

LAW REVIEW 756

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1.3: USERRA Service and Notice

Laid Off and Called Up

Layoffs are still employment relationships under USERRA, but other factors may keep you from getting your old job back.

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Q: I served on active duty as a naval aviator for eight years and was released from active duty in 1999. In September 2000, I was hired by a major airline as a pilot. The September 11 atrocities occurred a year later, and the airline substantially reduced the number of scheduled flights and laid off hundreds of pilots. Under the collective bargaining agreement between the airline and the Air Line Pilots Association (ALPA), layoffs and recalls from layoff are based strictly on seniority. Because I only had one year of seniority with the airline, I was among those laid off.

I found myself unemployed and in some financial difficulty, but the Navy offered me the opportunity to go back on active duty, voluntarily. I went back on active duty in November 2001, and I have been on active duty continuously since that time. I recently spoke to an old friend who was hired by the airline, with me, in September 2000 and laid off in September 2001. He told me that he was finally called back to work by the airline in late 2005. If I leave active duty now, will I have the right to return to the airline as a pilot?

A: Maybe. To have the right to reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA), you must meet five simple eligibility criteria:

1. You must have left a "position of employment" for the purpose of performing voluntary or involuntary service in the uniformed services.
2. You must have given the employer prior oral or written notice.
3. You must not have exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, relating to the employer relationship. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. See Law Review 201.
4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have made a timely application for reemployment, after release from the period of service.

You must meet all five of these criteria to have the right to reemployment; four out of five gets you nothing. I am confident that you will meet numbers 4 and 5; it is unlikely that you will get in serious trouble with the Navy before you leave active duty, and it will be easy enough for you to apply for reemployment within 90 days after the date you leave active duty. Let's talk about the first three criteria.

Although you had been laid off in September 2001, you still held a "position of employment" with the airline, and you left that position to go on active duty in November 2001. In its first case construing the 1940 reemployment statute, the Supreme Court held, "The 'position' to which the veteran is restored is the 'position' which he left plus cumulated seniority. Certainly he would not have been discharged from such position and unable to get it back, if at the time of his induction into the armed services he had been laid off by operation of a seniority system. Plainly he still held his 'position' when he was inducted." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 287-88 (1946). See also *Colon v. Shawnee County, Kansas*, 815 F.2d 594 (10th Cir. 1987); *Kelly v. Ford Instrument Co.*, 298 F.2d 399 (2d Cir. 1962); *Hall v. Chicago & Eastern Illinois Railroad Co.*, 240 F. Supp. 797 (N.D. Ill. 1964).

Did you give notice to the airline before you went on active duty in November 2001? I have heard from several airline pilots in this sort of situation who did not notify their civilian employers before going on active duty. If you

failed to give notice, you do not have the right to reemployment, simply because you failed to give notice. The eligibility criterion is stated in the statute as follows: "The person [who seeks reemployment] (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or oral notice of such service to such person's employer." 38 U.S.C. 4312(a)(1). You must have given advance notice to the employer, or an appropriate officer of the Navy must have given such notice for you. If no such notice was provided, you do not have the right to reemployment.

There is no particular form for the notice. If you had contacted me in November 2001, before you went on active duty, I would have advised you to notify the airline's personnel office by certified mail, return receipt requested. But any kind of notice to a responsible person in the management of the airline would have been sufficient. I suggest that you search your memory and your records. Did you send an e-mail to the airline's chief pilot, informing him of your intention to return to active duty? Did you call the chief pilot on the telephone?

I am also concerned about the five-year limit. Since you went on active duty in November 2001 and have been on active duty continuously, your five-year limit expired in November 2006, unless some part of your service has been exempt from the five-year limit. I explain the five-year limit in considerable detail in Law Review 201. I suggest that you gather together all your military orders—if your orders contain the "magic words" described in Law Review 201, your period of service under those orders is exempt from the computation of the five-year limit.

Q: Time out! If I had not gone on active duty in November 2001, I would not have been called back to work until sometime in 2005. It seems to me that the period when I would not have been working anyway, because of the layoff, should not count toward my five-year limit. Do you agree?

A: No. The statute states this eligibility criterion as follows: "Such person's *cumulative period of service* in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years." It is the *cumulative period of service* (not the period of *absence* from your job) that is subject to the five-year limit. Although you were laid off by the airline in September 2001, you still had an employer relationship with the airline for as long as you had some possibility of being recalled to work. As I explain in Law Review 201, there are eight generous exemptions from the five-year limit, but the period when you would have been laid off anyway is not one of the exemptions.

You have a lot at stake in a situation of this kind. You need to plan your affairs in such a way that you clearly meet each of the five eligibility criteria, and that you will be able to prove that you meet each criterion. It may be prudent to spend some money to get legal advice before you have settled the facts in such a way that you do not have the right to reemployment. Just make sure that you find a lawyer who knows something about USERRA; there are not a lot of lawyers out there who even know the acronym.