

Recording Conversations Constitutes ERA Protected Activity, According to ARB

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On September 28, 2015, the U.S. Department of Labor's Administrative Review Board ("ARB") remanded *Franchini v. Argonne National Laboratory*, a nuclear whistleblower case, [holding](#) that surreptitious tape recording constitutes protected activity under the Energy Reorganization Act of 1974 ("ERA"), under certain circumstances. After reversing the decision of the Administrative Law Judge, the ARB ordered that the case proceed to an evidentiary hearing on the merits.

Complainant Felipe Franchini worked in the High Energy Physics Division of Argonne, a company owned by the Department of Energy ("DOE"). Franchini claims to have discovered radiation contamination and other workplace safety concerns in 2007 and 2008. As early as the summer of 2007, Franchini reported these concerns internally, followed by his filing a formal written complaint with the company in September 2007. Franchini claims his reports led to his supervisor issuing him a written reprimand in 2007 for the first time in his six-year tenure with the company. Franchini again reported safety issues in a March 2008 email to the DOE and an April 16, 2008 formal complaint to the DOE. On April 23, 2008, Franchini telephoned the DOE to report elevated levels of radiation detected in his work facility due to improper storage of radioactive materials, claiming he was being exposed to depleted uranium. According to the company, its subsequent investigation refuted his radiation exposure claim.

On June 6, 2008, Argonne asked Franchini to meet with managers to discuss his alleged insubordination regarding sick leave policies. During that meeting, Argonne managers asked Franchini if he had recorded co-workers without their consent, to which Franchini conceded that he had taped conversations since 2004. Of the 50 recordings he made, only three were obtained with prior knowledge of those involved. Franchini consented to returning the tapes, returned a portion, and then agreed with Argonne to return the remainder upon his return to work from sick leave in a written directive dated June 13, 2008. However, on October 3, 2008, Argonne alleges that it sent Franchini a letter via Federal Express directing him to return the tapes immediately, a letter for which Franchini did not sign and denies receiving. Argonne then terminated Franchini on October 10, 2008 for insubordination for failing to provide these recordings.

Despite the covert nature of these recordings, the ARB held that Franchini engaged in protected activity when making the recordings, as well as when taking surreptitious photographs, to the extent that the recordings involved the workplace safety concerns Franchini reported and were taken in anticipation of Franchini having to report his safety concerns externally. The ARB further noted that even if an employee agrees to perform an action under the threat of termination—in this case, the turning over the tapes— and later fails to do so, an employer does not automatically have the right to terminate the employee on the basis of the employee's inaction. The ARB held that, at that point in the proceedings, there was an issue of material fact as to whether Franchini's failure to turn over all of the recordings before returning to work constituted insubordination justifying his termination.

More generally, the ARB's determination that surreptitious recordings are protected activity under the ERA's whistleblower retaliation provision is good news for [nuclear whistleblowers](#), as recordings can

be powerful evidence that supports a whistleblower report of a substantive violation or subsequent retaliation.