

LAW REVIEW 961

Your Civilian Job and USERRA: Beware of Gaps in Your Period of Service, And Maintain a Proper Balance of Military and Civilian Responsibilities

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1.3.1.1—Left Job for Service and Gave Prior Notice

1.3.1.3—Timely Application for Reemployment

Q: I am a local police officer and a member of the Army Reserve. I am currently on Army special training duty for 35 days, set to expire on Jan. 15 (Friday). I have received word from my Reserve unit's Commanding Officer that our unit is to report to annual training (12 days) on Jan. 25 (Monday). I did not know about this annual training tour when I gave my employer notice of my 35-day training orders, and the employer is expecting me to report back to work on Monday, Jan. 18. My special training is at a base that is several hundred miles away from home, and my unit's annual training will be conducted at the same base. It seems pointless for me to go home just to report back to work for a week and then leave again. How do you suggest that I handle this situation?

A: We strongly suggest that you report back to work on Jan. 18, as you had promised, and bring up the issue of the new period of service as soon as possible, if necessary. We also suggest that you contact your Commanding Officer and inquire as to whether you could be exempted from the annual training, in view of the burden that this short-notice training would put on your civilian employer, coming as it does shortly after your 35 days of special training. If your Commanding Officer cannot exempt you from the annual training requirement, then it would be incumbent upon you to communicate the new training requirement to your employer right away.

There are five conditions that you must meet to have the right to reemployment after a period of uniformed service:

- a. You must have left your position of employment for the purpose of performing service in the uniformed services.
- b. You must have given the employer prior oral or written notice.
- c. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years.
- d. You must have been released from the period of service without having received a punitive or other-than-honorable discharge.
- e. You must have reported back to work in a timely manner, or you must have made a timely application for reemployment.

Section 4303(13) of USERRA [38 U.S.C. 4303(13)] has a broad but not unlimited definition of “service in the uniformed services.” The problem is that the period between Jan. 15 (when you complete the 35 days of special training) and Jan. 25 (when you start the 12 days of annual training) does not meet USERRA’s definition of “service in the uniformed services.”

Section 4312(a)(1) provides that the individual who is to perform service in the uniformed services or an appropriate officer of the uniformed service must give prior oral or written notice to the civilian employer, unless prior notice is precluded by military necessity or otherwise impossible or unreasonable [section 4312(b)]. In your situation, it is not possible to argue that giving the employer prior notice of the 12-day annual training tour is impossible or unreasonable or precluded by military necessity.

Section 4312(a)(1) does not require that you provide any specific period of advance notice—a week, a month, etc. But we strongly suggest that you give the employer as much advance notice as possible, to minimize the employer’s burden. Providing adequate advance notice is especially important for a civilian employer that is a public safety agency, like a local police department.

It is the policy of the Army Reserve (and the other Reserve Components) to minimize the burden on civilian employers by providing them as much advance notice as possible. Your unit should have made it possible for you to give much more advance notice of your 12-day annual training tour. Scheduling your annual training on short notice, and shortly after your 35 days of special training, seems not to give adequate deference to the needs of the local police department.

The notice to the employer can be given by the individual servicemember or by an appropriate officer of the service. If your participation in the 12-day annual training tour cannot be postponed, perhaps your unit's Commanding Officer should give the notice to your civilian employer.

Section 4312(e) requires that you be timely in reporting back to work or applying for reemployment, after release from the period of service. The deadline depends upon the duration of the period of service from which you are returning. After a period of service of less than 31 days, you are required to report to your 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 service to the person's residence." 38 U.S.C. 4312(e)(1)(A)(i). Generally, you must report back to work the next day following one of these short tours of duty, or the second day if there is a great deal of travel involved.

After a period of more than 30 days but less than 181 days of service, you must submit an application for reemployment to the employer within 14 days after the date of release from service. 38 U.S.C. 4312(e)(1)(C). After a period of service of 181 days or more, you must apply for reemployment within 90 days. 38 U.S.C. 4312(e)(1)(D).

In your situation, you will be released from a period of 35 days of service on Jan. 15, so the deadline for you to apply for reemployment expires on Jan. 29. Your position is that the 14-day period to apply for reemployment stops running during your 12 days of annual training, from Jan. 25 to Feb. 5. That is a decent argument, but USERRA does not say that the deadline to apply for reemployment after an earlier period of uniformed service is tolled during a subsequent period that starts a few days later. You should not have to bet your job on a legal argument that a court may or may not accept.

This scenario occurs often. Some Reserve and Guard personnel perform multiple tours, back to back or sometimes with short gaps between orders. They want to delay as long as possible the date when they must return to their civilian jobs. They finally return to work only when the service cuts them off from additional orders or when the five-year clock is about to run out. Please see Law Review 201 for a definitive discussion of what counts and what does not count toward the five-year limit.

As is explained in Law Review 30 (Oct. 2001), Law Review 161 (Mar. 2005), Law Review 0719 (May 2007), and Law Review 0760 (Nov. 2007), USERRA most definitely applies equally to voluntary and involuntary military service. But it is more palatable to employers when the service is involuntary. The policy of the Army Reserve, under General Stultz and his predecessor General Helmly, has been to rely primarily upon involuntary call-ups to meet the needs of the Global War on Terrorism (GWOT), now known within DOD as Other Contingency Operations (OCO). The Air National Guard and Air Force Reserve, on the other hand, rely primarily upon individual members to volunteer to meet the mission.

When a service relies primarily upon volunteerism, it can create a disproportionate burden on some civilian employers. Under the Army Reserve's policy, the required service will usually be on a predictable schedule (like one year in five) and the burden will be spread more equitably among civilian employers of Army Reservists. However, the nature of the service, voluntary or involuntary, is not the most important take-away. The most important point is *communication*.

Most often, problems arise between employees and employers when there is a lack of communication. Open communication is the key to balancing civilian and military duties and goes a long way towards gaining and maintaining the support of an employer for both endeavors. Rather than being fearful of the employer's reaction, the best approach is to communicate immediately the new requirement to the employer and see what can be done to minimize the impact before the additional absence must take place. As mentioned earlier, this may also require engagement with your military commander to come up with the best "win-win" situation for both the military and

civilian workplaces. In communicating the situation, you have the opportunity to assure your employer that you remain a dedicated employee and plan to work hard in that organization upon your return. Once you return to your civilian job, follow through on that plan – strive to be the best worker in the workplace as actions speak much louder than words.

If we are going to continue to rely upon the National Guard and Reserve for major contributions in today's conflict, we must develop and implement policies and practices that are sustainable over the long haul. We must find ways to maintain the support and good will of civilian employers.

As part of the process of making the Total Force Policy work over the long haul, each of us needs to develop and maintain a proper balance among our military responsibilities, our family responsibilities, and our responsibilities to our civilian employers.

If problems persist or become too much to handle, we suggest that you contact the National Committee for Employer Support of the Guard and Reserve (ESGR), a DOD organization. ESGR's mission is to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. As the strategic reserve has morphed to an operational reserve, the burden on Guard and Reserve members and their civilian employers has increased exponentially. Thus, the work of ESGR is important and relevant, now more than ever.

Call ESGR at 800-336-4590. That line is answered between 8:00 a.m. and 6:00 p.m. Monday through Friday, except federal holidays. For reasons explained in Law Review 0702 (Jan. 2007), we suggest that you not contact ESGR from work, or during work hours, to complain about your civilian employer.

If you need to contact ESGR and you cannot call them between 8 a.m. and 6 p.m. Eastern Time without calling from work, we suggest that you send ESGR an e-mail at USERRA@osd.mil. Give them the whole story, and provide a time and a telephone number where ESGR can reach you. Do not use your employer's e-mail system to communicate with ESGR about your employer. If you cannot afford a computer and Internet access at home, go to your local public library.

ESGR headquarters will put you in touch with an ESGR volunteer ombudsman in your area. The ombudsman will work with you and your civilian employer, and perhaps your Army Reserve Commanding Officer, to work all this out in an amicable manner, if feasible. It may be possible to find a "win-win" solution that enables you to maintain your military readiness while minimizing the burden on the police department.

If you have questions, suggestions, or comments, please contact Captain Samuel F. Wright, JAGC, USN (Ret.) (Director of the Servicemembers' Law Center) at swright@roa.org or 800-809-9448, ext. 730.