Number 101, December 2003:
Does USERRA Apply to Temporary Positions?

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Q: I am a Specialist in the Army Reserve. I have enjoyed reading your "Law Review" articles, especially the articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA). I work for a Department of Defense (DOD) agency outside the U.S. Although I have worked here for two years, my job has been labeled "temporary." Some of my colleagues have worked for the organization for more than a decade, but they are also referred to as "temporary." I was called to active duty from February to August 2003. I made a timely application for reemployment, but the organization turned me down. The personnel officer insists that USERRA does not apply outside the U.S. and that, in any case, I do not have reemployment rights because I left a "temporary" position. The personnel officer has cited Army Publication DAPE-CP-PPE of 20 February 2003, entitled "Information Guide on Employment Rights Benefits and Entitlements for Federal Civilian Employees Who Perform Active Military Duty." Do I have the right to re-employment?

A: Yes. Under a 1998 amendment to USERRA, this law explicitly applies all over the world to U.S. and U.S.-affiliated employers. That amendment is discussed in some detail in Law Review 24 (April 2001), entitled "Enforcement of USERRA Outside the U.S." Even before this 1998 amendment, USERRA probably applied to the U.S. Government all over the world. If there was any doubt on that question, the 1998 amendment put that doubt to rest.

The fact that the job you left was labeled "temporary" does not defeat your right to re-employment. Indeed, the very publication that the personnel officer has cited supports your position. That publication states, on page 5: "An employee who enters active military duty (voluntarily or involuntarily) from any position, including a temporary position, has full job protection, provided he or she applies for reemployment within the [required] time limits." (Emphasis supplied.)

In Law Review 89 ("Enforcing USERRA Against a State" published September 2003), I explained that USERRA replaced the Veterans' Reemployment Rights (VRR) law in 1994. Under the VRR law, the returning veteran was required to establish, as an eligibility criterion for re-employment rights, that his or her job was "other than temporary." USERRA has no such eligibility criterion, so the veteran can have re-employment rights even if the pre-service employment was correctly considered to have been "temporary."

Under USERRA, "An employer is not required to reemploy a person under this chapter if--…the employment from which the person leaves to serve in the uniformed services is for a brief, nonrecurrent period and there is no

reasonable expectation that such employment will continue indefinitely or for a significant time." 38 U.S.C. 4312(d)(1)(C). Moreover, USERRA makes it clear that "the employer shall have the burden of proving … the brief or nonrecurrent nature of the employment without a reasonable expectation of continuing indefinitely or for a significant time." 38 U.S.C. 4312(d)(2)(C).

USERRA shifts the burden of proof on the "temporary" issue to the employer. The fact that your job was labeled "temporary" does not establish this defense. Because you have reported that some of your colleagues have worked for this organization for many years in such "temporary" jobs, I believe that the employer will not be able to meet its burden of proof on this affirmative defense.

I also invite your attention to Stevens v. Tennessee Valley Authority, 687 F.2d 158 (6th Cir. 1982), holding that a "temporary" employee of the Tennessee Valley Authority had re-employment rights under the VRR law. Stevens is cited with approval in USERRA's legislative history. See House Report No. 103-65, 1994 United States Code Congressional and Administrative News 2449, 2455.

Q: The personnel officer has pointed to some additional language in DAPE-CP-PPE, later on the same page (page 5). That language is as follows: "An employee who was on a temporary appointment serves out the remaining time, if any, left on the appointment. (The military activation period does not extend the civilian appointment.)" My "temporary" appointment was for one year, starting in August 2002. It was scheduled to expire in August 2003, just about the time I returned from active duty. Am I out of luck?

A: No. It should be emphasized that this document is an "information guide" and not a regulation or instruction. It is some unnamed DOD lawyer's attempt to summarize USERRA. It is reasonably accurate, but I noticed several significant errors. I think that this particular paragraph (that you quoted) is a misleading oversimplification.

I agree that the military activation period does not, per se, extend the period of your civilian appointment. However, in your case, I think that you had a "reasonable expectation" of continued employment, after the end of the one-year appointment, because many of your colleagues with similar appointments have been extended. Certainly, the employer cannot meet its burden of proof, showing that you had "no reasonable expectation" that your appointment would be extended.

Note: After reading a draft of this article, the personnel officer relented and rehired this reservist in the "temporary" position that she had left when called to service.

*Military title used for purposes of identification only. The views expressed in these articles are the personal views of the author and are not necessarily

the views of the Department of the Navy, the Department of Defense, the Department of Defense or the U.S. government.