LAW REVIEW 1126

Can We Fire Him for Going over the Five-Year Limit?

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Q: I am the Staff Judge Advocate of a major army base. We have a civilian employee (let's call him Joe Smith) who is an Army Reservist. Almost seven years ago, he left his civilian job to go on active duty, and he has been on active duty continuously since then. His orders have been extended several times, and each time he receives a new extension he sends us a letter and a copy of the new orders. His current orders expire 30 Sept. 2011.

An employee in our civilian personnel department reached Joe by telephone at the Army base where he is serving on active duty. She asked him when he expects to return to his civilian job here. He stated that he is trying to get his orders extended again and that it may be Sept. 2012, or later, when he finally leaves active duty for good. He also frankly acknowledged the he finds his active duty assignments more interesting, and the pay more lucrative, than his civilian job here, and that he is going to string out the active duty for as long as he can.

The personnel department employee asked Joe about the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He insisted that most of the military duty that he has performed over the last seven years has been "contingency" duty that does not count toward the five-year limit. I have reviewed all his orders, from his file in our civilian personnel office. I considered your Law Review 201 in determining which periods of service count toward Joe's five-year limit and which periods are exempt. It seems to me that the first two years are exempt, but if he remains on active duty past Sept. 2011 he will be over the five-year limit.

Our civilian personnel director wants to initiate an action to fire Joe for going over the five-year limit. She wants to cut off his receipt of paid military leave under 5 U.S.C. 6323, and she also wants to open up the billet that Joe currently "encumbers" and hire a new employee for that position. What do you think?

A: I think that the personnel director is wrongfully conflating section 4312 of USERRA (the right to reemployment) with section 4311 (the prohibition on discrimination). I think that you, as the SJA, should set her straight.

As I explained in Law Review 0766, and other articles, Joe must meet five eligibility criteria to have the right to reemployment under USERRA:

a. He must have left a civilian position of employment for the purpose of performing voluntary or involuntary uniformed service. It seems clear that Joe did this, almost seven years ago.

b. He must have given the employer prior oral or written notice. It seems clear that he gave such notice.

c. He must be released from the period of service *without* having exceeded the cumulative five-year limit with respect to the employer relationship for which he seeks reemployment. As I explained in Law Review 206, *all*involuntary service and *some* voluntary service are exempted from the computation of his five-year limit.

d. He must be released from the period of service *without* having received a punitive (by court martial) or other-than-honorable discharge.

e. He must make a timely application for reemployment *after release* from the period of service.

It should be emphasized that Joe has not applied for reemployment, and he cannot apply for reemployment at this point, because he has not been released from the period of service. It is by no means inevitable that Joe will apply for reemployment or that he will meet the USERRA eligibility criteria if and when he does apply. Joe could stay on voluntary active duty for the next ten years, and be clearly beyond the five-year limit. Unless and until Joe is released from active duty and then applies for reemployment in his civilian job at your base, there is no occasion to consider the five-year limit and the other eligibility criteria.

Firing Joe now, or in October if he extends his active duty beyond the end of his current orders, would violate section 4311(a) of USERRA, which provides: "A person who is a member of, applies to be a member of, *performs,* has performed, applies to perform, or has an obligation to perform service in a uniformed service shall not be denied initial employment, reemployment, *retention in employment,* promotion, or any benefit of employment by an employer on the basis of that membership, application for membership, *performance of service,* application for service, or obligation." 38 U.S.C. 4311(a) (emphasis supplied).

It should also be emphasized that it is not necessary to remove Joe from federal civilian employment, or to "fire" him from his "military leave" status, to cut off his receipt of paid military leave under 5 U.S.C. 6323. As I explained in Law Review 1098, there is no necessary connection between section 6323 and USERRA. And the fact that Joe may someday seek reemployment and thus necessitate the displacement of a replacement employee in no way justifies discrimination against Joe.

Further, it should be emphasized that the five-year limit is *solely an eligibility criterion for reemployment.* Performing uniformed service, even beyond the five-year limit, *is not misconduct* meriting removal from federal civilian employment or other adverse civilian personnel action. Performing uniformed service, whether for a day or for a decade, is a protected activity under section 4311(a).

Let us assume that Joe extends his active duty for another two years, beyond the end of his current orders. He finally leaves active duty on 30 Sept. 2013, at which point he is two years beyond the five-year limit. He applies for reemployment in October 2013. At that point, the personnel department will need to determine whether Joe meets the five USERRA eligibility criteria, including the five-year limit. If Joe is beyond the five-year limit, or if he fails to meet one of the other eligibility criteria, Joe is not entitled to reemployment when he applies in October 2013. But Joe can still apply for vacant positions on your base, or elsewhere within the Department of the Army, or elsewhere in the Federal Government. If the record shows that you have fired him for the "misconduct" of remaining on active duty past the five-year limit, that record will make it very difficult if not impossible for him to find other federal civilian employment.

If you are certain that Joe's five-year limit expires on 30 Sept. 2011, you could send him a friendly letter advising him of that fact, and of the basis for your conclusion. But neither you nor the base commander can lawfully order Joe to return to his civilian job or fire him or threaten to fire him for extending his voluntary active duty.

Joe's expression of preference for Army active duty over Department of the Army civilian employment is irrelevant for USERRA purposes. This issue is clearly addressed in USERRA's legislative history, as follows: "The Committee [House Committee on Veterans' Affairs] does not intend that the requirement to give notice to one's employer in advance of service in the uniformed services be construed to require the employee to decide, at the time the person leaves a job, whether he or she will seek reemployment upon release from active service. One of the basic purposes of the reemployment statute is to maintain the service member's civilian job as an 'unburned bridge.' Not until the individual's discharge or release from service and/or transportation time back home, which triggers the application time, does the service member have to decide whether to recross that bridge. *See Fishgold v. Sullivan Drydock & Repair Corp.,* 328 U.S. 275, 284: 'He is not pressed for a decision immediately upon his discharge, but has the opportunity to make plans for the future and readjust himself to civilian life.'" House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News (USCCAN)* 2449, 2459.

Moreover, Joe's statement on the telephone that he prefers Army active duty and will extend his active duty as long as possible cannot be seen as a waiver of his rights under sections 4311 and 4312 of USERRA. USERRA's legislative history contains the following statement: "The Committee wishes to stress that rights under chapter 43 [USERRA] belong to the claimant, and he or she may waive them, either explicitly or impliedly, through conduct. Because of the remedial purposes of chapter 43, any waiver must, however, be clear, convincing, specific, unequivocal, and not under duress. Moreover, *only known rights which are already in existence may be waived. See Leonard v. United Airlines, Inc.,* 972 F.2d 155, 159 (7th Cir. 1992)." 1994 *USCCAN* at 2453 (emphasis supplied). Joe's statement of preference for active duty over civilian employment, and his expression of his intent to string out his active duty as long as possible, cannot, as a matter of law, waive his USERRA rights or justify the civilian employer taking an adverse action against him during this active duty service.

Joe does not have the right to reemployment under USERRA unless and until he is released from the period of service (without a bad discharge and without having exceeded the five-year limit) and then makes a timely application for reemployment. Anything that Joe says or does before or during his active duty cannot, as a matter of law, defeat his right to reemployment, unless it results in the kind of bad discharge that disqualifies him from reemployment under section 4304 of USERRA. *See Petty v. Metro Government of Nashville-Davidson County,* 538 F.3d 431 (6th Cir. 2008). I discuss the implications of *Petty* in detail in Law Review 0864 (Dec. 2008).

Please note that I discuss the holding and implications of *Leonard,* along with the "unburned bridge" concept, in detail in Law Review 0857 (Nov. 2008).

Finally, please note that USERRA's very first section expresses the "sense of Congress that the Federal Government should be a model employer in carrying out the provisions of this chapter." 38 U.S.C. 4301(b). As one of the principal beneficiaries of USERRA, the Department of the Army and other Department of Defense (DOD) organizations should, I respectfully submit, especially strive for "model employer" status. Please inform the civilian personnel officer that initiating an action to remove Joe Smith from federal service, because he has gone on active duty and remained past the five-year limit, creates a terrible precedent and a terrible appearance.

Through its National Committee for Employer Support of the Guard and Reserve (ESGR), DOD preaches to employers generally the need to support the men and women of the National Guard and Reserve. If small business owners see the Department of the Army seeking to remove an employee for military service, how do we ever persuade those small business owners to support Guard and Reserve employees? "Do as I say and not as I do" has always been an unpersuasive argument.