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Federal Judge Finds PETA Investigative Technique Unlawful

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The animal rights group, People for the Ethical Treatment of Animals (PETA), has been known to utilize “undercover” video and other methods in conducting investigations of animal enterprises. One of those techniques was recently found unlawful by a federal court district. *PETA v. Tri-State Zoological Park of W. Maryland*, 2018 WL 5761689, No. 1:17-cv-02148 (D. Md. Nov. 1, 2018).

PETA brought the case under the Endangered Species Act (ESA) challenging the conditions in which defendants, a zoological park in Cumberland, Maryland and its owners and operators, maintained certain animals. “[A]t the direction of its counsel, and in anticipation of filing this lawsuit,” PETA collected evidence against defendants by “deploy[ing] undercover investigators who posed as volunteers offering their services to the Zoo,” thereby gaining entry to the facility and denying that they had “any affiliation with an animal-rights organization.” *Id.* at *1. The operatives made more than 300 photographs and 70 video recordings, some of which appeared to record conversations between PETA investigators and one of the individual defendants. PETA admitted in its deposition that its agents “‘would not have asked [for] permission’ to record audio.” *Id.* at *7.

Among other motions, defendants filed a motion for sanctions seeking to dismiss the action for PETA having illegally obtained evidence. *Id.* at *6. Specifically, defendants argued that the video tapes made by PETA operatives recorded the audio of unconsenting persons in violation of the Maryland Wiretap Act. The court agreed with defendants:

Under Maryland’s Wiretap Act, a person must obtain all parties’ consent before recording oral communications. Md. Code, Cts. & Jud. Proc. § 10-402. ... PETA’s own internal memorandum and deposition testimony strongly suggest that certain of its video recordings also include audio. ... Further PETA appears to have unlawfully recorded audio without first obtaining consent of those who were recorded. Such recordings violate the Wiretap Act and will be excluded entirely from this case.

Id. at 6-7 (citations omitted). The court declined to dismiss the case in light of “the strong public policy in favor of deciding cases on the merits,” *id.* at 7, reasoning that a lesser sanction, namely, the evidentiary exclusion — coupled with a strong warning to PETA as to future actions — would be sufficient:

[A]s to any video recorded with audio, those videos will not be accepted as evidence for any and all purposes in future court proceedings. Md. Code, Cts. & Jud. Proc. § 10-405. Exclusion of such evidence, in the Court's view, cures any prejudice that otherwise would have been visited on Defendants. At this stage in the litigation, and now that PETA has been specifically put on notice regarding the lawful limits of its investigative techniques, the Court does not believe additional sanction is warranted. ... Any future violations, however, will be viewed as knowing, willful and contemptuous, and will be sanctioned accordingly.

Id. (citation omitted).

Maryland is a so-called "two-party" state in which all participants in a recorded conversation must consent for the recording to comply with the wiretap law. Ten other states have similar laws. In other states and at the federal level, only one of the participants' consent is needed ("one-party consent") for the recording to be lawful.

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