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Is it Lawful for me To Record my Employer Ranting and Raving about his Hostility to my USAR Service?

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[Update on Sam Wright](#)

1.4—USERRA enforcement

Q: I am a Specialist (E-4) in the Army Reserve. I have read with great interest several of your “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). On the civilian side, I work as the cook for a small diner—let’s call it Bob & Edward’s Diner, in a small town in Texas.

Edward Jones is the owner-operator of the diner. Whenever I need time off from my civilian job for Army Reserve training or service, Mr. Jones gives me a very hostile response, full of profanity and vulgarity, to the effect that being in the Army Reserve and working for the

¹ I invite the reader’s attention to www.roa.org/lawcenter. You will find more than 1600 “Law Review” articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), the Uniformed Services Former Spouse Protection Act (USFSPA), and other laws that are especially pertinent to those who serve our country in uniform. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics. The Reserve Officers Association (ROA) initiated this column in 1997. I am the author of more than 1400 of the articles.

² BA 1973 Northwestern University, JD (law degree) 1976 University of Houston, LLM (advanced law degree) 1980 Georgetown University. I served in the Navy and Navy Reserve as a Judge Advocate General’s Corps officer and retired in 2007. I am a life member of ROA. For 42 years, I have worked with volunteers around the country to reform absentee voting laws and procedures to facilitate the enfranchisement of the brave young men and women who serve our country in uniform. I have also dealt with the Uniformed Services Employment and Reemployment Rights Act (USERRA) and the Veterans’ Reemployment Rights Act (VRRA—the 1940 version of the federal reemployment statute) for 36 years. I developed the interest and expertise in this law during the decade (1982-92) that I worked for the United States Department of Labor (DOL) as an attorney. Together with one other DOL attorney (Susan M. Webman), I largely drafted the proposed VRRA rewrite that President George H.W. Bush presented to Congress, as his proposal, in February 1991. On 10/13/1994, President Bill Clinton signed into law USERRA, Public Law 103-353, 108 Stat. 3162. The version of USERRA that President Clinton signed in 1994 was 85% the same as the Webman-Wright draft. USERRA is codified in title 38 of the United States Code at sections 4301 through 4335 (38 U.S.C. 4301-35). I have also dealt with the VRRA and USERRA as a judge advocate in the Navy and Navy Reserve, as an attorney for the Department of Defense (DOD) organization called Employer Support of the Guard and Reserve (ESGR), as an attorney for the United States Office of Special Counsel (OSC), as an attorney in private practice, and as the Director of the Service Members Law Center (SMLC), as a full-time employee of ROA, for six years (2009-15). Please see Law Review 15052 (June 2015), concerning the accomplishments of the SMLC. My paid employment with ROA ended 5/31/2015, but I have continued the work of the SMLC as a volunteer. You can reach me by e-mail at SWright@roa.org.

diner shows my “divided loyalty” and that I must choose between “playing soldier” and working at the diner. Mr. Jones continually harasses me and makes my life miserable. I would quit, but there are very few other job opportunities in this small town.

Three times over the last year, I have found it necessary to call for assistance from the Department of Defense (DOD) organization called “Employer Support of the Guard and Reserve” (ESGR). Three different ESGR volunteers have patiently explained to Mr. Jones that federal law (USERRA) gives me the right to time off from my civilian job for Army Reserve training or service and that if he fires me or denies me reemployment he is violating federal law. Each time, that has shut up Mr. Jones, but only until the next time that I need time off for military training or service.

Recently, I applied for and was selected for a one-year voluntary recall to active duty, scheduled to start on 10/1/2018. From reading your articles, I understand that I must give Mr. Jones prior oral or written notice before leaving my job to report to active duty on October 1. When I give the notice, either in person or by telephone, I want to tape the conversation, and I have already obtained the necessary equipment to tape the telephone or in-person conversation.

I am confident that Mr. Jones will respond as he usually does, with a string of profanities and vulgarities and threats to fire me for “playing soldier.” I want to record the conversation because Mr. Jones is probably willing to lie, even under oath, about what he has said.

Is it lawful for me to tape my conversation with Mr. Jones? Will the tape be admissible to prove my USERRA claim, if Mr. Jones fires me or denies me reemployment?

A: In Texas, as in most states, it is lawful to tape a conversation (either in person or by telephone) so long as at least one party to the conversation is aware of that the conversation is being recorded.³ If recording the conversation is lawful, the recording will be admissible and probably persuasive in proving your case.

One caveat: With call-forwarding and cell phones that have area codes all over the country, it is not always possible to ascertain that the person you call, or the person calling you, is in the same state (Texas) where you are located. In some states, like Maryland, it is necessary that *all parties* to a conversation be made aware of the recording. If you are going to record a telephone conversation, you need to ensure that Mr. Jones and any other parties to the call are also in Texas.

³ Texas Penal Code, section 16.02(c)(4)(A).

Second caveat: It is possible that Bob & Edward's Diner has a written policy, perhaps in the employee handbook, making it a rules violation for an employee to "wear a wire" to work. You do not want to violate a company rule and thereby give the employer an excuse to fire you.

Third caveat: Recording the employer's rants and raves about your Army Reserve service is not calculated to preserve a civil employer-employee relationship, but in your case, based on your explanation, it sounds like there is no civil employer-employee relationship to preserve.