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Category: USERRA Coverage

Does USERRA Apply to Probationary Jobs--YES!

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Q: I am a First Lieutenant in the Army Reserve and a teacher in a public school system. I began my teaching career in September 2001, and I was called to active duty in March 2005. Teachers in my state must work for five years, undergo training under an experienced teacher, and receive satisfactory performance ratings before being granted "tenure." As an untenured teacher, I am considered to be "probationary."

In January 2005, I notified the school principal that I had been giving a "warning order" of likely mobilization in March. She notified the district superintendent, who called me into his office the next day and told me that I was fired. When I protested, citing the Uniformed Services Employment and Reemployment Rights Act (USERRA), he told me that the law does not apply because I am a probationary employee with no tenure and no appeal rights. Does USERRA apply to persons holding probationary jobs?

A: Most definitely, *yes.* The reemployment statute has always applied to probationary jobs. *See Collins v. Weirton Steel Corp.,* 398 F.2d 305 (4th Cir. 1968). I also invite the reader's attention to Law Reviews 35, 101, 108, and 162.

As I explained in Law Review 104, Congress enacted USERRA in 1994 as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. Under the VRR law, the returning veteran claiming reemployment rights was required to prove, as an eligibility criterion, that his or her pre-service civilian employment relationship was "other than temporary." *See* 38 U.S.C. 2021(a) (1988 edition of the United States Code).

The returning veteran was not required to prove that the pre-service job was *permanent,* only *other than temporary.* In *Collins* and other cases, courts construed the term "other than temporary" broadly, in view of the Supreme Court's dictum that the reemployment statute should be "liberally construed for he who has laid aside his civilian pursuits to serve his country in its hour of need." *Fishgold v. Sullivan*

Drydock & Repair Corp., 328 U.S. 275, 285 (1946). A probationary job is not temporary. A seasonal job is not temporary. *See United States v. Wimbish,* 154 F.2d 773 (4th Cir. 1946); *United States v. North American Creameries, Inc.,* 70 F. Supp. 36 (D.N.D. 1947).

The situation is even better under USERRA. The returning veteran is no longer required to prove that his or her pre-service employment relationship was "other than temporary." Now, there is an *affirmative defense,* for which the employer bears the burden of proof. "An employer is not required to reemploy a person under this chapter if … the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. 4312(d)(1)(C). "In any proceeding involving an issue of whether … the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, the employer shall have the burden of proving … the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period." 38 U.S.C. 4312(d)(2)(C).

In other words, the returning veteran is not required to prove that he or she had a reasonable expectation of continued employment, before military service interrupted the civilian job. Rather, the employer would be required to prove that the veteran had *no reasonable expectation* of continued employment. The allocation of the burden of proof often determines the outcome.

Probationary employment is a subset of "at-will" employment, and USERRA most certainly applies to at-will employees. A law that did not apply to at-will employees would be essentially useless, because more than 80 percent of all employees in this country are considered to be at-will. You are considered to be at-will unless you have one of the following: (a) A union collective bargaining agreement that provides that you can only be fired for just cause, (b) the leverage to negotiate an individual "no-cut contract" with your employer, or (c) a state or federal statute that gives you tenure or job protection.

Under the traditional "employment at will doctrine," an at-will employee can be fired for any reason or no reason, *but not a reason that is forbidden by federal or state law.* The employment at will doctrine does not mean what it once meant, because of all the Federal employment-protection laws that have been enacted in recent

decades, starting with National Labor Relations Act in 1935 and the VRR law in 1940.

Q: I was recalled to active duty in March 2005, and I do not expect to return until about March of 2007. I started my teaching career in September 2001. If I had not been mobilized, I probably would have achieved tenure in September 2006, at the start of the 2006-07 school year. When I return to work in March 2007, will I then be entitled to be considered to be a tenured teacher?

A: Probably not, because of the training requirement for achieving tenure. After you return to work, you will need to complete the requirements for tenure. When you complete those requirements, you will be entitled to have the effective date of your tenure backdated to September 2006, when you would have completed the tenure requirements but for the military interruption. Please see Law Review 53.

Q: I am concerned that the school district will reinstate me in March 2007 and then fire me, in that I will still be considered to be probationary. How does USERRA protect me in that scenario?

A: "A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause … within one year of such reemployment, if the person's period of service before the reemployment was more than 180 days." 38 U.S.C. 4316(c)(1). We should not try to "make a federal case" out of the school district referring to you as probationary, but if the employer fires you it must prove that the firing was for cause, during the first year after your proper reinstatement to your teaching job. *See Collins v. Weirton Steel Corp.,* 398 F.2d 305 (4th Cir. 1968). You also have the benefit of 38 U.S.C. 4311, USERRA's anti-discrimination provision, and that protection continues indefinitely. I invite the reader's attention to Law Reviews 11, 35, 36, 64, 122, and 150.

Q: I expect to be released from active duty in March 2007, and I will want to return to work as quickly as possible. The school district has a strict policy that no teacher is permitted to return to work during a school year—the district claims that it is important that students have the same teacher for the entire year. The district says that I will have to wait until September

2007 to return to work. Would making me wait until the start of the next school year violate my reemployment rights?

A: Yes. *See Fitz v. Board of Education of the Port Huron Area Schools,* 662 F. Supp. 1011 (E.D. Mich. 1985), *affirmed,* 802 F.2d 457 (6th Cir. 1986). If you meet the USERRA eligibility criteria, as described in Law Review 77, you are entitled to *prompt* reemployment. You should be back on the payroll within two weeks after you apply for reemployment, after you are released from the period of service.

Q: The school district's lawyer claims that the district cannot be required to provide me these USERRA benefits because doing so violates state law, and that the district must comply with state law. What do you think about that?

A: USERRA explicitly overrides state laws that purport to limit USERRA rights or that impose additional prerequisites on the exercise of these rights. *See* 38 U.S.C. 4302(b). "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." United States Constitution, Article VI, Clause 2 (capitalized just that way, in the 18th Century style). This is called the Supremacy Clause, and it means that federal law trumps state law. If the school district cannot comply with USERRA without violating state law, the district must violate the state law in order to comply with federal law.

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