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Does USERRA Apply to Voluntary Service?

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Q: I am the commanding officer (CO) of an Air Force Reserve unit. I participate in the Additional Flight Training Periods (AFTPs), as do many of the members of my unit. In addition to weekend drills and two weeks of annual training, we fly AFTPs for the Air Force to maintain our proficiency. Many of us do this during working hours and ask for time off from our civilian employers because the aircraft are not generally available to us during non-work hours. Participation on any particular day is entirely voluntary, but pilots need to fly these hours to maintain their proficiency. Without the AFTPs, unit members would be unable to complete missions safely and successfully upon mobilization.

One particular member of my unit is getting a hard time from her employer about time off for military training, especially for AFTPs. Recently, I received a letter from the employer's attorney, contending that my unit member has no right to be away from work for AFTPs because they are voluntary. Is the attorney correct?

A: The attorney is wrong. USERRA's definition of "service in the uniformed services" expressly includes "the performance of service on a voluntary or involuntary basis." [38 U.S.C. 4303(13)]. AFTPs clearly qualify as "service in the uniformed services" as defined by USERRA.

USERRA was enacted in 1994, and it replaced the Veterans' Reemployment Rights (VRR) law, which was originally enacted in 1940. The VRR law also applied to voluntary as well as involuntary service. See Foster v. Dravo Corp., 420 U.S. 92, 96 n. 6 (1975); Boston & Maine Railroad v. Hayes, 160 F.2d 326 (1st Cir. 1947); Mazak v. Florida Department of Administration, 113 LRRM 3217 (N.D. Fla. 1983).

Q: The attorney also said that this particular unit member is taking "excessive" military leave and putting an undue burden on the employer. How much military leave is too much?

A: That question is for you to decide, not the civilian employer or the courts. As the CO, you are responsible for the readiness and the safety of your unit. It is for you (and Air Force leaders above you) to decide how much training your unit members need and how much voluntary or involuntary service they are to perform. You should try to work with employers to minimize disruption of their operations, but not at the expense of safety and readiness.

The individual Reservist's right to time off from his or her civilian job is not limited by what the employer or even a court might consider "reasonable." For many years, there was a dispute about whether a "rule of reason" limited

the duration of Reserve component training, but that dispute was resolved by the Supreme Court, favorably to Reservists and National Guard members, even before USERRA was enacted in 1994.

Under the VRR law, there was a four-year limit on "active duty" with respect to any one employer, but there was no express limit on the duration of active duty for training (ADT) and inactive duty training (either of a particular period or cumulatively with that employer). For almost 20 years, there was an intense dispute and conflicting court decisions about whether there was an implied limit or a "rule of reason." The Supreme Court finally put an end to that argument in 1991, when it held that there is no limit on the duration of ADT. See King v. St. Vincent's Hospital, 502 U.S. 215 (1991).

USERRA eliminated the sometimes-confusing distinctions among categories of military training or service found in the VRR law. All categories (active duty, ADT, inactive duty training, initial active duty training, funeral honors duty, etc.) now fit within USERRA's broad definition of "service in the uniformed services." [38 U.S.C. 4303(13)] Under USERRA, the cumulative limit on service, with respect to a particular employer, is generally five years, but most Reserve component training and several other categories of service are exempt from the five-year limit. See generally "Law Review" Number 6, available on ROA's Web site at www.roa.org.

To the extent that there was any lingering doubt about the continuing existence of a "rule of reason," Congress drove a stake in it when it enacted 38 U.S.C. 4312(h):

In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met.

This section could hardly be more clear, but the intent of Congress is further buttressed by USERRA's legislative history. In its report (House Report No. 103-65, 1994 United States Code Congressional and Administrative News, at page 2463), the House Committee on Veterans' Affairs wrote:

Section 4312(h) is a codification and amplification of King v. St. Vincent's Hospital. This new section makes clear the Committee's intent that no "reasonableness" test be applied to determine re-employment rights and that this section prohibits consideration of timing, frequency or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the service member has complied with the requirements under sections 4312(a) and (e).

The Committee believes, however, that instances of blatant abuse of military orders should be brought to the attention of appropriate military authorities [see Hilliard v. New Jersey Army National Guard, 527 F. Supp. 405, 411-412 (D. N.J. 1981)], and that voluntary efforts to work out acceptable alternatives could be attempted. However, there is no obligation on the part of the service member to rearrange or postpone already-scheduled military service nor is there any obligation to accede to an employer's desire that such service be planned for the employer's convenience. Good employer-employee relations dictate, however, that voluntary accommodations be attempted by both parties when appropriate.

Q: When I told the unit member about the letter that I had received from her employer's attorney, she was very angry. She told me that it was unlawful for the employer to contact me as the CO and that I should tell the employer and the attorney to "pound sand." What do you think?

A: Contacting the CO is not unlawful and indeed is encouraged by DoD policy. Please do not tell the employer to "pound sand." You should meet with the attorney and/or the employer and explain why it is necessary for this unit member to participate in AFTPs and other service. The idea here is to promote good employer-employee relations and to gain the employer's voluntary cooperation, if possible.

If there is a way for you (as the CO) to schedule her AFTPs and other training in such a way as to minimize the disruption of the employer's operations, without detracting from readiness, safety, and mission accomplishment, you should do that. If, however, there is an unavoidable conflict between the needs of the Air Force and the needs of the civilian employer, the needs of the Air Force must prevail.

Congress fully recognized that USERRA puts a burden on civilian employers, and that during the era of the "Total Force Policy" that burden can sometimes be severe. "Undue hardship" on the employer arising from an employee's military training or service is not a defense to the employer's legal obligation to re-employ.

For several years, ROA has pushed for legislation that would give employers a tax break or other compensation for the inconvenience caused by the mobilization of Reservists. Nothing has been enacted yet, but our effort continues. Under current law, there is no financial compensation for employers, but the National Committee for Employer Support of the Guard and Reserve (NCESGR) does have an awards program for particularly cooperative employers.

I suggest that you contact NCESGR at 1-800-336-4590. You should also see NCESGR's Web site at www.esgr.org. The NCESGR staff can put you in touch with an "employer support" volunteer in your area who can help you work

with this particular employer and other employers..

*Military title used for purposes of identification only. The views expressed herein should not be attributed to the Department of the Navy or the U.S. government generally.

Captain Wright was employed as an attorney for DoL for ten years. He was largely responsible for drafting USERRA, along with one other DoL attorney. He also helped to write the successful appellate briefs for the veterans in both the Imel and the Akers cases. Most recently, he was on active duty for 71 days (May–July 2001), including 40 days in Bahrain. Please see his July 2001 "Law Review" article.

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