

LAW REVIEW 760

(November 2007)

1.19: USERRA Enforcement

Second Careers

USERRA applies to retirees voluntarily returning to Active Duty.

By CAPT Samuel F. Wright, JAGC, USN (Ret.)

Q: I served on active duty in the Regular Army for 21 years, retiring as a major in 1996. In 1998, I went to work for a prestigious military college. In 2005, I volunteered to return to active duty for two years. I deployed to Iraq for a year, and now I am serving at Fort Bragg, N.C. I expect to leave active duty by the end of 2007, and I want to return to the staff of the military college. The college's personnel director has told me, in an e-mail, that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply to me because I volunteered for this active duty period and because I am not a member of the National Guard or Reserve. Is that correct?

A: No. As I explained in detail in Law Reviews 30 and 0719, USERRA applies to voluntary as well as involuntary service, and to service in the regular military as well as the Reserve Components. USERRA accords the right to reemployment to anyone who meets the five eligibility criteria. The person must have left a position of civilian employment for the purpose of performing voluntary or involuntary service in the uniformed services and must have given the employer prior oral or written notice. The person's cumulative period or periods of uniformed service *with respect to the employer relationship for which the person seeks reemployment* must not have exceeded five years. The person must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and the person must have made a timely application for reemployment with the pre-service employer.

It seems clear that you will soon meet the five criteria. Your five-year limit with respect to the military college started running in 1998, when you went to work for that employer. Your 21 years of active duty prior to 1998 is irrelevant for USERRA purposes. (Please see Law Reviews 6 and 201.) When you meet the criteria, the employer is required to reemploy you *promptly* (generally, within two weeks after your application), even if that means laying off another employee hired to fill your position in your absence. See Law Review 206.

Your e-mail is not the first complaint I have received about that particular military college. One would hope that a military college would uniquely appreciate the sacrifices of military personnel and would bend over backwards to be a model employer in complying with USERRA.

Q: A year ago, while I was on active duty in Iraq, there was a promotion opportunity at the military college. I sent an e-mail to the dean and to the personnel director, asking that I be considered for the promotion. The personnel director responded, saying that he would not consider my application for the position because the college wanted someone who was immediately available to start in the position. Did refusing to consider my application violate USERRA?

A: Yes. Section 4311 of USERRA (38 U.S.C. 4311) makes it unlawful for an employer to deny an individual initial employment, retention in employment, promotion, or a benefit of employment because of the individual's membership in a uniformed service (Regular or Reserve), application to join a uniformed service, performance of service, or application or obligation to perform service. Denying a person initial employment because the person is on active duty and not immediately available to start work has been held to be a violation of section 4311. *See McLain v. City of Somerville*, 424 F. Supp. 2d 329 (D. Mass. 2006); *Beattie v. Trump Shuttle Inc.*, 758 F. Supp. 30 (D.D.C. 1991). I discuss those cases in detail in Law Reviews 36 and 0746.

The same principle applies to an employee applying for a promotion or transfer while away from work for military service. *See Allen v. United States Postal Service*, 142 F.3d 1444 (Fed. Cir. 1998). I discuss that case in detail in Law Review 191. I also invite the reader's attention to Law Reviews 170 and 0604.

Q: Selection for the promotion was not based on seniority alone, unlike the *Allen* case that you cited. What is to keep the college from going through the motion of "reopening" the promotion decision to "consider" my application and then selecting the same person all over again?

A: In your lawsuit, if it comes to that, you should ask the court to order that the decision be reopened and that the decision be made by someone independent of the college. I think that the court would order such a procedure as part of the remedy, to ensure that the remedy is meaningful and that your application is given fair consideration.

I have received many e-mails from deployed servicemembers with complaints like yours, concerning missed promotion opportunities while deployed. Let me offer a suggestion, to ensure that deployed servicemembers get fair consideration for promotion opportunities and to minimize the disruption for employers and fellow employees of the deployed member. When you leave a position of employment for voluntary or involuntary military service, you should give a *limited power of attorney* to a trusted colleague at work. Ideally, this person should be someone who is well aware of promotion opportunities as they come up, but someone who is well senior to you and not likely to be in competition with you for the same opportunities. That person should be familiar with your qualifications and interests and should use the power of attorney to make applications on your behalf while you are away from work serving our country. The employer should be required to give fair consideration to those applications, just as if you were present to apply for yourself.

As is explained in Law Reviews 106, 125, 134, 147, 0617, 0629, and 0749, the basic purpose of USERRA, as well as the Servicemembers' Civil Relief Act, is to take these civilian concerns off the servicemember's mind while he or she is serving our country at the tip of the spear. While you are serving our country in a place like Iraq, you should not have to worry about applying for promotion opportunities at your civilian job back home, and you should not have to worry about missing out on promotion opportunities because of your service to our country. This is a safety issue, your safety and the safety of your Citizen Warriors.

I have passed along this concern to the National Committee for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization with the mission to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. As part of its "five star" program, ESGR reviews employer policies and procedures for compliance with USERRA and for "going the extra mile" for employees who have been called to the colors. I hope that ESGR will work with employers, as well as National Guard and Reserve members, to promote the power of attorney solution. The point is to ensure that employees do not lose out on valuable promotion opportunities that may not recur for many years, and also to minimize the burden on employers and the fellow employees who were not called to the colors.