LAW REVIEW 0619

Effect of State Employment at Will and Right to Work Laws

By CAPT Samuel F. Wright, JAGC, USNR

Q: I was on active duty from 1990 to 1994 and then briefly in the Army Reserve. I stopped actively participating in 1996, but after 9/11 I reconsidered and recently signed up again. Before signing up, I consulted with my supervisor at work, and she strongly discouraged me from rejoining the Army Reserve. I signed up anyway, without informing her. Then, I brought in a letter from my new commanding officer, outlining my upcoming military training dates.

Just days after I gave the employer this notification, the employer summarily fired me, with no explanation other than "it just does not seem to be working out." When I suggested that firing me could violate the Uniformed Services Employment and Reemployment Rights Act (USERRA), the employer denied that my Army Reserve service had anything to do with the decision to fire me.

I have worked for this company for five years, and my job evaluations have always been satisfactory or better. This is a non-union company, and I am not the first employee fired with no explanation. The employer's personnel director insists that because our state (Virginia) is an "employment at will" state and a "right to work" state, USERRA does not apply, that the employer is not required to provide any explanation for the decision to fire me, and that no explanation will be provided.

I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR), which referred me to a local ESGR volunteer, who told me that the employer is essentially correct and that without an admission of employer wrongdoing or a "smoking gun" there is nothing that can be done about my firing.

Please explain to me what "employment at will" and "right to work" mean. Is the employer correct?

A: The employer and the ESGR volunteer are wrong, but I hear this misconception expressed all the time. Neither Virginia's "employment at will" doctrine nor its "right to work" law defeats your rights under USERRA. I need more information to say for sure, but it sounds like you have a strong USERRA case.

In Virginia and every other state, an individual is considered to be an "employee at will" unless there is a state law in effect that provides due process steps that must be completed before firing the person (often the case for state and local government employees), or unless the person is represented by a union that has negotiated a collective bargaining agreement (CBA) with the employer, limiting discharges to "just cause." More than 80 percent of all employees in this country are employees at will. As I explained in Law

Review 108, USERRA most definitely applies to the employment-at-will situation, including to "probationary" employment. Any law that does not apply to employment at will is a useless law.

If you are an employee at will, the employer does not need a reason to fire you—the employer is permitted to fire you for any reason, *except a reason that is forbidden by a specific federal or state law.* The employment at will doctrine meant a lot more 100 years ago than it means today, because of all the federal (and later state) employment laws that have been enacted in the past 70 years. In 1935, Congress enacted the National Labor Relations Act (NLRA). In 1940, Congress enacted the precursor to USERRA. In 1964, Congress enacted the Civil Rights Act—title VII of that law forbids employment discrimination on the basis of race, color, sex, religion, or national origin. Many more such laws have been enacted in recent years (Age Discrimination in Employment Act, Americans With Disabilities Act, whistleblower protection laws, etc.).

Virginia's "right to work" law is even more remote from your case. Under the NLRA, once a union has been certified by the National Labor Relations Board (NLRB) or voluntarily recognized by the employer, the union has a duty of fair representation to all employees in the bargaining unit (usually all non-supervisory employees of the employer), including employees who have chosen not to join the union and pay dues.

Unions frequently complain that employees in the bargaining unit who benefit from union representation but do not pay dues are "free riders" enjoying the benefits of the union without paying any part of the costs. In a state that does not have a "right to work" law, it is permissible for the union and the employer to agree to a CBA that includes a "union security" clause. Such a clause would require employees in the bargaining unit to pay a fee to the union, as a condition of employment.

Section 14(b) of the NLRA permits a state to enact and enforce a state "right to work" law. Such a law makes it unlawful for a union and an employer to agree to a CBA that makes payments to the union a condition of employment. Virginia and 20 other States have enacted "right to work" laws. Virginia's "right to work" law is important, but it has absolutely no effect whatsoever on your rights under USERRA. The "right to work" issue is a red herring in your case.

Section 4311 of USERRA, 38 U.S.C. 4311, makes it unlawful for an employer or prospective employer to deny an individual initial employment, retention in employment, promotion, or any benefit of employment on the basis of the individual's membership in a uniformed service, application to join a uniformed service, performance of uniformed service, or application or obligation to perform uniformed service in the future. I have discussed section 4311 in detail in Law Reviews 11, 35, 36, 61, 64, 122, 150, 162, 198, and 205.

I invite your attention specifically to Law Review 122. That article makes it clear that it is unlawful for an employer to forbid an existing employee to join a Reserve Component or to discharge or otherwise discipline an employee for joining without notifying the

employer first or over the employer's objection. It sounds to me like this is exactly what has happened in your case.

Q: What must I prove in order to establish a violation of section 4311?

A: You must prove that your membership in the Army Reserve or your upcoming military obligations or activities were *a motivating factor* (not necessarily the sole reason) for the employer's decision to fire you. If you prove motivating factor, the *burden of proof* (not just the burden of going forward with the evidence) shifts to the employer to prove you would have been fired even if you had not been a member of the Army Reserve.

Q: How can I prove that my Army Reserve obligations were a motivating factor in the employer's decision to fire me?

A: As I explain in Law Review 205, one factor that the courts look to is the *proximity in time* between the protected activity (your rejoining the Army Reserve and notifying the employer of your military training obligations) and the employer's decision to fire you. In your case, I think the proximity in time may be sufficient to make out a *prima facie* case of a section 4311violation and to shift the burden of proof to the employer.

I am continually frustrated when ESGR volunteers and even Department of Labor investigators say that nothing can be done without an employer admission or a "smoking gun." As employers become more sophisticated and "lawyered up," they will avoid making such admissions or providing such smoking guns. It is most important to establish that *no employer admission or smoking gun is necessary to establish a violation of section 4311.* There are other ways to prove that the employer considered improper factors in making an employment decision.

The views expressed in this article are the personal views of the author, not necessarily the views of the Department of the Navy, the Department of Defense, or the U.S. Government.