LAW REVIEW 812

(February 2008)
CATEGORY: 1.1 USERRA Coverage
1.15 Training or Retraining and Entitlements of Returning Disabled Veterans
1.3 Left job for service and gave prior notice

Prior Notice To Employer Not Required To Predict Return To Job

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

Q: I am the owner of a very small business—only 10 employees. Almost four years ago, Joe Smith (not his real name) came to me and told me that he was resigning to join the Army. He told me that he had decided to make the Army his career. We held a party to honor him, and I never heard another word from him until last week, when he showed up at the shop with his discharge papers. Moreover, he had an artificial left arm and left leg—he told me that he had been injured in Iraq when a bomb blew up near a vehicle that he was driving. He told me that he wants to come back to work here, and that federal law requires me to take him back.

My lawyer has informed me that I don't need to worry about federal laws governing employment so long as I keep the total number of employees under 15.

A: Other federal laws (including Title VII of the Civil Rights Act of 1964 and the Age Discrimination in Employment Act) only apply to employers with 15 or more employees, but the reemployment statute has never had such a threshold. You only need one employee to be an "employer" for purposes of this law. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).

The pertinent law here is the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified in title 38, U.S. Code, sections 4301 through 4334 (38 U.S.C. 4301-4334). Congress enacted USERRA in 1994, as a complete rewrite of the Veterans' Reemployment Rights (VRR) law, which can be traced back to 1940. I invite your attention to Law Review 104, for a comprehensive discussion of the history of the reemployment statute.

I also invite your attention to Law Review 77, for the eligibility criteria that an individual must meet to have the right to reemployment:

a. Left a position of employment for the purpose of performing voluntary or involuntary service in the uniformed services—anything from five hours (one drill period for a National Guard or Reserve member) to five years of full-time voluntary active duty.

b. Gave the employer prior oral or written notice.

c. Cumulative period or periods of uniformed service, relating to that employer relationship, have not exceeded five years. All involuntary service and some voluntary service are exempted from the computation of the five-year limit. See Law Review 201.

d. Released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.

e. Has made a timely application for reemployment after release from the period of service. If the period of service was longer than 180 days, the deadline to apply for reemployment is 90 days after release from the period of service. See 38 U.S.C. 4312(e)(1)(D). If the person was hospitalized or convalescing from a service-connected injury or illness when released from service, the deadline to apply for reemployment can be extended by up to two years. See 38 U.S.C. 4312(e)(2)(A).

It appears that Mr. Smith meets these criteria and is entitled to reemployment.

Q: I will grant you that Mr. Smith told me that he was joining the Army, but he never told me he would be coming back and seeking reemployment. He specifically told me that he was resigning and that he intended to make the Army his career.

A: Mr. Smith was not required to tell you anything about his future plans at the time he left his job to join the Army, and his use of the word "resign" when giving you notice does not defeat his right to reemployment. Please see Law Review 63.

As directed by Section 4331 of USERRA (38 U.S.C. 4331), the Department of Labor (DOL) published the final USERRA regulations Dec. 19, 2005. They went into effect 30 days later and are now published in Title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). You can find the complete text of the regulations, along with a well-written DOL preamble explaining their purpose and effect, on the DOL website, at www.dol.gov/vets. I also invite your attention to Law Review 0604 for a discussion of these regulations.

The DOL USERRA regulations address your issue head-on: *"Is the employee required to tell his or her civilian employer that he or she intends to seek reemployment after completing uniformed service before the employee leaves to perform service in the uniformed services?* No. When the employee leaves the employment position to begin a period of service, he or she is not required to tell the civilian employer that he or she intends to seek reemployment after completing uniformed service. Even if the employee tells the employer before entering or completing uniformed service that he or she does not intend to seek reemployment after completing the uniformed service, the employee does not forfeit the right to reemployment after completing service. The employee is not required to decide in advance of leaving the civilian employment whether he or she will seek reemployment after completing uniformed service." 20 C.F.R. 1002.88.

The DOL preamble to the USERRA regulations elaborates on this issue, as follows: "Section 1002.88 implements the long-standing legal principle that an employee departing for service is not required to decide at that time whether he or she intends to return to the pre-service employer upon completion of the tour of duty. Rather, the employee may defer the decision until after he or she concludes the period of service, and the employer may not press the employee for any assurances about his or her plans. See H.R. Rep. No. 103-65, Pt. I, at 26 (1993) ('One of the basic purposes of the reemployment statute is to maintain the service member's civilian job as an 'unburned bridge.') and S. Rep. No. 103-158, at 47 (1993), both of which cite *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284 (1946)." 2005 *Federal Register* at page 75256, near the top of the right-hand column.

Mr. Smith's compelling situation is an excellent example of the need for this "not required to decide when leaving" rule. At the time he left your company, he almost certainly did intend to make the Army his career. Losing his left arm and leg has frustrated his military career plan. Now that he has been medically retired from the Army, he is entitled to reemployment at your company, as his "unburned bridge." If he meets the five eligibility criteria, and it certainly seems that he does, you have a legal obligation, under federal law, to reemploy him.

Q: When Mr. Smith worked for me before he went into the Army, he was a strong and healthy young man—his job was to load heavy equipment onto a vehicle and then to drive that vehicle to job sites and unload it. I realize that medical science has made remarkable advances in recent years, but I don't think that a man with one arm and one leg can do this job.

A: Under section 4313(a)(3) of USERRA [38 U.S.C. 4313(a)(3)], you are required to make reasonable efforts to enable Mr. Smith to return to the job he left and almost certainly would have maintained but for his military service. If the disability cannot be reasonably accommodated in that particular position of employment, you are required to reemploy Mr. Smith in some other position for which he is qualified, or can become qualified with reasonable employer efforts, and that provides like seniority, status, and pay, or the closest approximation consistent with his severe disability. I also invite your attention to Law Reviews 121, 136, 199, and 0640 for a detailed discussion of the obligations of the employer to the returning disabled veteran.

Q: This law that you describe puts a heavy burden on a small business like mine. Why should I have to bear this burden?

A: When Congress enacted the reemployment statute in 1940, and also when it updated it in 1994 (USERRA), Congress was fully aware that this law could be burdensome on employers, and also on the co-workers of the returning veteran. During the 1940 debate in the Senate, Sen. Elbert Thomas of Utah (principal proponent of the reemployment provision of the Selective Training and Service Act) frankly acknowledged the burden and insisted that it was justified "because the lives and property of employers, as well as everyone else in this country, are preserved by such military service." Sen. Thomas's eloquent argument carried the day with his colleagues.

Just a few months after the end of World War II, the first reemployment rights case reached the Supreme Court. In an eloquent decision endorsed by all nine justices, Justice William O. Douglas wrote that this statute "is to be liberally construed for he who has laid aside his private pursuits to serve his country in its hour of great need." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 285 (1946).

Of course, Justice Douglas was referring to the young men and women who had just won World War II. I am sure you will agree that those fine words apply equally to the grandsons and granddaughters, and great-grandsons and great-granddaughters, of the greatest generation who are fighting the Global War on Terrorism today.