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Effect of Resignation

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Q: In June 1999, I left a civilian position at a major military headquarters to serve a three-year Active Guard & Reserve (AGR) tour at the very same headquarters. At the time I left my civilian job, my civilian supervisor told me that I had no choice but to "resign" my federal civilian job. The Standard Form 50 that I was given shows my status as "resignation-U.S." I recently completed the three-year AGR tour. Does my resignation adversely affect my right to re-employment under the Uniformed Services Employment and Reemployment Rights Act (USERRA)? I can clearly show that I gave advance notice to my civilian supervisor that I was leaving for military service.

A: Your "resignation" is of no consequence, so long as you can establish that you resigned for the purpose of service and gave advance notice to your civilian employer. See Jordan v. Air Products and Chemicals, Inc., 2002 WL 31164489, page 2 (C.D. Cal. 2002); Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126, 1128-29 (W.D. Mich. 2000); Winders v. People Express Airlines, Inc., 595 F. Supp. 1512, 1518 (D.N.J. 1984), affirmed, 770 F.2d 1078 (3rd Cir. 1985).

I also invite your attention to the "VetGuide" published by the U.S. Office of Personnel Management (OPM), which provides: "While on duty with the uniformed services, the [federal civilian employing] agency carries the employee on LWOP [leave without pay] unless the employee requests separation. A separation under these circumstances does not affect restoration." See www.opm.gov/veterans/html/vetguide.htm.7.

Your federal civilian employer should have recorded your status as "LWOP-U.S." rather than "resignation-U.S." However, the "resignation" does not defeat your right to reemployment under USERRA.

Having said that, let me quickly add that my advice is to avoid the use of words like "resign" or "resignation" when giving an employer notice of an upcoming period of service in the uniformed services. I suggest that you "request a military leave of absence" even if your service is expected to last for years, and even if you think it highly unlikely that you will seek to return to that civilian employer upon completion of the service.

In your case, there is another reason why you are much better off if listed as "LWOP-U.S." rather than "resignation-U.S." As I explained in Law Reviews 33 and 62, federal civilian employees earn 15 days (120 hours) of paid military leave per fiscal year, in accordance with 5 U.S.C. 6323. You earn that entitlement while in an "LWOP-U.S." status, but not while in a "resignation-U.S." status. Because your federal civilian supervisor erroneously informed you that you had "no choice" but to "resign" in June 1999, when you began

your AGR tour, the federal civilian personnel office should change your status to "LWOP-U.S.," retroactively to June 1999.

Q: A good friend of mine worked for a city government in Alabama when she was called to active duty in the aftermath of the 11 September atrocities. Perhaps foolishly, she submitted a written "resignation" letter, because she expected at the time that she would be staying on active duty long-term, and she really did not want to return to work for the city. However, she did make clear to her civilian supervisor that she was resigning because she had been called to active duty. Near the end of her one-year involuntary recall, she suffered a serious injury in a military training accident. She was medically retired from the Army Reserve, and her military career is now over. She submitted a timely application for re-employment, but the city has refused to take her back. The city attorney insists that her resignation defeats her right to re-employment, citing 38 U.S.C. 4316(b)(2)(A). Is the city attorney correct?

A: No, the city attorney is wrong. Your friend's situation is a good example of the need for the rule that the veteran generally cannot waive re-employment rights before or during the period of military service. The right to re-employment does not mature until the veteran has returned from the period of service, and rights that have not matured cannot be waived. The statute was intended to keep the service member's options open until he or she returns to civilian life. See House Report No. 103-65, 1994 United States Code Congressional and Administrative News, at page 2453. See also Leonard v. United Airlines, Inc., 972 F.2d 155, 159-160 (7th Cir. 1992); Ryan v. City of Philadelphia, 559 F. Supp. 783 (E.D. Pa. 1983), affirmed, 732 F.2d 147 (3rd Cir. 1984).

The pertinent section of USERRA (cited by the city attorney) provides as follows: "Subject to subparagraph (B), a person who—(i) is absent from a position of employment by reason of service in the uniformed services, and (ii) knowingly provides written notice of intent not to return to a position of employment after service in the uniformed service, is not entitled to rights and benefits under paragraph 1(B)." 38 U.S.C. 4316(b)(2)(A) (emphasis supplied). The city attorney's interpretation of this provision is wrong, for at least three reasons.

First, your friend's resignation letter was not a "written notice of intent not to return to a position of employment." Saying "I resign" is not the same thing as saying, "I intend never to return." Every day, former employees who have resigned return to the same employer.

Second, the city attorney is conveniently neglecting to mention 38 U.S.C. 4316(b)(2)(B), which makes it clear that the employer has a very heavy burden of proof. That subsection provides: "For the purpose of subparagraph (A), the employer shall have the burden of proving that a person knowingly provided clear written notice of intent not to return to a position of

employment after service in the uniformed service and, in doing so, was aware of the specific rights and benefits to be lost under subparagraph (A)." Your friend's resignation letter certainly did not meet this stringent test.

Finally, and most importantly, a "written notice of intent not to return" does not defeat the individual's right to re-employment with the pre-service employer, or the right to be treated as continuously employed, for seniority purposes, after re-employment. Even if it meets the stringent criteria of section 4316(b)(2)(B) [in writing, clear, with specific knowledge of the rights to be lost], the "written notice of intent not to return" only defeats one's "furlough or leave of absence" clause rights to non-seniority benefits while away from the civilian job performing service in the uniformed services. Please see the italicized phrase of section 4316(b)(2)(A), above. The "furlough or leave of absence" clause is discussed in detail in Law Reviews 41, 56, and 57.

* Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.