

# LAW REVIEW 1109

## USERRA Does Not Protect Absence from Work To Attend DEP Meetings

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

### 1.2—USERRA-Discrimination Prohibited

#### 1.3.1.1—Left Job for Service and Gave Prior Notice

#### 1.3.1.2—Character and Duration of Service

**Q:** I recently enlisted in the Air Force, and I am in the Delayed Entry Program (DEP). I expect to report to boot camp in July, but the recruiter informs me that the boot camp date may slip to October or later. My friend joined the Air Force last year, and I know that her boot camp reporting date slipped three times before she finally reported to boot camp in late 2010. I am looking forward to going on active duty, but in the meantime I need income to support myself.

The recruiter has set up a series of “DEP meetings” for me and several other new recruits here in this area. The meetings are held on Saturday mornings. That is a good time for the other new recruits, but I work in a store and Saturday morning is our busiest time of the week.

The recruiter sent a form letter to my employer, giving him the schedule for these DEP meetings and saying that I will not be at work on those Saturday mornings. This letter greatly annoyed my civilian employer, because I had not even told him that I was joining the Air Force.

**I am in a terrible dilemma. The recruiter tells me that attending these meetings is mandatory, but my civilian employer is telling me that if I miss one more Saturday morning shift I will be fired. Does federal law protect my right to miss work to attend a DEP meeting?**

**A:** No. The law that applies here is the Uniformed Services Employment and Reemployment Rights Act (USERRA), which is codified in title 38, United States Code, sections 4301-4335 (38 U.S.C. 4301-4335). USERRA gives you the right to absent yourself from work in order to perform “service in the uniformed services.” Section 4303(13) of USERRA defines that term as follows: “The term ‘service in the uniformed services’ means the performance of duty on a voluntary or involuntary basis in a uniformed service under competent authority and includes active duty, active duty for training, initial active duty for training, inactive duty training, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of *an examination to determine the fitness of the person to perform any such duty*, and a period for which a person is absent from a position of employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.” 38 U.S.C. 4303(13) (emphasis supplied).

This definition is broad but not unlimited. It includes the time you miss work to report to the Military Examination and Processing Station (MEPS) for a physical examination and to take the Armed Forces Qualifying Test (AFQT), but these “DEP meetings” do not fall within USERRA’s definition of “service in the uniformed services.”

**Q: I did not need time off from my job for the physical and to take the AFQT. My civilian job schedule has me off on Wednesdays, because I am expected to work every Saturday. I arranged to go to the MEPS on a Wednesday, because I did not want to inform my civilian employer that I am joining the Air Force, until I have a firm report date for boot camp. I am greatly annoyed and concerned that the recruiter informed my civilian employer that I am joining the Air Force. I really need to keep my civilian job until a few days before I report to boot camp, and I am concerned that the boot camp report date will slip, as it did for my friend.**

**A:** You are right to be concerned. I have brought this matter to the attention of the Commander of the Air Force Recruiting Command. I suggest that it should be Air Force policy that the recruiter should not inform the civilian employer unless and until the recruit specifically requests such notification. I have also brought to the attention of the Air Force Recruiting Command that attendance of “DEP meetings” is not protected by

USERRA, so the recruiter needs either to exempt the recruit from the attendance requirement or to schedule each DEP meeting for a time that does not conflict with the recruit's job schedule.

I have heard from several Air Force recruits that they lost their civilian jobs after they informed their civilian employers that they had enlisted. This put them in serious financial difficulties, because they lost their civilian jobs weeks or months before they had planned to leave to report to boot camp. Section 4311 of USERRA makes it unlawful for an employer to fire a recruit under these circumstances, because of the enlistment. Please see Law Review 0849 (Oct. 2008), available at [www.roa.org/law\\_review](http://www.roa.org/law_review). But making it unlawful does not mean that it will not happen.

My advice to persons enlisting in the armed forces is to keep your enlistment quiet until the fact of the enlistment and the boot camp reporting date are *certain*. Then, you should give the employer 4-8 weeks of advance notice, prior to the date that you will leave to report to boot camp. Don't get the employer spun up about a possibility that may not come to pass or that may be significantly delayed.

USERRA gives you the right to miss a day or two of work, without pay, to go to the MEPS for the physical and the AFQT. But as a practical matter I suggest that you are better off to schedule the MEPS visit for a non-work day, or to take a day of vacation from your civilian job, so that you will not need to disclose your military plans to the employer at a time when it is by no means certain that you will in fact be joining the military.

USERRA applies to regular military service, as well as service in the National Guard or Reserve. Please see Law Review 0719. You can have the right to reemployment in this job, provided you meet the five eligibility criteria under USERRA. You need to leave the job for the purpose of performing uniformed service, and you need to give the employer prior oral or written notice. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years, but certain kinds of service are exempted from the computation of the five-year limit. You must be released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge, and you must make a timely application for reemployment after release from the period of service.

When you give the employer notice that you will be leaving work for service, you need not promise to return to work after service or predict that you will be coming back at any particular time. USERRA preserves your right to return to the civilian job as an unburned bridge behind you, and you can wait until you leave active duty to determine if you want to recross that bridge. Even if you think that under no circumstances whatsoever would you ever want to return to the pre-service job, you should nonetheless give the employer notice that you are leaving work for service. But I suggest that you withhold that notice until about a month before you will be leaving to report to boot camp, and only after you know for sure the date of commencement of active duty.