LAW REVIEW 833

(August 2008)
CATEGORY: 1.3—Left Job for Service

Rights and Regard Keep your employer informed about when to expect your return.

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

Q: I found your Law Review articles on the ROA website and find them most useful in understanding the employer's obligations under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I work for a defense contractor. I manage a project for the Air Force on an Air Force base and supervise 25 employees of the contractor on the base.

One employee is an Air Force Reservist. In June 2007, he gave me notice that he would be on military duty for 30 days, from July 130. He provided me a copy of his orders in advance, and the orders showed that the period of service would expire on July 30. The orders called for him to perform his military duty at the same base where he normally works as a contractor employee. I expected to see him back at work on July 31 or August 1, but he did not report back and did not call in.

On August 8, I saw him at the Air Force base, and he was in uniform. I asked him why he had not come back to work, and he said that his Air Force orders had been extended. I asked him to come by our office and bring me a copy of the orders extension. He said he had no obligation to do so and that if I had any questions about his military status I should call his commanding officer. I don't know the name of the commanding officer or how to contact that officer.

In accordance with the company's employee handbook, I sent him a certified letter, demanding that he return to work or provide me new Air Force orders by August 20. He did not respond to the letter and did not report back to work in August. I did not hear from him again until Jan. 2, 2008, when he showed up at 8 a.m. with copies of military orders and a DD-214 showing that he had been on military duty from July 1 to Dec. 31, 2007. He demanded his job back.

Am I required to reemploy him? After he did not respond to our certified letter in August, we fired him and advertised the position. We hired a new employee who is a lot more dependable than this guy ever was.

A: As I explained in Law Review 77, and other articles available at www.roa.org, you are required to reemploy this fellow if he meets the five eligibility criteria under USERRA. It appears he meets those criteria. He left his job to perform uniformed service, and he gave you prior notice. He has not exceeded the cumulative five-year limit on the duration of the period or periods of service, and this sort of service probably does not count toward the limit. He was released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and he made a timely application for reemployment, after release from the period of service.

"Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if — …the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer." 38 U.S.C. 4312(a)(1). This fellow met this requirement because he gave you advance notice before he left his job to report to his Air Force duty. He was not required to predict when or even if he would be returning to work.

One particular section of the USERRA regulations issued by the Department of Labor in December 2005, published in title 20 of the *Code of Federal Regulations* at Part 1002, is right on point to the question you pose:

"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 position whether he or she will seek reemployment after completing uniformed service." 20 C.F.R. 1002.88.

Q: Our company's employee handbook explicitly provides that an employee on any kind of leave of absence must report back to work at the end of the leave or request (in writing) an extension of the leave. This fellow did neither, even after we notified him in writing of this requirement. Accordingly, we fired him in August 2007 and filled the position with another permanent employee.

A: The employee handbook can give this fellow (or National Guard and Reserve members generally) greater or additional rights, but it cannot take away rights that Congress has granted by statute, and it cannot impose additional prerequisites upon the exercise of statutory rights. The August 2007 firing of this fellow is a legal nullity and does not deprive him of the right to reemployment (see 38 U.S.C. 4302(b); see also 20 C.F.R. 1002.7).

The fact that the job has been filled does not defeat the veteran's right to reemployment, either. Quoting here from a 1993 Federal Circuit Court ruling in *Nichols v. Department of Veterans Affairs:* "The department [Department of Veterans Affairs, the employer in the case] first argues that, in this case, Nichols' [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 produce temporary work dislocations for nonveteran employees, these 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).' *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 defeat the veteran's right to reemployment, I invite your 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: This fellow could have avoided a lot of problems by providing me a copy of his extension orders in August.

A: For more than 25 years, I have been advising National Guard and Reserve personnel to minimize the problems of their civilian employers by giving the employer as much advance notice as possible and keeping the employer informed as to when to expect the employee's return. I reiterate that advice now.