LAW REVIEW 969

Only Really Serious Miscreants Lose Their Reemployment Rights for Misconduct During Service

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

1.3.1.2—Character and Duration of Service

"A person's entitlement to the benefits of this chapter by reason of the service of such person in one of the uniformed services terminates upon the occurrence of any of the following events:

(1) A separation of such person from such uniformed service with a dishonorable or bad conduct discharge.

(2) A separation of such person from such uniformed service under other than honorable conditions, as characterized pursuant to regulations prescribed by the Secretary concerned.

(3) A dismissal of such person permitted under section 1161(a) of title 10.

(4) A dropping of such person from the rolls pursuant to section 1161(b) of title 10."

38 U.S.C. 4304.

Only these four events, enumerated in section 4304, can disqualify an individual from reemployment, based on the characterization of his or her military service. A recent federal appellate court decision illustrates this point. *Petty v. Metropolitan Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008).

Brian Petty was a captain in the Army Reserve and a sergeant in the police department of the Metro Government of Nashville-Davidson County (Metro). The Army called him to active duty in January 2004. He and the unit he commanded were deployed to Camp Navistar, Kuwait. He was charged with violations of the Uniform Code of Military Justice, for having manufactured, possessed, and consumed alcohol (in violation of a lawful general order applicable to military personnel in Southwest Asia) and for having provided alcohol to a female enlisted Soldier under his command.

CPT Petty appeared before a military judge for arraignment on these charges, and then he agreed to resign his commission "for the good of the service" in lieu of court martial. He received a general discharge under honorable conditions, and he was sent home, his military career over. In accordance with the standard procedure for all Soldiers leaving active duty, he received two different DD-214 forms: the private version showed the general discharge and the fact that it was awarded in lieu of trial by court martial, while the public version of the form did not show this adverse information.

After returning home to Nashville, he made a timely application for reemployment with the Metro police department. He provided the employer the public version of his DD-214. Mr. Petty met the five eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He left his civilian job for the purpose of performing uniformed service, and he gave the employer prior oral or written notice. He did not exceed the cumulative five-year limit on the duration of the period or periods of uniformed service relating to his employer relationship with Metro. Since his service was involuntary, it did not count toward his five-year limit. He made a timely application for reemployment after the general discharge.

Mr. Petty's conduct during his active duty in Kuwait notwithstanding, he did not receive one of the four disqualifying items mentioned in section 4304. The legal maxim *expressio unius est exclusio alterius* clearly applies here. That maxim has been defined as follows: "Expression of one thing is the exclusion of another. … Mention of one thing implies exclusion of another. … When certain persons or things are specified in a law, contract, or will, an

intention to exclude all others from its operation may be inferred." *Black's Law Dictionary, Revised Fourth Edition,* page 692 (internal citations omitted).

In section 4304 of USERRA, four specified events (relating to unsatisfactory performance of military service) disqualify the individual from the right to reemployment. It is thus clear that no other events (including a general discharge after a resignation in lieu of court martial) can disqualify the individual from the right to reemployment. The *Petty* case strongly supports this interpretation.

When Mr. Petty applied for reemployment after his general discharge, the Metro police department leadership suspected that something untoward had happened during the time that he was away from work for military service, although they were not initially familiar with the details of what had happened in Kuwait. The department delayed reinstating Mr. Petty into the position of employment that he left and almost certainly would have continued to hold if he had not been called to the colors. The department applied its "return to work policy" to Mr. Petty and subjected him to a lengthy internal affairs investigation.

Section 4302(b) of USERRA provides: "This chapter supersedes any state law (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that reduces, limits, or eliminates in any manner any right or benefit provided by this chapter, *including the establishment of additional prerequisites* to the exercise of such right or the receipt of any such benefit." 38 U.S.C. 4302(b) (emphasis supplied).

Mr. Petty argued (through attorney Michael J. Wall of Nashville) that Metro's return-to- work policy was an "additional prerequisite" to the right to reemployment and that section 4302(b) precluded Metro from applying that additional prerequisite to Mr. Petty. The District Court rejected that argument and granted Metro's summary judgment motion. On appeal, the Court of Appeals accepted the argument and overturned the summary judgment for the defendant Metro, and then granted summary judgment for the plaintiff, Mr. Petty.

"The district court determined that Metro's return-to-work procedures could be applied to Petty, finding that because they are applicable to all individuals regardless of military service, these procedures did not constitute 'additional prerequisites.' In this, the district court erred. First, section 4302(b) does not limit its superseding effect only to 'additional prerequisites.' It supersedes any 'policy, plan, [or] practice' that 'reduces, limits, or eliminates in any manner any right or benefit' provided by USERRA, 'including,' but not necessarily limited to, 'the establishment of additional prerequisites.' Second, Metro's return-to-work procedures *do* constitute 'additional prerequisites' for returning veterans, because the procedures are in addition to the requirements Congress specified for the exercise of USERRA's reemployment rights. The district court apparently viewed the term 'additional prerequisites' as 'additional to the *employer's* existing prerequisites' and concluded that Metro's procedures are not discriminatory because they apply to all individuals returning to the department. But this analysis is not appropriate for a claim brought under section 4312, and the superseding effect of section 4302(b) is not so limited; Metro's return-to-work procedures are indeed superseded by USERRA's reemployment provisions."

Brian Petty's conduct while on active duty in Kuwait was indefensible, especially for a commissioned officer. His military career ended in disgrace, when he resigned his commission and received a general discharge. But he did not receive one of the four disqualifying events enumerated in section 4304. He met the USERRA eligibility criteria and he was entitled to reemployment, and the Court of Appeals so held.

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.