

Number 35, December 2001: Impending Service Results in Immediate Firing

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Q: I am the Commanding Officer of an Air National Guard unit that was recalled to active duty on 15 October 2001.

In mid-September, immediately after the atrocities, I notified members of the unit that it was likely we would be recalled, and I advised them to notify their civilian employers of the possibility. A member of my unit followed my advice and notified her employer on 15 September. The employer fired her then and there.

She probably does not intend to go back to this outfit, but she lost four weeks of pay because of the employer's action. If the employer had not fired her, she would have worked four more weeks, until shortly before our unit actually entered active duty. Have her USERRA rights been violated? What can be done at this time?

A: The employer action you have described sounds to me like a clear violation of 38 U.S.C. 4311(a), which provides as follows: "A person who is a member of, applies to be a member of, performs, has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation."

A review of USERRA's legislative history clearly indicates that Congress envisioned exactly this situation and intended that 38 U.S.C. 4311(a) would outlaw exactly what this employer has apparently done. In its statement explaining section 4311, the House Committee on Veterans' Affairs wrote: "If the employee is unlawfully discharged under the terms of this section prior to leaving for military service, such as under the Delayed Entry Program, that employee would be entitled to reinstatement for the remainder of the time the employee would have continued to work plus lost wages. Such a claim can be pursued before or during the employee's military service, and processing of the claim should not await completion of the service, even if for only lost wages." [House Report No. 103-65, 1994 U.S. Code Congressional and Administrative News, pages 2456-57.]

I have put this Air National Guard member in touch with the Veterans' Employment and Training Service (VETS), U.S. Department of Labor. I hope that VETS will pursue this case diligently.

Q: The employer's conduct in this case seems egregious. Does USERRA provide for punitive damages?

A: USERRA does not provide for punitive damages, but it does provide as follows: "The court may require the employer to pay the person an amount equal to the amount referred to in subparagraph (B) [back pay for lost wages] as liquidated damages, if the court determines that the employer's failure to comply with the provisions of this chapter was willful." [38 U.S.C. 4323(d)(1)(C).] In other words, if she proves \$4,000 in lost wages and that the employer violation was willful, the court can award her \$8,000.

Although USERRA does not provide for punitive damages, many states have laws providing for punitive damages for egregious employer violations of employee rights. USERRA explicitly does not supersede any state law "that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person under this chapter." [38 U.S.C. 4302(a).]

If your state law provides punitive damages in such a case, that claim is in no way superseded by USERRA. If a federal lawsuit is brought to enforce the USERRA rights, the state law claim for punitive damages can be appended as a matter within the pendent jurisdiction of the federal court. Especially in the post-11 September environment, this case has a great deal of "jury appeal."

*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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