LAW REVIEW 1067

My Big Bank Will Be Taken Over by Bigger Bank

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1.1.1.9—Successors in Interest
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Q: I am an Army Reserve officer and ROA member. I have read with great interest your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA), available atwww.roa.org/law_review. I expect to be called to active duty for a year, from January 2011 to January 2012.

I work for Big Local Bank (BLB), which has 80 branches, all in this state. BLB is being bought out and taken over by Big National Bank (BNB), which has more than 800 branches nationwide but currently has only 11 branches in this state. BNB has grown tremendously in recent years by taking over small and intermediate sized banks to gain market share in new states and cities.

The sale of BLB to BNB is likely to be finalized in March or April 2011, about three months after I leave to go to Afghanistan on active duty. When I return from active duty in January 2012, will I have reemployment rights at BNB?

A: Yes, if BNB qualifies as the "successor in interest" to BLB. Based on your description, it seems clear that BNB will be the successor in interest and will inherit BLB's obligation to reemploy you under USERRA. This assumes, of course, that you meet the USERRA eligibility criteria. You must have left the civilian job for the purpose of performing voluntary or involuntary service in the uniformed services, and you must have given the pre-service employer (BLB) prior oral or written notice. Your cumulative period or periods of uniformed service, relating to your BLB-BNB employment, must not have exceeded five years. If this is an involuntary call-up, it does not count toward your five-year limit. You must have been released from the period of service without having received a punitive (by court martial) or other than honorable discharge, and you must have made a timely application for reemployment after release. It seems quite likely that you will meet these criteria.

Congress enacted USERRA in 1994, as a long-overdue recodification of the Veterans' Reemployment Rights Act (VRRA), which goes back to 1940. USERRA is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335).

Section 4303 of USERRA defines 16 terms used in this law, including the term "employer." That definition includes "any successor in interest to a person, institution, organization, or other entity referred to in this subparagraph." 38 U.S.C. 4303(4)(A)(iv).

USERRA does not define the term "successor in interest" but the term is addressed in USERRA's legislative history, as follows: "This provision [the definition of "employer"] would also have the effect of placing liability on a successor in interest, as is true under current law. The Committee [House Committee on Veterans' Affairs] intends that the multi-factor analysis utilized by the court in *Leib v. Georgia-Pacific Corp.,* 925 F.2d 240 (8th Cir. 1991) is to be the model for successor in interest issues, except that the successor's notice or awareness of a reemployment rights claim at the time of merger or acquisition should not be a factor in this analysis. In actual practice, it is possible that the successor would not have notice that one or more employees are absent from employment because of military responsibilities and a returning service-person should not be penalized because of that lack of notice." House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.

As BLB officials work with BNB officials to finalize the details of this acquisition, it is unlikely that the BLB officials will divulge: "We have an employee, Jane Doe, who is away from work for about a year serving in the Army in Afghanistan. Jane is scheduled to return in about January 2012." The fact that BNB was not

aware of your potential USERRA claim at the time of the acquisition should not be a factor in determining your reemployment rights at BNB.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Department of Labor (DOL) published proposed USERRA regulations in September 2004, for notice and comment. After considering the comments received and making a few minor adjustments, DOL published the final USERRA regulations in the *Federal Register* on December 19, 2005. Those regulations are now published in title 20 of the Code of Federal Regulations (C.F.R.), in Part 1002. The regulations address the successor in interest issue as follows:

Section 1002.35. Is a successor in interest an employer covered by USERRA?

USERRA's definition of "employer" includes a successor in interest. In general, an employer is a successor in interest when there is a substantial continuity in operations, facilities, and workforce from the former employer. The determination whether an employer is a successor in interest must be made on a case-by-case basis using a multi-factor test that considers the following:

a. Whether there has been a substantial continuity of business operations from the former to the current employer;

b. Whether the current employer uses the same or similar facilities, machinery, equipment, and methods of production;

c. Whether there has been a substantial continuity of employees;

d. Whether there is a similarity of jobs and working conditions;

e. Whether there is a similarity of supervisors or managers;

f. Whether there is a similarity of products or services.

Section 1002.36. Can an employer be liable as a successor in interest if it was unaware that an employee may claim reemployment rights when the employer acquired the business?

Yes. In order to be a successor in interest, it is not necessary for an employer to have notice of a potential reemployment rights claim at the time of the merger, acquisition, or other form of succession.

20 C.F.R. 1002.35, 1002.36 (bold headings in original).

Applying these principles, it seems likely that a court would find that BNB is the successor in interest to BLB and that BNB has the obligation to reemploy you, upon your return from active duty.

Q: BNB currently has only 11 branches in my state. Unfortunately for me, one of those branches is right across the street from the BLB branch where I work. That BNB branch is considerably larger and newer than the BLB branch where I work. It seems likely that BNB will retain most of the acquired BLB branches, but the particular branch where I work will likely close. If the BLB branch where I work is closed by the time I return from active duty in January 2012, what effect will that have on my reemployment rights? What can I do to protect my rights while I am deployed to Afghanistan?

A: If you meet the USERRA eligibility criteria, and if BNB qualifies as the successor in interest to BLB, BNB will be required to reemploy you "in the position of employment in which the person [you] *would have been employed* if the continuous employment of such person had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A) (emphasis supplied).

In its first case construing the VRRA, the Supreme Court enunciated the "escalator principle" when it held: "The returning veteran does not step back on the seniority escalator at the point he stepped off. He steps back on at the precise point he would have occupied had he kept his position continuously during the war." *Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284-85 (1946). Section 4316(a) of USERRA [38 U.S.C. 4316(a)] codifies the escalator principle in the current reemployment statute.

It has always been the case that the escalator can descend as well as ascend. The reemployment statute does not protect you from a bad thing (like a layoff or reduction in force) that *clearly would have happened anyway* even if you had not been on active duty at the time.

Let us assume that you are the chief teller of the BLB branch, and that branch closes after BNB takes over BLB. When you return from active duty in January 2012, you find that the BLB branch where you had worked has been turned into a fast food restaurant. The question then becomes: "What *would have happened* to Jane Doe's job if she had not been on active duty in Afghanistan at the time BNB took over BLB?" To answer that question, we will need to look to what happened to the other BLB employees of the branch that closed, and what happened to the chief tellers of other BLB branches after the takeover.

During the time that you are on active duty, and especially after the BNB takeover of BLB, there will likely be a lot of upheaval in the employment at the BLB branches. There will be opportunities to apply for new BNB jobs that come open. You should apply for those jobs as the opportunities are announced. If BNB refuses to hire you on the grounds that you are not immediately available to start work (because you have months left to go on your deployment) that would amount to a clear violation of section 4311 of USERRA, 38 U.S.C. 4311. *See McLain v. City of Somerville,* 424 F. Supp. 2d 329 (D. Mass. 2006); *Beattie v. Trump Shuttle,* 758 F. Supp. 30 (D.D.C. 1991). I also invite the reader's attention to Law Review 0746 (September 2007), available at www.roa.org/law_review.

While you are deployed to the tip of the spear, your time will be fully engaged in your military duties, and we don't want you to spend precious time applying for BNB jobs on the Internet. This is a safety issue, your safety and that of your colleagues in arms. If I am in the foxhole next to yours, I should not have to worry that you are not paying full attention to your sector of the perimeter because you are busy completing an on-line job application. Texting while on watch is sort of like texting while driving—don't even think about it.

Accordingly, I strongly recommend that you draft and sign a *limited power of attorney* to a trusted colleague at work, authorizing that individual to access your personnel record and to apply, on your behalf, for promotions, transfers, benefits, etc. This limited power of attorney is separate and different from the general power of attorney that you grant to your husband, to act on your behalf in business matters generally while you are deployed. The agent to whom you issue the limited power of attorney should be a trusted colleague at work who is likely to learn of opportunities as they arise—your husband does not work for the bank and is unlikely to have access to this information.