LAW REVIEW 701
(Web Only-January 2007)

No Telepathy Required

Employer admission is not necessary to make a USERRA claim.

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CATEGORY: USERRA Enforcement

Q: I am a member of the Army Reserve, and I have been employed by the XYZ Corporation since 1995. My supervisor at work has given me a hard time about my drill weekends and annual training, and he was really upset when I informed him, in June 2004, that I was being mobilized. I served on active duty from September 2004 to February 2006, when I was released from active duty and applied for reemployment at the XYZ Corporation. The company's personnel office did not act right away on my application, so I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR).

An ESGR volunteer contacted the personnel office on my behalf, and I returned to work on April 1, 2006. Three months later, on a Monday, I notified my supervisor that I would need the weekend off for my Army Reserve drill, and I also notified the personnel office in writing. Neither the personnel office nor my supervisor said anything about my military leave request, and I returned to work the following Monday morning, after my weekend drill, without incident.

On the Thursday of the next week, I was called into the personnel office and given two weeks notice of my dismissal from the company. I asked for an explanation, and the personnel director told me that because I am an "employee at will" the company does not need to offer any explanation, and that the company will not provide any explanation. This is a non-union company, and I am not the first employee to be fired with no explanation.

I told the personnel director that I thought that my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) were being violated. He proceeded to deny that my Army Reserve service had anything to do with the decision to fire me, but he declined again to provide any other explanation.

I contacted the ESGR volunteer again. He called me back the next day, informing me that the personnel director had adamantly refused to speak to him, either in person or by telephone. He suggested that I contact the Veterans' Employment and Training Service, U.S. Department of Labor (DOL-VETS), which I did. I heard from a DOL-VETS investigator, who told me that there is no way to make a case for a USERRA violation without an employer admission that the employer had considered my Army Reserve membership when making the decision to fire me. He told me that he was closing my case because my supervisor and the personnel director had not said anything derogatory about my Army Reserve service at the time of my firing and

because the personnel director had denied considering my Army Reserve service when the DOL-VETS investigator contacted him.

In your Law Review 184 (September 2005), you wrote that if the returning veteran is fired during the first year after returning, the employer has the burden of proof to show that the firing was for cause. It seems to me that the DOL-VETS interpretation, or at least the understanding applied by this particular DOL-VETS investigator, renders that USERRA section a nullity. Where do I go from here? Help!

A: I have heard several reports of DOL-VETS investigators making remarks to that effect, but that remark does not reflect DOL-VETS policy. The agency's policy and interpretation of USERRA are set forth in the USERRA regulations.

Section 4316(c) of USERRA provides as follows:

"A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause (1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days." 38 U.S.C. 4316(c).

As I explained in Law Review 0604, 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. DOL-VETS promulgated the final USERRA regulations by publishing them in the Federal Register on Dec. 19, 2005. You can find the regulations themselves and a lengthy and most helpful preamble in the 2005 edition of the Federal Register, pages 75246-75313. You can also find the regulations and the preamble on the DOL-VETS website, **www.dol.gov/vets.**

The USERRA regulations are now codified in the Code of Federal Regulations (CFR), at 20 CFR Part 1002. Two sections of the regulations address the "protection against discharge" provision of 38 U.S.C. 4316(c). Section 1002.247 simply restates the statute—that your period of protection is one year if your period of service was more than 180 days, and your period of protection is 180 days if your period of service was more than 30 days but less than 181 days.

Section 1002.248 reads as follows: "The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of the application of other legitimate non-discriminatory reasons.

(a) In a discharge action based on conduct, *the employer bears the burden of proving* that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge.

(b)If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. *The employer bears the burden of proving* that the employee's job would have been eliminated or that he or she would have been laid off" [emphasis supplied].

As I explained in my Law Review 0616, your "employee at will" status is irrelevant to your rights under USERRA. The employer does not need cause to fire other employees, but the employer needs to prove cause to fire you, during your protection period, because USERRA explicitly says so.

Your case is a section 4312 case, but the DOL-VETS investigator you contacted is treating it as a section 4311 case. I invite your attention to my Law Review 61 for an explanation of the distinction.

If the protection period had expired in your case, you would be required to prove, under section 4311, that the XYZ Corporation had denied you "retention in employment" (had

fired you) because of your Army Reserve membership, performance of service, and/or obligation to perform future service. Under section 4311(c), you would only be required to prove that your service was a motivating factor (not necessarily the sole reason) for the discharge.

Because of section 4312 and section 4316(c), you are not required to "get in the employer's head" and prove the reason for the discharge. You are only required to prove that you meet the five objective eligibility criteria for reemployment rights under USERRA:

1. You left your position of employment for the purpose of performing voluntary or involuntary service in the uniformed services—this can be anything from five hours (for a single drill period) to five years of full-time voluntary active duty;
2. You gave the employer prior oral or written notice;
3. Your cumulative period or periods of uniformed service, relating to that employer relationship, do not exceed five years—because your 2004-06 period of service was involuntary, it does not count toward this five-year limit (please see Law Review 201);
4. You were released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge;
5. You made a timely application for reemployment after completing the period of service.

Please see Law Review 77 for a full explication of these eligibility criteria. When I say that you have the burden of proof on these criteria, I do not mean that you should be required to provide documentation before DOL-VETS will even open a case. The agency has subpoena power under USERRA, and it has the duty to investigate your claim to find proof, if available, that you meet the criteria. But please provide DOL-VETS as much documentation and

information as you can, and if you do not have a good-faith belief that you meet each of the five criteria, please do not waste their time by filing a complaint.

If you met these five criteria after you were released from active duty in February 2006, and it seems quite clear that you did, you were entitled to reemployment as a matter of federal law, regardless of the reason the employer did not want you back. You do not need to prove that the employer's refusal to reemploy you was based on some animus against you because of your military service. Because of section 4316(c), firing you during the protection period is essentially the same as refusing to reemploy you—the firing is unlawful unless the employer can demonstrate that the firing was for cause.

I explained this concept in my Law Review 61, but the concept is explained even better in the preamble to the USERRA regulations, which follows:

"There has been some disagreement in the courts over the appropriate burden of proof in cases brought under 38 U.S.C. 4312, the provision in USERRA establishing the reemployment rights of persons who serve in the uniformed services. One court has interpreted that provision to be 'a subsection of section 4311 [the anti-discrimination and anti-retaliation provision].' Curby v. Archon, 216 F.3d 549, 556 (6th Cir. 2000). Other courts have interpreted section 4312 to establish a statutory protection distinct from section 4311, creating an entitlement to reemployment for qualifying service members rather than a protection against discrimination. *Wrigglesworth v. Brumbaugh, 121 F. Supp. 2d 1126, 1134 (W.D. Mich. 2000)* (stating that requirements of section 4311 do not apply to section 4312). Brumbaugh relies in part on legislative history and the Department's interpretation of USERRA. Id. At 1137. Another district court supports the Brumbaugh decision and characterizes the contrary view in Curby as dicta. Jordan *v. Air Products & Chem., 225 F. Supp. 2d 1206, 1209 (C.D. Ca. 2002).*

"In the proposed rule, the Department agreed with the district court decisions in Brumbaugh and Jordan that sections 4311 and 4312 of USERRA are separate and distinct. Accordingly, the proposed section 1002.33 provided that a person seeking relief under section 4312 need not meet the additional burden of proof requirements for discrimination cases brought under section 4311. The Department disagreed with the decision in Curby v. Archon discussed above, insofar as it interprets USERRA to the contrary, and the Department invited comment regarding the proper interpretation of the statute regarding the burden of proof for relief under section 4312.

The Department received four comments regarding this issue, and all four agreed with the Department's interpretation that a person alleging a violation of section 4312 of USERRA need not prove the elements of an alleged violation of section 4311. In the absence of any negative comment to consider, the Department will incorporate this provision of the proposed rule in the final rule."

You can find this language in the 2005 edition of the Federal Register, in the right-hand column of page 75251. It is also available on the DOL-VETS website.

The pertinent regulation states, “The employee is not required to prove that the employer discriminated against him or her because of the employee’s uniformed service in order to be eligible for reemployment.” 20 CFR 1002.33.

In summary, the DOL-VETS investigator was clearly wrong to treat your case as a section 4311 case and to put the burden on you to prove that anti-military animus motivated the employer’s decision to fire you. I think that it is clear that you have made out a prima facie case that you met the five eligibility criteria after you were released from active duty in February 2006 and that you were fired before the protection period had expired. Accordingly, the firing was unlawful, unless the employer can prove (not just say) that it was for cause, as described in 20 CFR 1002.248.

Over the last quarter century, I have, on many occasions, heard DOL-VETS investigators say, “We cannot make a case for a violation of the reemployment statute without an employer admission that he fired the claimant or denied the claimant reinstatement because of the claimant’s military service” (or words to that effect). In many more cases, I have heard reports from claimants that DOL-VETS investigators have told them that in person, by telephone, or even in writing, in a letter or e-mail.

I am informed that DOL-VETS is making an effort to correct any wrong information that may have been dissiminated. If you have received such a communication from a DOL-VETS investigator since Jan. 1, 2000, please report the communication to:

Rob Wilson
Chief, Investigation and Compliance
Veterans’ Employment and Training Service
U.S. Department of Labor
200 Constitution Ave. NW
Washington, DC 20210
rmwilson@dol.gov

Please provide Mr. Wilson as much detail as possible, including the name of the DOL-VETS investigator who told you this and the date or approximate date. If the communication was in writing, please provide Mr. Wilson a copy, if possible.

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