LAW REVIEW 0609

Userra's Prohibition on Discrimination Applies Even to "Temporary" Positions of Employment

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Q: I am a volunteer ombudsman for the National Committee for Employer Support of the Guard and Reserve (ESGR), the DOD organization that assists Reserve Component (RC) personnel in securing their rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I attended your USERRA training class in Denver last year, and I read and use your "Law Review" articles in my ombudsman work. I am writing to request your advice with regard to a most difficult USERRA case that I am working.

The claimant, "Joe Smith" applied for work through temporary services agency we'll call "Temps-R-Us (TRU)" and was assigned to work at a firm we'll call "Daddy Warbucks Industries (DWI)" in late December 2005. Mr. Smith notified both DWI and TRU that he would not be at work the first weekend in January to attend his Army Reserve drill. When he showed up for work Monday morning after his drill weekend, DWI refused to let him enter the DWI facility, and DWI told TRU, "Don't send us any more Reservists—it is too much of a hassle, and they cannot be depended upon."

Mr. Smith is paid by TRU only when he works for a TRU client—the client pays a fee to TRU, which covers the wages paid to an employee like Mr. Smith, plus overhead and profit for TRU. Mr. Smith is still carried on TRU's books as "available," but he has not been assigned to any work nor has he been paid since DWI sent him packing. He is really hurting financially, so he complained to ESGR.

Have Mr. Smith's USERRA rights been violated by TRU? By DWI? Or perhaps by both?

A: TRU and DWI violated section 4311(a) of USERRA, 38 U.S.C. 4311(a). That section makes it unlawful for an employer to deny an individual "retention in employment" because of his or her membership in a uniformed service, performance of uniformed service, etc. Mr. Smith only needs to establish that his performance of uniformed service was *a motivating factor* (not necessarily the sole reason) for the discharge, but in this case it seems clear that Mr. Smith's service was the only reason for firing him. He had not been there long enough to give the employers any other grounds to fire him.

Under circumstances like these, TRU and DWI are *joint employers* of Mr. Smith, because both corporations control certain aspects of the employment relationship. Both corporations are responsible for complying with USERRA. If necessary, a lawsuit should be brought against both corporations. Please see my Law Review 154.

Q: That is an interesting point—so far I have been dealing only with TRU through their lawyer. She has cited section 4312(d)(1)(C) of USERRA, 38 U.S.C. 4312(d)(1)(C) and contends that TRU is off the hook because Mr. Smith's position at TRU was brief and non-recurrent.

A: "The prohibitions in subsections (a) and (b) [prohibiting discrimination or reprisal because of uniformed service, asserting a USERRA right, or participating in a USERRA investigation] shall apply to any position of employment, including a position that is described in section 4312(d)(1)(C)" [38 U.S.C. 4311(d)]. *See also* 20 C.F.R. 1002.21. (This Code of Federal Regulations provision is part of the newly promulgated USERRA regulations.)

Section 4312(d)(1)(C) is an affirmative defense to the employer's obligation to reemploy an individual returning from a period of service in the uniformed services. Section 4312(d)(1)(C) does not exempt the employer from its obligation to comply with section 4311.

Section 4331 of USERRA, 38 U.S.C. 4331, gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published the final regulations in the *Federal Register* on December 19, 2005. DOL also published a lengthy and well-written preamble, explaining the rationale for USERRA and the regulations and summarizing the comments received and the reasons that DOL had made or had decided not to make changes. That preamble contains language directly pertinent to your case:

"The Department [of Labor] received two comments on proposed section 1002.21. The first commenter suggests that the application of USERRA's anti-discrimination and anti-retaliation provisions to brief, non-recurrent positions is 'unduly burdensome for employers and contains unnecessary verbiage.' Because the statute explicitly requires the application of the anti-discrimination and anti-retaliation provisions to such employment positions, see 38 U.S.C. 4311(d), the Department will retain the provision unchanged." You can find this language in the 2005 volume of the *Federal Register,* on page 75249, near the bottom of the right-hand column.

The point is that even if TRU can establish that Mr. Smith's employer relationship with TRU (and DWI) was brief and non-recurrent, and that there was no reasonable expectation that it would continue indefinitely or for a significant time, TRU (and DWI) have nonetheless violated section 4311(a) by firing Mr. Smith the first time he took a weekend off, as permitted by USERRA, to attend his Army Reserve training. Moreover, section 4311(a) also outlaws discrimination in *initial employment.* By demanding of TRU "don't send us any more Reservists," DWI has committed another violation of section 4311(a), and TRU would violate section 4311(a) if it complies with that DWI demand.

As I explained in Law Review 101, section 4312(d)(1)(C) is a narrow affirmative defense for which the employer bears a heavy burden of proof, and I do not believe that under these facts TRU could establish that its *employer relationship* with Mr. Smith was brief

and non-recurrent and that there was no reasonable expectation that it would continue indefinitely or for a significant time. I do not doubt that the *particular job assignment* to DWI was expected to be brief—that is the nature of work in the temporary services industry. But the expected duration of the particular job assignment is not the test—the test is the expected duration of Mr. Smith's employer relationship with TRU. I know folks who have made a whole career out of a series of short-term job assignments through temporary services firm like TRU. If TRU and DWI had not fired Mr. Smith the first time he needed a weekend off for Army Reserve training, Mr. Smith might well have worked for TRU for many years.

Q: TRU, through its lawyer, insists, "DWI is our best customer. We cannot stay in business if we violate DWI's demand not to send Mr. Smith, or any other Reservist or National Guard member, to a work assignment. Give us a break."

A: In 1964, Congress enacted the Civil Rights Act. Title VII of that Act makes unlawful employment discrimination based on race, color, sex, religion, or national origin. In the years after 1964, some employers (especially in the South) argued, "We would like to hire black salesmen, but our customers will not buy from black salesmen, and we will go out of business." In a pamphlet entitled "Employee Rights When Working for Multinational Employers," the U.S. Equal Employment Opportunity Commission (EEOC) has made the blanket statement, "Customer preference is never a defense to violations of U.S. EEO law." The same principle applies here: the preference of the customer (DWI) does not exempt TRU from its obligation to refrain from discrimination against Reserve Component members like Mr. Smith.

Moreover, this situation demonstrates the need for the joint employer doctrine, in USERRA and in other laws. Without that doctrine, a large organization like DWI could make a mockery of a law like USERRA or Title VII by the device of utilizing multiple temporary services firms and demanding that those firms commit unlawful discrimination.

I suggest you make these points to TRU and DWI orally and then follow up with a certified letter. I think it is probably unlikely that TRU and DWI will be susceptible to the informal communications of the ESGR ombudsman in a case like this, because these companies will not want to admit that USERRA and other laws apply to this kind of employment. You should promptly refer this case to DOL, once it becomes clear that TRU and DWI are not going to change their ways based on your communications.

The views expressed herein are the personal views of the author, and not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Labor, or the U.S. Government.