LAW REVIEW 762

(November 2007)
1.17: USERRA Discrimination

Harassment in the Air
Airline discourages Reserve service with contrary paycheck, insurance, and leave policies.

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Q: I am a pilot for a major airline and a major in the Air Force Reserve. I do a lot of military periods in the 10-to-15-day range. The airline recently established a new policy and procedure. If I (or any other pilot) am on military duty for more than eight days, the airline deletes my account in the payroll direct deposit system. This means that after I return from a period of military duty of nine days or more I must travel several hundred miles, in an off-the-clock status, to reenroll in the payroll system. The requirement to reenroll always delays my next paycheck by at least a few days.

Most importantly, the delay in my paycheck causes a delay in the payment of the employer share and the employee share of the health insurance coverage for my family. I have a son with several serious health concerns. On more than one occasion, we have encountered delays at the physician's office because the insurance company said that my policy had lapsed for non-payment of premiums.

The chief pilot and other leaders of the airline have made it clear that they want the pilots to quit the National Guard or Reserve. I think this new policy is an attempt to harass us, to further encourage us to get out of our commitments to Reserve Components. Does the airline's practice violate the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: Yes. USERRA's very first section provides as follows:
"The purposes of this chapter are-
(1) to encourage noncareer service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;
(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and
(3) to prohibit discrimination against persons because of their service in the uniformed services" (38 U.S.C. 4301(a)).

By dropping you from the airline's payroll and direct deposit system whenever you go on military duty for nine days or more, the airline is violating USERRA's "furlough or leave of absence clause." That provision reads: "Subject to paragraphs (2) through (6), a person who is absent from a position of employment by reason of service in the uniformed services shall be-
(A) deemed to be on furlough or leave of absence while performing such service; and
(B) entitled to such other rights and benefits not determined by seniority as are generally provided by the employer of the person to employees having similar seniority, status, and pay who are on furlough or leave of absence under a contract, agreement, policy, practice, or plan in effect at the commencement of such service or established while such person performs such service" (38 U.S.C. 4316(b)(1)). I invite the reader's attention to Law Reviews 41, 58, and 158 for a detailed discussion of the "furlough or leave of absence" clause.

The procedure of dropping you from the payroll system and making you reenroll inevitably results in a delay in your reinstatement after returning from a short tour of military training or service, and that delay clearly violates the employer's duty, under 38 U.S.C. 4313(a), to reemploy you "promptly." In Law Review 8 I address the issue of immediate reinstatement after return from a short period (less than 31 days) of military training or service: "If your period of service was less than 31 days (such as a drill weekend or a 12-day annual training tour), you must report for work at your first regularly scheduled shift following the completion of such service, the time reasonably

required for safe transportation from the place of service to your residence, and the expiration of an eight-hour period (for rest). If you do this, you are entitled to immediate reinstatement. For example, if you report to work at 0800 Monday morning following your [Annual Training], you are entitled to be back on the payroll as of Monday morning."

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. The secretary published the final USERRA Regulations in the *Federal Register* on Dec. 19, 2005, and the regulations went into effect 30 days later. These regulations are published in Title 20, Code of Federal Regulations (C.F.R.), Part 1002. I invite the reader's attention to 20 C.F.R. 1002.181 with regard to the right to *prompt* reinstatement in one's civilian job after return from a period of uniformed service, and *immediate* reinstatement if the period of service was less than 31 days.

Under section 4317(a) of USERRA, 38 U.S.C. 4317(a), you are entitled to elect continued health insurance coverage, for yourself and your family, through your civilian employer, when you are away from that employer for uniformed service. If the period of service is less than 31 continuous days, the employer is permitted to charge you, for such coverage, only the employee share that you normally pay while employed. Going forward, I suggest that you send your employer a *certified* letter (so they cannot deny having received it) before every short tour of uniformed service. You should cite 38 U.S.C. 4317(a), and you should explicitly request that the employer continue your health insurance coverage, for yourself and your family, during the upcoming period of uniformed service.

Under section 4317(b) of USERRA, 38 U.S.C. 4317(b), your employer is required to restore your civilian health insurance coverage *immediately* upon your reemployment, following a period of uniformed service (regardless of duration). There must be no waiting period and no exclusion of "pre-existing conditions" except conditions that the Department of Veterans Affairs has determined to be service-connected. This applies to your family members as well as yourself.

By causing your health insurance coverage to lapse, during or shortly after a short tour of uniformed service, through the employer's unlawful "make him reenroll" policy, your employer has violated 38 U.S.C. 4317. I invite the reader's attention to Law Reviews 10, 69, 85, 118, 142, and 176 for a detailed discussion of section 4317.

Q: Thank you for the detailed exposition of my rights under USERRA. My concern is about the employer harassment. The employer will eventually "correct" the violation, before or after I file suit or make a formal complaint, but the employer can make my life miserable in the meantime. Is there a solution to this problem?

A: Yes. "The court may use its full equity powers, including temporary or permanent injunctions, temporary restraining orders, and contempt orders, to vindicate fully the rights or benefits of persons under this chapter" (38 U.S.C. 4323(e)). If you sue the airline, either through private counsel or through the Department of Labor (DOL) and the Department of Justice (DOJ), you should ask for an injunction against the airline to command it to cease and desist from violating USERRA. The injunction should be made applicable to specific airline officials (the chief pilot, the personnel director, etc.), as well as the airline itself. If the unlawful actions continue, in defiance of the injunction, these individuals can quite literally be put in jail for contempt of court.

Q: Along with all my fellow pilots, I belong to the pilots' union. The "military liaison" between the union and the airline is a pilot who retired from the regular Air Force-he was never in the Air National Guard or Air Force Reserve. Like many regulars and retired regulars, he does not like the Reserve Components and their members. I went to him for help with my problems, and he was of no help whatsoever. He told me that the airline's policy and practice are consistent with the collective bargaining agreement (CBA) between the union and the airline. He also told me that I should quit the Air Force Reserve. What gives?

A: In its first case construing the 1940 reemployment statute, the Supreme Court held, "This legislation is to be liberally construed for the benefit of those who left private life to serve their country in its hour of great need. ... And no practice of employers or agreements between employers and unions can cut down the service adjustment benefits which Congress has secured the veteran under the Act" (*Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946)). This language has been quoted and followed in almost every subsequent reemployment rights case over the past 61 years.

Of course, the Supreme Court was referring to members of my father's generation who had just won World War II the year before *Fishgold* was decided. Courts today recognize that those eloquent words equally apply to the members of Generation X and Generation Y who serve today. Of course, the numbers today are small, as compared to the numbers during World War II, when more than 16 million men and women served on active duty in the Armed Forces. Today's total military force, including National Guard and Reserve personnel not currently on active duty, makes up far less than 1 percent of our nation's population, which recently passed 300 million, according to the Census Bureau.

The fact that the number of military personnel serving today is comparatively small only heightens the obligations of employers and co-workers to those who serve. As Prime Minister Winston Churchill said of Royal Air Force members in the immediate aftermath of the Battle of Britain, "Never in the course of human conflict has so much been owed by so many to so few."

It is not surprising that your union is not particularly supportive of your rights as a servicemember or veteran. Those who serve and have served generally make up a small minority in a union, and their interests sometimes conflict with the interests of the majority-those who have not served. Union officers are elected by the members, and they respond to the wishes of the majority, not the minority.

"(a) Nothing in this chapter shall supersede, nullify or diminish any federal or state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is more beneficial to, or is in addition to, a right or benefit provided for such person in this chapter.

(b) This chapter supersedes any state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, including the establishment of additional prerequisites to the exercise of any such right or the receipt of any such benefit" (38 U.S.C. 4302).

The CBA between your union and the airline can give you greater or additional rights, beyond USERRA, but it cannot take away the rights that Congress gave you when it enacted this law. Your rights are under USERRA, not the CBA, so the attitude of the union official is not particularly pertinent. But it sure would be nice if he would support you instead of standing in your way. Maybe the national union president would insist on the appointment of somebody else, if you were to send him a copy of this article, with this paragraph circled. I invite your attention to Law Review 18 for a detailed discussion of the relationship between CBAs, employer policies, and USERRA. Also, somebody should point out to this "military liaison" that USERRA is not limited to the National Guard and Reserve-it also applies to persons who leave civilian jobs to perform up to five years (and sometimes a little longer) of voluntary active duty in the regular military. Please see Law Review 0719.

Q: I fly for the airline about 16 to 18 days per month. I know before the start of the month what days I will be expected to fly. I have some flexibility in scheduling my military duty. To the extent practicable, I schedule my military duty around my airline schedule to minimize the burden on my employer. The airline has encouraged pilots to do exactly this sort of scheduling, although the airline has also made it clear that it wants me and the other pilots who are Reservists to quit the Reserve as soon as possible.

I have read your Law Reviews 26, 59, and 188. I understand that I do not continue accruing vacation days while I am *away from work* performing uniformed service. My issue is that the airline docks me vacation days for days that I perform uniformed service *even if I was not scheduled to fly for the airline on that day*. I think that this policy is fundamentally unfair and ought to be unlawful. What do you think?

A: I think that the policy that you describe is unlawful. DOJ has filed a class action suit against American Airlines over exactly this issue. The outcome of that suit will not affect you directly, because you are not employed by American Airlines and you are not part of the plaintiff class. But that case could result in a favorable precedent. I suggest that you make a formal complaint against the airline with DOL, on this and other issues. Good luck.