

LAW REVIEW 804

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CATEGORY: 1.1-USERRA Coverage

1.19-USERRA Enforcement

USERRA Applies to Employment as Adjunct Professor

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Q: For the last four years I have had a part-time job as an adjunct professor at our local community college. I teach one or two classes per semester and get paid a few thousand dollars per year. I was called to active duty with my Army Reserve Civil Affairs unit in July 2007, and I expected to be on active duty for more than a year. I informed the college dean, and he reassigned to another adjunct professor the two classes that I had been scheduled to teach during the Fall 2007 semester.

After reporting to active duty, I was sent to a military base here in the United States for some last-minute training before deployment to Iraq. I was injured during that training, and I was sent home-released from active duty after just 28 days of service. Now, what happens to my civilian job at the community college? The college's personnel director insists (in a letter that she sent me) that the Uniformed Services Employment and Reemployment Rights Act (USERRA) does not apply here because I was not tenured and my position was part-time. Also, the personnel director insists that reemploying me for the 2007 fall semester would impose an "undue hardship" on the college because the classes I had been scheduled to teach during that semester were assigned to another teacher after I notified the college that I was going on active duty for a year or more.

A: 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 Department of Labor (DOL) published the final regulations in December 2005. The regulations went into effect in January 2006 and are now published in Title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002).

The DOL USERRA regulations specifically address the question of USERRA applicability to part-time employment, as follows: "USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense." 20 C.F.R. 1002.41.

"An employer is not required to reemploy a person under this chapter if ... the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant time." 38 U.S.C. 4312(d)(1)(C). "In any proceeding involving an issue of whether ... the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, the employer shall have the burden of proving ... the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant period." 38 U.S.C. 4312(d)(2)(C).

This is what is known as an affirmative defense: the employer has the burden of proof. You do not need to prove that you had a reasonable expectation of continued employment at the time that you were mobilized; the employer must prove that you had *no reasonable expectation* of continued employment. Based on the facts as you have described them, the employer will not be able to prove that. You had already taught at the college for four years, and you were scheduled to teach in the fall of 2007 before you learned of your mobilization.

As I explained in Law Review 77 and other articles, an individual must meet five simple eligibility criteria in order

to have the right to reemployment under USERRA. The individual must have left a position of civilian employment (including a part-time or temporary position) for the purpose of performing voluntary or involuntary service in the uniformed services, and the individual must have given the employer prior oral or written notice. The individual's cumulative period or periods of uniformed service, relating to this employer relationship, must not have exceeded five years. (Since this was an involuntary mobilization, your period of service does not count toward your cumulative five-year limit with the community college.) The individual must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. And the individual must have made a timely application for reemployment after release from the period of service.

If you meet these five criteria, and it seems clear that you do, the employer has the *legal obligation to reemploy you promptly even if that means displacing the replacement employee*. The U.S. Court of Appeals for the Federal Circuit has held, "The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [Nichols was the returning veteran and the plaintiff] former position was 'unavailable' because it was occupied by another, and thus it was within the department's discretion to place Nichols in an equivalent position. This is incorrect. Nichols' former position is not unavailable because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. Employers must tailor their workforces to accommodate returning veterans' statutory rights to reemployment. Although such arrangements may create temporary work dislocations for nonveteran employees, those hardships fall within the contemplation of the act, which is to be construed liberally to benefit those who 'left private life to serve their country.' *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).¹ *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols' former position is not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him." *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993).

For other cases holding that the lack of a current vacancy does not excuse the employer's failure to reemploy the returning veteran, I invite the reader's attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662 F. Supp. 10 (E.D. Mich. 1985); and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981).

Q: You mention, among the eligibility criteria, that I must make a *timely* application for reemployment. How much time do I have to ask for my job back?

A: As I explain in Law Review 7, the deadline for reporting back to work or submitting your application for reemployment depends upon the duration of the period of uniformed service from which you are returning, and it is the *actual duration* (not the expected duration) that controls. After a period of service of less than 31 days, you are required to report back to work "not later than the beginning of the first regularly scheduled work period on the first full calendar day following the completion of the period of service and the expiration of eight hours after a period allowing for safe transportation from the place of service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i).

In your case, your *actual* period of service was less than 31 days, although you had expected that you would be on active duty for a year or more. Accordingly, you were required to report back to work the next regularly scheduled workday after you were released from the period of service and transported home.

Q: Time out! I cannot do that. I arrived home, after early release from service, on Aug. 15, 2007. This was after the end of the college's summer term and before the start of the fall semester. Almost nobody was present at the college on Thursday, Aug. 16, 2007. How was I supposed to report for work?

A: Section 4312(e)(1)(A)(i) required you to report for work at the next regularly scheduled work period. It sounds like there was no regularly scheduled work period for adjunct professors like you until the start of the fall semester, so you are not untimely in reporting back for work. I recommend that you send an e-mail to the college's personnel director and then follow up with a certified letter. Please see the attachment to Law Review 77 for a sample application for reemployment letter.

Q: I sent a certified letter to the college's personnel director, as you suggested. I have tried to call her five times, but she refuses to take or return my calls. Where do I go now?

A: I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR), the DoD organization tasked with assisting National Guard and Reserve personnel with exactly this sort of problem. Call ESGR at 1-800-336-4590 or DSN 426-1386. You can also seek ESGR assistance through the organization's website, www.esgr.mil.