

LAW REVIEW 1026

Special Protection against Discharge, Except for Cause

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

1.1.1.9—USERRA-Applicability to Federal Government

1.2—USERRA-Discrimination Prohibited

1.3.1.1—Left Job for Service and Gave Prior Notice

1.3.2.12—Special Protection Against Discharge, Except Cause

1.4—USERRA Enforcement

Q: I am a Commander in the Navy Reserve. I was on active duty from July 2006 to September 2008. I then started a new civilian job for the Department of the Navy (DON) in November 2008. I had never worked for the Federal Government, as a civilian, prior to this job. I worked at the Navy civilian job for 11 months, and then I was fired in October 2009, for "unsatisfactory work." I read somewhere on the Employer Support of the Guard and Reserve (ESGR) website that I could not be fired, except for cause, within one year after starting my job. I was fired after just 11 months. Does this USERRA provision protect me?

A: You are referring to section 4316(c) of the Uniformed Services Employment and Reemployment Rights Act (USERRA), 38 U.S.C. 4316(c). You are misreading that section, and it does not apply to a person in your situation.

Section 4316(c) reads as follows:

"A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—(1) within one year after the date of such reemployment, if the person's period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days." 38 U.S.C. 4316(c) (emphasis supplied).

You were not *reemployed* by DON in November 2008, because you did not work for DON, or the Federal Government, before your 2006-08 active duty. Section 4316(c) does not apply to a person in your situation.

Q: After I lost my DON civilian job in October 2009, I arranged to go back on active duty in January 2010. I expect to be released from this period of active duty in January 2011. Upon release from this period of service, will I have the right to reemployment in the DON job?

A: No. To have the right to reemployment in a position of employment, you must meet five eligibility criteria, and you fail to meet the first criterion. You must meet all five criteria to have the right to reemployment, so it does not matter if you meet the other four.

The first criterion for reemployment rights is that you left your civilian position of employment for the purpose of performing service in the uniformed services. You left your civilian DON job in October 2009 when you were fired. You went on active duty three months later. The timing makes clear that you left your civilian position of employment for reasons unrelated to uniformed service.

Q: How does USERRA apply to the October 2009 firing?

A: You can challenge the lawfulness of the firing under section 4311(a) of USERRA, 38 U.S.C. 4311(a). Because the employer is a federal executive agency, the forum for your claim is the Merit Systems Protection Board (MSPB), not federal court. Section 4311(a) 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).

Section 4311(c)(1) sets forth the burden of proof for section 4311(a) cases, as follows:

"An employer shall be considered to have engaged in actions prohibited—(1) under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is a *motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service." 38 U.S.C. 4311(c)(1) (emphasis supplied).

You can certainly bring an action in the MSPB to challenge the lawfulness of the firing. To prevail in that action, you will need to *prove* that your membership in the Navy Reserve, or your performance of uniformed service, or your obligation to perform future service was a *motivating factor* in the employer's decision to fire you in October 2009. You do not need to prove that your Navy service was the reason that the employer fired you. It is sufficient for you to prove that your service was a *motivating factor* in the employer's decision to fire you. If the employer had 15 reasons for firing you, and one reason was your Navy Reserve service, the firing is unlawful, unless the employer can *prove* that it would have fired you for the other 14 reasons, and that those reasons are not unlawful.

You don't need an employer admission or a "smoking gun." You can prove "motivating factor" by either direct or circumstantial evidence, or by a combination of the two. You don't have to prove your case beyond a reasonable doubt—it is sufficient to prove it by a preponderance of the evidence, meaning that you have established that it was *more likely than not* that the employer considered your Navy Reserve service when deciding to fire you.. If you have no evidence from which the MSPB could reasonably conclude that the employer considered your Navy Reserve service in making the decision, please do not waste everyone's time by filing an MSPB action.

Q: What is the MSPB?

A: The MSPB is a quasi-judicial federal agency that was created by the Civil Service Reform Act of 1978. The MSPB adjudicates disputes between federal employees and prospective employees and federal agencies, as employers, under many different laws, not just USERRA. The MSPB has three members, each of whom is appointed by the President with Senate confirmation.

Congress enacted USERRA in 1994, to replace the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA gave the MSPB new and additional jurisdiction, beyond the jurisdiction that it has had since its creation in 1978. Under section 4324 of USERRA, 38 U.S.C. 4324, the MSPB has the explicit jurisdiction to adjudicate a claim that a federal agency has violated USERRA and to order appropriate relief, including reinstatement and back pay.

Q: The head of the DON personnel office told me that the MSPB has no jurisdiction in this case, because I had not worked for the Federal Government for more than a year at the time I was fired. Is that correct?

A: No.

Under the general MSPB rules, in effect since 1978, a federal employee with less than a year of federal service cannot appeal a firing to the MSPB. But under section 4324 of USERRA, the MSPB must adjudicate your claim that the firing violated USERRA. USERRA's legislative history makes clear that the enactment of USERRA broadened the jurisdiction of the MSPB to include cases brought by persons (such as federal employees in the initial year of employment when fired) who could not get MSPB review prior to the enactment of USERRA. "Section 4322(e) [later renumbered 4324] would give to the Merit Systems Protection Board (MSPB) the jurisdiction to decide contested cases concerning Federal sector reemployment rights, including cases brought by former Federal employees and employees or former employees of non-

appropriated fund activities of the United States." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2472.

Q: How are MSPB cases adjudicated?

A: The MSPB has regional offices around the country. Your case will be assigned to an MSPB Administrative Judge (AJ) in your part of the country. The AJ will conduct a trial and will make a decision on the facts and the law, based on evidence that you and the agency (DON) present at the hearing conducted by the AJ.

You or the employer may appeal to AJ's decision to the MSPB itself, here in Washington. The MSPB can affirm, reverse, or modify the AJ's decision and can remand the case back to the AJ, if necessary. If the MSPB rules against you, you can appeal to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court that sits here in Washington.

Please remember that an appeal is not a new trial. The MSPB and the Federal Circuit will review the record created at the hearing and will affirm, modify, or reverse based on that record. If you did not present evidence on an important point at the AJ's hearing, you will not have an opportunity to present that evidence at a later stage of the proceeding.

The AJ's holding on a *question of law* will be reviewed *de novo* (as of new) by the MSPB, and the MSPB's holding on a question of law will be reviewed *de novo* by the Federal Circuit. The AJ's finding of fact will be disturbed on appeal only if the MSPB or the Federal Circuit can say that *no reasonable person could have come to that conclusion* based on the evidence before the AJ. It is usually a waste of time to appeal on factual questions.

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.