

LAW REVIEW 1021

The Civilian Employer Does Not Get a Veto

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

1.1.1.8—USERRA Application to Federal Government

1.3.1.1—Left Job for Service and Gave Prior Notice

1.7—USERRA Regulations

Q: I am a Colonel in the Air Force Reserve and the Commanding Officer (CO) of a Reserve unit on the East Coast, although I live and work in the Rocky Mountain West. In my civilian job, I work for a federal department.

My Air Force Reserve responsibilities require me to miss two or sometimes three work days a month from my civilian job, since I must travel a great distance, at my own expense, to get to the training site and return to my home. On the front end, I must miss work on Friday, and sometimes part of Thursday, and on the back end I am traveling Monday and unable to return to work until Tuesday. Moreover, my CO responsibilities sometimes require me to work with officials of the gaining command on Friday or Monday.

Some years ago, I had a hassle with my immediate civilian supervisor about my need for time off from my job for Air Force Reserve service. I contacted the National Committee for Employer Support of the Guard and Reserve (ESGR), and that organization sent an ombudsman to explain to my supervisor that under the Uniformed Services Employment and Reemployment Rights Act (USERRA) I have the right to miss work to perform uniformed service, and that this includes inactive duty training (drill weekends) and travel necessitated by inactive duty training. For almost five years, I have had no problem with my civilian employer about my Air Force Reserve service, until last month.

Last month, the “Third Level Supervisor” (TLS) who is two steps above my immediate supervisor in the department’s chain of command sent out a written notice to each of the several hundred employees under his cognizance. The notice states that too many employees are taking time off from their jobs to “play soldier” and that effective immediately no employee under his cognizance is to take military leave without his personal prior approval, in writing, at least a month in advance.

TLS’s memorandum does not mention me by name, but only about 1% of the employees under TLS’s cognizance are National Guard or Reserve members. I can think of two others, and there may be some others of whom I am not aware. Is TLS’s memorandum consistent with USERRA?

A: It is clear that TLS and many other federal supervisors need to be educated about USERRA. This law applies to essentially all employers in this country, including the Federal Government (all departments and agencies), state and local governments, and private employers, regardless of size. 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).

In recent years, in multiple congressional hearings and reports, Congress has shown growing impatience with federal agencies that flout USERRA. In 2008, Congress added a new final section to USERRA, as follows:

Section 4335: Training for Federal executive agency human resources personnel on employment and reemployment rights and limitations

(a) TRAINING REQUIRED.-The head of each Federal executive agency shall provide training for the human resources personnel of such agency on the following: (1) The rights, benefits, and obligations of members of the uniformed services under this chapter. (2) The application and administration of the requirements of this chapter by such agency with respect to such members.

(b) CONSULTATION-The training provided under subsection (a) shall be developed and provided in consultation with the Director of the Office of Personnel Management.

(c) FREQUENCY-The training provided under subsection (a) shall be provided with such frequency as the Director of the Office of Personnel Management shall specify in order to ensure that the human resources personnel of Federal executive agencies are kept fully and currently informed of the matters covered by the training.

(d) HUMAN RESOURCES PERSONNEL DEFINED-In this section, the term "human resources personnel," in the case of a Federal executive agency, means any personnel of the agency who are authorized to recommend, take, or approve any personnel action that is subject to the requirements of this chapter with respect to employees of the agency.

38 U.S.C. 4335.

It would appear that TLS either missed the required training or was not listening when he attended.

A person who leaves a position of civilian employment to perform service in the uniformed services (anything from five hours to five years) is entitled to reemployment in the civilian position (with continued seniority and pension credit as if continuously employed), provided that the person meets the five USERRA eligibility criteria. One criterion is that "the person (or an appropriate officer of the uniformed service in which such service is performed) has given advance written or verbal notice of such service to such person's employer." 38 U.S.C. 4312(a)(1).

USERRA's definitions section defines "notice" as follows: "The term 'notice' means (with respect to subchapter II) any written or verbal notification of an obligation or intention to perform service in the uniformed services provided to an employer by the employee who will perform such service or by the uniformed service in which such service is to be performed." 38 U.S.C. 4303(8).

It is clear that you are required only to give *notice* to your civilian employer of an upcoming period when you will be away from work for service. You don't need the employer's permission, and the employer is not entitled to a veto.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA. The Secretary has done so, and one section of the regulations is directly on point to your situation:

"Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of impending service."

20 C.F.R. 1002.87.

Q: Does the distribution of TLS's memorandum amount to a USERRA violation in and of itself?

A: Probably not. There will be a USERRA violation the first time the department tries to deny you reemployment, or delay your reemployment, or deny you a benefit of employment, on the grounds that you were away from work for uniformed service without TLS's prior written approval. I am sure that the

department will come to its senses long before we reach that point, and that higher authority within the department will disavow TLS's memorandum.

In the meantime, I hope that readers can utilize this article to educate federal supervisors (as well as supervisors for state and local governments and private employers).

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.