

LAW REVIEW 837

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USERRA Coverage for Individuals Performing National Guard AGR Duty

1.1 USERRA Coverage

1.1.3.3 National Guard Service

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Q: I have been a member of the Army National Guard since 1999. I was hired by the XYZ Corporation in January 2004. In June 2004, I resigned my job at XYZ to go on long-term voluntary Active Guard and Reserve (AGR) duty with the National Guard of my state, in the counterdrug effort. I told the employer that I was going on full-time military duty and that I did not intend or expect to return to XYZ. In June 2007, the Army involuntarily called me to active duty. My AGR orders under title 32 of the United States Code were terminated, and I was put on title 10 mobilization orders and deployed to Iraq. I am still in Iraq now. I expect to leave active duty in the summer of 2008.

When I leave active duty this summer, I had hoped to return to my title 32 AGR job in the counterdrug program. I sent an e-mail to my boss at the state headquarters of the National Guard to inquire about returning to that position upon my release from these federal mobilization orders. He responded, telling me that budget cuts had resulted in the termination of the counterdrug program, that all of my colleagues in that program had been sent home, and that the same thing would have happened to me if I had not been on title 10 orders at the time.

I protested, asserting that my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) had been violated. My supervisor back home insists that USERRA does not apply to my situation. Is that correct?

A: Yes. USERRA applies to a person who leaves a *position of civilian employment* to perform service in the uniformed services. USERRA does not apply to leaving one form of uniformed service (title 32 duty) to perform another form of uniformed service (title 10 duty) and then seeking to return to the first form of duty.

Section 4303(13) of USERRA [38 U.S.C. 4303(13)] defines the term “service in the uniformed services.” The definition includes “full-time National Guard duty.” That term is not defined in USERRA, but it is defined in title 10, as follows: “The term ‘full-time National Guard duty’ means training or other duty, other than inactive duty training, performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member’s status as a member of the National Guard of a State or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States.” 10 U.S.C. 101(d)(5). I also invite your attention to Law Review 45 for a detailed discussion of USERRA coverage for National Guard duty.

I have seen your National Guard title 32 AGR duty orders, and those orders cite as authority 32 U.S.C. 502(f). Accordingly, your service under those orders constituted “full-time National Guard” duty under 10 U.S.C. 101(d)(5) and “service in the uniformed services” for USERRA purposes. Of course, your current involuntary active duty in Iraq also qualifies as “service in the uniformed services” for USERRA purposes.

You do not have the right, under USERRA, to go back to your title 32 AGR status in the counterdrug program when you are released from your title 10 duty this summer. Moreover, there is a problem with your use of USERRA *even as an analogy*. In its first case construing the reemployment statute, the Supreme Court enunciated the “escalator principle” when it held, “[The returning veteran] does not step back on the seniority escalator at the point he stepped

off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war.” *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 284-85 (1946). Section 4316(a) of USERRA [38 U.S.C. 4316(a) codifies the escalator principle in the current law.

It has always been the case that the “escalator” can descend as well as ascend. The reemployment statute does not protect you from unfortunate events, such as a layoff or reduction in force, that occur during the time you are away from work for uniformed service. It sounds like budget cuts resulted in the termination of the AGR counterdrug program while you were on active duty. Your former colleagues in the program lost their AGR positions when the program was terminated. The same thing would have happened to you if you had not been on title 10 duty at the time.

When you leave active duty this summer, however, you will have the right to reemployment at XYZ, the civilian employer that you left in June 2004, provided you meet the USERRA eligibility criteria. As I explained in Law Review 77, and other articles, you must meet five conditions to have the right to reemployment under USERRA:

- a.** You must have left a civilian position of employment for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that in June 2004 you left a civilian position of employment at XYZ in order to perform service in the uniformed services—the title 32 National Guard AGR duty.
- b.** You must have given the civilian employer prior oral or written notice. It is clear that you gave XYZ sufficient notice before you left your job in June 2004. Your use of the word “resign” when giving such notice is not fatal to your reemployment rights. See Law Review 63. It is also irrelevant that you and the employer were unaware of USERRA at the time.
- c.** Your cumulative period of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. As I explain in Law Review 201, *all* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit. Any uniformed service that you performed before January 2004, when you started the XYZ job, is irrelevant for USERRA purposes. Your three years of voluntary title 32 AGR duty count toward your five-year limit, but the one year of involuntary title 10 duty does not count. It appears that you are still well within the five-year limit.
- d.** You must be released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge. You will meet this condition this summer.
- e.** You must have made a timely application for reemployment with the pre-service employer, after release from the period of service. Because your period of service has exceeded 180 days, you have 90 days, starting on the date of release, to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). But I suggest that you apply for reemployment soon after you leave active duty.

Right now, in anticipation of your release from active duty in about four months, would be a good time for you to start rebuilding your bridges with XYZ. Send the owner of the company a polite letter, bringing her up to date on your activities. Enclose a copy of this article.

One of the principal purposes of USERRA, as well as the Servicemembers’ Civil Relief Act, is to remove civilian concerns from your mind, insofar as possible, so that you can concentrate on your military duties while you are serving at the tip of the spear. I hope that you find this information reassuring. You be careful out there.