LAW REVIEW 829

(June 2008)
CATEGORY: 1.14—Status of Returning Veteran
USERRA Overrides the Interests of the Replacement Employee

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

Q: I have never served in the military myself, but I consider myself a patriotic American. Last year, I applied for and was hired by a large insurance company as a sales representative. I worked at a small office in Del Rio, Texas, and my territory included Val Verde County and several surrounding counties. About a month after I started this new job, I learned that I had been hired to replace Joe Smith (not his real name) when Joe was called to active duty (from the Army Reserve) and deployed to Iraq. I asked my direct supervisor, and also the insurance company's personnel office, about what would happen to my job and my territory when Joe Smith returned from active duty. Both my direct supervisor and the personnel director assured me that I would not lose my job or my territory when Mr. Smith returned—they told me that Mr. Smith would be entitled to a "comparable" job, not the job he left, and that the company would stand by its assignment of the Del Rio job to me.

Last month, Mr. Smith returned from active duty and made a timely application for reemployment with the insurance company. The company offered him similar but currently vacant positions in Austin and Corpus Christi, but he declined those offers, insisting on returning to the Del Rio job that he had held. The company initially refused to displace me from the Del Rio job, but after Mr. Smith contacted a Department of Defense organization called the National Committee for Employer Support of the Guard and Reserve (ESGR), the company reversed itself and told me that I would have to leave the Del Rio office to make room for Joe Smith. I think that I have been treated unfairly.

The company then offered me the vacant positions in Corpus Christi or Austin, but I refused. I have spent my whole life in Del Rio and its vicinity—I own a home in Del Rio, my wife has a good job in Del Rio, and our kids are in good schools in Del Rio. I cannot just drop all of that and move several hundred miles to Austin or Corpus Christi, and I don't think that I should have to. After I refused to move, the insurance company terminated my employment.

The personnel director told me that the company wanted to support me, but the ESGR volunteer threatened the company with "negative media attention." I called the ESGR volunteer myself, but he refused to discuss the matter with me, other than to refer me to the ROA Law Review column, which is available as a link on the ESGR website, www.esgr.mil. I see that you have written most of the "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), so I am contacting you. I think that ESGR has abused its authority and has bullied my employer into doing something not required by the law. I love the military too, but I think that it is unfair that I should be punished because Joe Smith got called up and has now returned. What do you think?

A: I do not agree with your assessment that ESGR has abused its authority. The insurance company had the legal obligation to reemploy Joe Smith in Del Rio, even if that meant displacing you from your preferred job location, or even from employment altogether. The ESGR volunteer was correct to refuse to deal with you—USERRA accords rights to those who leave civilian jobs for voluntary or involuntary service in the uniformed services, and USERRA imposes obligations on employers. The interests of co-workers are no doubt implicated, but the affected co-worker has no rights and no standing under USERRA.

As I explain in Law Review 77 and other articles, Joe Smith has the right to reemployment under USERRA if he met five simple eligibility criteria. He must have left his civilian job for the purpose of performing voluntary or involuntary service in the uniformed services, and he must have given the employer prior oral or written notice. His cumulative period or periods of uniformed service, relating to the employer relationship for which he seeks reemployment, must not have exceeded five years. Because Mr. Smith was involuntarily mobilized, his recent

period of uniformed service does not count toward his cumulative five-year limit with the insurance company (see Law Review 201 for a detailed discussion of the five-year limit). Mr. Smith must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and he must have applied for reemployment with the pre-service employer within 90 days after release from service. For purposes of this article, I am assuming that Joe Smith met these five simple requirements.

Because Mr. Smith met the USERRA eligibility criteria, the insurance company was required to reemploy him "in the position of employment in which the person [Mr. Smith] would have been employed if the continuous employment of such person had not been interrupted by such service, or a position of like seniority, *status* and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A) (emphasis supplied). For purposes of this article I am assuming that there is no reason to believe that Mr. Smith would have been moved from his Del Rio job if he had not been called to the colors.

Reemploying Mr. Smith in Corpus Christi or Austin, well outside any reasonable commuting distance to Del Rio, would not have been a sufficient compliance with USERRA, because location (commuting area) is part of the "status" to which the returning veteran is entitled. *See Armstrong v. Cleaner Services, Inc.,* 79 LRRM 2921, 2923 (M.D. Tenn. 1972). Congress enacted USERRA in 1994, as a complete recodification of a law that can be traced back to 1940. The prior reemployment statute also used the word "status" in the same context. USERRA's legislative history (showing the intent of Congress) cites *Armstrong* with approval. See House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2464.

Q: Joe Smith is a childless bachelor and he lives in a rented apartment. I live in a house with a mortgage, and a wife and three children enrolled in Del Rio schools. My wife has a good job in Del Rio. If I have to move to Austin or Corpus Christi, my wife and I would have very difficult decisions to make. Either she would have to give up her good job to move with me to Austin or Corpus Christi, or I would have to live apart from her and the kids most of the time. It would be a lot easier for Joe to move than for me to move. What gives?

A: All of that is irrelevant. Joe Smith has rights under USERRA and you do not. In its first case construing the 1940 reemployment statute, the Supreme Court held, "The act was designed to protect the veteran in several ways. He who was called to the colors was not to be penalized on his return by reason of his absence from his civilian job. *He was, moreover, to gain by his service to his country an advantage which the law withheld from those who stayed behind." Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284 (1946) (emphasis supplied).

Joe Smith left his job to serve our country in the armed forces, while you remained behind. Joe Smith has rights under this statute, but you do not. If it had chosen to do so, and if it really wanted to keep you in Del Rio, the company could have offered Joe Smith other incentives (like a salary supplement) to induce him to accept the vacant position in Corpus Christi or Austin, but the company had no legal obligation to make Mr. Smith such an offer, and he could have turned it down in any case.

Justice William O. Douglas, joined by all eight of his colleagues, also wrote, "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." *Fishgold,* 328 U.S. at 285. Of course, Justice Douglas and his colleagues no doubt had in mind the brave young men and women who had just won World War II nine months earlier. I am sure that you will agree that Justice Douglas' eloquent words apply equally to their grandsons and granddaughters, and great-grandsons and great-granddaughters who are fighting the Global War on Terrorism today.

When Congress enacted the reemployment statute in 1940 and substantially updated it in 1994, Congress was very much aware that this law sometimes puts a burden not only on the employer but also on the stay-at-home co-workers of the employee who is called to the colors. During the 1940 debate on the Selective Training and Service Act (STSA), Sen. Elbert Thomas of Utah conceived of the idea of requiring employers to reemploy the young men who were drafted under the STSA. Sen. Thomas drafted and offered an amendment to that effect. The Senate and later the House adopted Sen. Thomas' amendment, and the STSA as enacted and signed into law by President Franklin Roosevelt included a chapter on reemployment rights. A year later, as part of the Service Extension Act, Congress expanded the reemployment provision to make it apply to voluntary enlistees as well as draftees.

During the 1940 Senate debate on the STSA, another senator objected to the Thomas amendment, asserting that

requiring reemployment would be unduly burdensome on employers and on the co-workers of those who left their jobs for military service. Sen. Thomas responded, acknowledging the burden and asserting that it was justified "because the lives and property of employers, and everyone else in this country, are protected by such [military] service." Sen. Thomas' eloquent argument carried the day with his colleagues. So, while it is unfortunate that folks like you might suffer inconvenience and income loss when other employees return to work after military service, this burden was clearly contemplated and accepted by Congress.

Allowing the hiring of another employee to defeat the reemployment rights of the returning veteran would render the reemployment statute largely meaningless, and it is clear that the lack of a current vacancy does not defeat the right of the veteran to return to his or her rightful position. "The department [Department of Veterans Affairs, 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. … 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). I also invite your attention to my Law Review 206 (December 2005).

Q: If I had known that the departure of Joe Smith for military service had created the vacancy that I was being hired to fill, I never would have taken this job, at least not without an ironclad guarantee, in writing, from the employer to the effect that I would not lose my job or territory upon the return of Joe Smith. What is a guy in my position supposed to do?

A: The company's contractual obligations to you could not detract from its statutory obligations to Joe Smith, because USERRA explicitly supersedes contracts which purport to limit USERRA rights. See 38 U.S.C. 4302(b). But USERRA does not excuse the employer's breach of contract. You could conceivably be entitled to money damages from the employer, if you can establish that the insurance company had a contractual obligation to you and breached the obligation.

In your situation, as you have described it, you probably do not have enforceable contract rights against the insurance company. There are three indispensable elements to a contract: offer, acceptance, and *consideration*. Consideration means a *quid pro quo*—a gratuitous promise, not supported by consideration, is not enforceable as a contract. In your situation, there is no consideration because you had already accepted and started the job when you first asked for assurance about what would happen when Joe Smith returned from military service. You would be on much stronger ground, on a contract theory, if you had asked for and received this assurance *before* you accepted the company's job offer.