

Tenth Circuit Finds Secretly Recorded Age-based Remarks To Be Double-Edged Sword That Can Be Used As Evidence Of Plaintiff's Own Wrongdoing

October 16, 2015 | [Employment Discrimination, Labor And Employment](#)



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In *Housley v. Spirit Aerosystems, Inc.*, the U.S. Court of Appeals discussed the significance of the parties' objections and requests for limiting instructions at trial, which serves as a reminder to plaintiffs and defendants alike. In this case, the plaintiff (a long-time employee of The Boeing Company (Boeing)) sued Spirit and Boeing, alleging that she had been discriminated based on her age (56) after Boeing sold its Wichita facility to Spirit, and Spirit did not hire her based upon the recommendations of Boeing management.

Specifically, Boeing had used particular criteria to evaluate employees, and the plaintiff failed to make the grade (due to her alleged "lower level of skills" and "problems teaming"). Spirit prevailed at trial, and an appeal ensued. In affirming that the jury's finding of no discrimination was reasonable, the Tenth Circuit considered audio recordings generated by the plaintiff during her employment and whether the use of such evidence for various purposes was proper. Specifically, the plaintiff had secretly recorded conversations with Boeing managers (who had been involved in the decision not to recommend her hire by Spirit) during which comments were made as to whether she was considering retirement and whether she was old enough to retire. The plaintiff had listed these recordings for use at trial presumably because they discussed age/retirement in close proximity to the recommendation not to hire her. However, Spirit turned the recordings on their head and alleged they were after-acquired evidence of wrongdoing and could preclude damages because Boeing would not have recommended her (and thus Spirit would not have hired her) had it known she had secretly recorded conversations at work. Plaintiff objected to the use of the evidence for this purpose, but the district judge did not rule on her objection. At trial, no limiting instruction was requested as to use of the recordings for after-acquired evidence, and the plaintiff failed to object to questioning about the recordings. The key Boeing manager testified that had she would not have recommended anyone for employment if she knew that person had engaged in secret recording of conversations with management at work. On appeal, the plaintiff objected to the relevancy of the recordings and the lack of limiting instruction on their use. The Court of Appeals, however, found the recordings to be a "double-edged sword" and the plaintiff was "obliged to take the bitter with the sweet." Having failed to object and request a limiting instruction upon the admission of the evidence, plaintiff didn't present an opportunity for the lower court to balance the probative value of the evidence against any prejudicial effect, and was left with the only argument she had advanced – that the recordings were not illegal and thus, not evidence of wrongdoing. As the jury was presented with Spirit's argument that her recordings evidenced a lack of teamwork and poor

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attitude, the Court of Appeals found she had a chance to explain her conduct in making the recordings and if any error existed in admitting them, it was harmless. The Court of Appeals further discussed the various pieces of information (including the recordings) that could have prompted a jury to find no discrimination had occurred and found such outcome reasonable. This case serves as a two-fold reminder for plaintiff and companies alike. First, parties must think outside the box as to how to most-effectively use evidence in their favor, but can't lose sight of how their opponents may try to turn that evidence against them. Second, it emphasizes the importance of strategy and diligence in pursuing objections at trial.