

IN THE UNITED STATES DISTRICT COURT FOR THE  
WESTERN DISTRICT OF MISSOURI  
WESTERN DIVISION

GRANT M. GUNDERSON, )  
 )  
 Plaintiff, )  
 )  
 vs. ) Case No. 02-1078-CV-W-ODS  
 )  
 LORI A. GUNDERSON and )  
 JOHN ALLINDER, )  
 )  
 Defendants. )

ORDER GRANTING DEFENDANT ALLINDER'S MOTION TO DISMISS COUNT II

Pending is Defendant Allinder's Motion to Dismiss Count II for failure to state a claim. (Doc. #4). The motion is granted, and Count II is dismissed.

I. BACKGROUND

The Plaintiff alleges in Count II of his Complaint that John Allinder violated the federal wiretapping statute and is civilly liable to Plaintiff. Plaintiff claims that Allinder directed Lori Gunderson to record Plaintiff's conversations. In Count II of Plaintiff's Complaint, he states that Allinder "instructed, encouraged, counseled and procured Lori Gunderson to intercept, disclose or use Plaintiff's wire or oral communications, all in violation of 18 U.S.C. § 2511." (Complaint ¶ 14). Plaintiff further alleges that he is entitled to damages of no less than \$10,000 pursuant to 18 U.S.C. § 2520(c)(2). (Complaint ¶ 15). Allinder moves to dismiss Count II alleging that the civil action created for a violation of section 2511 is only applicable against the party that commits the violation, not one who allegedly procures another to commit the violation. Allinder argues that because the facts asserted by Plaintiff do not support a finding of a violation of the statute by him, Count II should be dismissed.

## II. DISCUSSION

### A. Standard

A motion to dismiss for failure to state a claim should be granted when it appears that "the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Davis v. Hall, 992 F.2d 151, 152 (8th Cir. 1993) (citing Conley v. Gibson, 355 U.S. 41, 45-46 (1957)). In ruling on a motion to dismiss, the Court is required to view the facts alleged in the complaint in the light most favorable to the plaintiff.

### B. Federal Wiretap Act

The Wiretap Act provides for both criminal and civil liability for violation of its provisions. Criminal liability is provided for in 18 U.S.C. § 2511.

(1) Except as otherwise specifically provided in this chapter any person who -

(a) intentionally intercepts, endeavors to intercept, or procures any other person to intercept or endeavor to intercept, any wire, oral, or electronic communication;. . . shall be punished as provided in subsection (4) or shall be subject to suit as provided in subsection (5).

The private right of action is found in 18 U.S.C. § 2520.

(a) Except as provided in section 2511(2)(a)(ii), any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

The Eighth Circuit has not addressed whether section 2520(a) applies to individuals who "procure" another person to violate section 2511 by encouraging them to intercept or endeavor to intercept a wire, oral or electronic communication. However, the Fifth Circuit has held that civil liability only applies against the party that commits the violation and does

not extend to one who procures another to commit a violation. Peavy v. WFAA-TV, Inc., 221 F.3d 158, 169 (5th Cir. 2000).

Plaintiff argues that the Fifth Circuit came to an incorrect conclusion in Peavy. Plaintiff claims that the use of the word “engaged” in section 2520 encompasses procurement of interception. Congress amended section 2520 in 1986 and in doing so replaced “shall (1) 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 communications,” with the language “may in a civil action recover from the person or entity *which engaged in that violation* such relief as may be appropriate.” See 18 U.S.C. § 2520 (1970); 18 U.S.C. § 2520 (1986) (emphasis added). Plaintiff argues that Congress was simply substituting the list of actionable conduct with the word “engaged.”

But, when interpreting statutory language, “if from the plain meaning of the statute Congressional intent is clear, except for rare instances, ‘that is the end of the matter.’” In re Old Fashioned Enterprises, 236 F.3d 422, 425 (8th Cir. 2001) (citing Chevron USA, Inc. v. Natural Res. Def. Council, 467 U.S. 837 (1984)). A court must determine whether the language at issue in a statute has a plain and unambiguous meaning with regard to the particular dispute in the case. Id. at 426 (citing Robinson v. Shell Oil Co., 519 U.S. 337, 340 (1997)). Criminal liability is found under 18 U.S.C. § 2511 for one who procures another person to intercept or endeavors to intercept a communication, but that broad language is not found in Section 2520. Section 2520 is limited to “any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.” 18 U.S.C. § 2520.

When Congress amends a statute, it is presumed that the change is made for a purpose and that the amendment is intended to have “real and substantial effect.” Stone v. I.N.S., 514 U.S. 386, 397 (1995). In amending 18 U.S.C. § 2520, Congress changed the statute. The language that allowed an individual to bring a civil action against a person who procured another to intercept communications was taken out, leaving only the individual engaged in the wiretapping civilly liable.

Plaintiff alleges that Allinder directed Lori Gunderson to record Plaintiff's conversations. However, Allinder cannot be held civilly liable for these actions because section 2520 of the federal wiretapping statute does not apply to those who merely "procure" another to violate the statute. Therefore, the motion to dismiss is granted and Count II against Defendant Allinder is dismissed for failure to state a claim.

IT IS SO ORDERED.

Date: April 14, 2003

*/s/ Ortrie D. Smith* \_\_\_\_\_  
ORTRIE D. SMITH, JUDGE  
UNITED STATES DISTRICT COURT