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Army Reserve Dentist Loses USERRA Case

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1.2—USERRA-Discrimination Prohibited
1.3.2.12—Special Protection Against Discharge, Except Cause

***Hart v. Family Dental Group PC,* No. 10-1008-cv (2nd Cir. May 31, 2011).**

Major Evan Hart, USAR is a life member of ROA and a dentist, both in civilian life and in the Army Reserve. He was already in the Army Reserve when he was hired by the Family Dental Group (FDG) in 2001. While employed by FDG, he was called to the colors twice. He served on active duty from March to September 2003, serving in North Carolina (Fort Bragg) and Texas (Fort Sam Houston). He was promptly reemployed upon returning from this period of active duty.

Dr. Hart was again called to active duty in July 2004, and he served in Iraq until released in December 2004. He promptly applied for reemployment and returned to work on January 17, 2005. Just three days later, Dr. Kenneth Epstein (FDG President) notified Dr. Hart by letter that his employment would be terminated in 60 days.

Dr. Hart questioned the lawfulness of the termination, asserting that it violated the Uniformed Services Employment and Reemployment Rights Act (USERRA). Dr. Epstein responded by reducing the notice of termination from 60 days to 30 days.[1] Dr. Hart filed a complaint with the Veterans' Employment and Training Service of the United States Department of Labor (DOL-VETS), and that agency prevailed on FDG to retain Dr. Hart for at least 180 days. Dr. Hart remained on the FDG payroll until July 20, 2005, when he was terminated.

It was clear and not disputed that Dr. Hart met the USERRA eligibility criteria for reemployment for both the 2004 and 2005 active duty periods. In each instance, he left his position of employment for the purpose of performing uniformed service, and he gave the employer prior notice. He was released from the period of service without having exceeded the cumulative five-year limit on the duration of service and without having received a punitive or other-than-honorable discharge that would disqualify him under section 4304 of USERRA, and he made a timely application for reemployment after release from service.

Section 4316(c) of USERRA provides as follows: "A person who is reemployed by an employer under this chapter shall not be discharged from such employment, except for cause—(1) within one year after the date of such reemployment, if the period of service before the reemployment was more than 180 days; or (2) within 180 days after the date of such reemployment, if the person's period of service before the reemployment was more than 30 days but less than 181 days." 38 U.S.C. 4316(c).

Congress enacted USERRA (Public Law 103-353) in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act (VRRA), which dates back to 1940. In enacting USERRA, Congress continued the VRRA's provision about a period of special protection against discharge, following reemployment, but tinkered with the computation of the duration of the special protection.[2]

USERRA's legislative history contains three paragraphs about the purpose and operation of the special protection provision:

"Section 4315(d) [later renumbered 4316(c)] would relate the period of special protection against discharge without cause to the length, and not the type, of military service or training. Under current law, there is a one year period of special protection against discharge without cause after return from active duty and six months protection after return from initial active duty training. There is no explicit protection [under the VRRA] for employees returning from active duty for training or inactive duty training regardless of length. *Under this provision, the protection would begin only upon proper and complete reinstatement. See O'Mara v. Peterson Sand & Gravel Co.,* 498 F.2d 896, 898 (7th Cir. 1974).

The purpose of this special protection period is to ensure that the returning serviceperson has a reasonable time to regain civilian skills and to guard against a bad faith or pro forma reinstatement. As expressed in *Carter v. United States,* 407 F.2d 1238, 1244 (D.C. Cir. 1968), 'cause' must meet two criteria: (1) it is reasonable to discharge employees because of certain conduct; and (2) the employee had notice expressed or fairly implied that such conduct would be notice [grounds] for discharge. The burden of proof to show that the discharge was for cause is on the employer. *See Simmons v. Didario,* 796 F. Supp. 166, 172 (E.D. Pa. 1992).

The limitation upon the duration of the period of special protection should not be considered to be a limitation upon the duration of other rights under chapter 43 [USERRA]. *See Oakley v. Louisville and Nashville R. Co.,* 338 U.S. 278, 284-85 (1949). Similarly, the expiration of the period of special protection does not end the protection against discrimination contained in proposed section 4311. It is to be understood, however, that good cause exists if the 'escalator' principle would have eliminated a person's job or placed that person on layoff in the normal course."

House Report No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2468 (emphasis supplied).

Section 4311(a) of USERRA 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).

After he was terminated by FDG in July 2005, Dr. Hart renewed his complaint to DOL-VETS. After that complaint did not result in resolution of his case, Dr. Hart retained private counsel and sued FDG and Dr. Epstein in the United States District Court for the District of Connecticut. In an eight-count complaint, he alleged that FDG and Dr. Epstein violated multiple sections of USERRA.

A jury trial was held on Dr. Hart's claims in February 2010. After Dr. Hart rested his case, the District Court granted judgment as a matter of law in favor of FDG and Dr. Epstein on Dr. Hart's claims under section 4311(b), 4312(a), and 4316(a) and (c). Dr. Hart's claims under section 4311(a) were submitted to the jury, which found in favor of FDG and Dr. Epstein.

After losing in the District Court, Dr. Hart appealed to the United States Court of Appeals for the Second Circuit.[3] On appeal, Dr. Hart challenged the District Court's grant of judgment as a matter of law in favor of FDG and Dr. Epstein on his claims under section 4312(a) of USERRA. He did not challenge the jury verdict or the District Court's grant of judgment as a matter of law on his other claims.

Section 4312(a) of USERRA provides: "Subject to subsections (b), (c), and (d) and to section 4304, any person whose absence from a position of employment is necessitated by reason of service in the uniformed services shall be entitled to the reemployment rights and benefits and other employment benefits of this chapter if—[the person meets the USERRA eligibility criteria as to prior notice, the limit on the duration of the period or periods of service, and a timely application for reemployment]." 38 U.S.C. 4312(a).

The District Court held and the Court of Appeals affirmed that FDG met its responsibilities to Dr. Hart when it reemployed him on January 17, 2005. The decision to terminate his employment, communicated to him just three days after he returned to work, implicated sections 4311(a) and 4316(c), not section 4312(a).

If I had represented Dr. Hart in this case, I would have adopted a different strategy. Instead of relying on section 4312(a), I would have relied on section 4316(c). I would have cited the legislative history (quoted above), and I would have cited *Omara v. Peterson Sand & Gravel Co*. [cited in the legislative history]. I would have argued that Dr. Hart was not properly and completely reinstated on January 17, 2005, because the employer clearly was already preparing to terminate his employment as soon as possible. I would have argued that the 180-day special protection period had not started running, because Dr. Hart was not properly and completely reinstated, and thus when his employment was terminated on July 20, 2005 the special protection period had not ended. Perhaps the result might have been different.[4]

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[1] The 2001 employment contract provided that Dr. Hart could be terminated without cause, so long as he was given 30 days of notice.

[2] Under the VRRA, the special protection period was one year after active duty (regardless of duration) and six months after initial active duty training.

[3] The 2nd Circuit is the federal appellate court that sits in New York City and hears appeals from district courts in Connecticut, New York, and Vermont.

[4] I express no criticism of Dr. Hart's attorney. Clearly, in expressing these opinions I have the great advantage of hindsight.