LAW REVIEW 1097

Is It Feasible To Expand the Active Component to Relieve the Burden on Employers of Reserve Component Personnel?

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1.1.1.2—USERRA Applicability to Small Employers

1.3.1.2—Character and Duration of Service

Q: I am a life member of ROA and I retired from the Army Reserve in 1988. I also own and operate a small business, with only 13 employees. One of my employees is an officer in the Army Reserve, and another is an enlisted member of the Marine Corps Reserve. These two employees have been called to active duty multiple times, sometimes voluntarily and sometimes involuntarily, on top of their monthly drill weekends and annual training periods. These two employees perform important functions at my small business, and accommodating their frequent and lengthy absences for military training and service is getting to be a real problem for me, as the operator of a small business. During my 1965-88 Army Reserve career, I was never asked to do more than one weekend of training per month and two weeks of annual training per year. What gives? Does the Uniformed Services Employment and Reemployment Rights Act (USERRA) require me to accommodate these frequent and lengthy absences from work by these two employees?

A: Yes. The days of National Guard and Reserve (NG&R) service as "one weekend per month and two weeks in the summer" are gone forever. The transformation of the NG&R from a strategic reserve (available only for something akin to World War III) to an operational reserve (routinely used for military operations like Iraq and Afghanistan) began in 1973, when Congress abolished the draft and the Department of Defense (DoD) adopted the Total Force Policy (TFP).

The real implementation of the TFP began in August 1990, two years after you retired. Iraq invaded and occupied Kuwait and President George H.W. Bush drew "a line in the sand" and responded forcefully, to protect Saudi Arabia and to liberate Kuwait. As part of his military response, President Bush ordered the call-up of NG&R units, for the first significant call-up of NG&R forces since the Korean War. All of the supposed domestic and international political reasons that made it "impossible" to call up NG&R forces for something short of World War III disappeared when President Bush called them up, and they performed very well in the 1990-91 conflict. Please see "Reserve Resolve" by Fred Minnick, on pages 70-75 of the January-February 2011 issue of *The Officer.*

Later in the 1990s, President Clinton continued to use NG&R forces for operations in the former Yugoslavia, Haiti, and elsewhere. The TFP has passed its greatest test since the terrorist attacks of September 11, 2001. As of December 14, 2010, 793,090 NG&R personnel have been called to the colors since September 11, 2001 for Operation Noble Eagle, Operation Enduring Freedom, Operation Iraqi Freedom, and Operation New Dawn.

Military operations in Iraq and Afghanistan would have been impossible without this NG&R participation, and the nation's reliance on NG&R personnel is most unlikely to decrease in the foreseeable future. Please see "Valuable Readiness" by the Honorable Dennis McCarthy (Assistant Secretary of Defense for Reserve Affairs) on pages 28-30 of the upcoming issue of *The Officer.*

Q: I think that it is fundamentally unfair to continue to put this burden on civilian employers, especially small employers like myself. I think that the Active Component (AC) should be expanded substantially, and the NG&R components should go back to their traditional role as a strategic reserve.

In 2007, Congress and DOD expanded the active duty strength of the Army by 60,000 and of the Marine Corps by 27,000. The National Defense Authorization Act for Fiscal Year 2009 authorized an additional 7,000

active personnel for the Army and 5,000 for the Marine Corps. Significantly relieving burdens on employers of NG&R personnel would require a much larger increase, and that is simply not feasible at this time of record budget deficits and fiscal stringency for DoD. Moreover, even if money were unlimited, recruiting the necessary quantity and quality of AC personnel is simply not demographically feasible, especially after the economy improves and the unemployment rate drops.

For the next several years, the age-18 cohort will decline significantly. The National Center for Health Statistics, in the United States Department of Health and Human Services, has reported on the number of live births in the United States by year as follows: 1990-4,179,000; 1991-4,111,000; 1992-4,084,000; 1993-4,039,000; 1994-3,979,000; 1995-3,892,000. It should also be noted that DoD has estimated that only 1/3 of young adults (age 18-25) in our country are eligible for military service. The other 2/3 are disqualified for many reasons, but most commonly (a) obesity, diabetes, and other medical problems; (b) mental and educational deficiencies; (c) criminal convictions; and (d) not being U.S. citizens or lawful permanent residents.

When the economy improves and youth unemployment rates drop, it will become increasingly difficult for the services to meet recruiting quotas to support current active duty numbers. Trying to meet greatly increased quotas to support greater AC strength numbers cannot even be contemplated. Relieving the pressure on NG&R members and their civilian employers by substantially expanding the AC is just not feasible.

Some employers and employer associations assert that USERRA was written for the old days when service in the National Guard and Reserve was generally limited to one weekend per month and two weeks in the summer. These employers and associations assert that USERRA is being misused as the traditional strategic reserve transforms into an operational reserve.

This assertion is an incorrect reading of history. Congress enacted the reemployment statute for World War II, and the burden placed on employers today pales in comparison to the burden placed on civilian employers during and immediately after that war. When Japan surrendered on Sept. 2, 1945, the United States had 12 million men and women on active duty in the armed forces.

Within a few weeks, that number was reduced to three million. Even if only half of the nine million returning veterans had civilian jobs to return to, that still amounts to 4.5 million men and women demanding (with the force of federal law behind them) that their pre-service employers reemploy them, even if that meant displacing other employees.

Starting in the 1970s, the seven Reserve Components encouraged their members to participate in military training and service well beyond the minimum requirements, and a long debate ensued as to whether an implied "rule of reason" limited the frequency and duration of military service periods for National Guard and Reserve members. In 1981, the Department of Labor (DOL) bowed to pressure from employer interests and announced a "90-day rule": that the individual Reserve Component member had the right to reemployment after military training or service only if such periods of service did not exceed 90 days in a three-year period. Just a few months later, DOL bowed to pressure from DoD and Congress and rescinded this 90-day rule.

Through the 1970s and 1980s, there were conflicting court decisions as to whether National Guard and Reserve service that exceeded the minimum requirements was protected by the reemployment statute. The Supreme Court finally put an end to that argument by holding clearly and unanimously that the right to time off from one's civilian job for military training or service was not subject to any implied limit or "rule of reason." See *King v. St. Vincent's Hospital*, 502 U.S. 215 (1991).

Three years later, Congress enacted USERRA as a comprehensive rewrite of the 1940 reemployment statute. In section 4312(h) of USERRA, Congress codified the Supreme Court's holding in *King*: "In any determination of a person's entitlement to protection under this chapter, the timing, frequency, and duration of the person's service, or the nature of such training or service (including voluntary service) in the uniformed services, shall not be a basis for denying protection of this chapter if the service does not exceed the limitations set forth in subsection (c) [the five-year limit] and the notice requirements established in subsection (a)(1) and the notification requirements [timely application for reemployment] are met." 38 U.S.C. 4312(h).

The language of section 4312(h) could hardly be clearer, but the clarity is further buttressed by the

legislative history: "Section 4312(h) is a codification and amplification of *King v. St. Vincent's Hospital*. This new section makes clear the Committee's intent that no 'reasonableness' test be applied to determine reemployment rights and that this section prohibits consideration of timing, frequency, or duration of service so long as it does not exceed the cumulative limitations under section 4312(c) and the servicemember has complied with requirements under sections 4312(a) and (e)." House Report No. 103-65, 1994 *United States Code Congressional & Administrative News*2449, 2463.

The transition from a strategic reserve to an operational reserve was largely complete by the time Congress enacted USERRA in 1994. In August 1990, Iraq invaded Kuwait, and President George Herbert Walker Bush began that month calling National Guard and Reserve personnel to active duty, the first significant call-up of the Reserve Components since the Korean War. It was only the rapid victory achieved by American and allied forces that limited the burden on civilian employers during 1990-91.

Yes, the Global War on Terrorism has increased the burden on employers, but this increased burden is certainly not unanticipated or unprecedented or unconstitutional

I also acknowledge that we need to address the concerns of civilian employers in order to make the TFP work for the expected long war. Please see "Concessions on all Sides" by Captain Ted Daywalt and myself, on pages 20-23 of the upcoming issue of *The Officer.*

I invite your attention to "Positive Investment Return" by Lieutenant General Jack Stultz (the Chief of Army Reserve) on pages 32-34 of the upcoming issue. On page 34, General Stultz writes: "Collectively we must convince America's employers that our program to develop and share our human talent is good for the nation and good for their bottom line."

Q: I have intentionally kept the number of employees in my small business below 15, because my lawyer has informed me that as long as I do not hire the 15th employee I am exempt from these burdensome federal employment laws. Does USERRA apply to very small employers like my business?

A: Yes. Other federal employment laws (including Title VII of the Civil Rights Act of 1964 and the Americans With Disabilities Act) have a 15-employee threshold for applicability. The reemployment statute has never had such a threshold. You only need one employee to be an employer covered by this statute. *See Cole v. Swint,* 961 F.2d 58, 60 (5th Cir. 1992).

Congress enacted USERRA in 1994, as a complete recodification of the Veterans' Reemployment Rights Act (VRRA), which was originally enacted in 1940. USERRA's legislative history makes clear the intent of Congress that: "This chapter [USERRA] would apply, as does current law [the VRRA], to all employers regardless of the size of the employer or the number of employees. [citing *Cole v. Swint].*" House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2454.