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Activation Prevents Start of New Job

By CAPT Samuel F. Wright, JAGC, USNR*

Q: A member of my Air National Guard unit has been applying for federal civilian employment for some months now. On 26 October, he was told that he had been selected for a Department of Defense (DoD) civilian job, with a start date of 5 November. He was called to active duty on 1 November, so he was unable to start the job on 5 November, as scheduled. The DoD civilian personnel office told him that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to his situation because he had not yet started his civilian job before he was called to active duty. Is that correct?

A: Congress enacted USERRA in 1994. It replaced the Veterans' Reemployment Rights (VRR) law, which was originally enacted in 1940. The VRR law was amended in 1986 to outlaw discrimination in hiring. (Since 1968, it has been unlawful to fire a Reservist for military obligations or to discriminate with respect to promotions or other incidents or advantages of employment.) It has been held that the protection against discrimination in hiring is not limited to persons who are immediately available to begin employment. If voluntary or involuntary military service is the reason that the individual is not immediately available to start work, denying the individual initial hiring is unlawful. [See Beattie v. Trump Shuttle, Inc., 758 F. Supp. 30 (D.D.C. 1991)].Beattie was decided three years before USERRA was enacted, but it is still good law because it is mentioned with approval in the new law's legislative history. [See Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126, 1135 (W.D. Mich. 2000)].

I think that it is reasonably clear that your unit member is entitled to the DoD civilian job he had been offered, at such time as he is released from active duty and is available to start the civilian job. Denying him that job under these circumstances would constitute a violation of 38 U.S.C. 4311, USERRA's anti-discrimination provision. Also pertinent is 38 U.S.C. 4301(b), which provides, "It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."

ROA Executive Director Jayson L. Spiegel has written to the Hon. Kay James, director of the Office of Personnel Management, and also to appropriate DoD officials on behalf of this recalled Air National Guard member. [Note: This question arose in the federal civilian employment context, but I believe that the same result applies in state and local government and private sector employment.]

*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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