

LAW REVIEW 956

Category 1.4--USERRA Enforcement

Bugged: Be cautious about recording conversations with employers for use in USERRA cases.

CAPT Samuel F. Wright, JAGC, USN (Ret.) • Director, Servicemembers Law Center

Q: I am an Army National Guard officer, and I have been called to active duty three times since the terrorist attacks of Sept. 11, 2001. This is in addition to my weekend drills, annual training, and three state call-ups by the governor. I expect to be called again soon, and I dread my employer's reaction. The employer was very supportive the first time I was called up, in the immediate aftermath of Sept. 11. The second time, the employer's reaction was cool, and the third time, he was downright hostile. The employer now constantly asks me about the likelihood that I will be called up again and gives me a hard time about my drilling weekends and annual training requirements. I have gone from being the junior manager with an "unlimited future" in the company to the guy they barely tolerate and want to get rid of, just because of my military service.

I do not yet have orders in hand for my next mobilization, but I have been told to expect it in about four months. I know you have strongly recommended that the mobilizing servicemember give the employer as much advance notice as possible. I am concerned that if I give the employer four months of advance notice he will have four months to make up a pretext to fire me.

I want to wear a wire when I go to the owner's office to inform him of the likelihood of a new call to active duty. I think it is quite likely the owner will say something negative about the Army when I inform him about the new call-up, but it is also likely he will later deny (even under oath) having said any such thing. Having the employer on tape will protect me from the employer's perjury. What do you think?

A: I urge you to be very cautious in recording the employer. First, make sure that the recording is lawful; rules vary from state to state. I invite your attention to the website www.callcorder.com/phone-recording-law-america-htm ("United States Telephone Recording Laws"). "The U.S. federal law allows recording of phone calls and other electronic communications with the consent of at least one party to the call. A majority of the states and territories have adopted wiretapping statutes based on the federal law, although most have also extended the law to cover in-person conversations. Thirty-eight states and Washington, D.C., permit recording phone conversations to which they are a party without informing the other parties that they are doing so. Twelve states require, under most circumstances, the consent of all parties to a conversation. Those jurisdictions are California, Connecticut, Florida, Illinois, Maryland, Massachusetts, Michigan, Montana, Nevada, New Hampshire, Pennsylvania, and Washington."

Do not assume that one-party taping is lawful in your state, just because your state is not one of the 12 listed above. Laws can change rapidly. Consult an attorney in your state before you record a meeting or telephone conversation. You should also determine if your employer has a published rule (maybe in the employee handbook) against recording or possessing recording devices at work. If the employer is looking for an excuse to fire you, the last thing you want to do is give him such an excuse by violating a company rule.

I have seen circumstances where recorded conversations, showing clear expressions of anti-military animus against an employee who was later fired, have been valuable in litigation. But remember that once you go down this adversarial road, it will be virtually impossible to restore a normal employer-employee relationship. I advise recording only in the most unusual circumstances, and only with the prior, considered advice of an attorney.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.