

# LAW REVIEW 910

(February 2009)

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## **You Must Apply for Reemployment after You Leave Active Duty**

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**Q: I am a member of the Coast Guard Reserve, and for five years I worked for a city government as the environmental services manager. I had 166 city employees working for me, and I was in charge of garbage removal, recycling, and several other programs. During the five years that I worked for the city, I received several awards for my management of these programs.**

**In August 2007, I learned from the Coast Guard that I would likely be called to active duty in early 2008, and I immediately informed the city manager. I offered to work with him, in the time before my expected mobilization, to train a subordinate to take over my job on an interim basis during the time that I would be away from work for military service.**

**I was shocked by the city manager's negative response to my notification of impending mobilization. I thought that I was doing the city a favor by giving them five months' advance notice, based on the informal notification that I received from the Coast Guard in August 2007. In retrospect, I think I should have waited until I had the written orders in hand, just a few days prior to my report date, to notify the city manager of my mobilization.**

**By giving the city manager five months of advance notice of my impending mobilization, I thereby gave him five months to make my life miserable and press me to resign, and to try to fire me. He trumped up charges against me and fired me, but an administrative appeal board held that there were no proper grounds to fire me. That was in November 2007.**

**Finally, just days before my scheduled departure to report to active duty, the city manager eliminated my position in a phony "reduction in force." He told me the garbage collection and recycling programs were going to be contracted out and that the environmental services manager position was being abolished. Under duress, I signed an agreement waiving my right to reemployment upon return from the active duty period that was about to start.**

**Shortly after I reported to active duty, I learned that the reduction in force was a sham. The garbage collection and recycling programs were not in fact contracted out. My responsibilities were divided among five existing city employees. In August 2008, while I was still on active duty, the city hired a new environmental services manager.**

**I was released from active duty in January 2009, and I have looked for other employment in the local area. The best opportunity I found pays only half of what the environmental services manager position paid. I believe that I have been treated most unfairly. What should I do now?**

**A: You should apply for reemployment with the city government. Because your period of active duty was more than 180 days, you have up to 90 days (starting on the date of release) to apply for reemployment. *See 38 U.S.C. 4312(e)(1)(D).* It is essential that you apply for reemployment before the 90th day after the date that you were released from active duty.**

As I explained in Law Review 77, and other articles, you must meet five eligibility criteria to have the right to

reemployment following a period of service in the uniformed services. You must have left a civilian position of employment for the purpose of performing uniformed service, and you must have given the employer prior oral or written notice. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. (Since this 20082009 active duty period was involuntary, it does not count toward your five-year limit with the city.) You must have been released from the period of service without having received a punitive or other-than-honorable discharge, and you must have made a timely application for reemployment.

You must meet all five conditions to have the right to reemployment. It is clear that you meet the first four. You still have the opportunity to meet number five, because the 90-day deadline to apply for reemployment has not yet passed.

The “waiver” that you signed in January 2008, just before you reported to active duty, is ineffective as a matter of law. You *cannot* as a matter of law waive the right to reemployment until you have the right to reemployment, and you do not have the right to reemployment until you meet all five of the eligibility criteria, including having been released from the period of service and having applied for reemployment. *See Leonard v. United Air Lines*, 972 F.2d 155 (7th Cir. 1992). I also invite the reader’s attention to Law Reviews 63, 0811, 0812, and 0857. All previous Law Review articles (almost 500) are available at [www.roa.org/law\\_review](http://www.roa.org/law_review).

**Q: How am I going to apply for reemployment? I can’t even get into City Hall. In January 2008, the city manager sent a police officer to escort me out of the building, after collecting my city badge, my city cell phone, the keys to my office, etc. The city treated me like a criminal, because of my Coast Guard service.**

**A:** You need not make your application for reemployment in person. I suggest that you send a certified letter to the city manager. Please see the attachment to Law Review 77 for a sample letter of application for reemployment.

**Q: If I apply for reemployment, am I entitled to return to the environmental services manager position? The city filled that position in August 2008, while I was away on active duty. The woman in the position now is well-qualified and is reported to be doing a fine job. The city manager will be most reluctant, to say the least, to displace her in order to make room for my return.**

**A:** If you meet the five eligibility criteria, including making a timely application for reemployment, the city is required to reemploy you “in the position of employment in which the person [you] would have been employed if the continuous employment of such person with the employer had not been interrupted by such service, or a position of like seniority, status and pay, the duties of which the person is qualified to perform.” 38 U.S.C. 4313(a)(2)(A).

It seems clear that if your city employment had not been interrupted by the 20082009 active duty period, you would almost certainly still be in the environmental services manager position. Accordingly, the city must reemploy you in that position or another position, for which you are qualified, that is of like seniority, status, and pay.

In the city government, there are probably a handful of other positions of like status and pay to the environmental services manager position, but you may not be qualified for any of those other positions. If there is no other position for which you are qualified that is of like seniority, status, and pay, the city must reemploy you in the environmental services manager position *even if that means displacing the well-qualified woman holding the job now*. I invite the reader’s attention to Law Reviews 206, 0704, and 0829.

“The department [Department of Veterans Affairs, the employer and defendant] first argues that, in this case, Nichols’ [Nichols was the returning veteran and the plaintiff.] former position was ‘unavailable’ because it was occupied by another, and thus it was within the department’s discretion to place Nichols in an equivalent position. This is incorrect. Nichols’ former position is not unavailable, because it still exists, even if occupied by another. A returning veteran will not be denied his rightful position because the employer will be forced to displace another employee. ‘Employers must tailor their workforces to accommodate returning veterans’ statutory rights to reemployment. Although such arrangements may produce temporary work dislocations for nonveteran employees, these hardships fall within the contemplation of the Act, which is to be construed liberally to benefit those who ‘left private life to serve their country.’ *Fishgold v. Sullivan Drydock & Repair Corp.*, 328 U.S. 275, 285 (1946).’ *Goggin v. Lincoln St. Louis*, 702 F.2d 698, 704 (8th Cir. 1983). Although occupied by Walsh, Nichols’ former position is

not unavailable and it is irrelevant that the department would be forced to displace Walsh to restore him.” *Nichols v. Department of Veterans Affairs*, 11 F.3d 160, 163 (Fed. Cir. 1993).

For other cases holding that the lack of a current vacancy does not defeat the returning veteran’s right to reemployment, I invite the reader’s attention to *Cole v. Swint*, 961 F.2d 58 (5th Cir. 1992); *Fitz v. Board of Education of the Port Huron Area Schools*, 662

F. Supp. 10 (E.D. Mich. 1985) and *Green v. Oktibbeha County Hospital*, 526 F. Supp. 49 (N.D. Miss. 1981).

**Q: The city manager who treated me like a criminal because of my Coast Guard Reserve service is still there and is likely to remain there for at least another decade. I plan to stay in the Coast Guard Reserve for 15 more years, until I reach my mandatory retirement date. If I return to work as the environmental services manager, especially if it is by court order, the city manager will be all the more anxious to make my life miserable and to try to fire me or force me to resign. I don’t know that I want to work for the city under these circumstances. What do you recommend that I do?**

**A:** I recommend that you get a good lawyer who knows USERRA, and that you drive a hard bargain with the city. The city probably does not want you back, especially if that means displacing the new manager, who is doing a fine job. But if the city expects you to waive your right to reemployment, the city should be prepared to compensate you for what you will lose by giving up your city job, for the remainder of your working life. That figure should be well into six figures, if not seven figures. I invite your attention to Law Review 206 for a comprehensive discussion of the computation of damages under USERRA. I also invite your attention to Law Review 172, concerning the award of “front pay” in USERRA cases.

You should not try to represent yourself in such negotiations. “A man who represents himself has a fool for a client.”

**Q: Based on your advice, I will make a written application for reemployment, by certified mail. I know that the city manager will tell me to “pound sand.” In the meantime, I need a job to support my family. If I take another job with a different employer, does that moot my reemployment claim with the city?**

**A:** No, quite the contrary. You have a duty to mitigate your damages by seeking and accepting other employment. I invite the reader’s attention to Law Review 0717. Taking another job in no way moots your reemployment claim with the city.

As you search for a new job, I recommend that you keep careful records of your efforts to find employment. The city’s fallback position is likely to be, “This guy should not get back pay because he made no effort to mitigate his damages.” Your records about job fairs that you attend, applications that you submit, resumes that you send out, etc., will be most helpful later in contradicting that likely employer defense.

Let us assume that you start a new job on April 1, 2009, with a base salary that is half of the salary of the environmental services manager position but with the opportunity to make substantial additional money by working overtime. Keep careful records, on a pay- period by pay-period basis, of your earnings in the new job, for straight time and for overtime. Your overtime earnings should not be deducted from the back pay that the city will be required to pay you. See *Helton v. Mercury Freight Lines, Inc.*, 444 F.2d 365 (5th Cir. 1971); *McKnight v. Twin Cities Broadcasting Corp.*, 13 CCH Labor Cases Par. 64,067 (D. Minn. 1947).

Your situation demonstrates the need for USERRA and for vigorous enforcement of USERRA. Good luck.