LAW REVIEW 11111

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Conflict Between National Guard Drill and Civilian Job

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Q: I am a member of the New Mexico Army National Guard. One weekend each month (usually the first weekend), I am required to participate in drills with my National Guard unit, all day Saturday and all day Sunday. As you have suggested, I sent a letter to my employer, back in September, with my drill schedule for Fiscal Year 2012 (October 1, 2011 through September 30, 2012). I also remind my employer of my drill weekends about two weeks in advance.

In my civilian job, I work for a company that provides security at a sensitive federal installation, under a contract with a federal agency. The agency pays a substantial fee to the contractor, and the contractor pays me and my colleagues who work security at the facility. On the job, we contractor employees report to and receive instructions from a federal employee who is responsible for operations and security of the facility. I always provide notice of my drill weekends both to the company that pays me and to the federal employee that I report to at work.

My November drill weekend was scheduled for 5-6 November, and I reported to my drill weekend as usual. I gave notice of this drill weekend in September, when I provided my drill schedule for Fiscal Year 2012, and I also provided a reminder notice in mid October.

My colleagues and I on the security contract carry weapons. We are required to practice on these weapons, and each year we are required to take a realistic test, wherein we demonstrate our proficiency with these weapons. The federal employee who is responsible for installation security scheduled the annual test for Saturday, 5 November.

In mid October, when I reminded my employer and the federal employee supervisor of my November drill weekend, I also informed them that I would be unable to take the annual weapons qualification test on Saturday, 5 November, because I would be at my National Guard drill several miles away. The federal employee supervisor told me that my attendance at the annual test was "mandatory" and would not be rescheduled, and that if I missed the test or failed the test I would not be permitted to work at my civilian job and would not be paid.

I then called the Commanding Officer (CO) of my National Guard unit and asked for his advice and assistance in resolving this dilemma. The CO told me that he would not excuse me from drill attendance on 5 November and would not permit me to leave the drill for three hours to travel to the federal facility, take the weapons test, and return to my drill. The CO told me that a federal law called the Uniformed Services Employment and Reemployment Rights Act (USERRA) gives me the right to miss work at my civilian job to attend my National Guard drill. The CO told me to report to my drill weekend as scheduled, and that if necessary he would go to bat for me with the civilian employer.

I followed the CO's advice and attended my drill weekend. When I reported to my civilian job on Monday, 7 November, the federal employee supervisor and my company told me that I would not be permitted to clock in because I had missed the annual weapons qualification test on Saturday. I offered to take the test that very morning, but the federal employee told me that was not feasible. I finally took it and passed it on Thursday, 10 November, and I returned to work on Monday, 14 November.

I lost a whole week of pay. I think that my USERRA rights have been violated. What do you think?

A: I agree that your USERRA rights have been violated. I think that both your direct employer (the contractor) and the federal agency have violated USERRA.

First, we must establish that you met the USERRA eligibility criteria for reemployment. As I explained in Law Review 0766[1] and other articles, you must meet five conditions to have the right to reemployment after a period of uniformed service:

a. You must have left a civilian position of employment for the purpose of performing service in the uniformed services. USERRA's definition of "service in the uniformed services" [38 U.S.C. 4303(13)] specifically includes inactive duty training, like this drill weekend.

b. You must have given the employer prior oral or written notice. 38 U.S.C. 4312(a)(1). It is clear that you provided more than adequate notice.

c. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. 38 U.S.C. 4312(c). Your National Guard inactive duty training does not count toward your five-year limit. 38 U.S.C. 4312(c)(3).

d. You must have been released from the period of service without having received a punitive or other-than-honorable discharge. 38 U.S.C. 4304. It is clear that you meet this criterion.

e. You must have been timely in reporting back to your civilian job. After a period of service of less than 31 days (like this drill weekend), you must report back to work at the start of the first full regularly scheduled work period on the first day after you a released from the period of service and the expiration of eight hours after the time reasonably required for safe transportation from the place of service to your residence. 38 U.S.C. 4312(e)(1)(A)(i). It is clear that you met this requirement when you reported to work at your civilian job at your scheduled time on Monday, 7 November.

It is clear to me that you met the USERRA eligibility criteria on Monday, 7 November, and you were entitled to be reinstated as of that date. You are entitled to compensation for the pay that you lost for that week, and your personnel record should be corrected to show that you were present and working during that week.

Congress enacted USERRA in 1994, as a long-overdue rewrite of the Veterans' Reemployment Rights Act, which dates from 1940. USERRA's 1994 legislative history provides as follows concerning prompt reemployment after uniformed service:

> The provisions of section 4313 require prompt reinstatement. The Committee [House Committee on Veterans' Affairs] recognizes that what is prompt depends on the circumstances of each case. However, reinstatement after weekend National Guard duty would, in most cases, be the next scheduled working day, while reinstatement after five years on active duty may require giving notice to an incumbent employee who may have to be 'bumped.' The Committee intends that any undue delay in reinstatement would be subject to a claim for lost wages.
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> House Rep. No. 103-65, 1994 *United States Code Congressional & Administrative News* 2449, 2465.

Q: The federal agency employee who supervises the security force said that he has no problem accommodating my National Guard drill weekends under most circumstances, but that he is unwilling to accommodate my absence from work on 5 November, the one day when he had scheduled the annual weapons qualification test. What do you think about that?

A: Your right to absent yourself from your civilian job for service in the uniformed services (including drill weekends) is not limited to circumstances wherein the timing of the service is convenient to your civilian employer. USERRA specifically provides:

> In any determination of a person's entitlement to protection under this chapter, the *timing*, frequency, and duration of the person's training or service, or the nature of such training or service (including voluntary service) in the uniformed services shall not be a basis for denying protection of this chapter [USERRA] if the service does not exceed the limitations set forth in subsection (c) and the notice requirements established in subsection (a)(1) and the notification requirements established in subsection (e) are met. 38 U.S.C. 4312(h) (emphasis supplied).[2]

Moreover, you do not need your employer's permission to be away from work to perform uniformed service, and the employer does not get a veto. You are only required to give *notice*.

Section 4331 of USERRA gives the Department of Labor (DOL) the authority to promulgate regulations about the application of USERRA to employers. DOL published in the *Federal Register* proposed rules, for notice and comment, in September 2004, and final rules in December 2005. The final rules are now published in title 20 of the Code of Federal Regulations (C.F.R.), Part 1002. The DOL USERRA regulations provide as follows:

> ***1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?***
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> No. The employee is not required to ask for or get his or her employer's permission to leave to perform service in the uniformed services. The employee is only required to give the employer notice of pending service.
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> 20 C.F.R. 1002.87 (bold question in original).

Q: The contractor that pays my salary said that it wants to compensate me for the week of missed pay, but that the federal agency contracting officer has threatened to terminate the security contract if the contractor does that. The federal employee who supervises the contract security force asserts that USERRA does not apply to him and his agency, because they are not my "employer." What do you think?

A: In this situation, the contractor and the federal agency are "joint employers" and both are responsible for complying with USERRA. If a federal agency, through the contracting function, stands in the way of USERRA compliance, that agency has violated USERRA, and the Merit Systems Protection Board (MSPB) has the authority to hear such a case and to order the federal agency to comply with USERRA. *See Silva v. Department of Homeland Security,* 2009 MSPB 189 (MSPB Sept. 23, 2009).[1]

[1] Please see Law Review 30 for a detailed discussion of the ramifications of section 4312(h).

[2] Please see www.servicemembers-lawcenter.org. You will find almost 1,000 articles about USERRA and other military-relevant laws, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[3] I discuss the implications of *Silva* in detail in Law Review 0953 and Law Review 0953 Update. Brigadier General Michael J. Silva, the plaintiff in that case, is ROA's President-Elect.