

LAW REVIEW 1131

Not Everything You Do for Your Reserve Component Is Protected by USERRA

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1.1.3.3—USERRA Coverage for National Guard Service

1.3.1.2—Character and Duration of Service

Leisek v. Brightwood Corp., 278 F.3d 895 (9th Cir. 2002).

John C. Leisek was a full-time employee of Brightwood Corporation and a member of the Oregon National Guard. He owned a hot-air balloon with National Guard insignia on it. He frequently attended events around the country and used the balloon as a recruiting and promotional tool for the National Guard. He received inactive duty training orders for most but not all of these events.

Leisek was scheduled to attend many events, with his balloon, during the summer of 1996. He asked his employer for leave from his civilian job for the entire summer, and the employer denied the request. Without the employer's permission, Leisek absented himself from his job for the entire summer and sought reemployment at Brightwood in September. Brightwood refused to reemploy Leisek when he applied in September, thus effectively firing him. The United States Court of Appeals for the 9th Circuit held that the firing did not violate the Uniformed Services Employment and Reemployment Rights Act (USERRA).

Leisek had National Guard orders for some but not all of the events that he attended, with his balloon, during the summer of 1996. He was certainly not performing "service in the uniformed services" for the entire summer.

USERRA is codified in sections 4301-4335 of title 38 of the United States Code (38 U.S.C. 4301-4335). Section 4303 defines 16 terms used in this law, including the term "service in the uniformed services" which is defined 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 for 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 under section 12503 of title 10 or section 115 of title 32." 38 U.S.C. 4303(13) (emphasis supplied).

This definition is broad, but it is not broad enough to cover activities that the individual Reserve Component (RC) member may engage in to support his or her unit or component but for which the member receives no compensation, not even retirement points. I am aware that many members (especially commanding officers) engage in substantial military activities between drill weekends and other periods of military service. These activities are expected by the component, but that does not mean that they are protected by USERRA. You do not have the right to take time off from your civilian job (even time off without pay) to do military-related activities that do not fall within USERRA's definition of "service in the uniformed services."

As I explained in Law Review 0766, and other articles, you must meet five eligibility criteria in order to have the right to reemployment following absence from a job (for a few minutes or up to five years) to perform uniformed service:

1. You must have left the job *for the purpose of performing service in the uniformed services*. If the activity that you perform during the time that you are away from work does not qualify as "service in the uniformed services" under the USERRA definition, you do not meet this criterion.
2. You must have given the employer prior oral or written notice.
3. Your cumulative period or periods of service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service (including Reserve and National Guard training) are exempted from the computation of the five-year limit.

4. You must have been released from the period of service without having received a punitive (by court martial) or other-than-honorable discharge.
5. You must have reported back to work in a timely manner or have submitted a timely application for reemployment, after release from the period of service.

It is necessary to meet all five of these criteria in order to have the right to reemployment. Leisek failed to meet the first criterion, so it is not necessary to determine whether he met the other four.

I realize that it is necessary for RC members (especially those in positions of leadership) to engage in substantial activities in support of their units and components outside of military duty days. But those who deal with and rely upon RC members need to understand that an RC member not on active duty or some military status on a particular day is fundamentally different from an active duty service member. If you need information from an RC member not on active duty, *do not call the member at his or her civilian job*. Call the member at home, during non-work hours. Yes, I realize that this will be inconvenient for the active duty members who would prefer to contact the RC members during work hours. But if we are to make the Total Force Policy work we must show some consideration for the civilian employers of RC members and we must ensure that RC members have USERRA protection for any military-related activity that takes away from their civilian jobs, even for a few minutes.

Some civilian employers objected to RC service even when such service was generally limited to one weekend per month and two weeks of full-time service per year. More than 800,000 RC members have been called to the colors (for many months at a time) since the terrorist attacks of September 11, 2001. As the demands upon RC members have increased, so have the objections of civilian employers of RC members. If your employer is annoyed with your military-related absences from work and is looking for an excuse to fire you, you need to avoid giving the employer any such excuse. Do not absent yourself from work for military-related activities that do not qualify as "service in the uniformed services." Do not do military activities while on the clock in your civilian job, and do not use employer resources (computer, telephone, etc.) for your military activities.