

LAW REVIEW 856

(October 2008)

CATEGORY: Adequate Time for Travel and Rest

Discrimination Prohibited

Left Job for Service and Gave Prior Notice

Timely Application for Reemployment

Unlawful for Airline To Deny You Free-Space-Available Travel to Your Drill—Right to Time Off for Travel to and from Your Drill Weekend

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For 15 years, I have worked for a major airline, and I have been a member of the Air Force Reserve since shortly after I was hired by this airline. A valuable benefit of airline employment is the right to fly for free, on a space-available basis, on flights, on off-duty hours, for whatever purpose. The airline employee shows up at the gate and shows company identification and is boarded, provided a seat is available. The employee is not asked the purpose of the trip.

Last year, the airline transferred me across the country, but I have been unable to affiliate with a new Air Force Reserve unit. I must travel across the country to drill with a unit near my former home. There is an Air Force base in my new city, but that base does not have a Reserve unit that requires my particular military specialty.

Since I moved to the new city, my new supervisor has given me a hard time about time off from work for my Air Force Reserve training, and especially about the time required on Friday and Monday to travel to and return from the drill weekend. He told me that it is not permissible for me to use the employee space-available travel to get to and return from my drill weekends. He put my name on a company “no fly” list on the Friday before and Monday after my drill weekends. Have my rights under the Uniformed Services Employment and Reemployment Rights Act (USERRA) been violated?

A: Yes. Section 4311(a) of USERRA provides: “A person who is a member of, applies to be a member of, performs, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, retention in employment, promotion, or any *benefit of employment* by an employer on the basis of that membership, application for membership, performance of service, application for service, or obligation.” 38 U.S.C. 4311(a) (emphasis supplied).

Section 4303(2) of USERRA [38 U.S.C. 4303(2)] defines the term “benefit of employment” broadly. I think that it is clear that the right of an airline employee to fly for free on a space-available basis clearly qualifies as a “benefit of employment” for purposes of section 4311. Denying you that benefit *because* you plan to use it to travel to your drill weekend is a clear USERRA violation.

I think that your supervisor is misunderstanding the airline’s policy and the circumstances of Reserve Component inactive duty training (drills). The airline’s written policy actually provides that an employee is not to use the free space-available travel privilege *if the military is available to reimburse the employee for the travel*. Your supervisor does not understand that the Air Force Reserve and the other Reserve Components do not ordinarily reimburse the individual member for the cost of traveling to and returning from a drill weekend. This is an issue that ROA has been working for many years, and the effort continues.

Q: The Air Force does not reimburse me for the travel to and from my drill weekends, but it does permit me and encourage me to sleep Friday and Saturday nights in temporary military housing on base, at a nominal cost. I need to arrive at the Air Force base by midnight on Friday, so that I can have a few hours sleep before reporting to my unit at 7:30 a.m. on Saturday. I could conceivably travel through the night and show up at 7:30 a.m., but in that case my commanding officer would not permit me to participate in flight operations, for understandable reasons. If I am exhausted, it is significantly more likely that I could make a serious error, with

catastrophic consequences for myself and others.

I must miss at least part of my scheduled Friday shift at the civilian airport, in order to get away in time to arrive at the Air Force base by midnight Friday. Does USERRA support my right to take time off from my job on Friday to travel to my military training site and be reasonably rested for duty Saturday morning?

A: USERRA, and particularly the Department of Labor (DOL) USERRA regulations, strongly support your right to miss the Friday shift or to leave early from that shift in order to travel to your drill weekend and be able to report for duty Saturday morning “fit for duty.”

The DOL USERRA regulations address this issue head-on: *“Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?”* No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed services site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services: (a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.” 20 C.F.R. 1002.74.

Q: My boss at work insists that, under company policy, I must rearrange my military training (including transferring to a unit that drills at the local base) in order to minimize the burden on the employer. Is that correct?

A: No. *“Is the employee required to accommodate his or her employer’s needs as to the timing, frequency, or duration of service?”* No. The employee is not required to accommodate his or her employer’s interests or concerns regarding the timing, frequency, or duration of uniformed service. The employer cannot refuse to reemploy the employee because it believes that the timing, frequency, or duration of service is unreasonable. However, the employer is permitted to bring its concerns over the timing, frequency, or duration of the employee’s service to the attention of the appropriate military authority. Regulations issued by the Department of Defense at 32 C.F.R. 104.4 direct military authorities to provide assistance to an employer in addressing these types of employment issues. The military authorities are required to consider requests from employers of National Guard and Reserve members to adjust scheduled absences from civilian employment to perform service.” 20 C.F.R. 1002.104.

I suggest that you go out of your way to avoid a confrontation with your civilian supervisor about your military duties and the absences from work that those duties necessitate. Give your civilian supervisor the name, telephone number, and e-mail address of your Reserve unit commanding officer, and also ask your commanding officer to contact your civilian supervisor.

I also suggest that you call the National Committee for Employer Support of the Guard and Reserve (ESGR), a Department of Defense (DoD) organization founded in 1972, at 1-800-336-4590. ESGR’s mission is to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. An ESGR volunteer ombudsman in your city can work with you, your commanding officer, and your civilian supervisor to find a win-win solution that everyone can accept. Perhaps you could be “cross-assigned” to a Reserve unit at the base in your new city, although that unit has an entirely different mission and personnel needs. Perhaps your commanding officer will permit you to perform at least some of your drill weekends locally, to minimize the burden on your civilian employer.

But under USERRA, the needs of the military have priority. If your commanding officer determines that permitting you to drill away from her unit would detract from the mission of the unit, then the employer must accept the inconvenience and expense entailed by your military duties. I invite your attention to Law Review 0821 (May 2008), titled “The Burden of Freedom.”

Q: My boss at work has told me repeatedly that I need his prior permission to miss a shift or leave early from a shift, and that he will not give me such permission to miss part or all of the Friday shift in order to travel to my

drill weekend site. He said that the travel and rest issue is “not my problem, and not the airline’s problem.” Is the boss correct?

A: No. Section 4312(a) of USERRA [38 U.S.C. 4312(a)] requires you to *give notice* to your civilian employer of the times that your military duties (including drill weekends and travel to and from drill weekends) will necessitate your absence from work. This is a *notice* requirement, not a *permission* requirement.

Section 4312(a)(1) of USERRA provides that the required notice to the civilian employer can be given either by the individual employee who is leaving work for service or by an “appropriate officer” of the uniformed service in which the service is to be performed. I suggest that you ask your commanding officer to send a certified letter to the employer, detailing your drill weekends for the whole fiscal year. The letter should also explain the requirement that you arrive at the Air Force base by midnight Friday, in order to be “fit for duty” Saturday morning. Perhaps a letter from the commanding officer will take some of the pressure off you.

“Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?” No. The employee is not required to ask for or get his or her employer’s permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.” 20 C.F.R. 1002.87.

USERRA gives you the right to depart early from your Friday shift, in order to catch a flight to travel across country and arrive at the Air Force base by midnight Friday. But the last thing that you need is an ugly confrontation with your supervisor, in front of your coworkers, about leaving early from work for military duty. After such a scene, it will probably be difficult for your civilian supervisor to climb down from his “you must have my permission” position. In most circumstances, it is probably better to miss the Friday shift altogether than to have a public scene about leaving early. I suggest that you consult with your commanding officer and your local ESGR ombudsman to manage this difficult situation while minimizing confrontation.

Q: I complete my drill weekend at about 5 p.m. Sunday, and then I have exactly the same problem in reverse. I must travel by car from the Air Force base to a commercial airport about 75 miles away, and then catch a flight, and at least one connection, to return to the city where I live and work. Especially at certain times of the year, weather, mechanical problems, and other issues frequently lead to the delay or cancellation of flights. How quickly must I report back to work after my drill weekend?

A: Under USERRA, the deadline for reporting back to work or applying for reemployment, after a period of uniformed service, depends upon the duration of that service. “In the case of a person whose period of service in the uniformed services was less than 31 days [like a drill weekend or a two-week annual training tour], [the deadline is met] by reporting to the employer—(i) not later than the beginning of the first regularly scheduled work period on the first full calendar day following completion of the period of service and the expiration of eight hours after a period allowing for the safe transportation of the person from the place of that service to the person’s residence; or (ii) as soon as possible after the expiration of the eight-hour period referred to in clause (i), if reporting within the period referred to in such clause is impossible or unreasonable through no fault of the person.” 38 U.S.C. 4312(e)(1)(A).

“If the period of service in the uniformed services was less than 31 days, or the employee was absent from a position of employment for a period of any length for the purpose of an examination to determine his or her fitness to perform service, the employee must report back to the employer not later than the beginning of the first full regularly scheduled work period on the first full calendar day following the completion of the period of service, and the expiration of eight hours after a period allowing for safe transportation from the place of that service to the employee’s residence. For example, if the employee completes a period of service and travel home, arriving at 10 o’clock in the evening, he or she cannot be required to report to the employer until the beginning of the next full regularly scheduled work period that begins at least eight hours after arriving home; i.e., no earlier than six o’clock the next morning. If it is impossible or unreasonable for the employee to report within such time period through no fault of his or her own, he or she must report to the employer as soon as possible after the expiration of the eight-hour period.” 20 C.F.R. 1002.115(a).

I hope that this information is useful to you in working with your civilian employer and your commanding officer to resolve this difficult work situation