LAW REVIEW 851

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Small Employers
Accommodations for Disabled Veterans

More Than Workers' Comp: Employer's USERRA obligation applies to Reservist injured on drill.

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Q: I own and operate a small company, with only 10 employees. One employee (let's call him Joe Smith) is a member of the Marine Corps Reserve. During a recent drill weekend, Joe broke his leg and injured his knee while running an obstacle course as part of his military training. Joe called in and told me he would not be at work on Monday, after the drill weekend, because he was hurt. He showed up Wednesday morning with his leg in a cast.

Joe's job routinely requires vigorous physical work, and he cannot readily do that job now, at least until his leg heals. I am informed the healing process will likely take several months.

Last year, another employee broke a leg while cleaning gutters at his home, on his own time. My lawyer told me I had no obligation to that employee because he did not suffer the injury at work. It seems to me that Joe Smith's situation is similar—I have no obligation to him because he did not suffer the injury while working for me. But Joe and his Reserve unit commanding officer say that this situation is different from the other injured employee because Joe suffered his injury during military training. Who is correct?

A: Mr. Smith and his commanding officer are correct. Unlike the other employee who suffered an injury away from work, Mr. Smith has rights under a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA). This law requires a civilian employer to reemploy an employee who leaves the civilian job for voluntary or involuntary service in the uniformed services and then returns or seeks to return to the civilian job after the period of service.

It appears clear that Mr. Smith meets the USERRA eligibility criteria for reemployment after his drill weekend. He left his job for the purpose of service and gave you prior notice. He has not exceeded the cumulative five-year limit on the duration of the period or periods of uniformed service, and this drill weekend does not even count toward the limit. He has not been discharged from the Marine Corps with a punitive or other-than-honorable discharge. He returned to work as soon as reasonably possible after his drill weekend.

The pertinent language of USERRA is as follows: "In the case of a person who has a disability incurred in, or aggravated during, such [uniformed] service, and who (after reasonable efforts by the employer to accommodate the disability) is not qualified due to such disability to be employed in the position of employment in which the person would have been employed if the continuous employment of such person with the employer had not been interrupted by such service—(A) [the person shall be reemployed] in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified to perform with reasonable efforts by the employer; or (B) if not employed under subparagraph (A), in a position which is the nearest approximation to a position referred to in subparagraph (A) in terms of seniority, status, and pay consistent with the circumstances of such person's case." 38 U.S.C. 4313(a)(3).

I invite your attention to Law Reviews 121, 130, 136, 199, and 0640, concerning the obligations of the employer to the returning disabled veteran. All of these articles are available at www.roa.org/law_review. It is irrelevant that Mr. Smith suffered his disabling injury during a drill weekend, not a longer period of service. USERRA's definition of "service in the uniformed services" expressly includes "inactive duty training" (drills).

USERRA requires you to put Mr. Smith back in the job he left and to make reasonable efforts to enable him to do that job, despite his injuries. If his disability cannot be reasonably accommodated in the job he left, you must put

him back to work in another position, *even if there is no current vacancy in that other position*. Please see Law Review 206, and especially the first three paragraphs of that article.

Q: My lawyer told me that as long as I have fewer than 15 employees, I don't need to worry about federal laws. Is that not the case?

A: Other federal employment laws (including Title VII of the Civil Rights Act of 1964 and the Americans with Disabilities Act) have a 15-employee threshold for applicability. The reemployment statute has never had such a threshold. You only need one employee to be an employer covered by this statute. See *Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).