LAW REVIEW 968

The Five Year Limit

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

1.3.1.2—Character and Duration of Service

"(a) The purposes of this chapter are—

(1) to encourage *noncareer* service in the uniformed services by eliminating or minimizing the disadvantages to civilian careers and employment which can result from such service;

(2) to minimize the disruption to the lives of persons performing service in the uniformed services as well as to their employers, their fellow employees, and their communities, by providing for the prompt reemployment of such persons upon their completion of such service; and

(3) to prohibit discrimination against persons because of their service in the uniformed services.

(b) It is the sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter."

38 U.S.C. 4301 (emphasis supplied).

"(c) Subsection (a) [the right to reemployment] shall apply to a person who is absent from a position of employment by reason of service in the uniformed services if such person's cumulative period of service in the uniformed services, with respect to the employer relationship for which a person seeks reemployment, does not exceed five years, except that any such period of service shall not include any service—

(1) that is required, beyond five years, to complete an initial period of obligated service;

(2) during which such person was unable to obtain orders releasing such person from a period of service in the uniformed services before the expiration of such five-year period and such inability was through no fault of such person;

(3) performed as required pursuant to section 10147 of title 10, under section 502(a) or 503 of title 32, or to fulfill additional training requirements determined and certified in writing by the Secretary concerned, to be necessary for professional development, or for completion of skill training or retraining; or

(4) performed by a member of a uniformed service who is—

(A) ordered to or retained on active duty under section 688, 12301(a), 12301(g), 12302, 12304, or 12305 of title 10 or under section 331, 332, 359, 360, 367, or 712 of title 14;

(B) ordered to or retained on active duty (other than for training) under any provision of law because of a war or national emergency declared by the President or the Congress, as determined by the Secretary concerned;

(C) ordered to active duty (other than for training) in support, as determined by the Secretary concerned, of an operational mission for which personnel have been ordered to active duty under section 12304 of title 10;

(D) ordered to active duty in support, as determined by the Secretary concerned, of a critical mission or requirement of the uniformed services; or

(E) called into Federal service as a member of the National Guard under chapter 15 of title 10 or under section 12406 of title 10."

38 U.S.C. 4312(c).

Congress abolished the draft in 1973, and 36 years have passed since the last time an individual was drafted by the United States Government. All military service is essentially voluntary. A person may be involuntarily called to active duty for deployment to Afghanistan, but it is only because she volunteered that she is in a status where she is subject to call-up.

Because our country now relies entirely upon individuals to volunteer for military service, including but not limited to National Guard and Reserve service, we need incentives that will induce individuals to volunteer, and we need to mitigate the disincentives. The Uniformed Services Employment and Reemployment Rights Act (USERRA) is one of many laws that Congress has enacted to encourage voluntary military service. USERRA's very first section (the statutory purposes) makes this point explicitly.

But of course there must be a limit. It is not reasonable to expect to go away for 20 years of full-time voluntary active duty, and earn a full regular military retirement, and then expect to return to one's pre-service civilian job and to be treated for seniority and pension purposes as if one had never left. The five-year limit, as set forth in 38 U.S.C. 4312(c), is the limit.

USERRA is most generous; especially when you consider that the limit applies "with respect to the employer relationship for which a person seeks reemployment." 38 U.S.C. 4312(c). If you start a new job with a new employer, you get a fresh five-year limit with the new employer.

For this purpose, the Federal Government should be considered to be a single employer. When you go from the Department of Labor to the Department of Interior and then to the Environmental Protection Agency, and take your federal civilian seniority with you, you have not started a new "employer relationship."

In considering USERRA's generosity, you should also recognize that there are eight statutory exemptions from the five-year limit, as set forth in 38 U.S.C. 4312(c). These are kinds of service that do not count toward your five-year limit with respect to a particular employer relationship. The shorthand is that *all* involuntary service and *some* voluntary service (including Reserve and National Guard training) are exempt from the computation of the limit. Under some circumstances, you can be away cumulatively for periods of service that add up to substantially more than five years, without having exceeded the five-year limit.

I invite the reader's attention to Law Review 201 (Oct. 2005), titled "Have I Exceeded the Five-Year Limit?" You can find more than 600 articles at www.roa.org/law_review, along with a detailed Subject Index, to facilitate finding articles about very specific topics. I also invite your attention to 20 C.F.R. 1002.99 through 1002.104 (part of the Department of Labor USERRA Regulations) for a detailed explanation of what counts and what does not count toward the five-year limit.

In the Department of Defense, there is an organization (founded in 1972) called the National Committee for Employer Support of the Guard and Reserve (ESGR). The organization's mission is to gain and maintain the support of civilian employers for the men and women of the National Guard and Reserve. I invite your attention to ESGR's website, www.esgr.mil.

On its website, ESGR urges National Guard and Reserve personnel to, "Show consideration for your boss and your co-workers when you volunteer for non-essential [military] training." I respectfully submit that it is wrong to put this burden on the individual member, to distinguish between essential and non-essential training and service.

The Reserve Components are dependent upon volunteerism, and we definitely want to encourage volunteerism. But that is not to say that the individual serial volunteer should expect to have every application for orders acted upon favorably. The leadership of the Reserve Component should tell the serial volunteer, "Thank you for volunteering, but we are going to find somebody else this time because you have already been away from your civilian job for a very long time." If a period of training or service is "non-essential," it should be disapproved by the military service. Essential training and service should be distributed among many members, not concentrated on a handful of serial volunteers.

The Cold War lasted for 45 years (1945-90). The Global War on Terrorism may last just as long or longer. If we are going to continue to rely on the National Guard and Reserve for major contributions, we must develop and implement policies and practices that are sustainable over the long haul.

Under the leadership of Lieutenant General Jack C. Stultz and his predecessor Lieutenant General James R. Helmly, the Army Reserve has relied primarily upon involuntary call-ups to support operations in Iraq and Afghanistan, while the Air Force Reserve and Air National Guard have relied primarily upon individual volunteers to meet the mission. I respectfully submit that the Army Reserve's policy is more conducive to maintaining employer support over the long haul. I also invite the reader's attention to Law Review 161 (Mar. 2005), titled "Does USERRA Apply to Voluntary Service—Continued."

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. For this reason, I believe that the Army Reserve's policy is more sustainable than the policy of the Air Force Reserve and Air National Guard.

On Aug. 20, 1940 (during the Battle of Britain), Prime Minister Winston Churchill said of the Royal Air Force, "Never in the field of human conflict was so much owed by so many to so few." Those eloquent words apply equally to the men and women who serve in the U.S. military today. It is only their service that stands between us and a repeat of the horrors of Sept. 11, 2001.

At the height of World War II, almost 10% of the U.S. population was on active duty in the armed forces. Today, our entire military establishment (including National Guard and Reserve personnel not currently on active duty) amounts to less than ¾ of 1% of our population. Our nation (including civilian employers) owes a great debt of gratitude to these 2.5 million men and women of the military.

In 1940, in 1994, and at all other relevant times, Congress recognized that the reemployment statute puts a burden on civilian employers and sometimes on the civilian colleagues of those who are called to the colors, voluntarily or involuntarily. I invite the reader's attention to Law Review 0821 (May 2008), titled "The Burden of Freedom: Recent USERRA burdens on employers are not unconstitutional or unprecedented."

In 1940, Senator Elbert Thomas of Utah conceived of the idea of requiring civilian employers to reemploy those who were drafted. He offered his idea as an amendment to the Selective Training and Service Act (STSA) of 1940, and he convinced his colleagues to adopt his amendment. A year later, as part of the Service Extension Act, Congress amended the reemployment provision to make it apply to voluntary enlistees as well as inductees.

During the floor debate on the STSA, another Senator objected that the reemployment requirement would be burdensome on employers. Senator Thomas replied, acknowledging the burden and arguing that it was justified "because the lives and property of employers, along with everyone else in this country, are protected by such [military] service." His congressional colleagues were persuaded by this eloquent argument.

But I am also realistic. The small size of the military establishment (especially the Reserve Components) means that most employers have no National Guard or Reserve members among their employees. Among employers, a few are bearing most of the burden.

To make the Total Force Policy viable over the long haul, I favor measures (like the Army Reserve has adopted) to mitigate the burdens on employers and make them more equitable by making military-related interruptions of civilian employment more predictable and fairly distributed.

I also favor tax breaks and other federal incentives for civilian employers of National Guard and Reserve personnel. As Executive Director of ROA, Lieutenant General Dennis McCarthy said (more than once) that "we need carrots as well as sticks in gaining and maintaining the support of civilian employers for Reserve Component service."

I have little sympathy with employers who complain about the burdens on employers imposed by the military service of employees. The burdens on employers are tiny in comparison to the burdens voluntarily assumed by those who serve, including substantial risk of loss of life or limb.

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.