

LAW REVIEW 854

(November 2008)

Left Job for Service and Gave Prior Notice

Character & Duration of Service

Timely Application for Reemployment

Accommodations for Disabled Veterans

Legal Assistance for Wounded Warriors—USERRA Component

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No Soldier is more deserving of our best efforts than a Soldier wounded in combat. I encourage every JAG Corps member, military and civilian alike, to reach out to our wounded Soldiers and their families in every way possible.

-- MG Scott C. Black, USA, Judge Advocate General of the Army

It seems that most judge advocates are not sufficiently cognizant of the critical importance of the Uniformed Services Employment and Reemployment Rights Act (USERRA) in advising and representing wounded Soldiers, Marines, Sailors, and Airmen. I recently spoke to a first lieutenant in the Army JAG Corps; he was not even familiar with the acronym USERRA.

USERRA accords the right to reemployment to anyone who leaves a job for voluntary or involuntary service in the uniformed services and who meets five eligibility criteria:

- a. Must have left a civilian position of employment for the purpose of performing *voluntary or involuntary* service in the uniformed services—anything from five hours (one drill period) to five years, and in some cases a little longer, of full-time voluntary active duty.
- b. Must have given the employer prior oral or written notice.
- c. Cumulative period or periods of uniformed service, relating to the employer relationship for which the person seeks reemployment, must not have exceeded five years. *All* involuntary service and *some* voluntary service are exempted from the computation of the five-year limit. Please see Law Review 201 for a definitive discussion of the five-year limit.
- d. Must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
- e. Must have made a timely application for reemployment with the pre-service employer, after release from the period of service.

Law Review 0719 explains that USERRA applies to *regular military service*, as well as service in the National Guard or Reserve. Law Review 77 details eligibility for reemployment rights. Law Reviews 121, 136, 199, and 0640 discuss the employer's obligation to the returning disabled veteran who meets the USERRA eligibility criteria. USERRA applies to essentially all employers in this country, including the federal government, the states and their political subdivisions, and private employers, regardless of size.

In a fictional scenario, I will present 1LT Mike Jones, an Army judge advocate six months out of law school and three months out of the Army's Justice School at Charlottesville, Va., who has been assigned to represent PFC Joe Smith, severely wounded in combat in Iraq.

In 2003, Mr. Smith was working for a city government when he visited an Army recruiter, took and passed the required tests, and took the oath of office. He reported to active duty Dec. 1, 2003.

On or about Nov. 1, 2003, Mr. Smith informed his immediate supervisor and the city's personnel office that he was resigning because he had joined the Army and would be reporting to active duty soon. Mr. Smith's use of the word "resign" when giving the employer notice is not fatal to his right to reemployment. Please see Law Review 63.

He expected to serve on active duty for four years and to be released on or about Nov. 30, 2007, unless he reenlisted. His intention was to make the Army his career, and he so informed his civilian supervisor. That communication does not defeat his right to reemployment, because a person giving notice to a civilian employer of impending departure for military service is not required to predict that he or she will return. The point of USERRA is to maintain the right to return to the pre-service civilian job as an unburned bridge, regardless of what the employee may have intended or said at the time of departure. Please see Law Review 0812.

PFC Smith was severely wounded in Iraq in February 2007. He lost his left arm and left leg and suffered other serious injuries. He has been at the Walter Reed Army Medical Center in Washington, D.C., since March 2007 and has had several surgeries and extensive rehabilitation, including installation of a prosthetic arm and leg. His active duty period was extended past November 2007 because of the ongoing medical treatment and rehabilitation, but the severity of his injuries will preclude him from remaining on active duty long-term.

With regard to USERRA, 1LT Jones needs to consider PFC Smith's five-year clock. If the ongoing treatment and the disability evaluation process will keep PFC Smith on active duty past Nov. 30, 2008, his orders for the extended period need to reflect that the extended period of active duty (past the five-year anniversary of going on active duty) has been necessitated by his wounds and rehabilitation. Getting such language included in the orders should not be difficult under the circumstances, but it is not going to happen automatically. 1LT Jones needs to contact the personnel office on behalf of PFC Smith.

Let us assume that PFC Smith is medically retired from the Army on Feb. 14, 2009, two years after being wounded. He will then have 90 days (starting on the date of release from active duty) to contact the city government and apply for reemployment. See 38 U.S.C. 4312(e)(1)(D).

Let us assume that because of his medical condition PFC Smith is medically retired from the Army on Feb. 14 and taken by ambulance to a Department of Veterans Affairs hospital for further medical treatment necessitated by his combat wounds. In that case, the 90-day deadline to apply for reemployment can be extended up to two years, while PFC Smith is hospitalized or convalescing from an injury or illness sustained or aggravated on active duty. See 38 U.S.C. 4312(e)(2).

Let us assume that PFC Smith applies for reemployment with the city government on May 1, 2009. PFC Smith then meets the five eligibility criteria for reemployment under USERRA.

Mr. Smith's job for the city, from 2001 to 2003, required him to drive a vehicle and to engage in vigorous physical activity. The city government is required to make reasonable efforts to accommodate PFC Smith's physical limitations and to enable him to return to the job he had held and almost certainly would have continued to hold, but for his decision to enlist. If the disability cannot be reasonably accommodated in that position, the city must reemploy him in some other position for which he is qualified or can become qualified with reasonable employer efforts. See 38 U.S.C. 4313(a)(3).

Thanks to 1LT Jones' efforts, PFC Smith receives a substantial monthly check from the federal government for his service-connected disabilities. But PFC Smith also needs to return to the world of work. Thanks to 1LT Jones' further efforts, PFC Smith has now returned to work for the city government, albeit not in the job that he had held from 2001 to 2003. He is now receiving monthly financial compensation from the federal government for his disabilities, and he is also receiving the psychic as well as financial benefits of holding a job.