IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY T. MILLER, Plaintiff	:	
v.	:	3:CV-06-0463
	:	(JUDGE VANASKIE)
MARY P. KRUZIK, GARY WILLIAMS, RANDALL SMITH, WILLIAM J. O'GUREK, CHARLES GETZ, WAYNE NOTHSTEIN AND CARBON COUNTY, Defendants	:	

MEMORANDUM

Plaintiff Mary T. Miller, former Senior Dispatcher for the Carbon County Communications Center, brought this action against certain employees of the Carbon County Communications Center, Carbon County, and the Carbon County Commissioners, alleging violations of the federal and Pennsylvania wiretapping laws, 18 U.S.C. § 2510 et seq., and 18 Pa. Cons. Stat. § 5701 et seq., for the purported intentional recording and copying of her conversations in the console area of the communications center on April 13, 2005. Plaintiff further alleges that Defendants violated the Pennsylvania Whistleblower Law, 43 Pa. Cons. Stat. § 1421 et seq., for purportedly firing her from her position as Senior Dispatcher as a result of her reporting the recording incident to the Carbon County District Attorney.

Presently before the Court is Defendants' Motion for Summary Judgment. (Dkt. Entry 42.) Because Plaintiff did not have a reasonable expectation of privacy as to her conversations in the console area of the call center, the recording of those conversations did not violate the

federal and Pennsylvania wiretapping statutes, and Defendants will be granted summary judgment motion as to the wiretapping claims. Since Plaintiff did not make a report of "wrongdoing" as that term is defined in the Pennsylvania Whistleblower Law, summary judgment on that claim will likewise be granted.

I. BACKGROUND

A. Factual History

Plaintiff Mary T. Miller was employed by Carbon County in its Communications Center at 1264 Emergency Lane, Nesquehoning, PA 18240, from December 31, 1992 until her termination on September 15, 2005.[1] (Defs.' Statement of Material Facts ("SMF"), Dkt. Entry 43, ¶¶ 1 & 8.) She worked as a Senior Dispatcher, which required her to receive 911 emergency calls, quickly and accurately determine the appropriate responses, and dispatch necessary services accordingly.[2] (Job Description, Dkt. Entry 43-2, at 36.)

The communications center has four consoles, with a phone and radio at each console. (Defs.' SMF, ¶ 36.) Each phone contains approximately eleven lines. (Williams Dep., Dkt.

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[1]Carbon County, Pennsylvania, owns and operates the Carbon County Communications Center. When Carbon County took over the call center, Ms. Miller had already been working there for about ten years. (Miller Dep., Dkt. Entry 43-2, at 10.) For the convenience of the reader of this opinion in electronic format, hyperlinks to the CM/ECF record have been inserted. Page references are to the number assigned by the CM/ECF pagination system.

[2]In handling calls ,a Senior Dispatcher was to act professionally, and be courteous to callers. (Defs.' SMF, ¶ 11.) Ms. Miller was reminded of these requirements by her managers and understood it to be part of her job. (Defs.' SMF, ¶ 12.)

Entry 49-2, at 4.) When the handset on the phone console is detached, or someone picks up the handset, the conversation is automatically recorded. (Defs.' SMF, at ¶ 37.) If a handset is not properly placed on the console, the phone will continue to record and pick up ambient room noises. (Id. at ¶ 38.) A radio is also located at each console. A button light turns on when the radio is actively recording. (Miller Dep., Dkt. Entry 49, at 12.)

1. The Recording of Ms. Miller's Conversations

On Wednesday, April 13, 2005, the handset on console four in the control center was not properly placed, so the phone recorded ambient room noises for approximately ten hours.[3] (Defs.' SMF, ¶¶ 38-39.) While the phone recorded, Ms. Miller engaged in conversations in the console area with co-workers Lee Marzen and Ray Bossard. (Dep. Miller, Dkt. Entry 49, at 15-16.) Mr. Marzen stated that Ms. Miller used "extreme obscene language" that day. (Marzen Compl., Dkt. Entry 43-3, at 12.) Mr. Bossard stated that Ms. Miller used foul language directed toward management.[4] (Bossard Complaint, Dkt. Entry 43-3, at 13.)

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[3]Plaintiff claims that Jason A. Helmer, a co-worker, was the last person scheduled to be working at console four on April 13, 2005, and that Mr. Marzen asked to come in early that day, before her scheduled shift. (Pl.'s Counter Statement of Material Facts ("CSMF"), Dkt. Entry 46, ¶ 39.) Plaintiff further alleges that Mr. Helmer and Mr. Marzen displayed disdain for her and conspired to record her conversations. (Pl.'s Br. Opp'n Mot. Summ. J., Dkt. Entry 48, at 12.)

[4]Ms. Miller knew that, even if a call was not coming in, if the handset was removed, or not properly placed, on any of the four consoles, the phone automatically recorded the conversations. (Miller Dep., Dkt. Entry 43-2, at 11.) Ms. Miller also knew that recordings were made from the conversations on the console phones, and that quality assurance reviews of recorded telephone calls were conducted routinely. (Id. at 12.) It appears that Ms. Miller has (continued...)

Mr. Williams periodically monitored dispatcher's conversations to ensure compliance with Emergency Medical Dispatching (EMD) guidelines. (Dkt. Entry 43-2, at 32.) The Carbon County Quality Assurance Program requires that quality assurance reviews be performed periodically depending on the call volume of the center.[5] (Assurance Program, Dkt. Entry 43-2, at 42.) Mr. Williams stated he monitored up to ten calls a week. (Defs.' SMF, ¶ 46.)

During one of his Quality Assurance Program reviews, Mr. Williams claims he discovered the recording of ten hours of ambient noise and listened to certain portions. He noticed that the tape had recorded statements and conversations by Ms. Miller disparaging management, and subsequently copied a portion of the statements onto a CD. (Defs.' SMF, ¶ 49.) Mr. Williams shared the recording with Defendant Mary P. Kruzik, the 911 manager, and they both passed the CD onto Defendant Randall Smith, the Carbon County Administrator (Chief Operating Official of Carbon County), and County Commissioners William J. O'Gurek, Wayne Nothstein and Charles Getz. (Defs.' SMF, ¶¶ 50-51.) According to Mr. Nothstein, the tape contained yelling, profanity and complaining by Ms. Miller. (Nothstein, Dkt. Entry 43-2, at 20.) Upon hearing the tape, Mr. O'Gurek testified that he "instructed Mary Kruzik to contact Attorney Susanin's office [the County's labor law attorney] to discuss whether any action

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[4](...continued)
had previous experience with handsets not being placed properly on the phones. (Id.)

[5]Quality Assurance Reviews are authorized and mandated by 35 Pa. Cons. Stat. §§ 7011 to 7021.

needed to be taken." (Id. at 21.) The Commissioners ultimately decided to suspend Ms. Miller for three days for what she said in the recorded conversations. (Defs.' SMF, ¶ 57.)

Plaintiff claims that the recording was not inadvertent. (Pl.'s CSMF, ¶ 42.) Plaintiff asserts that Mr. Williams was not conducting quality assurance reviews when he re-recorded and played the recording of Plaintiff's private conversations for the County Commissioners. (Pl.'s CSMF, ¶ 47.) Plaintiff further asserts that Ms. Kruzik and Mr. Williams made a CD of the selected sections of the recording and contacted Mr. Smith with an objective of eventually playing the recording for the County Commissioners. (Id.) Plaintiff claims that Defendants knowingly and deliberately recorded her "private" conversations. (Id.)

On June 7, 2005, John P. Karoly, Jr., Esquire, representing Ms. Miller, sent a letter to Carbon County District Attorney Gary Dobias, alleging that several persons committed felonies of the third degree on April 13, 2005, in recording Ms. Miller's statements. (Compl., Ex. A., Dkt. Entry 1, at 20-21.) On July 24, 2005, District Attorney Dobias informed Ms. Miller that he would not pursue a criminal action in connection with the April 13, 2005 recording. (Defs.' SMF, ¶ 59.)

2. Complaints of Ms. Miller in the Workplace

Some of Ms. Miller's co-workers did not speak highly of her job performance and complained to their superiors. (Defs.' SMF, ¶ 13.) Commissioner Nothstein testified that he heard complaints about Ms. Miller from the staff of emergency services – fire, police, and ambulance. (Defs.' SMF, ¶ 14.) Mr. Smith testified that the Commissioner's Office received

complaints "from different responders who found Mary's tone to be inappropriate when operating–dispatching." (Defs.' SMF, ¶ 15.) No one, however, ever complained to Mr. Smith personally. (Pl.'s CSMF, ¶ 15.) Mary Kruzik testified that Borough of Nesquehoning Assistant Fire Chief Bob Stempa complained of Ms. Miller's attitude toward him on the radio. (Kruzik Dep., Dkt. Entry 43-2, at 6.) In a signed complaint dated January 14, 2005, Stempa stated that "Dispatcher Mary Miller became rude/short with" him. (County Complaint, Dkt. Entry 43-3, at 7.)

Dispatcher Cheryl Steigerwalt, Ms. Miller's co-worker, testified that in August of 2004, after finding out she was going to have to work an additional shift, Ms. Miller "screamed and hollered and ranted and raved and carried on all morning." (Miller Dep., Dkt. Entry 43-2, at 27.) Ms. Steigerwalt complained of Ms. Miller's "screaming and hollering and carrying on . . . ." (Defs.' SMF, ¶ 20.) In a letter dated August 16, 2004, Ms. Steigerwalt expressed her frustrations and concerns with Ms. Miller's purported constant complaining about management. (Steigerwalt Complaint, Dkt. Entry 43-2, at 48.) She reported that Ms. Miller thought that everything was a conspiracy against her.[6] (Id. at 50.)

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[6] It is evident that Ms. Miller was upset that she did not receive the position of assistant manager of the communications center. Co-worker Christopher Evans wrote in August of 2004 that Ms. Miller was very upset with the appointment of Mr. Williams to assistant manager and was very difficult to work with. (Evans Note, Dkt. Enter 43-2, at 47.) He further complained that Mary dealt with family problems at work, making it hard for others to perform their duties. "This is caused by tantrums and screaming at family on the phone," he wrote. (Id.) Justin

(continued...)

Mr. Williams, the supervisor, confirmed that Ms. Steigerwalt complained of Ms. Miller's attitude. (Williams Dep., Dkt. Entry 43-2, at 28.) Mr. Williams stated that another co-worker, Heinz Rausch, complained about her yelling on the phone and attitude toward callers. (Williams Dep., at 30.)

In January of 2003, Ms. Miller received an official warning letter in connection with a call from Betty Fairchild of Carbon Crest Personal Care Home, who had called requesting an ambulance. The letter states Ms. Miller acted in "a rude and abrupt manner." (Warning, Dkt. Entry 43-2, at 44.) Mr. McGettigan, Ms. Miller's supervisor, later called Ms. Fairchild to apologize for Ms. Miller's behavior. (Miller Dep., Dkt. Entry 43-2, at 13.)

Dispatcher Jason A. Helmer testified that Ms. Miller would yell at people. (Helmer Dep.,

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[6](...continued)
Markell, a part-time 911 Dispatcher, wrote in August of 2004 that Ms. Miller believed that she did not receive the assistant manager position as a result of a personal vendetta against her by the management of the call center and the County administration. (Markell Complaint, Dkt. Entry 43-2, at 46.) He also wrote:

> Mary has . . . multiple times while working on a shift with me become frustrated with either emergency service providers or callers to the 911 center, to the point where she is very belligerent, disrespectful, and she has even hung up on them. Mary also seems to believe that the problems that currently are faced by the dispatchers at this 911 center are the result of whatever dispatcher is on vacation.

It should be noted that during his deposition, Mr. Markell denied that he ever made any complaints about Ms. Miller's job performance. (Markell Dep., Dkt. Entry 49-3, at 23; Pl.'s CSMF, ¶ 25.)

Dkt. Entry 43-2, at 4.) He wrote a complaint, dated Tuesday, February 8, 2005, concerning the actions of Ms. Miller. (Helmer Complaint, Dkt. Entry 43-3, at 8.) He commented on the "screaming, yelling, banging, degrading comments, rudeness, and unprofessional attitude" of Ms. Miller. (Id.)

Lee Marzen, another co-worker, stated that Mr. Helmer complained of a hostile work environment to him – "Mary yelling at people on the phone, yelling at people on the radio, and just an overall hostile type of environment." (Defs.' SMF, ¶ 30; Marzen Dep., Dkt. Entry 43-2, at 9.) He personally attested to Ms. Miller's attitude in the work place.[7] "[M]y basic complaints were the angry attitude towards callers, the angry attitude towards providers in the field, and hostile work environment that I had to work in." (Marzen Dep., Dkt. Entry 43-2, at 8.)

Dispatcher Ray Bossard also asserted that Ms. Miller "complained constantly." (Bossard Dep., Dkt. Entry 43-2, at 1.) He wrote a letter complaining of her poor attitude and negative effect on office morale in April of 2005. (Bossard Complaint, Dkt. Entry 43-3, at 13.)

Ms. Miller's Manager, Mary Kruzik, observed that Ms. Miller exhibited a poor attitude on the telephone. (Kruzik Dep., Dkt. Entry 43-2, at 5.) "She was very belligerent to a woman who had telephoned in a call from a ski slope." (Id.) Ms. Kruzik made complaints to County Administrator Smith about Ms. Miller's bad attitude. (Smith Dep., Dkt. Entry 43-2, at 25.) On

[7]Plaintiff's assert that Mr. Helmer and Ms. Marzen exhibited animosity and disdain toward Ms. Miller. (Pl.'s CSMF, ¶¶ 26 - 31.)

January 18, 2005, in a written letter, Mr. Williams reported that "Mary Miller's attitude was far from professional."[8] (Williams Complaint, Dkt. Entry 43-3, at 4-5.)

3. Ms. Miller's Termination

On August 31, 2005, more than one month after the District Attorney indicated that no criminal charges would be filed in connection with the April, 2005 taping incident, dispatcher Bossard reported to management that he believed that Ms. Miller mishandled a suicide call that day. (Bossard Letter, Dkt. Entry 43-3, at 17.) According to Mr. Bossard, "[t]he caller was disconnected by the dispatcher and referred to call MHMR by phone. That does not follow EMD protocols and is not in the best interest of the caller." (Id.) Ms. Kruzik testified that Ms. Miller "put the caller on hold to answer a non-emergency telephone. She didn't verify the person's name, phone number, address, or anything about the caller. She didn't keep the caller on the line until emergency personnel arrived on scene." (Kruzik Dep., Dkt. Entry 43-2, at 7.)

Ms. Kruzik approached Gary Hoffman, the Director of Communications for the Monroe County Control Center, and asked for his opinion as to whether Ms. Miller's handling of the call was appropriate. (Kruzik Dep. at 7.) Mr. Hoffman sent a written report to Mary Kruzik on September 2, 2005, summarizing the required steps and Ms. Miller's actions. (Hoffman Letter,

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[8]Other Carbon County Communications Center workers did not express any complaints about Ms. Miller's job performance. (Sandra Miller Dep., Dkt. Entry 49-3, at 11; Poko Dep., Dkt. Entry 49-3, at 17.) (See Pl.'s CSMF ¶ 65.)

Dkt. Entry 43-3, at 18-19.) He stated: "From our agency's perspective this incident and specifically how it was handled would have resulted in the dispatcher receiving some form of disciplinary action. As to the degree, that would depend upon other circumstances since we have a progressive disciplinary policy." (Id. at 19.)

Ms. Miller contends that Monroe County uses different standards for handling calls from persons expressing suicidal thoughts, a fact acknowledged by Mr. Hoffman. (Hoffman Letter, Dkt. Entry 43-3, at 18.) Ms. Miller asserts that she complied with the standards employed in Carbon County, an assertion she says is corroborated by a letter from the organization whose standards were followed by Carbon County. (NAED letter of Sept. 10, 2005, Dkt. Entry 49, at 9-10.)

On September 2, 2005, Ms. Kruzik sent a memorandum to Mr. Smith and the Carbon County Commissioners explaining the circumstances of the suicide call. The letter stated the following:

> 1. A female telephoned 9-1-1 stating she is having suicidal thoughts and was told to dial 9-1-1 after dialing 4-1-1.
> 2. Dispatcher placed the (9-1-1 call) suicide threat on hold to answer a non-emergency line.
> 3. Dispatcher did not follow EMS dispatching procedures as she did not obtain and/or verify the callers name and phone number.
> 4. Dispatcher did not follow proper EMD protocols as it is stated that for a suicide threat made by a 1st party caller, keep the caller on the line until responders arrive at scene.
> 5. Dispatcher informs the non-emergency caller to hold because she has a suicide threat on 9-1-1 (sharing confidential information possibly violating HIPAA regulations).

> 6. Gives the distraught caller another telephone number to call (Blue Mountain Health Systems, Lehighton Locations) and tells the caller to ask for the Mental health Unit instead of transferring the caller leaving our agency with no liability defense.
> 7. Dispatcher calls the hospital herself to see if the caller telephoned them and assumes she did.
> 8. Hospital telephones dispatch center, in regard to the caller. Gives the dispatcher the caller's name and type of call (suicide) and asks if the dispatcher is aware of it. Dispatcher states, yes, that we transferred the call down there. (There is no record of transferring the call, as stated above; the dispatcher gave the distraught caller, the telephone number for the caller to call herself).
> 9. The hospital employee informs the dispatcher that the caller hung up on them before they could get any real information and the dispatcher gives the employee the caller's phone number that the dispatchers assumes is correct.
> 10. The hospital employee asks the dispatcher if we should call the police and instead of transferring the call to the state police, gives the caller the phone number of the police to make the call herself. (Our dispatch center has one button transfer to all state police barracks)
> 11. Dispatcher then calls state police herself to tell them about the suicide call as if state police already knows about it but couldn't possibly because the dispatcher failed to notify them earlier.

(Dkt. Entry 43-3, at 15-16.)

On September 8, 2005, Ms. Kruzik wrote Ms. Miller a letter in which she found that the call of August 31, 2005, was mishandled. (Kruzik Letter, Dkt. Entry 1, at 22.) As a result, Ms. Miller recommended "immediate suspension with a recommendation to terminate for violating established protocols, negligence and carelessness in performing . . . duties as a Senior Dispatcher." (Id.) Ms. Kruzik wrote that Ms. Miller's actions "exposed the County to liability regarding the incident that occurred on August 31, 2005, and put the caller at risk for self-harm." (Id.) By letter dated September 16, 2005, Carbon County Acting Director Dawn M.

Bowman terminated Ms. Miller from her position as Senior Dispatcher. (Defs.' SMF, ¶ 71.)

Plaintiff claims that she was summoned to a meeting with Ms. Kruzik, Mr. Williams and Mr. Smith prior to September 15, 2005, where she was told by Mr. Smith that he was firing her on his own authority and that the County would be firing her on September 15, 2005. (Pl.'s CSMF, Dkt. Entry 46, ¶ 9.) Commissioners Getz, O'Gurek and Nothstein testified, however, that Ms. Miller was terminated from her employment by unanimous vote of the County Commissioners on September 15, 2005. (Defs.' SMF, ¶ 9.)

B. Procedural History

Plaintiff filed this action on March 3, 2006. (Compl., Dkt. Entry 1.) On April 5, 2006, Defendants moved for dismissal of the action, and on June 2, 2006, Defendants filed an Amended Motion to Dismiss. (Dkt. Entries 13 & 22.) At an oral argument conducted on August 16, 2006, the Court granted in part and denied in part Defendants' Motion and Amended Motion to Dismiss. (Dkt. Entry 27.)

The Court dismissed Plaintiff's claim under 42 U.S.C. § 1983 for violation of her rights under the First Amendment to the United States Constitution. (Id. at ¶ 3.) The Court further dismissed Plaintiff's request to have Commissioners O'Gurek, Getz, and Nothstein suspended from public service under 42 Pa. Con. Stat. § 1426. (Id. at ¶ 4.) Official capacity claims against Defendants Kruzik, Williams, Smith, O'Gurek, Getz, and Nothstein were likewise dismissed. (Id. at ¶ 5.) Finally, Plaintiff's demand for punitive damages against Defendant Carbon County

was dismissed. (Id. at ¶ 6.) All other claims were permitted to proceed.

On September 1, 2007, Defendants moved for summary judgment on all Plaintiff's remaining claims. (Mot. Summ. J., Dkt. Entry 42.) Defendants' Motion is now ripe and ready for resolution.

II. DISCUSSION

A. Standard for Summary Judgment

Summary judgment should be granted when "the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(c). A fact is "material" if proof of its existence or nonexistence might affect the outcome of the suit under the applicable law. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986). An issue is genuine "if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." Id.

All doubts as to the existence of a genuine issue of material fact must be resolved against the moving party, and the entire record must be examined in the light most favorable to nonmoving party. Cont'l Ins. Co. v. Bodie, 682 F.2d 436, 438 (3d Cir. 1982). The moving party has the burden of showing the absence of a genuine issue of material fact, but the nonmoving party must present affirmative evidence from which a jury might return a verdict in the nonmoving party's favor. Anderson, 477 U.S. at 256-57. Merely conclusory allegations taken

from the pleadings are insufficient to withstand a motion for summary judgment. Schoch v. First Fid. Bancorporation, 912 F.2d 654, 657 (3d Cir. 1990). Summary judgment is to be entered "after adequate time for discovery and upon motion, against a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial." Celotex Corp. v. Catrett, 477 U.S. 317, 322 (1986).

B. The Federal and Pennsylvania Wiretapping Acts

Title III of the Federal Omnibus Crime Control and Safe Streets Act of 1968 "governs the interception of wire, electronic and oral communications by the government and private parties." United States v. Longoria, 177 F.3d 1179, 1181 (10th Cir. 1999). In particular, § 802 of the legislation, Pub. L. 90-351, Title III, June 19, 1968, 82 Stat. 213, codified at 18 U.S.C. § 2511, provides that any person who:

> (c) intentionally discloses, or endeavors to disclose, to any other person the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection;
>
> (d) intentionally uses, or endeavors to use, the contents of any wire, oral, or electronic communication, knowing or having reason to know that the information was obtained through the interception of a wire, oral, or electronic communication in violation of this subsection . . .
>
> shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

18 U.S.C. § 2511; see also18 U.S.C. § 2520 (creating a civil cause of action against the person

or entity engaged in a violation of this act.). The Federal Wiretapping Act thus creates civil and criminal causes of action against those who intentionally use or disclose to another the contents of a wire, oral, or electronic communication, knowing or having reason to know that the information was obtained in violation of the statute. See Bartnicki v. Vopper, 200 F.3d 109, 114 -15 (3d Cir. 1999). In order to establish a violation of the Federal Wiretapping Act, a plaintiff must satisfy two elements: "the interception must have violated the law, and the defendant must have known or had reason to know this when he disclosed the contents of the intercepted communication." Nix v. O'Malley, 160 F.3d 343, 348 (6th Cir. 1998).

The Pennsylvania Wiretapping and Electronic Surveillance Control Act (the "Pennsylvania Wiretapping Act") contains a similar provision. It provides:

> (a) Cause of action.-Any person whose wire, electronic or oral communication is intercepted, disclosed or used in violation of this chapter shall have a civil cause of action against any person who intercepts, discloses or uses or procures any other person to intercept, disclose or use, such communication . . . .

18 Pa. Cons. Stat. § 5725; see Bartnicki, 200 F.3d 115.

Both the federal and state statutes regulate the interception of only certain types of communications. See Longoria, 177 F.3d at 1181; Agnew v. Dupler, 717 A.2d 519, 522 (Pa. 1998). In the context of this case, the precise question is whether Ms. Miller's conversations within the call center constitute protected "oral communications," a term of art specifically defined in the federal and state legislation.

Under the Wiretapping Act, a protected "oral communication" is defined as "any oral communication uttered by a person exhibiting an expectation that such communication is not subject to interception under circumstances justifying such expectation." 18 U.S.C. § 2510(2). The Pennsylvania Wiretapping Act defines "oral communication" in language almost identical to its federal counterpart:

> Any oral communication uttered by a person possessing an expectation that such communication is not subject to interception under circumstances justifying such expectation. The term does not include any electronic communication.

18 Pa. Cons. Stat. § 5702.

Defendants contend that a sine qua non of recovery under either statute is a reasonable expectation of privacy in the recorded conversation itself. (Defs. Supp. Brief, Dkt. Entry 44, at 10.) Plaintiff, on the other hand, argues that she need only show a reasonable expectation that the conversation will not be intercepted. (Pl.'s Opp'n Brief, Dkt. Entry 48, at 11.)

Plaintiff's position has been considered and rejected by the Pennsylvania Supreme Court in the context of a claim under the Pennsylvania Wiretapping Act. See Agnew v. Dupler, 717 A.2d 519 (Pa. 1998).[9] In Agnew, Michael Dupler, the chief of police, manually activated an

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[9]Regrettably, neither party cited this controlling case authority in briefing on the summary judgment motion. Plaintiff did cite Agnew in her brief in opposition to the motion to dismiss. (Dkt. Entry 16 at 16.) Significantly, Plaintiff acknowledged at that time that "a conversation amounts to a protected 'oral communication' under the Pennsylvania Wiretapping Control Act only where the speaker possessed a reasonable expectation of privacy in the conversation." (Id.) Whether a reasonable expectation of privacy in the conversation existed

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intercom on one of the phones in the squad room, a common area consisting of four desks, two counters and four phones, in order to investigate a morale problem within the department. Id. at 35-36. He then walked to his office, some thirty feet away, "closed the door [ ], turned off the light, and waited for the patrolmen to enter the squad room during the upcoming 11:00 p.m. shift change." Id. at 36. Plaintiff Agnew later entered the room, made a few comments to two fellow patrolmen, prepared for his shift, and left without making any disparaging comments about the department or Chief Dupler. Id. Agnew later found out he was being secretly recorded. Id. at 37. Mr. Agnew brought an action under the Pennsylvania Wiretapping Act.

Mr. Agnew, appealing a compulsory nonsuit, argued that the trial court applied an improper standard in determining whether the conduct at issue was proscribed by the Pennsylvania statute. Like Ms. Miller here, Mr. Agnew argued that "the proper standard is whether the speaker had a justifiable expectation that his words will not be seized and carried away through the use of a device, as opposed to whether or not the speaker had a justifiable expectation of privacy." Id. at 522. In rejecting this contention, the court explained that any expectation of non-interception of a conversation must be assessed "in accordance with the principles surrounding the right of privacy, for one cannot have an expectation of non-

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could not be determined on a motion to dismiss. Now that the matter is before the Court on a fully developed record, Plaintiff has taken the position that a reasonable expectation of non-interception should be the standard.

interception absent a finding of a reasonable expectation of privacy." Id. at 523. The court explained that to determine whether there was "an expectation of privacy in one's activities, a reviewing court must first examine whether the person exhibited an expectation of privacy; and second, whether that expectation is one that society is prepared to recognize as reasonable." Id. The court concluded that an "oral communication" falls within the purview of the Wiretapping Act "only where the speaker possessed a reasonable expectation of privacy in the conversation." Id. (emphasis added). Thus, under Pennsylvania law, Ms. Miller must show more than a reasonable expectation of non-interception; she must show a reasonable expectation of privacy in the conversation.

Case law interpreting the federal wiretap law also overwhelmingly supports the proposition that a plaintiff must have a reasonable expectation of privacy in the intercepted conversation itself. See, e.g., United States v. Dunbar, 553 F.3d 48, 57 (1st Cir. 2009); Kee v. City of Rowlett, Texas, 247 F.3d 206, 211 n.8 (5th Cir. 2001); United States v. Peoples, 250 F.3d 630, 637 (8th Cir. 2001) ("Before the interception of a conversation can be found to constitute . . . an 'oral communication' under the federal wiretap law, . . . the individuals involved must show they had a reasonable expectation of privacy in that conversation."); Longoria, 177 F.3d at 1181-82; United States v. Foster, 985 F.2d 466, 469 (9th Cir. 1993); United States v. McKinnon, 985 F.2d 525, 527-28 (11th Cir. 1993); In re: John Doe Trader No. One, 894 F.2d 240, 242-43 (7th Cir. 1990). This impressive string of appellate court precedent

is premised upon the congressional expression of intent that the term "oral communication" is to be understood "in light of the constitutional standards expressed in Katz v. United States, 389 U.S. 347 (1967)." McKinnon, 985 F.2d at 527. As stated in Longoria, 177 F.3d at 1181, "[t]he legislative history of Title III instructs that Congress intended this definition [of "oral communications"] to parallel the 'reasonable expectation of privacy test' articulated . . . in Katz . . . ." See also State v. Duchow, 749 N.W.2d 913, 919-20 (Wis. 2008) (examining and following federal case law in concluding that the Wisconsin legislature incorporated a reasonable expectation of privacy standard into the meaning of "oral communication" in state wiretap law). Although it does not appear that the Court of Appeals for the Third Circuit has addressed the issue presented here, the fact that seven United States Courts of Appeals have concluded that there must be a reasonable expectation of privacy in the conversation for a communication to fall within the purview of the federal legislation; Plaintiff has not cited any contrary authority; and Congress has indicated that only communications for which there is a reasonable expectation of privacy are protected, this Court concludes that Plaintiff must show more than a reasonable expectation of non-interception.[10]

Application of the reasonable expectation of privacy standard here compels the

[10]In Boddie v. American Broadcasting Companies, Inc., 731 F.2d 333, 338-39 (6th Cir. 1984), the court indicated that a reasonable expectation of non-interception was the appropriate standard. The court, however, did not refer to the legislative history of the federal wiretap law. Furthermore, the facts of the case indicated that the plaintiff had been led to believe that her interview with broadcast journalists was not being recorded.

conclusion that Defendants are entitled to judgment in their favor on both the federal and state wiretap law claims. Pertinent factors considered in reaching this conclusion, articulated in Kee, 247 F.3d at 213 -15, included:

> (1) the volume of the communication or conversation; (2) the proximity or potential of other individuals to overhear the conversation; (3) the potential for communications to be reported; (4) the affirmative actions taken by the speakers to shield their privacy; (5) the need for technological enhancements to hear the communications; and (6) the place or location of the oral communications as it relates to the subjective expectations of the individuals who are communicating.

Ms. Miller communicated at a volume sufficient to be captured by a recorder on a phone console activated by leaving the handset off its proper resting place. It is evident that there were persons in the area who could hear Ms. Miller. There was a clear potential for the communications of Ms. Miller to be reported, as her alleged rudeness and insubordination had been reported on prior occasions. There is no evidence that Ms. Miller sought to shield her communications. There is also no evidence that sophisticated technological enhancements were used to capture the conversations. All that was used was the recording apparatus with which Ms. Miller was familiar. Finally, the recording occurred in an open work area where several dispatchers performed their responsibilities. There was not only no expectation of privacy as to communications occurring within the communications center, there was an explicit understanding that certain conversations would be recorded and periodically reviewed.

In similar settings, courts have found that a party whose conversations were recorded did not have a viable claim under wiretap legislation. For example, in Agnew, supra,

conversations with one patrolman could be heard by the other, as well as anyone else in the police station squad room. 717 A.2d at 524. In addition, the door to the squad room was open, so the conversation could be heard outside the squad room without the intercom. Id. Finally, the Court noted that the intercom lines on the phones could be open at any time so that conversations could be heard anywhere within the building. Id. at 42.

The facts in Agnew parallel those in this matter and require the same outcome. As in Agnew, Ms. Miller engaged in conversations in a public room with two co-workers. Ms. Miller also knew that her conversations could be recorded given the circumstances of her employment – she worked at a call center where all calls were automatically recorded. Ms. Miller is understandably frustrated that her conversations were recorded, but she did not have a reasonable expectation of privacy in engaging in those conversations.

Another case that has parallels to the facts presented here is Wesley v. WISN Division-Hearst Corp., 806 F. Supp. 812, 815 (E.D. Wis. 1992). The plaintiff in Wesley, a business employee at a broadcast station, was found not to have an expectation of privacy in conversations with others. The plaintiff, Wesley, spoke frequently to a co-worker about station management at her co-worker's workplace in the station newsroom. Id. at 813. In the middle of the desk of her co-worker's workplace was six-inch long microphone used for broadcasting. Id. at 815. The Court found that Wesley, "with a general knowledge of what the broadcast microphone does, would have known that the detection of comments made close to the

microphone was a distinct possibility. The microphone and its position should have put Wesley on notice that her comments might be intercepted." Id.

Finally, in John Doe, supra, "Doe," while on the trading floor of the Chicago Mercantile Exchange, made statements that an FBI agent both heard and recorded on a recording device concealed in the agent's jacket. Id. at 241. The Seventh Circuit, affirming the trial court, found that the statements made by Doe were not protected oral communications, nor were they susceptible to interception according to the definitions of those terms in 18 U.S.C. § 2510. Id. at 246. The court reasoned that "by exposing these statements to the public in this manner, Doe cannot now contend that he reasonably believed his conversations were private . . . ." Id. at 243. The court explained that "Doe exposed his discussions to those around him and took the risk that his statements would be overheard and recorded. The environment of the trading floor, the presence of the agent and other traders all indicate that a reasonable expectation of privacy did not exist."[11] Id. at 245.

Like the plaintiffs in Wesley and Doe, Ms. Miller did not have an expectation of privacy, (or even of non-interception), in engaging in conversations in the console area of the Carbon County call center. First, as an experienced dispatcher of twenty-three years, over ten with Carbon County, Ms. Miller knew the radios and consoles recorded conversations. In her

[11] Significantly, the court also held that a Mercantile Exchange rule that prohibited, inter alia, recording devices on the trading floor did not provide a basis for a reasonable expectation of privacy. Id. at 244.

deposition, she stated she knew that, even if a call was not coming in, if the handset was removed, or not properly placed, on any of the four consoles, the phone automatically recorded the conversations. (Miller Dep., Dkt. Entry 43-2, at 11.) She also knew that recordings were made from the console phones, and that quality assurance reviews of recordings were conducted routinely. (Id. at 12.) The presence of the radios and consoles, and the constant recording that took place at each console, put Ms. Miller on notice that conversations in that area could be recorded.

More importantly, Ms. Miller engaged in conversations in a public area with two co-workers. She was not in a private office, nor in a location where she would not be overheard by a passerby. Her conversations were not private in any respect. Each co-worker overheard what Ms. Miller said to the other. In short, there simply cannot be an expectation of privacy when engaging in conversations with two co-workers in a public area designed for recording not only incoming and outgoing emergency calls, but also ambient sounds in the communications center. Accordingly, Defendants will be granted summary judgment on the wiretap law claims.

C. Pennsylvania Whistleblower Law

The Pennsylvania Whistleblower Act, 43 Pa. Cons. Stat. § 1421 et seq., in pertinent part, provides:

> [no] employer may discharge, threaten or otherwise discriminate or retaliate against an employee regarding the employee's compensation, terms, conditions, location or privileges of employment because the employee . . . makes a good faith report or is about to report, verbally or in writing, to the

> employer or appropriate authority an instance of wrongdoing or waste.

43 Pa. Cons. Stat. § 1423(a). The Act's scope is limited to employees discharged from governmental entities or any other "public body" which is created or funded by the government. See 43 Pa. Cons. Stat. § 1422; see also Krajsa v. Keypunch, Inc., 622 A.2d 355, 360 (1993).

The employee alleging the violation is statutorily required to:

> show by a preponderance of the evidence that, prior to the alleged reprisal, the employee or a person acting on behalf of the employee had reported or was about to report in good faith, verbally or in writing, an instance of wrongdoing or waste to the employer or an appropriate authority.

43 Pa. Cons. Stat. § 1424(b). If the plaintiff is successful in meeting his or her prima facie burden, then, to establish a defense to the action, a defendant must prove "by a preponderance of the evidence that the action by the employer occurred for separate and legitimate reasons, which are not merely pretextual." 43 Pa. Cons. Stat. § 1424(c); O'Rourke v. Pennsylvania, 778 A.2d 1194, 1200 (Pa. 2001).

Defendants argue that Ms. Miller is not entitled to pursue a claim under the Pennsylvania Whistleblower Act because she cannot show that she made a report of "wrongdoing." (Defs.' Br. Supp. Mot. Summ. J., Dkt. Entry 44, at 19.) The term "wrongdoing" has a specific statutory definition. Wrongdoing is defined as "[a] violation which is not of a merely technical or minimal nature of a Federal or State statute or regulation, of a political subdivision ordinance or regulation or of a code of conduct or ethics designed to protect the interest of the public or the employer." 43 Pa. Cons. Stat. § 1422. Good faith reports of conduct

that do not constitute "wrongdoing" will not support a claim under the Whistleblower Act See Riggio v. Burns, 711 A.2d 497, 501-503 (Pa. Super. Ct. 1998) (finding the regulatory statutes cited by appellant "entirely too general and vague to permit the conclusion that a violation had occurred amounting to 'wrongdoing' under the Whistleblower law."); McNamee v. County of Allegheny, 2007 WL 2331878, at *6 (W.D. Pa. 2007) ("[T]he regulations to which plaintiff cites are too general and vague to permit the conclusion that they were violated in a manner amounting to "wrongdoing" under the Whistleblower Law."); Keefer v. Durkos, No. CIV A 304-187, 2006 WL 2773247 (W.D. Pa. Sept. 25, 2006); cf. Surmacz v. Dep't of Pub. Welfare, 612 A.2d 566, 568 (Pa. Commw. Ct. 1992) (finding that the petitioner's allegations that defendant violated an unwritten treatment team policy insufficient to establish "wrongdoing" because of the absence of a written code of conduct.).

For example, in Keefer, suit was brought against the members of a school board under the Pennsylvania Whistleblower statute alleging that Suzanne Keefer was relieved from her position as board secretary for filing a complaint to the Auditor General that a member of the school board "improperly, and possibly illegally," bought food through the school cafeteria for non-school activities without paying taxes on the food. Keefer, 2006 WL 2773247, at *3 - *6. The court ultimately found that Keefer had failed to produce evidence of illegal activity. Id. at *12. First, her complaint to the Auditor General expressed doubt as to whether the school district was compensated for purchasing untaxed food, as she stated that she believed it was improper and possibly illegal. Id. Second, the Ethics Commission conducted an investigation

and did not find any wrongdoing, and no school district policy was violated. Id. at *13. And third, there was a lack of evidence on the record that the school board engaged in any wrongdoing. Id.

As in Keefer, Riggio, and McNamee, Plaintiff in this case did not report "wrongdoing." As already discussed, interception of workplace conversations occurring in common areas like the communication center does not violate the federal or Pennsylvania laws. Indeed, the Pennsylvania Supreme Court's 1998 decision in Agnew plainly foreclosed any finding of a violation of the state wiretap law for deliberate interception of communications occurring in a common work area, circumstances indistinguishable from those presented here.[12] Thus, it is unsurprising that the Carbon County District Attorney told Plaintiff that there would be no criminal action against any person. There is also no basis for a conclusion that the recording of conversations violated federal law. In short, Plaintiff's report did not reveal "wrongdoing" as that term is defined in the applicable legislation. Apart from these allegations under the Wiretapping laws, Ms. Miller does not allege that Defendants violated any other written policy, code, statute, ordinance, or regulation.[13] Therefore, Plaintiff's claim under the Pennsylvania Whistleblower

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[12]Agnew also compels a finding that Plaintiff did not make a "good faith report" of a violation of the wiretap laws. A "good faith report" is one that the "person making the report has reasonable cause to believe is true." 43 Pa. Cons. Stat. § 1422. Given the facts of Agnew, a reasonable person would not believe that the wiretap laws had been violated in this case.

[13]Even assuming that Defendants acted negligently, there is still no violation under § 1822. Riggio, 711 A.2d at 502.

law is without merit.[14]

III. CONCLUSION

For the reasons set forth in the foregoing memorandum, Defendants' Motion for Summary Judgment will be granted. An appropriate Order follows.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge

[14]Even if Plaintiff had made a good faith report of a violation of a code or statute under the Pennsylvania Whistleblower Law, Defendants established a defense to her claim by showing a legitimate reason for her termination. Defendants have pointed to her mishandling of a suicide call on August 31, 2005, an instance completely independent of Plaintiff's report to the county district attorney. While Plaintiff disputes the soundness of the decision, she has not submitted evidence that Defendants' reason was somehow a pretext for her termination. Significantly, she does not contest the accuracy of the facts reported by Ms. Kruzik in her memorandum of September 2, 2005. (Dkt. Entry 43-3, at 15-16.) Those facts plainly disclose that a call from a person expressing suicidal inclinations was not handled properly. Nor has she presented evidence that suggests that another Carbon County dispatcher would not have been discharged under similar circumstances. In this regard, she does not dispute the fact that she had received a number of disciplinary sanctions leading up to her dismissal. Under these circumstances, no reasonable juror could find that the reason for Ms. Miller's firing was a pretext to retaliate for having asserted a violation of the wiretap laws.

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF PENNSYLVANIA

MARY T. MILLER, Plaintiff	:	
v.	:	3:CV-06-0463
	:	(JUDGE VANASKIE)
MARY P. KRUZIK, GARY WILLIAMS, RANDALL SMITH, WILLIAM J. O'GUREK, CHARLES GETZ, WAYNE NOTHSTEIN AND CARBON COUNTY, Defendants	:	

ORDER

NOW, THIS 23rd DAY OF FEBRUARY, 2009, for the reasons stated in the foregoing memorandum, IT IS HEREBY ORDERED THAT:

1. Defendants' Motion for Summary Judgment (Dkt. Entry 42) is GRANTED. Judgment shall be entered in favor of Defendants and against Plaintiff.

2. The Clerk of Court is directed to mark this matter CLOSED.

s/ Thomas I. Vanaskie
Thomas I. Vanaskie
United States District Judge