

LAW REVIEW 807

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CATEGORY: 1.17-Discrimination Prohibited

Bonus Bust: Mobilization deprives Soldier of earned bonus at civilian job.

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

Q: Since 2000, I have worked for XYZ Corp. At this company, every employee gets a performance evaluation and an annual bonus on Dec. 31, or the last business day of the calendar year. The annual bonus amounts to a substantial proportion (sometimes more than one-third) of the individual employee's compensation. The performance evaluation determines the amount of the bonus. If you get a mediocre evaluation, your bonus will be a few hundred dollars. If you get an outstanding evaluation, your bonus can amount to many thousands of dollars.

I have received substantial bonuses each year that I have worked for XYZ, and I had been expecting another substantial bonus last year. I am a member of the Army Reserve, and was mobilized at the end of the year, ordered to report to active duty on Dec. 27, two days after Christmas.

I informed my supervisor and the personnel director of XYZ about my impending mobilization. The personnel director told me that I would not receive a bonus for 2007 because I would not be present for work on Monday, Dec. 31. This is not fair. I have worked hard all year, and my recall to active duty should not serve to deprive me of the bonus I have earned. Does depriving me of the bonus violate the Uniformed Services Employment and Reemployment Rights Act (USERRA)?

A: In my opinion, yes. Section 4311(a) of USERRA [38 U.S.C. 4311(a)] makes it unlawful for an employer to deny an individual any "benefit of employment" because of the individual's service in the uniformed services. In this situation, you have been present for work for all but the last three or four workdays of 2007. You have earned the bonus based on your work over the course of the whole year. Denying you the bonus because you are away from work performing uniformed service on Dec. 31 is a clear and egregious USERRA violation, in my view.

Q: The personnel director insists that the XYZ employee manual clearly states that an employee must be present for work on the last business day of the year to receive a performance evaluation and to qualify for an annual bonus. She said that the company has never made an exception to this rule and will not make an exception now. What do you think about that?

A: In its first case construing the reemployment statute, the Supreme Court stated, "No practice of employers or agreements between employers and unions can cut down the service adjustment benefits that Congress has secured the veteran under the act." *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946). Section 4302(b) of USERRA [38 U.S.C. 4302(b)] provides that USERRA overrides any agreement or employer policy that purports to limit USERRA rights.

Q: Where do I go from here?

A: I suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR), at 1-800-336-4590. ESGR is a Department of Defense organization, founded in 1972. Its mission is to gain the support of civilian employers for the men and women of the National Guard and Reserve. If ESGR is unable to persuade XYZ to come into compliance, your next step is to make a formal complaint to the U.S. Department of Labor's Veterans' Employment and Training Service, or to retain a private counsel and sue XYZ in the U.S. District Court for any district where the company maintains a place of business. But please give ESGR a chance to try to work this out informally and amicably, before you "make a federal case out of it."