarily, the extent to which an employer may regulate the private behavior of the employee. Because this chapter gives an overview of basic privacy law, the emphasis will be on the broad scope of privacy issues rather than on a detailed analysis of specific statutes or regulations.

## II. LEGAL SOURCES OF PRIVACY PROTECTION

### A. Common Law Action for Invasion of Privacy.

#### 1. Nature of the Action

The cause of action for an action for invasion of privacy is not one tort, but a complex of the four causes of action set forth in sections 1(a) through 1(d) below. (Curran v. Children's Service Center of Wyoming County, Inc., 396 Pa. Super. 29, 38, 578 A.2d 8, 12 (1990)):

- a) intrusion upon seclusion in a manner that would be highly offensive to a reasonable person. Employment cases that discuss "intrusion upon seclusion" include the following:
  - i. Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992) (predicting that Pennsylvania courts would hold that certain drug testing procedures violate the employee's right to privacy).
  - ii. Doe v. Kohn, Nast & Graf, P.C., 866 F.Supp. 190 (E.D. Pa. 1984) (opening of employee's personal mail creates cause of action; jury question on whether intrusion offensive to reasonable person).
  - iii. Frankel v. Warwick Hotel, 881 F.Supp. 183 (E.D. Pa. 1995) (no invasion of privacy where employer fires his son because son refuses to divorce his wife).

- iv. Rogers v. International Business Machines Corp., 500 F.Supp. 867 (W.D. Pa. 1980) (no invasion in employer's investigation of employee's inappropriate behavior; employer interviewed other employees and reviewed company records).
  - v. Spencer v. General Telephone Co. of Pennsylvania, 551 F. Supp. 896 (M.D. Pa. 1982) (no invasion of privacy in requiring an employee to consent in writing to certain investigations).
- b) unreasonable publicity of private facts which are not a matter of legitimate concern to the public, in a manner that is highly offensive to a reasonable person. Employment cases that address publicity given to a private fact include the following:
- i. Borton v. Unisys Corporation, 1991 WL 915 (E.D. Pa.) (publication of photograph of female employee at Company event while male employee cupped her breasts was not actionable, since event occurred in public).
  - ii. Wells v. Thomas, 569 F.Supp. 426 (E.D. Pa. 1983) (discussion of reasons for employee's termination in staff meeting and with other employees is not actionable; requisite "publicity" not found.).
  - iii. Krochalis v. Insurance Co. of North America, 629 F.Supp. 1360, 1370 (E.D. Pa. 1985) (alleged publicity throughout industry establishes material fact precluding summary judgment for employer).
- c) "false light" publicity, i.e., publicity that unreasonably places an individual in a false light in a highly offensive manner. To be actionable in an employment context, there must be some public disclosure with reckless disregard as to the falsity of the publicized matter.
- i. An action for "false light" invasion of privacy differs from an action for defamation in two ways: (1) there must be publicity (i.e., widespread dissemination), not mere publication; and (2) the false statement need not be defamatory. Smith v. Bell Atlantic Network Services, Inc., 1995 WL 389697, \*4 (E.D. Pa.), *affirmed*, 82 F.3d 406 (3d Cir. 1996). A limited disclosure within the

workplace is generally not actionable. Kryeski v. Schott Glass Technologies, Inc., 426 Pa. Super 105, 626 A.2d 595 (1993), *appeal denied*, 536 Pa. 643, 639 A.2d 29 (1994); *but see* Borton v. Unisys Corporation, 1991 WL 915 (E.D. Pa.) (employee could survive summary judgment on claim that photograph attributed lewd activities to employee at company event) *and* Krochalis v. Insurance Co. of North America, 629 F.Supp. 1360, 1371 (E.D. Pa. 1985) (publicity through industry would support “false light” claim).

ii. An action for “false light” invasion of privacy may allege selective publication of true but favorable facts, but the employee who alleges selective publication will not succeed if the publicity of negative facts is self-contained and complete. *See* Santillo v. Reedel, 430 Pa. Super. 290, 634 A.2d 264 (1993) (publicity confirming police investigation of ex-officer not actionable for failure to disclose officer’s commendations); Smith v. Bell Atlantic Network Services, Inc., 1995 WL 389697, \*4 (E.D. Pa.) *affirmed*, 82 F.3d 406 (3d Cir. 1996) (employer not obligated to inform co-employees who saw employee escorted out of the workplace as to the true reason for the employee’s demotion).

d) use of the an individual’s name for business purposes without authorization. Cases in the employment area include Hamson v. World Life & Health Insurance Co. of Pa., 62 Del. Co. L.R. 449 (1979); *see also* Restatement (Second) of Torts, §652A(2).

2. Limitations on the Right to Bring an Invasion of Privacy Claim. In addition to the courts’ reluctance to uphold claims for invasion of privacy, an action for invasion of privacy has limited utility because of the exclusivity of other remedies, including the following:

a) Labor Law Preemption - Invasion of privacy claims by unionized employees will be preempted by labor laws to the extent that the claim requires interpretation of a collective bargaining agreement. Wall v. Americold Corp., 1997 WL 431006 (E.D. Pa.).

b) Worker's Compensation Exclusivity – Claims for invasion of privacy during employment may be limited to the exclusive remedies for injured workers under the worker's compensation laws. *See Jackson v. Rohm and Haas Co.*, 56 Pa. D.&C. 4<sup>th</sup> 449 (Phila. Co. 2002); *compare St. Luke's Hospital of Bethlehem, Inc. v. O'Leary*, 1994 WL 672629 (E.D. Pa.) (fact question as to whether investigation took place while employee was suspended (in which case worker's compensation provided exclusive remedy) or after employee was terminated (in which case worker's compensation not available)). The worker's compensation laws will not provide an exclusive remedy if the invasive activity was personal in nature and unrelated to the employee's duties. *Dunn v. Warhol*, 778 F. Supp. 242 (E.D. Pa. 1991).

3. Public Policy Claims - An employee who brings an action for wrongful discharge on the basis that the employer's invasion of privacy constitutes a public policy violation will generally not state a claim for wrongful discharge, unless the claim relates to an invasive drug test. *Compare Borse v. Piece Goods Shop, Inc.*, 963 F.2d 611 (3d Cir. 1992) (refusing to dismiss wrongful discharge claim by employee fired for refusing to take invasive drug test) *with Green v. Bryant*, 887 F.Supp. 798 (E.D. Pa. 1995) (rejecting wrongful discharge claim by employee who was fired because she was a victim of spousal abuse).

## B. Constitutional Principles

The Fourth Amendment to the United States Constitution prohibits unreasonable searches and seizures. By virtue of the Fourteenth Amendment, the Fourth Amendment is binding upon states and political subdivisions. As such, the Fourth Amendment prohibits unreasonable searches and seizures of public employees by public employers. *See, e.g., O'Connor v. Ortega*, 480 U.S. 709, 107 S.Ct. 1492 (1987). What constitutes a "reasonable" search depends upon the context in which the search takes place and requires balancing the employee's legitimate expectation of privacy against the government's need for supervision, control, and the efficient operation of the workplace. *See Id.*

## C. Statutes

Many statutes protect individuals against invasive information gathering. *See, e.g.,* the Health Insurance Portability and Accountability Act, Pub. L. 104-191 ("HIPAA"). HIPAA warrants discussion in a whole Chapter and therefore will not be covered in detail in this Chapter.

### III. INFORMATION PRIVACY IN PRACTICE – THE EMPLOYER’S RIGHT TO GATHER INFORMATION

#### A Drug and Alcohol Use

##### 1. Private employers

- a) Pennsylvania law permits drug testing of current employees unless the drug testing invades the employee’s privacy. Compare Muse v. Philadelphia Electric Co., 1996 WL 309971 (E.D. Pa. 1996) (employer may discharge employee who refuses to submit to drug and alcohol testing) with Borse v. Piece Goods Shop, Inc., 963 F.2d 611 (3d Cir. 1992) (employee stated a claim for wrongful discharge where employee refused to submit to drug test that violated personal privacy).
- b) Pennsylvania courts have dismissed actions for wrongful discharge based on “false positive” results from drug tests. Hershberger v. Jersey Shore Steel Co., 394 Pa. Super. 363, 575 A.2d 944 (1990), *appeal denied*, 527 Pa. 601, 589 A.2d 691 (1991).

**NOTE:** The Americans with Disabilities Act would protect a victim of a “false positive” test if the victim were erroneously regarded as a drug addict.

##### 2. Public employers

- a) Both the United States Constitution and Pennsylvania law permit pre-employment screening and periodic, pre-announced testing of employees. See National Treasury Employees Union v. Von Raab, 489 U.S. 656, 109 S. Ct. 1384 (1989); Amalgamated Transit Union, Division 1279 v. Cambria County Transit Authority, 691 F. Supp. 898 (W.D. Pa. 1988).
- b) Unannounced drug testing of employees is permissible where the employer has “reasonable suspicion” of drug use (*see, e.g., Copeland v. Philadelphia Police Dept.*, 840 F.2d 1139 (3d Cir. 1988), *cert. denied*, 490 U.S. 1004, 109 S.Ct. 1636 (1989)), or in safety-sensitive jobs (*e.g., in the transportation industry*). See, *e.g.* Transportation Workers’ Union Local No. 234 v. SEPTA, 884 F.2d 709 (3d Cir. 1998) (permitting random drug testing of rail operators because of safety concerns). See also Kerns v. Chalfont New Britain Township Joint Sewage Authority, 2000 WL

433983 (E.D. Pa.), *affirmed*, 263 F.3d 61 (3d Cir. 2001) (safety concerns support random testing of sewer plant operator; plant operator voluntarily consented to testing).

- c) Federal law also permits testing of all individuals at an accident site or after an accident. Skinner v. Railway Labor Executives Ass'n, 489 U.S. 602, 109 S.Ct. 1402 (1989); Turner v. SEPTA, 1994 WL 54821 (E.D. Pa.).
- d) The employer's latitude in testing employees depends upon the relationship between the employee's duties and the public's safety. *See, e.g.*, Bolden v. SEPTA, 953 F.2d 807 (3d Cir. 1991) *cert. denied*, 504 U.S. 943, 112 S.Ct. 2281 (1992) (unreasonable to test custodial employee on return to duty).
- e) Even where an employer has the right to search for drugs and alcohol, the search is subject to the United States Constitution's prohibition on unreasonable searches and seizures. *Compare* Wilcher v. City of Wilmington, 139 F.3d 366 (3d Cir. 1998) (reasonable to monitor firefighters while firefighters provided specimens; public safety interest justifies invasion) *and* McKenna v. City of Philadelphia, 771 F. Supp. 124 (E.D. Pa. 1991) (enjoining full body cavity search of police officer but allowing warrantless drug and alcohol testing, upon officer's return to work from disability leave).

3. Commercial drivers' license holders are subject to pre-employment, periodic, "reasonable cause", and random drug testing. 49 U.S.C. § 31306; 49 CFR § 382.101 *et seq.*

4. Unemployment Compensation Cases- "Rightful Discharge" Cases Involving Drug Testing

Pennsylvania courts have denied unemployment compensation on the ground of willful misconduct to employees who refuse for no good reason to submit to drug tests or who fail to remain drug-free upon returning to work after drug treatment. Rebel v. Commonwealth, Unemployment Compensation Board of Review, 555 Pa. 114, 723 A.2d 156 (1998), *affirming* 692 A.2d 304 (Pa. Cmwlth. 1997) (refusal to submit to test); Szostek v. Commonwealth, Unemployment Compensation Board of Review, 116 Pa. Cmwlth. 7, 541 A.2d 48 (1988) (failure to remain drug-free).

5. Actions Against Testing Laboratories

In Sharpe v. St. Luke's Hospital, 573 Pa. 90, 821 A.2d 1215 (2003), the Pennsylvania Supreme Court held that a third party that had collected an employee's specimen owed a duty of care to the employee in the collection and handling of the specimen. This decision depended on a negligence analysis but has obvious implications in the privacy area.

B. Other Workplace Searches

1. Public Employers

Workplace searches by supervisors are subject to a reasonableness standard. *See O'Connor v. Ortega*, 480 U.S. 707, 107 S.Ct. 1492 (1987). Supervisors have greater latitude in conducting workplace searches than law enforcement officials. *See Id.* Even though a public employee may have a reasonable expectation of privacy in a desk or a locker, the courts will not hold a public employer liable for a desk or locker search for evidence of misconduct where the search is reasonable in inception and scope. *See, e.g. Brambrinck v. City of Philadelphia*, 1994 WL 649342 (E.D. Pa.).

2. Private Employers

Although there is no constitutional prohibition against workplace searches, a search of an employee's workplace that is done in such a way as to reveal matters unrelated to the workplace may constitute tortious invasion of privacy. *See Doe v. Kohn, Nast & Graf, P.C.*, 862 F. Supp. 1310, 1326 (E.D. Pa. 1994); *Doby v. DeCrescenzo*, 1996 WL 510095, \*11-12 (E.D. Pa.).

C. Physical Examinations

1. Americans With Disabilities Act

- a) Under the Americans With Disabilities Act ("ADA"), 42 U.S.C. § 12112(c)(4), an employer's physical examination of a current employee must be job related and consistent with business necessity.
- b) The ADA prohibits employers from conducting physical examinations of prospective employees before extending an offer of employment. 42 U.S.C. § 12112(c)(2). Post-offer, pre-employment examinations are permissible if administered to all applicants who have received offers. 42 U.S.C. § 12112(c)(3).

2. Pregnancy

A employer's mandatory pregnancy test for a public employee violates an employee's privacy where the test does not meet a special need for the employer's intrusion into a zone of privacy. *See Ascolese v. SEPTA*, 925 F. Supp. 351 (E.D. Pa. 1996).

3. AIDS

- a) AIDS generally is a non-job related inability or handicap. However, the Pennsylvania Supreme Court has allowed a health care facility to disclose a surgeon's HIV-related infection to former patients and specified physicians. *See Application of Milton S. Hershey Medical Center of Pennsylvania State University*, 535 Pa. 9, 634 A.2d 159 (1993) *affirming* 407 Pa. Super. 565, 595 A.2d 1290 (1991).
- b) Under ADA, an employer may conduct pre-employment (but not pre-offer) AIDS tests. The employer may not screen employees out on the basis of AIDS unless the illness prevents the individuals with AIDS from performing essential job functions.

D. Psychological Testing

1. Pennsylvania law permits an employer to conduct psychological testing of employees. *See Heins v. Commonwealth, Unemployment Compensation Board of Review*, 111 Pa. Cmwlth. 604, 534 A.2d 592 (1987) (upholding denial of unemployment compensation to employee for willful misconduct in refusing to take psychological test; employer's request to take test was reasonable and fact that test was not of highest reliability did not make request unreasonable).
2. Pennsylvania law prohibits the use of certain testing devices without consent, including psychological stress evaluators and audio stress monitors. 18 Pa. C.S. 7505.
3. The ADA is a factor in any employer inquiry about an employee's psychological condition. Therefore, an employer should ensure that any psychiatric examination of an employee is job related and consistent with business necessity. For an example of a psychiatric examination that may have met this standard, *see Murray v. Pittsburgh Board of Education*, 759 F. Supp. 1178 (W.D. Pa. 1991), in which a teacher failed in an attempt to enjoin a psychiatric examination that the school district ordered in response to concerns about the teacher's inability to interact with others and

fitness to teach; the case predated the effective date of the ADA.

E. Polygraphs

1. Federal Law – The Employee Polygraph Protection Act, 29 U.S.C. § 2001, prohibits private employers from:
  - a) requiring employees to take polygraph tests of any employee;
  - b) asking an employee about results of polygraph tests;
  - c) discharging, disciplining, or discriminating against employees who refuse to take polygraph tests;
  - d) discharging, disciplining, or discriminating against employees on the basis of the results of any polygraph test;  
or
  - e) discharging, disciplining, or discriminating against employees who have either instituted or testified in proceedings related to the wrongful use of polygraph equipment

**NOTE:** The federal law does not apply to government employers.

2. Pennsylvania Law
  - a) The Pennsylvania Crimes Code provides that an employer who requires a polygraph test as a condition of employment or continued employment is guilty of a third degree misdemeanor. 18 Pa. C.S. § 7321.
  - b) The Pennsylvania law permits polygraph testing only for public law enforcement officers and those who have access to dangerous or narcotic drugs. Anderson v. City of Philadelphia, 845 F. 2d 1216 (3d Cir. 1988). Police officers have had some success challenging the requirement of polygraph tests after employment has begun, where the employer did not give adequate notice of the test. Marion v. Green, 95 Pa. Cmwlth. 210, 505 A.3d 360 (1980).
  - c) Private employees in Pennsylvania have stated claims for wrongful discharge in violation of public policy after being fired for refusal to submit to a polygraph test or for unfavorable polygraph results when the employee authorized the test under circumstances that suggested

duress. Kroen v. Bedway Security Agency, Inc., 430 Pa. Super. 83, 633 A.2d 628 (1993); Perks v. Firestone Tire & Rubber Co., 611 F.2d 1363 (3d Cir. 1979) (refusal to take polygraph); Polsky v. Radio Shack, Inc., 666 F.2d 824 (3d Cir. 1981) (employee authorized polygraph test under threat of job loss); Smith v. Greyhound Lines, Inc., 614 F. Supp. 558, 563 (W.D. Pa. 1984), *affirmed*, 800 F.2d 1139 (3d Cir. 1986).

## F. Criminal History

1. The Pennsylvania Criminal History Record Information Act prohibits employers from considering applicants' criminal records in making employment decisions, except to the extent that criminal history affects suitability for employment. 18 Pa.C.S. § 9125 (a) and (b). The employer must notify any unsuccessful applicant in writing if the employer decides not to hire the applicant because of criminal history. 18 Pa. C.S. § 9125 (c).
2. In Nixon v. Commonwealth of Pennsylvania, \_\_\_ Pa. \_\_\_, 839 A.2d 277 (2003), *affirming* 789 A.2d 376 (Pa. Cmwlth. 2001), the Pennsylvania Supreme Court invalidated the criminal records provisions of the Older Adult Protective Services Act. The Act permanently barred the hiring of individuals convicted of specified crimes from work in facilities that cared for the elderly, but grandfathered individuals who had worked in a facility for more than one (1) year as of the Act's effective date. The Supreme Court held that the law violated Article I, Section 1 of the Pennsylvania Constitution by infringing upon employees' right to continue in their occupation and by distinguishing between employees on the basis of the grandfather clause.
3. Public Policy Litigation
  - a) A public employee stated a claim for wrongful discharge when the employer terminated the employee for failure to disclose a pardoned misdemeanor conviction. Hunter v. Port Authority of Allegheny County, 277 Pa. Super. 4, 419 A.2d 631 (1980).
  - b) However, the courts have upheld an employer's right to refuse to rehire an employee after discharging the employee upon the employee's arrest, even though the employee was not convicted of the offense. Rank v. Township of Annville, 163 Pa. Cmwlth. 492, 641 A.2d 667 (1994); Cisco v. United Parcel Services, Inc., 328 Pa. Super. 300, 476 A.2d 1340 (1984). Similarly, an employee who was

terminated on the basis of false accusations of criminal behavior had no claim for wrongful discharge in violation of public policy. Gillespie v. Saint Joseph's University, 355 Pa. Super. 362, 513 A.2d 471 (1986).

G. Review of Employee Mail

1. Electronic Mail (Email)

- a) In general, an employee has no privacy interest in e-mail messages sent or received in the workplace. (Fraser v. Nationwide Insurance Co., 352 F.2d 107 (3d Cir. 2003), *affirming in part* 135 F. Supp.2d 623 (E.D. Pa. 2001)). Since the employer is typically the owner of the computer system that transmits the email, the employer may monitor the employee's e-mail. Fraser v. Nationwide Insurance Co., *supra*.
- b) Since case law does not foreclose the possibility that an employee may have some expectation of privacy in e-mails, the employer should adopt an e-mail policy that makes it clear that e-mail messages are the employer's property. *See, e.g., Kelleher v. City of Reading*, 2002 WL 1067442, \*8 (E.D. Pa) for such a policy (all e-mail messages are employer's property; employer reserves right to review all e-mails; e-mail system is exclusively for work-related use).
- c) An employer may discharge an employee for personal use of the e-mail system or for sending disparaging or threatening messages by e-mail. Smyth v. Pillsbury Co., 914 F. Supp. 97 (E.D. Pa. 1996)). Although the employer intercepted the e-mail message, the Eastern District held that the interception did not invade the employee's privacy because (1) the e-mail message did not disclose any personal information about the employee; and (2) the employer's interest in preventing inappropriate communications or illegal activity outweighed any privacy interest on the employee's part.
- d) An employee who is discharged for sending derogatory e-mails may be denied unemployment compensation for willful misconduct. Oaster v. Unemployment Compensation Board of Review, 705 A.2d 507 (Pa. Cmwlth. 1998).

## 2. Regular Mail (“Snail Mail”)

An employer’s opening of an employee’s mail will support an action for invasion of privacy if the mail appears to be personal and does not relate to matters of the employer’s own interest (e.g., completion of assignments). *See Vernars v. Young*, 539 F.2d 966, 968 (3d Cir. 1976); *Doe v. Kohn, Nast & Graf*, 866 F. Supp. 190 (E.D. Pa. 1994).

## H. Electronic Monitoring

Statute and case law distinguish between visual monitoring or surveillance (which is not prohibited, even without the subject’s consent, if carried out in a public place) and aural monitoring, which is prohibited without the consent of all parties to the communication unless the person conducting the monitoring is a law enforcement officer. Both the Electronic Communications Privacy Act, 18 U.S.C. § 2510 *et seq.* (“ECPA”) and the Pennsylvania Wiretapping and Electronic Surveillance Control Act, 18 Pa. C. S. § 5701 *et seq.* (“WESCA”) regulate the interception of oral communications without the consent of all parties. WESCA provides that the unauthorized interception of oral communications without the consent of all parties constitutes a third degree misdemeanor. 18 Pa. C.S. § 5725. Even listening to a tape recording made by another is prohibited in the absence of consent.

### 1. Distinction Between Electronic Monitoring and Interception of E-mail

In *Fraser v. Nationwide Insurance Co.*, 352 F.2d 107 (3d Cir. 2003), affirming in part 135 F. Supp.2d 623 (E.D. Pa. 2001), the Third Circuit held that the ECPA did not prohibit an insurance company’s search of an insurance agent’s e-mail because the insurance company provided the e-mail service and the ECPA did not prohibit seizure of e-mail authorized by the “person or entity providing a wire or electronic communications service”. 18 U.S.C. § 2701 (c) (1).

### 2. Cases on Visual Monitoring

a) In *Audenreid v. Circuit City Stores, Inc.*, 97 F. Supp.2d 660 (E.D. Pa. 2000), the Eastern District held that an employer’s use of a video system (with no audio features) to survey an employee’s management of store and control loss-prevention did not violate electronic surveillance control acts.

- b) However, a secret videotape of a private act may be excluded from evidence in an employee disciplinary grievance. *See AFSCME District Council 88 v. County of Lehigh*, 798 A.2d 804 (Pa. Cmwlth. 2002) (upholding arbitrator's award reinstating corrections officer who was terminated for fraternizing with inmate; arbitrator had refused to admit videotape showing employee and former inmate in sexual encounter in private room). *See* 18 Pa. C.S. § 7507.1 (prohibiting viewing, photographing, or filming individual in state of nudity where person has reasonable expectation of privacy).

3. The Line Between Permissible and Impermissible Aural Monitoring

- a) WESCA prohibited the Pennsylvania Public Utility Commission from directing a telephone company to monitor customer service and collection representatives during telephone conversations with customers without authorization from telephone employees. *United Telephone Co. of Pennsylvania v. Pennsylvania Public Utility Commission*, 676 A.2d 1244 (Pa. Cmwlth. 1996).
- b) A specific showing of an interception of an oral communication that violates WESCA or a party's privacy is necessary in order to support a cause of action for recording oral communications. *Gross v. Taylor*, 1997 WL 535872 (E.D. Pa. 1997).
- c) Intention is an essential element of any finding of a violation of WESCA. *Kline v. Security Guards, Inc.*, 2003 WL 22271672 (E.D. Pa. 2003); *Bayges v. SEPTA*, 144 F.R.D. 269 (E.D. Pa. 1992); *Bayges v. SEPTA*, 29 Phila. Co. Rptr. 396, 1995 WL 1315972 (Phila. Co.) (No violation arises from inadvertent recording).
- d) The routine recording of telephone calls to employees to give work instructions, where the employee knows of the recording, does not violate WESCA. *Consolidated Rail Corporation v. Colville*, 19 Pa. D. & C. 3d 545 (Allegheny Co. 1981).
- e) An employee's commission of a crime in secretly tape recording a supervisor may not be determinative in the employee's civil rights/whistleblower suit challenging his discharge; there may not be a reasonable expectation of privacy when a supervisor discusses employment matters

with subordinates. McDonald v. McCarthy, 1990 WL 131393 (E.D. Pa.).

I. Credit History

The Fair Credit Reporting Act, 15 U.S.C. §1681 et seq. (“FCRA”) sets forth conditions that must be satisfied before consumer reporting agencies may provide consumer reports for employment purposes. FCRA requires employers to disclose in writing to employees that consumer reports may be solicited for employment purposes and to obtain authorization from employees or potential employees before procuring such reports. 15 U.S.C. §§ 1681b(b)(2)(A)-(B). FCRA defines consumer reports obtained for “employment purposes” as reports used “for the purpose of evaluating an individual for employment, promotion, reassignment or retention as an employee.” 15 U.S.C. §1681a(h). See Kelchner v. Sycamore Manor Health Center, \_\_\_ F.Supp.2d \_\_\_, 2004 WL 371840 (M.D. Pa. 2004).

1. An employer may require an employee to authorize the employer to obtain consumer reports as a condition of continued employment. Kelchner v. Sycamore Manor Health Center, *supra*.
2. An employer may require the employee to authorize the procurement of consumer reports on a blanket basis, rather than on a case-by-case basis. Kelchner v. Sycamore Manor Health Center, *supra*.
3. An employer who denies employment on the basis of credit history has to give the employee both access to the credit report and an opportunity to correct the report.
4. In 1999, the Federal Trade Commission issued an advisory opinion letter that an employer who hires an investigator to consider allegations of sexual harassment is required to comply with the notice requirements of FCRA, because the investigation could result in a “consumer report”. The FTC opinion letter has been widely criticized and is not binding; for a synopsis of these criticisms, see Rugg v. Hanac Inc., 2002 WL 31132883 (S.D.N.Y.).
5. The FCRA is violated when a consumer report is used for unauthorized purposes (*e.g.*, to investigate a worker’s compensation claimant). Hall v. Harleysville Insurance Co., 896 F. Supp. 478 (E.D. Pa. 1995).

J. Fingerprinting

Employers may fingerprint employees in government employment and government licensed occupations (e.g., security exchange employees, private investigators, taxicab drivers, bartenders, liquor licensees). *See, e.g., Private Detective Act of 1953, 22 P.S. § 23.* One purpose of fingerprinting is to allow the employer to compare the fingerprints with fingerprints in law enforcement agencies' files to find out whether an employee has a criminal record. Nicholson v. M & S Detective Agency, Inc., 11 Phila. Co. Rptr. 398, 1984 WL 320921 (Phila. Co. 1984).

K. Personal Information

1. Financial Disclosure- Completion of financial disclosure forms by applicants for the Philadelphia Police Department's Special Investigations Unit did not infringe upon applicants' privacy interests. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105 (3d Cir. 1987).
2. Social Security Numbers- The Pennsylvania Supreme Court's requirement that attorneys file their own social security numbers annually does not constitute an invasion of privacy. Cantor v. Supreme Court of Pennsylvania, 353 F.Supp. 1307 (E.D. Pa. 1973), *affirmed*, 487 F.2d 1394 (3d. Cir. 1973).
3. Private Associations- The City of Philadelphia violated the associational rights of applicants for the Philadelphia Police Department's Special Investigations Unit by asking applicants to list positions in profit and nonprofit associations held by the applicants, their spouses and minor children. Fraternal Order of Police, Lodge No. 5 v. City of Philadelphia, 812 F.2d 105 (3d Cir. 1987).

IV. WHAT YOU DON'T KNOW MAY HURT YOU: THE EMPLOYER'S DUTY TO GATHER AND ACT ON INFORMATION

A. Negligent Hiring, Retention, and Supervision

1. An employer may be liable for damages for negligent hiring, negligent retention, or negligent supervision if the employer hires, retains, or supervises an employee and knows or should have known that the employee had dangerous tendencies.
2. The employer's liability stems from Restatement (2<sup>nd</sup>) of Agency, §213, which provides that a principal is subject to liability for harm resulting from the agent's conduct if the principal is negligent or reckless either in the employment of improper persons or instrumentalities in work involving risk of harm to others

(§213(b)), or in the supervision of activity (§213(c)), or in permitting or failing to prevent negligent or other tortious conduct on premises or with instrumentalities under the employer's control (§213(c)).

3. Restatement (2<sup>nd</sup>) of Torts, §317 provides that a master is under a duty to exercise reasonable care to control a servant while acting outside the scope of employment so as to prevent the servant from intentionally harming others, if the master knows or has reason to know of the ability to control the servant, and knows or should know of the necessity or opportunity for exercising such control.

4. Cases

a) Examples of successful negligent

hiring/retention/supervision claims include the following:

- i. A lawsuit by the guardian of an infant against the infant's parents after the infant was abused by a babysitter. Glomb v. Glomb, 366 Pa. Super. 206, 530 A.2d 1362 (1987), *appeal denied*, 517 Pa. 623, 538 A.2d 876 (1988).
- ii. A claim by prospective homebuyers defrauded by a sales manager/employee who induced buyers to enter into a fraudulent investment scheme. Heller v. Patwil Homes, Inc., 713 A.2d 105 (Pa. Super. 1998).
- iii. A claim by a minor abused by a priest. Hutchison v. Luddy, 763 A.2d 826 (Pa. Super. 2000), *appeal denied*, 567 Pa. 743, 788 A.2d 377 (2001).
- iv. A claim by a rape victim against a meter reader hired whose employer did not check on the reader's criminal history. Keibler v. Cramer, 36 Pa. D.& C. 4<sup>th</sup> 193 (Westmoreland Co. 1998).

b) The success of a negligent hiring/retention claim depends upon a showing that an employer knew or had reason to know of an employee's dangerous propensities. In Dempsey v. Walso Bureau, Inc., 431 Pa. 562, 246 A.2d 418 (1968) and R.A. v. First Church of Christ, 748 A.2d 692 (Pa. Super. 2000), *appeal denied*, 563 Pa. 689, 760 A.2d 855 (2000), negligent hiring or retention claims did not succeed because the employer did not know, and had no reason to know, of an employee's violent propensities.

- c) An employer's responsibility to warn customers of a dangerous employee may include the duty to warn of the employee's termination. *See e.g. Coath v. Jones*, 277 Pa. Super. 479, 419 A.2d 1249 (1980) (Employer had obligation to protect customer against discharged employee who was alleged rapist, since employee had been admitted to customer's home). *But see Pittsburgh National Bank v. Perr*, 431 Pa. Super. 580, 637 A.2d 334 (1994), *appeal denied*, 537 Pa. 665, 644 A.2d 1202 (1994) (Former manager of building had no duty to warn regarding potential danger posed by maintenance employee; duty to victim fell on new management company).

#### IV. WHAT OTHERS HAVE THE RIGHT TO KNOW: THE EMPLOYER'S OBLIGATION TO DISCLOSE INFORMATION

##### A. Disclosure to the Employee: Personnel Files

1. The Pennsylvania Personnel Files Act, 43 P.S. § 1321 *et seq.*, allows an employee or an employee's designated agent to review the contents of the employee's own personnel file. Ex-employees have no right to review their personnel files, unless the ex-employee requests the review at the time of termination or within a reasonable period of time after termination. *Beitman v. Commonwealth, Department of Labor and Industry*, 675 A.2d 1300 (Pa. Cmwlth. 1996).
2. The contents of the personnel file that the employee may review include applications and information on employment history, compensation history, discipline, and evaluations. Reports of a peer review committee are "performance evaluations" and may be inspected. *Pennsylvania State University v. Commonwealth, Department of Labor & Industry, Bureau of Labor Standards*, 113 Pa. Cmwlth. 119, 536 A.2d 852 (1988).
3. The employer need not provide the employee with access to investigatory, medical, and reference information; legal documents; or plans for future operations.
4. The law does not require the employer to copy the employee's file; the employer need only make the file available for review during regular business hours, on the employee's own time, no more than once per calendar year. *See* 43 P.S. §§ 1322-1323.

5. The principle of academic freedom does not exempt a college from the requirement that employees may examine their own personnel files. Lafayette College v. Commonwealth, Department of Labor & Industry, Bureau of Labor Standards, 119 Pa. Cmwlt. 11, 546 A.2d 126 (1988), *appeal denied*, 521 Pa. 632, 558 A.2d 533 (1989).

B. Disclosure to Third Parties

1. Freedom of Information Act / Right to Know Act

A number of recent decisions prohibit or limit the ability of third parties (e.g., unions and vendors) to obtain employee information from government agencies on privacy grounds. Generally, these decisions prohibit disclosure of addresses and social security number but allow access to certain other information.

a) Cases Refusing or Limiting Disclosure

- i. United States Department of Defense v. Federal Labor Relations Authority, 510 U.S. 487, 114 S.Ct. 1006 (1994) (refusing to grant union request for access to the home addresses of federal agency employees).
- ii. Sheet Metal Workers Ass'n., Local Union No. 19 v. United States Department of Veterans Affairs, 135 F.3d 891 (3d. Cir. 1998) (holding that disclosure of names, social security numbers, or addresses of employees would constitute an unwarranted invasion of personal privacy).
- iii. Barger v. Department of Labor and Industry, Unemployment Compensation Board of Review, 720 A.2d 500 (Pa. Cmwlt. 1998) (rejecting lawyer's request for names and addresses of claimants and employers scheduled for hearings before unemployment compensation referees).
- iv. Cypress Media, Inc. v. Hazleton Area School District, 708 A.2d 866 (Pa. Cmwlt. 1998), *appeal dismissed as improvidently granted*, 555 Pa. 340, 724 A.2d 347 (1999) (rejecting a newspaper's request for applications for teaching positions).
- v. Tribune Review Publishing Co. v. Allegheny Housing Authority, 662 A.2d 677 (Pa. Cmwlt. 1995), *appeal denied*, 546 Pa. 688, 686 A.2d 1315

(1996) (holding that social security numbers and payroll records are within the “personal security exemption” from disclosure under the Right To Know Act).

b) Cases Permitting Partial Disclosure

- i. United States v. Westinghouse Electric Corporation, 638 F.2d 570 (3d Cir. 1980) (holding that employees could object to disclosure of medical records to the National Institute for Occupational Safety and Health on the basis of invasion of privacy, but refusing to prohibit all access).
- ii. Sapp Roofing Company, Inc. v. Sheet Metal Workers’ Int’l Ass’n., Local Union No. 12, 552 Pa. 105, 713 A.2d 627 (1998) (permitting union to have access to wage information of a contractor’s employees, but prohibiting access to home addresses).

2. Discovery/Subpoenas

Particularly in employment discrimination actions, plaintiffs may seek discovery of other employees’ personnel files or records. Although a detailed analysis of this topic lies beyond this Chapter, it is possible for the employer to oppose discovery of internal information about other employees (*e.g.*, personnel files, reprimands) on privacy grounds. *See e.g. Getz v. Commonwealth of Pennsylvania, Blindness and Visual Services*, 1998 WL 961901 (E.D. Pa.) (refusing to allow discovery of personnel files and reprimands but requiring disclosure of EEOC/PHRA complaints by other employees). Alternatively, private information may be disclosed under seal. *See, e.g. Vearling v. Bensalem Township School District*, 1996 WL 119984 (E.D. Pa.)

V. BEHAVIORAL PRIVACY: AN EMPLOYER’S ABILITY TO REGULATE OFF DUTY CONDUCT

A. Employee Speech

1. Private Employees

- a) A private employer may not coerce an employee to engage in a lobbying effort that conflicts with the employee’s political beliefs. Novosel v. Nationwide Insurance Co., 721 F.2d 894 (3d Cir. 1983). In the years since Novosel was decided, courts have limited the decision to its own facts.

- b) A private employer may discharge (or refuse to hire) an employee because of the employee's speech activities outside the workplace. *See, e.g. Halstead v. Motorcycle Safety Foundation, Inc.*, 71 F. Supp. 2d 464 (M.D. Pa. 1999) (Private employer may refuse to offer position to applicant because of applicant's statements in newspaper interview); *DeMuth v. Miller*, 328 Pa. Super. 437, 652 A.2d 891 (1995), *appeal denied*, 542 Pa. 634, 665 A.2d 469 (1995), *cert. denied*, 516 U.S. 1114, 116 S.Ct. 916 (1996) (employee fired for speaking out on gay rights issues; employment contract forbade homosexuality; court enforced noncompete)
- c) An employer may discharge a private employee for filing a lawsuit unrelated to the workplace (*Wagner v. General Electric Co.*, 760 F. Supp. 1146 (M.D. Pa. 1991)).

## 2. Government Employees

- a) Public employees have the right to comment on matters of public concern, as long as the comments do not interfere with the employer's ability to carry out government responsibilities, with the employee's ability to carry out job responsibilities, or with essential and close work relationships. *See, e.g., Pickering v. Board of Education*, 391 U.S. 563, 88 S.Ct. 1731 (1968); *Holder v. City of Allentown*, 987 F.2d 188 (3d Cir. 1993); *Sacks v. Commonwealth, Department of Public Welfare*, 502 Pa. 201, 465 A.2d 981 (1983).
- b) A township secretary/treasurer has no right to challenge the township's failure to reappoint her, where the alleged reason for the failure to reappoint was the employee's inability to prevent her husband from speaking out on public issues. *Burkholder v. Hutchison*, 403 Pa. Super. 498, 589 A.2d 721 (1991).
- c) The Fourteenth Amendment and the Civil Rights Act prohibit public employers from discrimination in hiring, transfer, promotion, recall, furlough, and discharge on the basis of political affiliation, except for confidential or policy making employees. *See, e.g., Rutan v. Republican Party of Illinois*, 497 U.S. 62, 110 S.Ct. 2729 (1990).

## B. Associational Issues

1. Employees are protected against discrimination arising from association with union members or with persons covered by the civil rights laws.
2. Law enforcement officers are subject to stricter requirements in terms of their associations. *See, e.g. D'Iorio v. Commonwealth Unemployment Compensation Board of Review*, 42 Pa. Cmwlth. 443, 400 A.2d 1347 (1979) (Criminal investigator socializing with known felons caused his own separation, and was therefore not entitled to unemployment compensation).
3. Family Associations
  - a) Anti-nepotism policies are enforceable unless the policies affect a protected group disproportionately (e.g., a no spouse rule that results in discrimination against women). *Kovich v. Mansfield State College*, 84 Pa. Cmwlth. 176, 478 A.2d 950 (1984).
  - b) Dating fellow employees in Pennsylvania is not a protected privacy right. *Staats v. Ohio National Life Insurance Co.*, 620 F. Supp. 118 (W.D. Pa. 1989). *See also Angelilli v. Borough of Conshohocken*, 1996 WL 663871 (E.D. Pa.) and *Jacien v. Borough of Conshohocken*, 1997 WL 34676 (E.D. Pa.), in which the Eastern District dismissed claims of violation of privacy rights by two municipal employees who were fired after becoming involved in a romantic relationship.
4. Off-Duty Associational Issues

An employee is not immune under the Constitution from adverse employment action on the basis of unmarried cohabitation. *See e.g. Hollenbaugh v. Carnegie Free Library*, 439 U.S. 1052, 99 S.Ct. 734 (1978).

## C. Off-Duty Employment

### 1. Private Employment

A private employer may prevent an employee from holding a second job. If the second job competes with the employee's duties for the employer, the prohibition on outside work stems from the employee's fiduciary duty to the employer. *See SHV Coal, Inc. v. Continental Grain Co.*, 376 Pa. Super. 241, 545 A.2d 917 (1988), *reversed in part on other grounds*, 526 Pa. 489, 587 A.2d 702

(1991). An explicit prohibition on outside work (either by contract or by employer rule) is helpful to reinforce the employee's fiduciary duty and may be necessary where the outside work does not compete with the employer. See J. Goldstein & Co., P.C. v. Goldstein, 52 Pa. D.& C. 4<sup>th</sup> 211 (Phila. Co. 2001).

2. Public Employers

A public employer may prohibit off-duty employment that conflicts with the employee's public duties. See Livingston v. Doylestown Twp., 145 Pa. Cmwlth. 460, 603 A.2d 705 (1992) (upholding discharge of township code inspector who performed private inspections); compare United States v. National Treasury Employees Union, 513 U.S.454, 115 S.Ct. 1003 (1995) (invalidating ban on federal executive branch employees' earnings from outside writing and speaking); Federation of State Cultural and Educational Professionals v. Commonwealth, Department of Education, 119 Pa. Cmwlth. 63, 546 A.2d 147 (invalidating prohibition against state employees' supplemental employment with state contractors where employment is unrelated to contracts).

C. Other Off-Duty Activity

1. Criminal Conduct

An employer may dismiss an employee for off-duty criminal conduct. See Commonwealth, Office of Attorney General v. Colbert, 142 Pa. Cmwlth. 657, 598 A.2d 344 (1991) *appeal dismissed as improvidently granted*, 533 Pa. 95, 619 A.2d 1062 (1993) (arrest warrant for failure to pay parking tickets); Powell v. Middletown, 782 A.2d 617 (Pa. Cmwlth. 2001), *appeal denied*, 568 Pa. 730, 797 A.2d 918 (2002) (neglect of duty established through police officer's pointing service revolver at fellow officer). Davenport v. Reed, 785 A.2d 1058 (Pa. Cmwlth. 2001) (child abuse).

2. Use of drugs or alcohol.

An employer may dismiss an employee for off-duty use of drugs or alcohol. In some circumstances, the off-duty use of drugs or alcohol may lead to a denial of unemployment compensation. See, e.g. Derry v. Unemployment Compensation Board of Review, 693 A.2d 622 (Pa. Cmwlth. 1997) (off-duty illegal drug activity by childcare workers). In other situations, although the employee may be dismissed, the courts will not uphold the denial of unemployment compensation on the ground that the offense may not be work related. See, e.g. Burger v. Unemployment Compensation Board of Review, 569 Pa. 139, 801 A.2d 487 (2002)

(off-duty drug use).

### 3. Residency Requirements

- a) Government employers may require employees to live within the corporate limits of the state, county, or municipal employer. Cuvo v. City of Easton, 678 A.2d 424 (1996), *appeal denied*, 546 Pa. 696, 687 A.2d 379 (1997), *cert denied*, 522 U.S. 823, 118 S.Ct. 79 (1998) (residency requirement for firefighters rationally related to legitimate state goal).
- b) Private employers may require employees to live near the workplace, or to spread out geographically in order to represent the firm in as large an area as possible.

### 4. Lawful Activity Statutes

- a) Pennsylvania has not enacted a law that prohibits employers from discharging employees for lawful off-duty activities.
- b) At least one neighboring state, New York, has enacted a “lawful activity” statute; in New York, there have been a number of decisions on an employer’s ability to terminate individuals engaged in “lawful”, but illicit, romantic relationships. In general, these decisions have not brought such activities within the protection of the “lawful activities” statutes. *See, e.g. State v. Wal-Mart Stores*, 207 N.Y.A.D. 2d 150, 621 N.Y.S.2d 158 (3d Dept. 1995); McCavitt v. Swiss Reinsurance America Corp., 237 F.3d 166 (2d Cir. 2001), effectively overruling Pasch v. Katz Media, Inc., 1995 WL 469710 (S.D.N.Y).

## VI. PRIVACY CONSIDERATIONS IN EMPLOYMENT DISCRIMINATION CLAIMS

On rare occasions, privacy considerations have allowed employers or service providers to establish that an otherwise discriminatory factor is a bona fide occupational qualification (BFOQ). In Healey v. Southwood Psychiatric Hospital, 78 F.3d 128 (3d Cir. 1996), the Third Circuit held that the need to have female staff members on all shifts in a hospital for emotionally disturbed children justified otherwise discriminatory shift assignments. In Rider v. Commonwealth of Pennsylvania, 850 F.2d 982 (3d Cir. 1988), *cert. denied*, 488 U.S. 993, 109 S.Ct. 556 (1989), the Third Circuit refused to re-visit an arbitrator’s decision rejecting male prison guards’ Title VII action challenging the hiring of only female guards for certain positions supervising female inmates. *See also Commonwealth*,

Department of Corrections, State Correctional Institution at Muncy v. American Federation of State, County, and Municipal Employees, 101 Pa.Cmwlth. 121, 515 A.2d 1000 (1986), *appeal denied*, 515 Pa. 610, 529 A.2d 1083 (1987). In Livingwell (North) Inc. v. Pennsylvania Human Relations Commission, 147 Pa. Cmwlth. 116, 606 A.2d 1287 (1992), *appeal denied*, 533 Pa. 611, 618 A.2d 401 (1992), the Commonwealth Court held that, under the “customer preference” defense, a “privacy right” permits exclusion of males from an all-female exercise facility.