

Ask the Lawyer: Even Legal Separation Can Lead to Adultery Conviction

By Mathew B. Tully

Question:

Can I be punished for adultery if I am legally separated? Could I be charged with anything else?

Answer:

Yes, you can be convicted of adultery even though you were legally separated at the time.

The provisions of the Uniform Code of Military Justice dealing with adultery are found under Article 134, the general article.

The two primary requirements to be charged with adultery are that the accused had sexual intercourse with another person, and at the time of sexual intercourse, either the accused or the other person was married to someone else.

Although a legal separation usually precedes a divorce, the divorce typically does not become final until a court issues an official decree of divorce.

This was the situation in *U.S. v. Rogan*. A warrant officer was living in Virginia and, pursuant to a court order, was legally separated from his wife, who was living in Nevada at the time.

The warrant officer began a relationship and had sexual intercourse with another woman before his divorce was finalized. The Navy-Marine Corps Court of Criminal Appeals upheld his conviction for adultery.

A third and critical requirement to be charged and convicted of adultery is that the accused's conduct is prejudicial to good order and discipline or brings discredit upon the armed forces.

Conduct is prejudicial to good order and discipline if it has a real and negative effect on the unit's discipline, morale, or readiness. Service-discrediting conduct simply means that the accused's conduct makes the military look bad in the public eye. The public does not need to be the public at large, but can be just a few members of the public.

The prejudicial or service-discrediting nature of the adultery must be proved through evidence. Whether the accused was legally separated and the relationship of the co-actor to the military are relevant to this third requirement.

Sometimes there isn't enough evidence to support a charge of adultery, since that requires proof that sexual intercourse actually occurred. Also, if the service member is not the married party, adultery requires proof that the service member knew the other person was, in fact, married.

However, Article 134 also contains an offense titled “wrongful cohabitation.” A service member can be charged with this offense if he or she openly and publicly lives with a person of the opposite sex and pretends to be husband and wife when they are not married. This offense also requires the conduct to be prejudicial to good order and discipline or discrediting to the military.

The maximum punishment for adultery is a dishonorable discharge and one-year confinement.

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. The information in this column is not intended as legal advice.