LAW REVIEW 1016

Army Command Violates USERRA with respect to Hiring Government Contractor Employees as Federal Employees

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1.1.1.8—USERRA-Applicability to Federal Government
1.1.1.9—Successor in Interest
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Introduction

This article presents a real situation, but I have changed the name and location to protect the privacy of the claimant. In 2007, a company called COMTEK hired Sergeant Joe Smith, USAR and assigned him to serve as the "supply sergeant" of the Army Reserve Officers Training Corps (ROTC) unit at the University of California Los Angeles (UCLA). In late 2008, Smith left his civilian job at the UCLA ROTC unit to report to active duty and deploy to Afghanistan. Smith returned to Los Angeles on terminal leave and applied for reemployment at the UCLA ROTC unit. He finally left active duty on Mar. 24, 2010. I believe that the way he was treated violated the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Context

The Army's Cadet Command (CC) is responsible for administering Army ROTC units at colleges and universities across the nation. After consulting with the leadership of the university, CC selects a Professor of Military Science (PMS) to head up each Army ROTC unit. The PMS is a Colonel or Lieutenant Colonel, depending on the size of the unit. The PMS needs a staff of instructors (officers) and support personnel (enlisted Soldiers) to operate the unit. The unit staff is a mixture of Regular Army officers and enlisted personnel and Army Reserve and Army National Guard personnel on Active Guard and Reserve (AGR) orders.

In recent years, the global demand for Soldiers in the Global War on Terrorism (GWOT) has often made it difficult for CC to fill the necessary instructor and support positions at ROTC units with Regular Army and AGR personnel. CC addressed this problem by providing for a government contractor to provide employees to work at Army ROTC units in both instructor and support roles. As a condition of employment, these contractor employees were required to be officers (instructors) or enlisted Soldiers (support personnel) in the Army National Guard or Army Reserve, in good standing, but they were not in a military status when working at the ROTC units. Nonetheless, they wore Army uniforms and observed military courtesies. The idea was that the cadets (college students) were not supposed to be able to distinguish Soldiers on active duty from National Guard and Reserve Soldiers not on active duty that were employed in instructor and support positions as employees of a government contractor.

The initial contractor was a company called MPRI. When the MPRI contract expired, CC awarded the contract to a company called COMTEK. When this occurred, the MPRI employees were offered the opportunity to remain in their positions as employees of COMTEK. COMTEK was considered to be the "successor in interest" to MPRI with respect to the ROTC contract and obligations to the employees under USERRA and other laws.

When Smith worked for the PMS at the UCLA ROTC unit, from early 2007 to late 2008, he had two joint employers—CC and COMTEK. CC (through the UCLA PMS) controlled almost all aspects of his employment, including training, supervision, scheduling, performance evaluation, and discipline (up to and including firing). COMTEK's only role was to pay him his compensation, by direct deposit in his checking account, after receiving vouchers signed by the UCLA PMS.

Contracting out and contracting back in

During the George W. Bush Administration, and previously, the federal procurement policy strongly favored contracting out of federal functions, except those functions that were deemed to be "inherently governmental" and that were reserved for federal employees. Soon after his inauguration, President Obama changed this policy direction by 180 degrees. The Obama Administration's policy favors "contracting back in." All over the Federal Government, contracts with companies that provide services for federal agencies by providing company employees

to work at federal facilities are being terminated. The Federal Government is hiring tens of thousands of new employees (many being the same individuals who had been performing these functions as contractor employees). In this worst recession since the Great Depression, the Federal Government is one of the few major employers that is hiring.

In accordance with the "contracting back in" policy, CC began early in 2009 reconsidering its relationship with COMTEK. In the summer of 2009, CC canceled the COMTEK contract. The COMTEK instructors and support personnel were given a few weeks to submit applications for federal civilian employment, to serve as employees in essentially the same roles they had been filling as contractor employees. Almost all the COMTEK employees applied for these federal positions, and almost all of those who applied were selected.[1]

CC violated USERRA by refusing to consider Smith's application for direct CC employment.

Mr. Smith was on active duty in Iraq in the summer of 2009. Despite the immense logistical difficulties because of the distance between Los Angeles and Iraq and Smith's service in a combat zone, Smith learned of the opportunity to apply for a CC civil service position. He submitted a proper application by the deadline. On behalf of CC, the UCLA PMS refused to consider Smith's application, on the grounds that Smith would likely remain on active duty for several more months and was not immediately available to begin the new civil service position.

The only reason that Mr. Smith was not immediately available, in the summer or fall of 2009, to start a new federal position was that he was on active duty and was expected to remain on active duty until approximately Mar. 2010. Under these circumstances, refusing to hire Mr. Smith because of his immediate unavailability violated section 4311(a) of USERRA.

That subsection provides, "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).

Congress enacted USERRA in 1994, as a complete recodification of the Veterans' Reemployment Rights Act (VRRA), which can be traced back to 1940. Since 1940, the VRRA has provided the right to *reemployment* to a person who has left a civilian position of employment in order to perform voluntary or involuntary military service and who has met the VRRA eligibility criteria for reemployment after release from the period of service. The VRRA originally only applied to active duty. In the 1950s and 1960s, Congress amended the law to make it apply also to initial active duty training, annual training, and inactive duty training (drills).

The nature of military service, protected by the VRRA, thus changed in a fundamental way. The original conception was that military service was a once-in-a-lifetime occurrence for the individual—he was drafted, or he volunteered, he served "for the duration" and then was honorably discharged, unlikely ever to serve again. As the VRRA was expanded to include National Guard and Reserve service, military service became, for the individual member and his or her civilian employer, became a *recurring* obligation.

When military service was perceived as a once-in-a-lifetime experience, there was no perceived need for ongoing protection against discrimination by civilian employers. Joe Smith served in World War II and was honorably discharged at the end of the war. His civilian employer had little or no incentive to discriminate against Smith based on past military service that was most unlikely to recur.

Bob Williams enlisted in the Army Reserve in 1958. Each month, Williams needed a weekend off to attend his required drills. Each year, Williams needed about two weeks off for his annual training tour. His employer might be tempted: let's figure out a pretext to get rid of Williams, so that we don't have to accommodate these recurring absences for Army Reserve training.

In 1968, Congress enacted what became section 2021(b)(3) of the VRRA—the subsection made it unlawful for an employer to deny a Reservist or National Guard member "retention in employment, or a promotion or other incident or advantage of employment" because of "obligations as a member of a Reserve Component of the armed forces." This new provision protected folks like Bob Williams.

In 1982, Coast Guard Reservist Mary Adams applied for a job with the same company that employed Bob Williams. The personnel director was heard to say, "Since 1958, we have been putting up with Williams' drill weekends and annual training tours, and he is only now getting ready to retire from the Army Reserve. If we hire

Adams, we may have to put up with this military nuisance for the next generation. Adams is the best qualified of the applicants, but the next best qualified is only very marginally inferior, and he is not a National Guard or Reserve member. Let's hire him instead."

Until 1986, such discrimination in hiring was not unlawful. In that year, Congress amended section 2021(b)(3) to add "hiring" to the list of items that the National Guard or Reserve member was not to be denied, based on "obligations as a member of a Reserve Component of the armed forces.

Clarence Beattie was an Air Force Reserve officer and a pilot for Eastern Shuttle. While he was away from his civilian job for about a year of military training, Donald Trump purchased the Eastern Shuttle and opened his Trump Shuttle. Eastern Shuttle pilots were offered jobs with the newly established Trump Shuttle, based on their Eastern seniority. Beattie's seniority was such that he could expect Trump to offer him employment. Trump did not offer Beattie a job, because he was not immediately available to start work—he had several months to go on his yearlong military training.

Beattie sued and won. *Beattie v. Trump Shuttle,* 758 F. Supp. 30 (D.D.C. 1991). USERRA's legislative history favorably mentions the *Beattie* case: "Current law protects Reserve and National Guard personnel from termination from their civilian employment or other forms of discrimination based on their military obligations. Section 4311(a) would reenact the current prohibition against discrimination, which includes discrimination against applicants for employment, (*see Beattie v. The Trump Shuttle, Inc.,* 758 F. Supp. 30 (D.D.C. 1991)), current employees who are active or inactive members of Reserve or National Guard units (*see Boyle v. Burke,* 925 F.2d 497 (1st Cir. 1991), or employees who have a military obligation in the future such as a person who enlists in the Delayed Entry Program which does not require leaving the job for several months. *See Trulson v. Trane Co.,* 738 F.2d 770, 775 (7th Cir. 1984). *The Committee*[House Committee on Veterans' Affairs] *intends that these anti-discrimination provisions be broadly construed and strictly enforced."* House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2456 (emphasis supplied).

More recently, a decision of the United States District of Massachusetts supports the proposition that a prospective employer violates section 4311(a) when it denies an individual initial hiring based on "lack of immediate availability" if military service was the reason for the lack of immediate availability. *See McLain v. City of Somerville,* 424 F. Supp. 2d 329 (D. Mass. 2006). Refusing to consider Mr. Smith's 2009 application for federal employment through CC was a clear and egregious violation of section 4311(a).

I would argue that Mr. Smith should not have had to apply to CC in the summer of 2009. There was no need to trouble Smith with this matter while he was in combat. CC should have "deemed" that Smith had applied. It could have considered his qualifications based on his record, and offered him the federal position. If upon his return from active duty Smith had declined the offer that would not have been a major problem for CC. In this case, however, that argument is moot and unnecessary, because Smith did in fact submit a proper and timely application from Iraq.

DOD entities must be model employers in USERRA compliance.

USERRA's very first section expresses 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(b). As a component of the Department of Defense (DOD), CC should especially strive for "model employer" status, because DOD is the principal beneficiary of USERRA.

Through its National Committee for Employer Support of the Guard and Reserve (ESGR), DOD is the principal proponent of the "gospel of employer support"—that civilian employers (federal, state, local, and private sector) should go above and beyond the requirements of USERRA in supporting employees who are National Guard or Reserve members. "Do as I say and not as I do" has always been a losing argument. It is essential that all DOD organizations, including CC, comply with USERRA willingly and cheerfully. Moreover, let the record reflect that the mission of CC is to administer the*Reserve* Officers Training Corps.

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[1] Under these circumstances, one can argue that CC is the "successor in interest" to COMTEK and inherited COMTEK's reemployment obligations, with respect to COMTEK employees like Smith who were away from their COMTEK jobs for military service at the time CC terminated the COMTEK contract and offered COMTEK employees the opportunity to apply for CC civil service positions. In the Smith case, we need not make that argument, because Smith did in fact make a proper and timely application for a CC position in the summer of 2009, despite

the fact that he was on active duty in Iraq at the time. A stronger argument for Smith is that CC violated section 4311(a) of USERRA by rejecting his 2009 employment application.

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.