

LAW REVIEW 1194

November 2011

Matthew King's Application for UCX Did Not Justify his Firing

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

1.3.1.3—Timely Application for Reemployment

1.3.2.12—Special Protection Against Discharge, Except for Cause

1.4—USERRA Enforcement

1.8—Relationship Between USERRA and other Laws/Policies

Matthew King is a member of the Oregon Army National Guard. In April 2008, he went to work for the Lowe's, the national hardware store chain. In September 2008, he notified his employer that he was being mobilized by the Army. He served on active duty for more than a year, including a year with "boots on ground" (BOG) in Iraq. He served honorably and was released and returned to Oregon in May 2010.

After his release from active duty, King met the five eligibility criteria for reemployment under the Uniformed Services Employment and Reemployment Rights Act (USERRA). He left his job for the purpose of performing service in the uniformed services. He gave the employer prior notice. King did not exceed the five-year cumulative limit on the duration of the period or periods of uniformed service, relating to his employer relationship with Lowe's.¹¹¹ He was released from the period of service without having received the sort of punitive or other-than-honorable discharge that would disqualify him from reemployment under 38 U.S.C. 4304.

After he was released from active duty and returned to Oregon, King applied for Unemployment Compensation for Ex-Servicemembers (UCX), at the local office of the Oregon employment service. I discuss the UCX program in [Law Review 1143](#). Like unemployment compensation generally, UCX is administered by state employment service offices. A person who has left active duty after honorable service and who has been unable to find civilian employment is entitled to UCX.

In this program, the military service plays the role of "base employer." The states consolidate the UCX payments and notify the United States Department of Labor (DOL), which in turn bills the Department of Defense (or the Department of Homeland Security for Coast Guard veterans). As I explained in [Law Review 1143](#), UCX payments have doubled since 2008, and this is an indication that veterans of the Iraq and Afghanistan wars are having great difficulty finding civilian jobs.

At state employment offices, there are state employees called Local Veterans' Employment Representatives (LVERs). These state employees are funded by a federal grant that is administered by the Veterans' Employment and Training Service of DOL (DOL-VETS). These LVERs are expected to spend substantially all of their work time assisting veterans. One of the important responsibilities of DOL-VETS offices around the country is to ensure that the state employment offices do not abuse the LVERs by putting them to work doing general employment service work, rather than concentrating on veterans.

It is unclear why King applied for UCX before he applied for reemployment at Lowe's. I believe that the likely explanation is that he was unaware of his USERRA rights, but somebody had told him about UCX. When he applied for UCX at the Oregon employment service office, he was appropriately referred to the LVER at that office, and the LVER advised him to apply for reemployment at Lowe's before the 90-day deadline to apply for reemployment expired.¹¹²

King applied for UCX, but he did not receive any UCX or unemployment compensation benefits. After he applied for reemployment at Lowe's, he promptly returned to work. Thus, he was not unemployed, and his application for UCX benefits was dismissed as moot. I think that King's application for UCX is legally irrelevant, but unfortunately Lowe's did not see it that way.

After not receiving any UCX or unemployment benefits, King reapplied to Lowe's in a timely manner.^[3] He was rehired. However, about two months later, the company learned that King had applied for UCX before he applied for reemployment. The company called King into a disciplinary meeting at the human relations office and fired him on the spot—no further discussion. It is unclear what caused Lowe's to believe that King's application for UCX showed misconduct that would justify firing him.

Under section 4316(c)(1) of USERRA [38 U.S.C. 4316(c)(1)], an individual who has been reemployed after more than 180 days of service is not to be discharged by the employer, except for cause, within one year after the proper reemployment. When Lowe's fired King, only about 1/6 of that special protection period had expired. Thus, the firing was unlawful under USERRA, unless Lowe's can prove that the firing was for cause.

King filed a complaint with DOL-VETS after Lowe's fired him. DOL-VETS investigated his USERRA complaint and found it to have merit. The agency tried to persuade Lowe's to come into compliance with USERRA, but the company did not want to hear it. In accordance with section 4322(e) of USERRA [38 U.S.C. 4322(e)], DOL-VETS explained to King the results of the agency's investigation and King's right to request referral to the Department of Justice (DOJ). In accordance with 38 U.S.C. 4323(a)(1), DOL-VETS referred the King case file to DOJ, and DOJ filed suit against Lowe's on behalf of King.

After DOJ sued, Lowe's finally came to its senses. The company agreed to a consent decree under which the company made King whole for the USERRA violation, including paying King \$45,000 in back pay and liquidated damages. This resolution came about a year after the unlawful firing.

I consider this a “good news” story. Yes, the system does work as intended, at least some of the time. Unlike most cases, it did not take many years to resolve this matter.^[4]

[1] This particular period of service was involuntary, so it did not count toward his five-year limit, under 38 U.S.C. 4312(c). Please see [Law Review 201](#) for a definitive discussion of what counts and what does not count toward exhausting an individual's five-year limit. I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 900 articles about USERRA and other laws that are particularly pertinent to those who serve in the Reserve Components, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] I would like to think that this situation is an illustration that the system is working as intended. King was referred to the LVER when he applied for UCX, and the LVER correctly advised him to apply for reemployment. King took the LVER's advice and applied, and went back to work for Lowe's.

[3] Because his period of service exceeded 180 days, he had 90 days (starting on the date of release) to apply for reemployment. 38 U.S.C. 4312(e)(1)(D). Shorter deadlines apply after shorter periods of service.

[4] Please see [Law Review 1174](#) (September 2011), concerning the case of *Serricchio v. Wachovia Securities LLC*. That case has been going on for more than eight years and is still not resolved, in that the employer can still apply to the 2nd Circuit for rehearing *en banc* and to the Supreme Court for *certiorari*.