

LAW REVIEW 1210

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Working at Your Civilian Job Prior to Reporting for Active Duty

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

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Q: I am a member of the Army National Guard and a state police officer. On March 24, 2010, I received notice that I was being called to active duty effective April 1, 2010—just one week of advance notice. I informed my state police supervisor within one hour after I received this notice from the Army. I stayed at my civilian job until the end of my shift on Wednesday, March 31, 2010. I reported to active duty early the next morning, as ordered.

When I notified my supervisor of my impending mobilization, on March 24, I had one pending investigation that I was in the process of completing, and I completed it just before I reported to active duty. On March 25, the day after I had informed my supervisor of my imminent mobilization, he gave me another investigation. I protested that there just was not enough time for me to complete that investigation, in addition to the other one that I was already working, plus all of my other pending work.

Because I was leaving my civilian job to report to active duty, I was required to write and turn in special performance evaluations on the seven state police officers who reported to me, and I was also required to account for and turn in all the state police equipment that I had in my custody, including the computer that I would need to write investigative reports. All of this was on top of the necessary personal preparations for my deployment (writing and signing a will, making arrangements for the care of my three small children, etc.). I completed the investigation that I had been working for some time, and I completed all the performance evaluations and other details necessitated by my imminent departure, but I did not complete the investigation that my supervisor assigned to me on the day after I informed him of my imminent deployment.

I reported to active duty early in the morning on Thursday, April 1, 2010. After a month of training at a military base in the United States, I deployed to Afghanistan for almost a year of intense service, including heavy combat. I served in Afghanistan for almost 11 months and returned home in March 2011, after almost a year of active duty. I applied for reemployment and returned to work almost immediately, although I really needed time to decompress from my Afghanistan experiences.

Shortly after I returned to my state police job, my supervisor wrote me up for failure to complete the investigation that he had assigned to me on March 25, 2010, the day after I informed him of my imminent departure for military service. The state police suspended me without pay for two weeks and gave me a written reprimand. The reprimand almost guarantees that I will not be promoted in the state police. Do you think that my rights

under the Uniformed Services Employment and Reemployment Rights Act (USERRA) have been violated?

A: Yes.

As I explained in [Law Review 0766](#) and other articles,[\[1\]](#) you must meet five eligibility criteria to have the right to reemployment under USERRA:

1. You must have left a civilian job for the purpose of performing service in the uniformed services.
2. You must have given the employer prior oral or written notice that you were leaving for the purpose of performing service.
3. Your cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. All involuntary service and some voluntary service are exempted from the computation of your five-year limit. Since your 2010-11 period of service was involuntary, it does not count toward your limit. Please see [Law Review 201](#) for a definitive summary 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 made a timely application for reemployment with the pre-service employer, after release from the period of service.

It is clear that you met these criteria when you returned from active duty in March 2011. Your civilian employer was required to reemploy you promptly after you applied for reemployment in late March 2011. It is clear that your short notice call to the colors precluded you from completing the investigation that was assigned to you on the day after you informed your civilian supervisor of your imminent call to active duty.

Your call to service necessitated your absence from your state police job starting on March 31, 2010, if not earlier. Your absence from the job prevented you from completing the investigation that was assigned to you on the day *after* you informed the employer of your imminent mobilization, and just six days before your required military report date. The service caused the absence, and the absence caused you to fail to complete that investigation. Punishing you for failing to complete that investigation amounts to punishing you for your uniformed service, and that violates section 4311(a) of USERRA, which provides as follows:

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 the uniformed services shall not be denied initial employment, reemployment, retention in employment, promotion, or any benefit of employment on the basis of that membership, application for membership, performance of service, application for service, or obligation.

38 U.S.C. 4311(a).

The Merit Systems Protection Board (MSPB) is a quasi-judicial federal agency that hears and adjudicates disputes between federal agencies, as employers, and federal employees under many federal statutes, including USERRA. Final MSPB decisions can be appealed to the United States Court of Appeals for the Federal Circuit, a specialized federal appellate court in our nation's capital that has nationwide jurisdiction as to certain kinds of cases, including MSPB appeals.

I invite your attention to *Erickson v. United States Postal Service*, 571 F.3d 1364 (Fed. Cir. 2009). The United States Postal Service (USPS) had fired Sergeant Major Erickson, a postal worker, because of his absence from his USPS job for service in the Army. The MSPB upheld the firing, holding that the USPS had fired Erickson because of his *absence from work* and not because of his *service in the uniformed services* and that the firing thus did not violate section 4311(a) of

USERRA. Erickson appealed to the Federal Circuit, which reversed the MSPB. The Federal Circuit forcefully rejected the nonsensical distinction that the MSPB had attempted to draw, as follows:

We reject that argument. An employer cannot escape liability under USERRA by claiming that it was merely discriminating against an employee on the basis of absence when that absence was for military service. ... The most significant—and predictable—consequence of reserve service with respect to the employer is that the employee is absent to perform that service. To permit an employer to fire an employee because of his military absence would eviscerate the protections afforded by USERRA.^[2]

It should be noted that you were not required to work until the end of your shift on Wednesday, March 31, 2010, the day before you were required to report to active duty. You could have given your notice on March 24 and left that very day, because USERRA entitles you some days or even weeks, before the start of your service, to get your affairs in order. You should be rewarded, not punished, for going beyond what you were required to do, in order to minimize the burden on your civilian employer.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to promulgate regulations about the application of USERRA to state and local governments and private employers. The Secretary promulgated those regulations in December 2005, and they are published in title 20, Code of Federal Regulations, Part 1002 (20 C.F.R. Part 1002). I invite your attention to one particular section of the Secretary's USERRA regulations:

§ 1002.74 Must the employee begin service in the uniformed services immediately after leaving his or her employment position in order to have USERRA reemployment rights?

No. At a minimum, an employee must have enough time after leaving the employment position to travel safely to the uniformed service site and arrive fit to perform the service. Depending on the specific circumstances, including the duration of service, the amount of notice received, and the location of the service, additional time to rest, or to arrange affairs and report to duty, may be necessitated by reason of service in the uniformed services. The following examples help to explain the issue of the period of time between leaving civilian employment and beginning of service in the uniformed services:

(a) If the employee performs a full overnight shift for the civilian employer and travels directly from the work site to perform a full day of uniformed service, the employee would not be considered fit to perform the uniformed service. An absence from that work shift is necessitated so that the employee can report for uniformed service fit for duty.

(b) If the employee is ordered to perform an extended period of service in the uniformed services, he or she may require a reasonable period of time off from the civilian job to put his or her personal affairs in order, before beginning the service. Taking such time off is also necessitated by the uniformed service.

(c) If the employee leaves a position of employment in order to enlist or otherwise perform service in the uniformed services and, through no fault of his or her own, the beginning date of the service is delayed, this delay does not terminate any reemployment rights.

20 C.F.R. 1002.74 (bold question in original) (italics in subsection b supplied).

It should also be noted that you were required to give *notice* to the employer that you would be leaving work for uniformed service, and you gave such notice. You did not need the employer's *permission* to absent yourself from work for military service, and the employer did not have the right to veto your service or the absence that the service would necessitate. I invite your attention to the Secretary's USERRA regulations:

§ 1002.87 Is the employee required to get permission from his or her employer before leaving to perform service in the uniformed services?

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.

20 C.F.R. 1002.87 (bold question in original).

Your state police supervisor apparently believed that you needed his permission to leave work for service, and that he could condition your right to depart upon your meeting his demands, including the unreasonable demand to complete that new investigation that he had assigned to you on the day after you informed him of your imminent mobilization. If that is his assumption, he needs to be disabused of that erroneous belief.

It should also be noted that I have counseled recalled Reserve Component members from trying to work part-time at their civilian jobs while on active duty, even when assigned to duty within the same metropolitan area. I invite your attention to my [Law Review 106](#) (December 2003), titled "Don't Try to Work at your Civilian Job while on Active Duty." Completing the assigned investigation while you were on active duty was not a viable option.

The whole point of USERRA, as well as the Servicemembers Civil Relief Act (SCRA), is to remove civilian distractions from the deployed service member, to the maximum extent possible. When you are deployed to a place like Afghanistan, or when you are training for an imminent deployment, you owe your entire attention to your military duties.

This is a safety issue—your safety and the safety of your colleagues in arms. If I am in the foxhole next to you, I should not have to worry that you are not paying full attention to your sector of the perimeter because you cannot put out of your mind your concern about the state police job back home.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find more than 800 articles about USERRA and other military-relevant laws, including 112 new articles that we added in 2011. You will also find a detailed Subject Index and a search function, to facilitate finding articles about very specific topics.

[2] I discuss the implications of *Erickson* in detail in [Law Review 0937](#) (October 2009).