LAW REVIEW 936

(Web only-August 2009)
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Ethan Allen Is Rolling Over in his Grave

By Captain Samuel F. Wright, JAGC, USN (Ret.)

The Uniformed Services Employment and Reemployment Rights Act (USERRA) most definitely applies to state government employers, as well as local governments, private employers, and the federal government itself, but state governments are among the most frequent USERRA violators. The latest example of a state government employer flouting USERRA comes from Vermont. This is an ironic location for such a situation, because Vermont has a long and most distinguished history of heroic contributions to our nation's defense, beginning with Ethan Allen and the Green Mountain Boys in the American Revolution.

That history of contributions and sacrifices has continued to our own time. The number of combat deaths of U.S. military personnel in Iraq and Afghanistan passed 5,000 in late June 2009, and that included 20 residents of Vermont. For the Green Mountain State, this represents a rate of 3.22 deaths per 100,000 people in the state population, a per capita rate greater than any other state. *See* "8 Years; 5,000 Lives" in *Air Force Times,* June 29, 2009; pages 23-26.

Vermont is also home to Norwich University, our nation's oldest private military college (founded in 1819) and the birthplace of the Reserve Officers Training Corps. The university is led by President Richard W. Schneider, a retired Coast Guard Reserve Rear Admiral and life member of ROA.

Daniel Brown of Rutland, Vermont is a Sergeant in the Vermont Army National Guard. He was hired by the Vermont Department of Corrections (VDOC) in January 2009 as a "temporary" corrections officer at the Southern State Correctional Facility in Springfield, Vermont. Not long after he was hired, the Adjutant General of Vermont notified his employer that in November 2009 he would be called to active duty for deployment to Afghanistan and that in the months leading up to the deployment he would need time off from his civilian job for deployment preparation training.

After the notification from the National Guard, the VDOC assigned Brown to undesirable shifts, denied him promotion to "tenured" status, and summarily fired him. The VDOC has taken the position that because of his "temporary" status the firing is not reviewable—*wrong*.

A state official was quoted by the Associated Press (July 20, 2009) as saying that USERRA "doesn't offer protection to temps unless there is a documented expectation that the temporary employment will lead to full-time employment." This statement shows a fundamental misunderstanding of USERRA that needs to be corrected.

Congress enacted the reemployment statute in 1940, as part of the Selective Training and Service Act (STSA), the law that brought about the drafting of millions of young men (including my late father) for World War II. In 1941, as part of the Service Extension Act, Congress amended the reemployment provision to make it apply to voluntary enlistees as well as draftees. The reemployment statute has applied to the Federal Government and to private employers (regardless of size) since 1940, and in 1974 Congress amended the law to make it apply to state and local governments as well.

The reemployment statute had many formal names, but it came to be known colloquially as the Veterans' Reemployment Rights (VRR) law. Until 1974, the VRR law was found in title 50 of the United States Code

(national defense), as part of the Selective Service law. Congress abolished the draft in 1973 and moved the VRR law to title 38 (veterans affairs) in 1974. In 1994, Congress enacted a long-overdue rewrite of the VRR law, and the new law is called USERRA, and is codified at title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

For a comprehensive history of the reemployment statute, I invite the reader's attention to Law Review 104 (Dec. 2003), entitled "Everything You Always Wanted To Know About USERRA But Were Afraid To Ask." You can find more than 500 "Law Review" articles at www.roa.org/law_review. You will also find a detailed Subject Index, to facilitate finding articles about very specific topics.

Under the VRR law, it was necessary to establish (as an eligibility criterion for reemployment after service) that the pre-service position of employment was "other than temporary." It was *not* necessary to establish that the pre-service position was "permanent," and there is a big difference between "other than temporary" and "permanent." It is sort of like the difference between telling your wife that she is "beautiful" and telling her that she is "other than ugly." Persons holding part-time, seasonal, probationary, and at-will jobs have always had reemployment rights. *See Stevens v. Tennessee Valley Authority,* 687 F.2d 158 (6th Cir. 1982); *Collins v. Weirton Steel Co.,* 398 F.2d 305 (4th Cir. 1968).

The Vermont official was referring to section 4312(d)(1)(C) of USERRA, which provides: "An employer is not required to reemploy a person under this chapter if-- … the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period." 38 U.S.C. 4312(d)(1)(C).

The official should be reminded of section 4312(d)(2)(C), which provides: "In any proceeding involving an issue of whether-- … the employment referred to in paragraph (1)(C) is for a brief, nonrecurrent period and there is no reasonable expectation that such employment will continue indefinitely or for a significant period, the *employer shall have the burden of proving* … the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant time." 38 U.S.C. 4312(d)(2)(C) (emphasis supplied).

Thus, contrary to the official's statement, the returning veteran is not required to establish "a documented expectation that the temporary employment will lead to full-time employment." Rather, the *employer* must establish, as an affirmative defense, that the veteran (prior to leaving for service) had no reasonable expectation that his or her employment would continue indefinitely or for a significant time. It is clear that VDOC will not be able to prove that. Most of Vermont's "temporary" corrections officers become "permanent" after a few months on the job.

The Department of Labor (DOL) USERRA Regulations provide: "USERRA rights are not diminished because an employee holds a temporary, part-time, probationary, or seasonal employment position. However, an employer is not required to reemploy an employee if the employment he or she left to serve in the uniformed services was for a brief, nonrecurrent period and there is no reasonable expectation that the employment would have continued indefinitely or for a significant period. The employer bears the burden of proving this affirmative defense." 20 C.F.R. 1002.41.

In a larger sense, the question of whether Sergeant Brown will have the right to reemployment after returning from his impending Afghanistan deployment is beside the point, because VDOC terminated his employment *before* he left the job to report for deployment. Firing him after the Adjutant General notified VDOC of his impending mobilization violated section 4311(a) of USERRA: "A person who is a member of, applies to be a member of, performs, has performed, 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 4311(d) provides: "The prohibitions in subsections (a) and (b) shall apply to any position of employment, *including a position that is described in section 4312(d)(1)(C) of this title."* 38 U.S.C. 4311(d) (emphasis supplied). This means that even if VDOC will be able to establish, after Sergeant Brown returns from deployment, that his pre-service position of employment was brief and nonrecurrent with no reasonable expectation of continuation, it was nonetheless unlawful for VDOC to fire him in 2009. Section 4312(d)(1)(C) is an affirmative defense to the

employer's duty to reemploy—it does not authorize the employer to discriminate with regard to retention in employment or initial employment. For more information about this important concept, I invite the reader's attention to Law Review 0609 (April 2006), entitled "USERRA's Prohibition on Discrimination Applies Even to 'Temporary' Positions of Employment."

"The prohibitions against discrimination and retaliation apply to all covered employers (including hiring halls and potential employers, see sections 1002.36 and .38) and employment positions, *including those that are for a brief, nonrecurrent period, and for which there is no reasonable expectation that the employment position will continue indefinitely or for a significant period."* 20 C.F.R. 1002.21 (emphasis supplied).

DOL published the final USERRA Regulations in the *Federal Register* on Dec. 19, 2005. Together with the regulations, DOL published a lengthy and well-written preamble, explaining the rationale for the regulations and summarizing the comments received (after the proposed regulations were published in the *Federal Register*) and the reasons DOL had decided to make or not to make changes. The preamble contains a statement that is directly pertinent to this issue.

"The Department [of Labor] received two comments on proposed section 1002.21. The first commenter suggests that the application of USERRA's anti-discrimination and anti-retaliation provisions to brief, non-recurrent positions is 'unduly burdensome for employers and contains unnecessary verbiage.' Because the statute explicitly requires the application of anti-discrimination and anti-retaliation provisions to such employment positions, see 38 U.S.C. 4311(d), the Department will retain the provision unchanged." 2005 *Federal Register,* page 75249, near the bottom of the right-hand column.

In summary, VDOC is clearly and egregiously violating USERRA in its treatment of Daniel Brown and other Vermont National Guard Soldiers who are about to leave their homes and jobs to serve our country in Afghanistan. I have asked the President of ROA's Department of Vermont to bring this situation to the attention of the Governor, Attorney General, Adjutant General, and Legislature of the Green Mountain State.