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Layoffs and the Special Protection Period

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Q: I am a volunteer ombudsman for the National Committee for Employer Support of the Guard and Reserve (ESGR), the Department of Defense organization that helps National Guard and Reserve personnel with their Uniformed Services Employment and Reemployment Rights Act (USERRA) issues. I currently have two cases involving two members of the same Army National Guard unit. Let's call them Joe Smith and Mike Jones. The unit (including both Smith and Jones) was called to active duty from January 2007 until April 2008.

Smith and Jones are both construction workers, but they work for different companies. Both of these young men were promptly reemployed by their civilian employers in April 2008. About six months later, the bottom fell out of the demand for new houses, and both Smith and Jones were laid off, along with hundreds of other employees at their companies. Both have complained to ESGR, and I am trying to help both of them.

Smith works for Company ABC, which has been unionized for decades. Under the collective bargaining agreement between the union and ABC, layoffs are based strictly on seniority. Smith's hire date at ABC is Jan. 1, 2004. The layoffs have reached back to employees with hire dates as early as Nov. 1, 2003, so Smith was included in the mass layoff, in accordance with his seniority.

Jones works for Company XYZ, which has never been unionized. XYZ laid off one-third of its workforce in October 2008, because of slackened demand for new houses. At XYZ, layoffs are not based on seniority. The 200 XYZ construction workers laid off included several who had worked for the company for more than 20 years. Jones was hired by XYZ on Jan. 1, 2002.

As an ESGR ombudsman, I regularly use your Law Review articles on the website of the Reserve Officers Association (ROA), available at www.roa.org/law_review. I have read and reread Law Review 184 (September 2005), entitled "Protection from Discharge after Reemployment." That article discusses in detail section 4316(c) of USERRA, 38 U.S.C. 4316(c). I am trying to figure out whether Smith or Jones has a valid claim under that section. I would appreciate your advice on this matter.

A: For purposes of this discussion, I will assume that both Smith and Jones met the USERRA eligibility criteria for reemployment in April 2008—including prior notice to their pre-service civilian employers, release from service under honorable conditions, and timely application for reemployment after release. I shall also assume that neither Smith nor Jones was accused of any work-related misconduct after returning to work.

Section 4316(c) of USERRA provides: "A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days." 38 U.S.C. 4316(c).

Section 4331 of USERRA (38 U.S.C. 4331) gives the secretary of labor the authority to promulgate regulations about the application of this law to state and local governments and private employers. The secretary promulgated

USERRA regulations and published them in the *Federal Register* on Dec. 19, 2005. Those regulations can be found in title 20, Code of Federal Regulations, Part 1002. Those regulations provide as follows about the kind of "cause" that justifies discharging a recently returned veteran during the special protection period:

"The employee may be discharged for cause based either on conduct or, in some circumstances, because of the application of other legitimate nondiscriminatory reasons. (a) In a discharge action based on conduct, the employer bears the burden of proving that it is reasonable to discharge the employee for the conduct in question, and that he or she had notice, which was express or can be fairly implied, that the conduct would constitute cause for discharge. (b) If, based on the application of other legitimate nondiscriminatory reasons, the employee's job position is eliminated, or the employee is placed on layoff status, either of these situations would constitute cause for purposes of USERRA. The employer bears the burden of proving that the employee's job would have been eliminated or that he or she would have been laid off." 20 C.F.R. 1002.248. Because neither Smith nor Jones have been accused of work misconduct after returning to their civilian jobs, subsection (a) of section 1002.248 does not apply to these cases.

The application of the bona fide seniority system at ABC is a good example of the "application of other legitimate nondiscriminatory reasons" referred to in 20 C.F.R. 1002.248(b). Smith's hire date was Jan. 1, 2004. Layoffs at ABC are based strictly on seniority. Layoffs have reached back to employees hired as early as Nov. 1, 2003. It is clear, based on these facts, that Smith would have been laid off in October 2008 even if he had not been called to the colors from January 2007 until April 2008. USERRA does not protect Smith from a bad thing (like a layoff) that *clearly would have happened anyway* even if his civilian career at ABC had not been interrupted by military service. The layoff of Joe Smith was not unlawful.

Mike Jones' situation is different, because at XYZ layoffs are not based on seniority. To justify laying off Jones during his one-year special protection period, the employer will have the burden of proving that Jones was laid off based on the application of legitimate nondiscriminatory reasons. Based on the facts as you have described them, it is likely to be impossible for XYZ to prove that.

Q: What if XYZ exempts Jones from the layoff until April 2009, one year and a day after he returned to work following his 20072008 active duty period? Would discharging Jones then be lawful?

A: Jones' special protection period expires one year after he was properly restored to work. Section 4316(c) no longer applies after the special protection period has expired. Of course, section 4311 still applies. If Jones can prove that his performance of uniformed service or obligation to perform uniformed service [section 4311(a)] or his previous assertion of his USERRA rights [section 4311(b)] was *a motivating factor* (not necessarily the sole reason) for the employer's decision to terminate his employment, the termination would be unlawful.

Q: At ABC, Smith and the other laid-off workers have been told that it is likely but by no means certain that they will be called back to work in the spring or summer of 2009, if business picks up substantially. That is good news, but Smith still needs to feed his family now. The adjutant general of our state has offered Smith the opportunity to go on active duty in the Active Guard and Reserve (AGR) program for three years and to serve full-time at the state headquarters of the National Guard in our state. Is it possible for Smith to take advantage of this AGR opportunity and still preserve his right to reemployment at ABC?

A: Yes, but Smith must be careful to meet all the USERRA eligibility criteria, *including giving prior notice to ABC before going on active duty*. Although Smith has been laid off by ABC, *he is still an employee for USERRA purposes,* so long as there is some possibility that he may be called back to work from the layoff status. I discuss this concept in detail in Law Reviews 31, 39, and 0756, all available at www.roa.org/law_review.

I suggest that you assist Smith in drafting a letter to the personnel director or owner of ABC, informing the employer of his entry on active duty. Let us assume that Smith performs a three-year AGR tour at the State Adjutant General's Office, from January 2009 until January 2012. Smith notifies ABC in writing before the start of that tour. In July 2009, Smith and the other laid-off ABC workers are notified of the opportunity to return to work, because business has picked up. Business remains strong, and the workers who return to work in July 2009 are not laid off again. But Smith is unable to respond to the recall notice in July 2009, because he has committed to remain on active duty until January 2012.

After serving the three years to which he had agreed, Smith leaves active duty under honorable conditions on Jan. 15, 2012. He applies for reemployment at ABC on Feb. 14, 2012, within 90 days after his release from active duty. At that point, Smith will be entitled to reemployment at ABC, because he meets all the USERRA eligibility criteria. If Smith had failed to notify ABC prior to entering active duty in January 2009, he would not have the right to reemployment, because prior notice to the employer is one of the five essential requirements to have the right to reemployment after a period of service.

Q: When Smith received ABC's recall notice in July 2009, he sent a letter to the ABC personnel director, explaining that he is unable to respond to the recall notice because he is on active duty until January 2012 but that he intends to return to ABC at the end of his AGR tour. ABC's attorney then sent Smith a letter, telling him that USERRA does not apply because Smith is on "state active duty" at the Adjutant General's Office. Is the attorney correct?

A: No. USERRA accords the right to reemployment to a person who leaves a civilian position of employment (including a position on the layoff list) in order to perform "service in the uniformed services." USERRA's definition of "service in the uniformed services" expressly includes "full-time National Guard duty." That phrase is defined in the definitions section of title 10, U.S. Code.

"The term 'full-time National Guard duty' means training or other duty, other than inactive duty [drills], performed by a member of the Army National Guard of the United States or the Air National Guard of the United States in the member's status as a member of the National Guard of a state or territory, the Commonwealth of Puerto Rico, or the District of Columbia under section 316, 502, 503, 504, or 505 of title 32 for which the member is entitled to pay from the United States or for which the member has waived pay from the United States." 10 U.S.C. 101(d)(5).

Smith will receive orders that cite 32 U.S.C. 502(f), for his three-year AGR tour at the State Adjutant General's Office. Thus, his duty qualifies as "full-time National Guard duty" for purposes of 10 U.S.C. 101(d)(5) and 38 U.S.C. 4303(13). Smith will have the right to reemployment after the AGR tour, provided he meets the USERRA eligibility criteria.

Q: Will Smith's three-year AGR tour count toward his five-year limit under USERRA?

A: Yes. Because the tour was voluntary, it will count toward his five-year limit, as set forth in 38 U.S.C. 4312(c). Smith's 20072008 active duty period does not count toward the limit, because it was involuntary. I invite the reader's attention to Law Review 201 for a detailed discussion of the five-year limit.

Q: Let's change the facts slightly. Instead of offering Smith the opportunity to do a three-year AGR tour, the National Guard offered him a technician position at a National Guard base. Can Smith accept the technician job and still preserve his reemployment rights at ABC?

A: No. A technician position is a *civilian job*. USERRA does not apply to a person who leaves a civilian job to take another civilian job. Let us assume that Smith starts his technician job in January 2009 and is recalled to work by ABC in July 2009. At that point, Smith will have to choose between the technician job and the ABC job. If he is unable or unwilling to give up the technician job in July 2009, he will lose his rights at ABC.