

LAW REVIEW 1030

Prior Notice to the Civilian Employer Need Not Be in Writing

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

1.3.1.1—Left Job for Service and Gave Prior Notice

1.3.1.3—Timely Application for Reemployment

1.8—Relationship Between USERRA and other Laws/Practices

Q: I am a member of the Army National Guard, and I was called to active duty for 14 months, from July 2008 to September 2009. In April 2008, when I learned that my unit would likely be mobilized, I orally notified my direct supervisor and the company's personnel office. A few days before my departure, when I finally received written orders from the Army, I gave the personnel director a copy of the orders, along with a short note. Unfortunately, I did not retain a copy of the note, and I am at a loss as to how I am to prove that I gave written notice.

I was released from active duty on Sept. 11, 2009. Three days later, I showed up at the employer's place of business, seeking reemployment. I provided the employer a copy of my DD-214, showing that I was on active duty from July 15, 2008 to Sept. 11, 2009 and that I was honorably released from active duty. The personnel director claims to understand the Uniformed Services Employment and Reemployment Rights Act (USERRA), and he has never said that I will not be reemployed, but there has been one delay after another. Almost eight months have gone by, and I am still without a job. The personnel director told me that he would put me back to work as soon as I provide him documentation that I provided the company a copy of my military orders before I started the active duty period in July 2008. I have no such documentation to provide. Help!

A: I think that you have been entirely too patient with this employer. You should call the National Committee for Employer Support of the Guard and Reserve (ESGR) at 800-336-4590. ESGR will put you in touch with a volunteer "ombudsman" in your state, to explain USERRA to the employer and to seek voluntary compliance. If ESGR does not resolve the matter within two weeks after you call, you should make a formal, written complaint to the Veterans' Employment and Training Service, United States Department of Labor (DOL-VETS).

I suggest you contact DOL-VETS 15 days after you complain to ESGR, or sooner if ESGR tells you that it will not open a case file for you. To file an online complaint with DOL-VETS, go to <https://vets1010.dol.gov/Login.aspx?ReturnUrl=%2default.aspx>. You will need to choose a username and password in order to use this online complaint form. Be sure to fill out all the information that pertains to your situation and provide as much detail as possible. Once you submit this form, the appropriate DOL-VETS investigator will open your form and ask you for a copy of your military orders and other documentation.

USERRA accords the right to reemployment to anyone who meets the five eligibility criteria, and it is clear that you met the criteria as of mid-September, when you applied for reemployment. The employer should have had you back on the payroll as of two weeks after your application. The employer owes you a substantial amount of back pay.

USERRA provides that in order for the person to have reemployment rights, "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) (emphasis supplied).

The employer is confusing the pre-service *notice* requirement with the post-service *documentation* requirement, which is set forth in 38 U.S.C. 4312(f)(1), as follows: "A person who submits an application for reemployment in accordance with subparagraph (C) or (D) of subsection (e)(1) or subsection (e)(2) shall provide to the person's employer (*upon the request of such employer*) documentation to establish that (A) the person's application is timely; (B) the person has not exceeded the service limitations set forth in subsection (a)(2) (except as permitted under subsection (c));

and (C) the person's entitlement to the benefits under this chapter has not been terminated pursuant to section 4304." 38 U.S.C. 4312(f)(1) (emphasis supplied).

When you returned from military duty and applied for reemployment, on or about Sept. 15, 2009, you appropriately provided the employer all the documentation that the employer is entitled to request under section 4312(f)(1), without waiting for the employer to request such documentation. The DD-214 that you provided clearly meets the documentation requirements.

The DD-214 shows that you were released from active duty on Sept. 11, 2009. After a period of more than 180 days of continuous service, as in this case, you have 90 days (starting on the date of release from service) to apply for reemployment. See 38 U.S.C. 4312(e)(1)(D). Thus, the DD-214 clearly shows that your application for reemployment was timely.

Your DD-214 also shows that you have not exceeded the cumulative five-year limit under 38 U.S.C. 4312(c). The form shows the date that you entered active duty for that period and the date you left active duty. Another part of the form shows earlier active duty periods that you have performed. If the cumulative periods of service do not exceed five years, you are clearly qualified. If the cumulative periods of service exceed five years, you will need to show (possibly through additional documentation) that the most recent period or one or more of the earlier periods fell within the eight statutory exemptions to the five-year limit, as set forth in section 4312(c). Please see Law Review 201 for a definitive discussion of what counts and what does not count in exhausting the five-year limit.

Your DD-214 also shows that you are not disqualified under section 4304, which provides: "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.

If one of these four untoward events had occurred, it would have been reflected in your DD-214. Instead, your DD-214 characterizes your most recent period of service as "honorable." Your DD-214 makes clear that you were entitled to reemployment and should have been reemployed in Sept. 2009.

Section 4302(b) [38 U.S.C. 4302(b)] makes it clear that it is unlawful for an employer to impose an additional prerequisite (beyond the prerequisites imposed by USERRA) upon the returning veteran's right to reemployment. That is exactly what your employer is trying to do. "Show us documentation that you provided us a copy of your military orders before you departed for service" is an additional prerequisite that the employer has no right to impose.

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). I also invite the reader's attention to *Petty v. Metropolitan Government of Nashville-Davidson County*, 538 F.3d 431 (6th Cir. 2008).

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.