Law Review 1223

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You Must Stay Within the Five-Year Limit to Have the Right to Reemployment

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Q: I am a senior enlisted member of the Army Reserve. I found your "Law Review" articles about the Uniformed Services Employment and Reemployment Rights Act (USERRA) by doing an internet search.

In January 2003, I went to work for a federal agency as a new federal employee, never having worked for the Federal Government (as a civilian) prior to that time. In July 2003, I voluntarily went back on active duty in the Active Guard and Reserve (AGR) Program, serving as an Army Reserve recruiter. I informed my civilian supervisor and the personnel office that I was leaving my job to go on active duty in the Army, and they put me in a status called Leave Without Pay-Uniformed Service (LWOP-US).

My initial three-year orders expired in July 2006 and were extended for another three years. In July 2009 I received a second three-year extension, which runs through July of this year. I expect that my orders will be extended again, and I expect to remain on active duty until July 2014, when I can retire with 20 years of active duty, since I was also on active duty from 1987-96.

I have kept in touch with my civilian supervisor, giving him information about these extensions of my active duty, and he has responded politely, telling me that there is no problem and that my civilian job is waiting for me when I am ready to leave the Army. I have corresponded with him each October, and each year I have applied for and have received 15 days of paid military leave from the federal civilian agency.

The civilian supervisor could not have been nicer or more supportive, but he retired recently. His replacement recently sent me a terse letter to the effect that I am well past the five-year limit under USERRA and that I will be fired in ten days (by March 12) unless I respond to him in writing and provide all my military orders and show that I have not exceeded the five-year limit. Help!

A: As I explained in Law Review 0766 and other articles, an individual must meet five eligibility criteria to have the right to reemployment under USERRA:

1. Must have left a position of civilian employment for the purpose of performing service in the uniformed services. It is clear that you did this in July 2003.
2. Must have given the employer prior oral or written notice.

3. Cumulative period or periods of uniformed service, relating to the employer relationship for which you seek reemployment, must not have exceeded five years. This is the problem criterion for you.
4. Must have been released from the period of service without having received a punitive or other-than-honorable discharge. You will meet this criterion unless you do something extraordinarily stupid while on active duty.
5. Must have made a timely application for reemployment after release from the period of service.

You already meet conditions a and b, and you have it in your power to meet d and e. The problem is the five-year limit. It appears to me that you are already past the five-year limit and that there is no feasible way at this point to bring you back under the limit. I regret that you did not contact me prior to July 2008, when your five-year limit expired.

I invite your attention to my Law Review 201 for a definitive discussion of the five-year limit—what counts and what does not count. I have known National Guard and Reserve members who have been away from work for more than ten years of full-time military service without exceeding the five-year limit, because there are eight statutory exceptions to the limit—kinds of service that do not count toward the limit.

Unfortunately, none of those exceptions applies in your case. At your request, I reviewed your 2003, 2006, and 2009 orders. These orders cite as their authority section 12301(d) of title 10 of the United States Code (10 U.S.C. 12301(d)). None of your orders contain a statement to the effect that "the Secretary of the Army has determined that service under these orders is exempt from the five-year limit under USERRA."

On October 25, 2011, the Honorable Daniel B. Ginsberg (Assistant Secretary of the Air Force for Manpower and Reserve Affairs) published a memorandum addressed to the Chief of Staff of the Air Force, the Director of the Air National Guard, and the Chief of Air Force Reserve. The memorandum relates to the five-year limit under the Uniformed Services Employment and Reemployment Rights Act (USERRA).

In his memorandum, Assistant Secretary Ginsberg explained that voluntary active duty that is *clearly linked to the National Emergency* created by the terrorist attacks of September 11, 2001 will be exempted from an individual's five-year limit. In a footnote in his memorandum, Mr. Ginsberg explained that: "Linkage to the National Emergency may be shown by one or more [of] various 'indicia' including citation to Presidential Proclamation 7463 or to Executive Order 13223 or to a named operational mission associated with the National Emergency or to funding sources that support named operations or missions associated with the National Emergency. *In most cases, members ordered to duty under 10 U.S.C. 12301(d) but serving under 10 U.S.C. 12310 (AGR duty), 10 U.S.C. 10211, or 10 U.S.C. 12402 will not fit this criteria."* (Emphasis supplied.)

I grant that you are Army rather than Air Force, but if the Assistant Secretary of the Army for Manpower & Reserve Affairs were to issue a similar memorandum he would likely conclude, as Secretary Ginsberg concluded, that in most cases AGR duty performed by Army Reserve and Army National Guard personnel is not exempted from the individual's five-year limit because routine AGR duty is not sufficiently linked to the National Emergency. National Guard and Reserve personnel performed AGR duty before September 11, 2001, and they will likely perform such duty after the present National Emergency period is formally concluded.

Under section 4312(c)(4)(A) of USERRA, 38 U.S.C. 4312(c)(4)(A), duty performed under section 12301(a) or section 12301(g) is exempted from counting toward the individual's

five-year limit, but duty performed under section 12301(d) is not exempted. I have reviewed each of the eight statutory exemptions to the five-year limit, and I find none that applies to your case. At this point, you are irretrievably beyond the five-year limit.

Q: It is not fair! Both the Army personnel office and the personnel office at the federal civilian agency told me that my civilian job is protected, and nobody said anything about any five-year limit. I want to sue somebody!

A: Sue if you want, but you won't get very far. The Supreme Court has held that a federal agency is not bound by "bum scoop" given out by a federal employee, orally or in writing. *See Office of Personnel Management v. Richmond,* 496 U.S. 414 (1990); *Federal Crop Insurance Corp. v. Merrill,* 332 U.S. 380 (1947). I invite your attention to my Law Review 1104 (January 2011) for a detailed discussion of the implications of these two cases.

Q: In July 2007, a year before my five-year limit ran out, I visited an Army legal assistance attorney and discussed my USERRA rights in considerable detail. He told me that during a national emergency the five-year rule is suspended, and that I could stay on active duty for as long as I liked, until the President declared an end to the period of national emergency that started on September 11, 2001. I want to sue the Army for legal malpractice by this legal assistance attorney.

A: If the legal assistance attorney told you that, he or she clearly had it wrong. But any such legal malpractice lawsuit is barred by the doctrine established by the Supreme Court in *Feres v. United States,* 340 U.S. 135 (1950). I discuss the "*Feres* Doctrine" in detail in Law Review 0830 (June 2008).

Q: What do I do now? Should I respond to the supervisor's letter? Or should I ignore it?

A: I suggest that you draft a polite letter to the supervisor, and send him a copy of your 2003, 2006, and 2009 orders. Tell him that you are not ready to return to work because the Army is not ready to release you from active duty. Tell him that you are interested in resuming your federal civilian career when you do leave active duty. Don't get into a legal argument with the supervisor about what does and does not count toward USERRA's five-year limit.

I also suggest that you include in your letter a formal resignation from your federal civilian job. Such a resignation would likely satisfy the supervisor and prevent him from going through the motions of firing you from the job. My concern is that if you are fired it will show up on your permanent federal civilian personnel record, and that record of firing will make it most difficult for you to be hired for a federal civilian position after you finally leave active duty in 2014.

Q: Would it be lawful for the civilian agency to fire me for being on active duty past the five-year limit?

A: As I explained in Law Review 1126, I think that it is unlawful to *fire* an employee for absenting himself or herself from work for the purpose of performing service in the uniformed services, even beyond the five-year limit. Such a firing would violate section 4311(a), which makes it unlawful for an employer to deny a person retention in employment because of the performance of service in the uniformed services. A *firing*

implies *misconduct,* and performing uniformed service for our country must never be considered misconduct in any civilian job, especially not a federal civilian job. The five-year limit is an eligibility criterion for reemployment. Staying on active duty beyond the five-year limit does not amount to misconduct.

It would be unlawful for the federal agency to fire you, but it would not be unlawful for them to change your status from "LWOP-US" to "former employee." The agency likely just wants to "unencumber" the position, in order to fill it with someone else.

Q: What is the difference between firing me and changing my status to that of a former employee?

A: There is a big difference. When you finally leave active duty in 2014, you will likely want to apply for federal jobs. If the record shows that you were "fired" in 2012, it is most unlikely that you will be hired. But if the record simply shows that you were a federal employee at some point and left, you will have a chance to be hired for vacant positions.

Q: What about restoring my right to reemployment?

A: At this point, there is no way that you will have the right to reemployment. You are beyond the five-year limit, and nothing you or anyone else can do now can bring you back under the five-year limit. Once you have broken the egg, you cannot put it back in the shell.

Note to readers: **Please contact me before the fact rather than after. It does little good to contact me about the five-year limit after you have irretrievably exceeded the limit. I do not have a magic wand, and I cannot turn back the hands of time.**

I am available to answer questions about USERRA and other military-legal topics between 10 a.m. and 4 p.m. Eastern Time every business day, and on Thursdays I am available until 10 p.m. Eastern. The point of the Thursday evening availability is to make it possible for Reserve and National Guard personnel to call me, without having to call from work or during work hours.

Law Review 1223 Reference article: Memo from Assist Secretary of Air Force re: Civilian Reemployment Protections for AF Military Personnel (pdf)

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