

LAW REVIEW 963

You Must Apply for Reemployment—Part 3

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1.1.1.8—Federal Government

1.1.3.4—PHS Service

1.3.1.3—Timely Application for Reemployment

1.4—USERRA Enforcement

Q: I went to work as a federal civilian employee in 2001 with the Centers for Disease Control (CDC, part of the Department of Health & Human Services or DHHS). I was an employee there when I joined the Public Health Service (PHS) as a commissioned officer. I served on active duty in the PHS commissioned corps from May 2005 to June 2006, when I left under honorable conditions.

Before I left my CDC civilian job, I informed the CDC personnel office that I was leaving to join the PHS commissioned corps, and a note to that effect was included in the Standard Form 50 (SF-50) that the personnel office gave me in May 2005.

Did USERRA entitle me to reemployment with the CDC in the summer of 2006 after I left Active Duty?

A: Perhaps. It is clear that you met four of the five eligibility criteria, and you may have met the fifth. You must meet five conditions to have the right to reemployment under USERRA:

- a. You must have left a 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 uniformed 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 made a timely application for reemployment

It is clear that you left a civilian position of employment for the purpose of performing service in the uniformed services. Section 4303(16) of USERRA defines the term “uniformed services” as follows: “The term ‘uniformed services’ means the Armed Forces, the Army National Guard and Air National Guard when engaged in active duty for training, inactive duty training, or full-time National Guard duty, *the commissioned corps of the Public Health Service*, and any other category of persons designated by the President in time of war or national emergency.” 38 U.S.C. 4303(16) (emphasis supplied).

Your May 2005 SF-50 makes clear that you gave prior notice. Your 13-month period of service was well within the five-year limit. Your PHS service may have been brief and undistinguished, but it did not result in one of the disqualifying events enumerated in section 4304. The remaining issue is whether you made a timely application for reemployment.

Q: In June 2006, when I was released from PHS service, I was not aware of USERRA, and I did not apply for reemployment, at least not in so many words. However, just a few days after I was released from PHS, I sent a letter to the CDC personnel director, applying for a job. The enclosures to my letter included a copy of the May 2005 SF-50 and a resume showing that I worked for CDC as a civilian from 2001 to 2005 and that I was on PHS duty from May 2005 to June 2006. The lady who was the CDC personnel director when I left in May 2005 was still the director when I returned in June 2006. She told me that the position I had left 13 months earlier had been filled and that the new employee was doing a fine job, and that there were no vacancies for which I was qualified. Did I make a sufficient application for reemployment?

A: I believe so, but you probably could have avoided a lot of problems if you had made a formal, written application for reemployment. Law Review 77 gives a sample application for reemployment letter.

For service greater than 180 days, you have 90 days, starting on the date of release, to submit an “application for reemployment” with the pre-service employer. 38 U.S.C. 4312(e)(1)(D). I believe that the application that you submitted to the CDC personnel department a few days after you were released from PHS service qualifies as an “application for reemployment” for USERRA purposes.

Section 4331 of USERRA gives the Secretary of Labor the authority to promulgate regulations under USERRA, and the Secretary exercised that authority four years ago (Dec. 2005). The USERRA Regulations are codified in title 20, Code of Federal Regulations (C.F.R.), Part 1002. Two sections of the Regulations are directly pertinent to your situation:

“Is an application for reemployment required to be in any particular form?

An application for reemployment need not follow any particular format. The employee may apply orally or in writing. The application should indicate that the employee is a former employee returning from service in the uniformed services and that he or she seeks reemployment with the pre-service employer. The employee is permitted but is not required to identify a particular reemployment position in which he or she is interested.”

20 C.F.R. 1002.118 (bold question in original).

“To whom must the employee submit the application for reemployment?

The application must be submitted to the pre-service employer or to an agent or representative of the employer who has apparent responsibility for receiving employment applications. Depending upon the circumstances, such a person could be a personnel or human relations officer, or a first-line supervisor.”

20 C.F.R. 1002.119 (bold question in original).

Based on your description of the package that you provided to the personnel director in June 2006, it appears that your job application also served as an application for reemployment. Including the May 2005 SF-50 and the resume served to put the personnel director on notice that you had been employed previously by the CDC, that you had left your job for uniformed service, that you had given the CDC prior notice of your departure for uniformed service, and that you had returned from service and were seeking to return to CDC employment. Moreover, it seems clear that the personnel director was well aware of all these facts. Your communication to the personnel director contained all the required elements and was made to an appropriate official of the pre-service employer.

The fact that your job had been filled by another employee in no way excused the CDC’s failure to reemploy you. “The department first argues that, in this case, 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 the plaintiff in an equivalent position. This is incorrect. The plaintiff’s 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 excuse the employer’s failure to reemploy the returning veteran, 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). There are circumstances in which the employer must lay off the replacement in order to reemploy the returning veteran. I think that your situation is such a case.

I also invite the reader's attention to Law Review 0829 (June 2008), titled "USERRA Overrides the Interests of the Replacement Employee." All previous "Law Review" articles (more than 600) can be found at www.roa.org/law_review.

Q: Where do I go from here?

A: Go to www.dol.gov/vets. You need to file a formal complaint, in writing, with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and you can do that through the website. There is no statute of limitations. See Law Review 0925 (June 2009), titled "No Time Limit on Justice for the Returning Veteran." But since this case is already 3.5 years old you should file your complaint now, without further delay.

DOL-VETS will investigate your complaint and, if it concludes that your complaint has merit, will try to persuade the CDC to come into compliance. If DOL-VETS is unable to resolve your complaint, it will, upon your request, refer your complaint to the Office of Special Counsel (OSC). 38 U.S.C. 4324(a)(1). If OSC is reasonably satisfied that you are entitled to the benefits you seek, it will initiate an action on your behalf (at no cost to you) before the Merit Systems Protection Board (MSPB). 38 U.S.C. 4324(a)(2)(A).

If you choose not to file a complaint with DOL-VETS, or if OSC declines your request for representation after the DOL-VETS investigation, you may file your case with the MSPB directly, through such private counsel as you obtain. 38 U.S.C. 4324(b). If you proceed with private counsel and prevail, the MSPB may award you reasonable attorney fees. 38 U.S.C. 4324(c)(4).

The MSPB is a quasi-judicial federal agency. It has three members, each of whom is appointed by the President with Senate confirmation. Your case will be heard initially by an Administrative Judge (AJ) of the MSPB, at one of the MSPB's regional offices. The AJ conducts a trial and makes a decision, and the AJ's decision can be appealed to the MSPB itself. The MSPB's decision can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court located here in Washington.

If the MSPB finds in your favor, it will order the CDC to reemploy you and to compensate you for the salary and benefits (including interest) that you have lost because of the employer's USERRA violation. 38 U.S.C. 4324(c)(2).

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.