

Law Review 1139

Injury or Illness Sustained During Service Can Extend Deadline to Apply for Reemployment

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1.3.1.3—Timely Application for Reemployment

1.3.2.1—Prompt Reinstatement

1.3.2.9—Accommodations for Disabled Veterans

Q: I am a volunteer ombudsman for the National Committee for Employer Support of the Guard and Reserve (ESGR). I use your “Law Review” articles all the time to assist me in resolving cases about the rights of National Guard and Reserve personnel under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I have a new case that has me stumped—I am not sure what to advise the Guard member to do.

Mary Smith (not her real name) is a member of the Army National Guard and an employee of a major corporation. She was called to active duty and deployed to Afghanistan, where she was wounded in action. Her active duty period was expected to last one year, but it ended up lasting 18 months, because of her wounds and her recuperation. When she was released from active duty on March 31, 2011, her recuperation was incomplete. She is scheduled for at least one more surgery and some physical rehabilitation, and she will have that treatment at an Army hospital, under a Line of Duty determination.

Mary’s civilian job requires vigorous physical activity and she will not be able to do that job until at least March 2012 (one year after her release from active duty). I understand that USERRA has a provision permitting the “wounded warrior” to wait up to two years to return to work in the pre-service civilian job after release from active duty. How does that provision work?

A: As I explained in Law Review 0766, and other articles, Mary must meet five conditions to have the right to reemployment with her pre-service employer:

1. She must have left the job for the purpose of performing voluntary or involuntary service in the uniformed services. It is clear that she meets this condition.
2. She must have given the employer prior oral or written notice. For purposes of this article, I shall assume that she met this condition.
3. Her cumulative period or periods of uniformed service, relating to the employer relationship for which she seeks reemployment, must not have exceeded five years. Because she was called to active duty involuntarily, this recent period of service does not count toward her five-year limit.
4. She must have been released from the period of service without having received a punitive (court martial) or other-than-honorable discharge. It is clear that she meets this criterion.
5. She must make a timely application for reemployment. This is the one condition that she has not yet met but can still meet.

Because her period of service was more than 180 days, Mary has 90 days to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

Mary’s DD-214 shows that she was released from active duty on March 31, 2011. Thus, the deadline for her to apply for reemployment is June 29, 2011 (90 days later).

“A person who is hospitalized for, *or convalescing from*, an illness or injury incurred in, or aggravated during, the performance of service in the uniformed services shall, *at the end of the period that is necessary for the person to recover* from such illness or injury, report to the person’s employer (in the case of a person described in

subparagraph (A) or (B) of paragraph (1)) or *submit an application for reemployment* with such employer (in the case of a person described in subparagraph (C) or (D) of such paragraph). Except as provided in subparagraph (B), *such period of recovery may not exceed two years.*" 38 U.S.C. 4312(e)(2)(A) (emphasis supplied).

Section 4303 of USERRA (38 U.S.C. 4303) defines 16 terms used in this law, but the term "convalescing" is not one of the defined terms. When a statute uses a term but does not define it, courts normally refer to dictionaries to determine the "generally understood meaning" of that term. *The American Heritage Dictionary, Second College Edition*, defines "convalesce" as follows: "To return to health after illness; recuperate." Applying this definition, it is clear that the deadline for Mary to apply for reemployment can be extended up to two years under 38 U.S.C. 4312(e)(2)(A).

The period of recovery can be *up to* two years. In Mary's case, the period of recovery will likely be substantially shorter.

Please note that section 4312(e)(2)(A) extends *the deadline for Mary to apply for reemployment*, which otherwise will expire on June 29, 2011. The deadline to *apply for reemployment* may be different from the deadline to *return to work*. *Once Mary applies for reemployment, that application will likely render moot her right to an extension of the deadline for her to apply for reemployment.* The Department of Labor USERRA regulation provides: "This period for recuperation and recovery extends the time period for reporting to or submitting an application for reemployment to the employer, and is not applicable following reemployment." 20 C.F.R. 1002.116.

Mary needs to think this through and she needs expert advice to determine the proper course of action. She should not apply for reemployment until she is ready for the employer to act on her application and put her back to work. Once she applies for reemployment, the employer is required to act on her application promptly. "Absent unusual circumstances, reemployment must occur within two weeks of the employee's application for reemployment." 20 C.F.R. 1002.181.

Q: Mary's pre-service employer is a major corporation with thousands of employees in scores of job classifications. Her recuperation from her wounds will likely extend until about March 2012. Her pre-service job required vigorous physical activity, and she cannot return to that job until sometime next year, but there are scores of other jobs that Mary can do despite her disability (which we hope and expect will be temporary). Does Mary have additional rights as a wounded warrior?

A: Yes. When Mary makes a timely application for reemployment and meets the five conditions, the employer is required to reemploy her "in the position of employment in which the person would have been employed if the continuous employment of such person [Mary] had not been interrupted by such service, or a position of like seniority, status, and pay, the duties of which the person is qualified to perform." 38 U.S.C. 4313(a)(2)(A). For purposes of this article, we shall assume that the position that Mary would have attained if she had been continuously employed is exactly the same position that she left in late 2009, when she was called to the colors.

Because Mary is returning from uniformed service with a disability incurred or aggravated during her service, the employer is required to make "reasonable efforts ... to accommodate the disability." 38 U.S.C. 4313(a)(3). If the disability cannot be reasonably accommodated in that specific position of employment (because that position requires vigorous physical activity), the employer must reemploy Mary "in any other position which is equivalent in seniority, status, and pay, the duties of which the person is qualified to perform or would become qualified with reasonable employer efforts." 38 U.S.C. 4313(a)(3)(A).

If there is no position of like seniority, status, and pay for which Mary is qualified, or for which Mary can become qualified with reasonable employer efforts, the employer must reemploy Mary in the position which is the "nearest approximation ... consistent with the circumstances of such person's case." 38 U.S.C. 4313(a)(3)(B).

In a big company, there must be another position that Mary is qualified to perform, or can become qualified to perform. The employer must reemploy Mary in that position, *even if it means displacing another employee*. When

Mary has fully recovered from her wounds, she can return to the position that she left in 2009, or the position that she would have attained if she had been continuously employed and had not suffered the wounds.

I invite the reader's attention to Law Review 0640 (December 2006), by Lisa C. Cassilly, Esq. and Matthew J. Gilligan, Esq. This is the definitive article about the employer's obligations to the returning disabled veteran, under USERRA.

I invite your attention to www.roa.org/law_review. You will find more than 700 articles about USERRA, the Servicemembers Civil Relief Act (SCRA), the Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA), and other laws that are particularly pertinent to those who serve our country in uniform. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

If you have questions about USERRA, UOCAVA, the SCRA, or other military-relevant laws, and if you don't find an article on point in our Law Review Library, please call me at 800-809-9448, extension 730 or e-mail me at swright@roa.org.