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Is It "Impossible or Unreasonable" To Reinstate Me?

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Q: I went to work for XYZ Corporation in 1990 and worked there until late 1998, when I entered active duty in the Navy. I served on active duty for four and a half years and was released from active duty in April 2003. The very next day, I submitted my application for re-employment at XYZ.

I left my job for the purpose of performing military service, and I gave prior notice to the employer. My period of service is within USERRA's five-year limit. I was released from active duty under honorable conditions. I made a timely application for re-employment, just one day after I left active duty. Nonetheless, XYZ refuses to re-employ me, claiming that doing so is "impossible or unreasonable" because of "changed circumstances."

XYZ is a government contractor, providing services to various government agencies. During the eight years that I worked for XYZ, before my active duty, I worked on about 25 individual contracts. Some of the contracts lasted for only a few days, and some for many months. Whenever I finished a contract, I was always able to find a new contract within a few days. Sometimes, I worked on "corporate overhead" projects for a few days between contracts. The same can be said about most XYZ employees.

XYZ claims that it is impossible or unreasonable to re-employ me because the contract I was working on, in late 1998, has long since been terminated. Of course, that is true, but I am confident that I would still be working for XYZ, because I would have found other contracts. Two XYZ colleagues worked with me on that particular contract in late 1998. One of them still works for the company, and the other left by choice. Do you think that I have a strong case?

A: Yes. I have reviewed your case, and I agree that you meet all of USERRA's eligibility criteria. It appears that the employer is not even trying to deny that you meet the criteria. The employer is relying totally on 38 U.S.C. 4312(d)(1)(A), which provides: "An employer is not required to reemploy a person under this chapter if … the employer's circumstances have so changed as to make such reemployment impossible or unreasonable." It should be noted that USERRA also provides: "In any proceeding involving an issue of whether … any reemployment referred to in paragraph (1) is impossible or unreasonable because of a change in the employer's circumstances, … the employer shall have the burden of proving the impossibility or unreasonableness." This is what we lawyers call an "affirmative defense" for which the defendant bears the burden of proof.

Essentially the same "impossible or unreasonable" language appeared in the

Veterans' Reemployment Rights (VRR) law, which was superseded by USERRA in 1994. USERRA's legislative history makes clear that, as was the case with the VRR law's essentially identical provision, this affirmative defense is very narrow, and the employer bears a very heavy burden of proof: "The only other exceptions to the unqualified right to reemployment would be the provisions in subsection (d), which provide that the employer need not reemploy the person if the employer's circumstances have so changed as to make it impossible or unreasonable to reemploy … The very limited exception of unreasonable or impossible, which is in the nature of an affirmative defense, and for which the employer has the burden of proof [see Watkins Motor Lines, Inc. v. deGalliford, 167 F.2d 274, 275 (5th Cir. 1948); Davis v. Halifax County School System, 508 F. Supp. 966, 969 (E.D.N.C. 1981], is only applicable 'where reinstatement would require creation of a useless job or where there has been a reduction in the work force that reasonably would have included the veteran.' Davis, supra, 508 F. Supp. at 968. 'It also is not a sufficient excuse that another person has been hired to fill the position vacated by the veteran nor that no opening exists at the time of application.' Davis, supra. See also Fitz v. Board of Education of the Port Huron Area Schools, 662 F. Supp. 1011, 1015 (E.D. Mich. 1985), aff'd 802 F.2d 457 (6th Cir. 1986); Anthony v. Basic American Foods, 600 F. Supp. 352, 357 (N.D. Cal. 1984); Goggin v. Lincoln St. Louis, 702 F.2d 698, 709 (8th Cir. 1983)." House Rep. No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2458.

Applying these standards to your situation, I think that it is very unlikely that XYZ Corporation will be able to establish that it is "impossible or unreasonable" to re-employ you. Re-employing you would be moderately inconvenient for the employer, but not all that difficult, and certainly not "impossible or unreasonable" within the meaning of USERRA.

* Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.