

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

LOIS SCHOFIELD,	:	
	:	
Plaintiff,	:	CIVIL ACTION FILE
	:	
v.	:	NO. 1:13-CV-03340-SCJ
	:	
ATLANTA WOMEN’S CENTER,	:	
INC.,	:	
	:	
Defendant.	:	
	:	

**DEFENDANT’S REPLY BRIEF IN SUPPORT OF ITS
MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND/OR OTHER
EVIDENCE REGARDING SECRETLY RECORDED TELEPHONE
CONVERSATIONS BETWEEN PLAINTIFF AND OTHER INDIVIDUALS**

This Court should not defer its ruling on AWC’s Motion *in Limine* to preclude the audio-recorded telephone conversations that Schofield surreptitiously acquired. If the Court defers until trial its admissibility ruling regarding the secretly recorded conversations, it will give Schofield an opportunity to confuse and improperly influence the jury. Although Schofield states that “she may not offer” the recordings at trial, the temptation of presenting the recordings at trial is much too great to ignore at this juncture of the litigation. (Pl.’s Opposition Brief, p. 2, ECF No. 92.) This case should be about the facts, and not about the sympathy that Schofield may attempt to elicit from the jury vis-à-vis the unreliable and

largely after-the-fact recordings that she obtained without the knowledge of the other participants. Accordingly, the Court should rule on AWC's Motion *in Limine* now and rule in AWC's favor.

I. SCHOFIELD CONCEDES THAT MOST OF THE SECRETLY RECORDED CONVERSATIONS ARE INADMISSIBLE AT TRIAL, WHILE THE REMAINING DISPUTED EXCERPTS ARE IRRELEVANT.

Schofield concedes that matters concerning her "ADA claim . . . [are] irrelevant, inasmuch as the Court has dismissed that claim." (Pl.'s Opposition Brief, p. 6, ECF No. 92.) It is also undisputed that any settlement discussions captured by the secretly recorded conversations should be precluded at trial. (*Id.*) The only remaining issue is whether the recorded excerpts of Schofield asking to return to a full-time CRNA schedule are appropriate for the jury's consumption (the "Remaining Disputed Excerpts"). The answer is simply "no."

The Court's relevancy analysis hinges on whether the Remaining Disputed Excerpts advance Schofield's *prima facie* claim that AWC failed to reengage her as a CRNA contractor *because of* her age. They do not. Schofield contends that the secretly recorded conversations are relevant because they show that: (1) Schofield asked to resume her CRNA contractor engagement on a "full-time" basis in June, 2011 (notably, before she was released to work by her physician); (2) AWC declined her request; and (3) AWC invited her to work as a substitute

CRNA. (Pl.’s Opposition Brief, pp. 3-4, ECF No. 92.) Schofield offered no rebuttal to the fact that none of the speakers referred to her age as the reason for AWC’s decision to decline Schofield’s request to return. Schofield also offered no counterargument to the fact the Remaining Disputed Excerpts discuss Schofield’s belief that she had fully recovered from hip replacement surgery—a fact that is germane only to her dismissed ADA claim. At no point in the Remaining Disputed Excerpts did Schofield complain about age-related bias. Simply put, the Remaining Disputed Excerpts do not advance the ball on whether AWC made its decision to part ways with Schofield solely because of her age. Accordingly, the secretly recorded conversations, inclusive of the Remaining Disputed Excerpts, are irrelevant and should be excluded at trial.

II. SCHOFIELD FAILS TO PROVIDE AN EXPLANATION WHY THE SECRETLY RECORDED CONVERSATIONS ARE INCOMPLETE.

Schofield’s Opposition Brief fails to assure the Court that the secretly recorded conversations are trustworthy. Although Schofield cites her Declaration in Support of Plaintiff’s Response to Defendant’s Second Motion for Summary Judgment (ECF No. 58-3) to show that the secretly recorded conversations are authentic, Schofield’s Declaration failed to affirm her competency to operate a recording device, the fidelity of the recording equipment, and why the secretly recorded conversations had deletions. *United States v. Reeves*, 742 F.3d 487, 501

(11th Cir. 2014) (a party seeking admission of audio-recorded material “must establish that [the recording] is an accurate reproduction of relevant sounds previously audited by a witness” and she “carries the burden of proving: (1) the competency of the operator; (2) the fidelity of the recording equipment; (3) the absence of material deletions, additions, or alterations in the relevant portions of the recording; and (4) the identification of the relevant speakers”). Rather than supply the Court with the necessary facts to ensure that the recordings are appropriate for the jury’s ears, Schofield asks the Court to allow her to authenticate the recordings at trial. However, if Schofield cannot supply the Court with these facts now, it logically follows that she is unable to supply them at all.

Schofield’s contention under Rule 801 relating to party admissions also fails for the same reasons set forth in the preceding paragraph. Specifically, the secretly recorded conversations are not sufficiently reliable for Schofield to establish that the other speakers could bind AWC. The Court should not bind AWC to recorded statements that have suspect reliability. Accordingly, the Court should grant the instant Motion in AWC’s favor.

III. THE REMAINING DISPUTED EXCERPTS ARE HIGHLY PREJUDICIAL TO AWC'S DEFENSE AND SCHOFIELD INTENDS TO USE THE EXCERPTS TO REEMPHASIZE UNDISPUTED FACTS IN THIS CASE.

The Court should exclude the Remaining Disputed Excerpts because they are highly prejudicial to AWC. For the sake of brevity, AWC respectfully refers the Court to its opening Brief as to its arguments regarding the highly prejudicial nature of the secretly recorded statements. In Schofield's Opposition Brief, she raised another ground for precluding the secretly recorded conversations at trial under Federal Rule of Evidence 403. That is, Schofield does not view the secretly recorded conversations as integral to her case, and she intends to use the secretly recorded conversations to establish factual matters that are undisputed.

Under Rule 403, the Court "may exclude relevant evidence if its probative value is substantially outweighed by a danger of . . . needlessly presenting cumulative evidence." Fed. R. Evid. 403. Schofield contends that the Remaining Disputed Excerpts are relevant because they show that she asked to resume her CRNA contractor engagement on a "full-time" basis in June, 2011; AWC declined her request; and AWC invited her to work as a substitute CRNA. (Pl.'s Opposition Brief, pp. 3-4, ECF No. 92.) However, AWC has already included these exact facts in its prior submissions to this Court, including most notably, in Defendant's

Outline of the Case and Trial Brief.¹ Moreover, in AWC's Second Motion for Summary Judgment, AWC identified as undisputed Schofield's request to return to a full time CRNA engagement, AWC's decision to decline her request, and AWC's ensuing offer to Schofield to become a substitute CRNA contractor. (*See* AWC's Statement of Undisputed Facts in Support of its Second Motion for Summary Judgment ¶¶ 74-78, ECF No. 51-2.) Because Schofield intends to use the secretly recorded conversations to establish factual matters that are undisputed, they are needlessly cumulative under Rule 403. Thus, the Court is within its power to exclude the secretly recorded conversations, and it should do so here.

IV. CONCLUSION

Schofield's arguments in her Opposition Brief confirm that the secretly recorded conversations are irrelevant to this dispute, untrustworthy, present

¹ (*See* Proposed Pretrial Order, Attachment "D," Defendant's Outline of the Case, p. 6 ("On June 8, 2011, Schofield asked an AWC outside consultant named Ruth Arick if she could return to providing services at AWC around June 10, 2011. As of that date, Schofield had not provided AWC with a medical certification indicating that she could return to work. During the call, Arick told Schofield that she would not be permitted to resume her "full-time" CRNA engagement with AWC, and told her to call Lazarus, which she did that day. During the call between Lazarus and Schofield, he told her that she would not be permitted to resume her "full-time" CRNA engagement because AWC did not want to jeopardize her health and the safety of AWC's patients. However, Lazarus left open the possibility of allowing Schofield to fill in on occasion as a substitute CRNA contractor, which Schofield has acknowledged is less strenuous."); *see also id.*, Attachment "H-2," Defendant's Trial Brief, pp. 7-8 (same).)

needless cumulative evidence, and are highly prejudicial to AWC. For the reasons set forth in AWC's opening Brief and the instant Reply Brief, AWC respectfully requests that its Motion *in Limine* to preclude testimony and/or other evidence regarding the secretly recorded conversations be granted in its entirety.

Respectfully submitted, this 30th day of December, 2016.

/s/ Catherine T. Barbieri

Catherine T. Barbieri, Esquire

(PA ID No. 78350)

Franz Español, Esquire

(PA ID No. 313707)

Fox Rothschild LLP

2000 Market Street, Twentieth Floor

Philadelphia, PA 19103-3222

Telephone: (215) 299-2839

Facsimile: (215) 299-2150

cbarbieri@foxrothschild.com

fespanol@foxrothschild.com

Admitted *pro hac vice* and

/s/ Glianny Fagundo

Glianny Fagundo, Esquire

(GA Bar No. 254033)

Taylor English Duma LLP

1600 Parkwood Circle, Suite 400

Atlanta, Georgia 30339

Telephone: 770 434-6868

Facsimile: 770 434-7376

gfagundo@taylorenghish.com

*Counsel for Defendant, Atlanta Women's Center,
Inc.*

RULE 7.1 CERTIFICATION OF COMPLIANCE

I certify that the foregoing DEFENDANT’S REPLY BRIEF IN SUPPORT OF ITS MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND/OR OTHER EVIDENCE REGARDING SECRETLY RECORDED TELEPHONE CONVERSATIONS BETWEEN PLAINTIFF AND OTHER INDIVIDUALS was prepared by using Times New Roman 14-point font in compliance with Local Rule 5.1(B).

/s/ Catherine T. Barbieri
Counsel for the Defendant

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CERTIFICATE OF SERVICE

I hereby certify that on December 30, 2016, I electronically filed DEFENDANT’S REPLY BRIEF IN SUPPORT OF ITS MOTION *IN LIMINE* TO PRECLUDE TESTIMONY AND/OR OTHER EVIDENCE REGARDING SECRETLY RECORDED TELEPHONE CONVERSATIONS BETWEEN PLAINTIFF AND OTHER INDIVIDUALS with the Clerk of Court using the CM/ECF system which will automatically send email notification of such filing to the following attorneys of record:

Nicholas G. Dumich, Esquire
ndumich@bellsouth.net

John C. Jones, Esquire
Jcjones1234@bellsouth.net

George M. Weaver, Esquire
gweaver@hw-law.com

Attorneys for Plaintiff

/s/ Franz Espanol

Franz Español, Esquire
Counsel for Defendant