LAW REVIEW 838

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Right to Reemployment at the End of the Initial Active Obligated Service

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Q: In 1998, I became a deputy sheriff in my home county. In late 2000, I became interested in joining the Army, and I visited with a recruiter. I enlisted in the Army's Warrant Officer Flight Training Program (WOFTP) and reported to basic training in January 2001. In the WOFTP, my initial active duty obligation is six years, measured from my completion of flight school. Completing basic training and flight school takes about 18 months, and I graduated from flight school in July 2002. I expect to leave active duty in July 2008, at the end of my initial active service obligation. I am wondering if I have the right to reemployment at the sheriff's office.

Before I left my deputy sheriff job, I told the sheriff that I was resigning to join the Army and that I intended to make the Army my career. At the time, I had not heard of the Uniformed Services Employment and Reemployment Rights Act (USERRA), but just recently a friend brought to my attention your Law Review column on the ROA website.

I recently sent a letter to the sheriff and told him that I expect to leave active duty and come home in the summer of 2008 and that I intend to apply for reemployment as a deputy sheriff. The sheriff referred the matter to the county attorney, who sent me a long, legalistic letter insisting that I will not have the right to reemployment with the county for several reasons. He said that I gave up my right to reemployment in December 2000 when I resigned the job and told the sheriff that I did not intend to return. He also said that I have long since exceeded the four-year limit on military absences imposed by state law. What do you think?

A: I think that the county attorney is wrong. The sheriff will be required to reemploy you if you meet the USERRA eligibility criteria, as described in Law Review 77. I think that you meet or will meet each of those conditions. It is clear that you left your civilian job for the purpose of performing uniformed service and that you gave the employer prior notice. The specific words that you used when giving notice are irrelevant, and your use of the word "resign" is not fatal to your right to reemployment. See Law Review 63. Moreover, contrary to popular misconception, USERRA applies to regular military service as well as service in the National Guard or Reserve. See Law Review 0719.

"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 (emphasis supplied).

The state law limit on the duration of your period of uniformed service is irrelevant, because that limit is shorter than the limit imposed by USERRA. Section 4302(b) of USERRA [38 U.S.C. 4302(b)] expressly provides that USERRA overrides state laws that purport to limit USERRA rights or that impose additional prerequisites upon the exercise of USERRA rights. Under Article VI, Clause 2 of the U.S. Constitution (commonly called the "Supremacy Clause"), federal laws trump conflicting state laws. *See Gibbons v. Ogden,* 22 U.S. 1 (1824).

Although USERRA generally establishes a five-year period of service for coverage under the law, there are exceptions in the law. "Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—that is required, beyond five years, to complete an initial period of obligated service." 38 U.S.C. 4312(c)(1). There are seven other exemptions from the five-year limit, but subsection (c)(1) is the exemption that applies in your case.

USERRA's legislative history explains the rationale for the exemptions from the five-year limit, and particularly this exemption: "In order … to ensure that the Armed Forces have an adequate supply of trained personnel, certain exceptions to the five years basic limitation would be established by the Committee [House Committee on Veterans' Affairs] bill. Section 4312(c)(1) would provide that the cumulative period of service may exceed five years if the additional time is necessary to complete an initial obligated service requirement. Because of the very high training costs for some military specialties, such as the Navy's nuclear power program, the services sometimes impose initial active service obligations exceeding five years upon persons serving in those specialties. The intent of this section is to ensure that a person leaving active duty upon completion of his or her initial active service obligation should have reemployment rights even if his or her continuous active service exceeds five years." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2460.

I think that your situation falls squarely within the contemplation of Congress. If you leave active duty under honorable conditions at your first opportunity to leave active duty, and if you apply for reemployment with the pre-service employer within 90 days after your release, you will have the right to reemployment.

Q: The county attorney also insists that the federal reemployment statute does not apply to state and local governments and that applying it to state and local governments would be unconstitutional. What do you say about that argument?

A: The county attorney is wrong. The federal reemployment statute has applied to federal agencies and private employers since 1940. In 1974, Congress amended the law to make it apply to state and local governments as well. (I invite your attention to Law Review 104 for a comprehensive discussion of the history of the federal reemployment statute.) The constitutionality of applying this law to state and local governments has been specifically upheld. *See Peel v. Florida Department of Transportation,* 600 F.2d 1070 (5th Cir. 1979)**.**

Q: I intend to remain in the Army Reserve or Army National Guard after I leave active duty. Will I lose my job the first time that I go to a weekend drill or annual training period?

A: No. Section 4312(c) contains eight statutory exemptions from the five-year limit. Reserve Component training and involuntary mobilizations are exempted from the computation of the five-year limit. Please see Law Review 201 for a comprehensive discussion of the limit and its exemptions.

Section 4312(c)(1) exempts from the five-year limit only that part of your initial active service obligation that exceeds five years. Thus, when you return to work for the county, you will have a zero balance in your five-year limit account. After you return to work, you must be careful that any additional military service falls within one of the eight statutory exemptions. If you later resign from county employment and take a new job with a new employer, you will receive a fresh five-year limit with the new employer.