LAW REVIEW 1228

March 2012

USERRA and the FMLA

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

1.3.2.2—Continuous Accumulation of Seniority-Escalator Principle

1.8—Relationship between USERRA and other Laws/Policies

Q: I am a Captain in the Army Reserve and a member of ROA. I went to work for a big company in July 2010. I was called to active duty in December 2010 and deployed to Afghanistan, where I was wounded in action. I have largely but not entirely recovered from my wounds, and I returned to work at DWI in January 2012, after I was released from active duty.

About once a month, I need to travel to an Army hospital for medical appointments related to my Afghanistan wounds. Each appointment requires that I miss an entire day of work at my civilian job, because the Army hospital is 300 miles from the city where I live and work. I asked the Army hospital to make appointments for me on weekends, to minimize the burden on my civilian employer, but I was told that weekend appointments are not available.

I have exhausted my sick leave with my employer, and I asked the employer to let me take unpaid leave under the Family Medical Leave Act (FMLA). The company's personnel office told me that I am not eligible to take FMLA leave because I have not worked for the company long enough and have not worked enough hours. The personnel director told me that an employee cannot take FMLA leave unless the employee has worked for the employer for at least a year and has worked at least 1,250 hours for the employer in the year before the proposed FMLA leave. The personnel director told me that I fell short on both accounts, because I was away from work for military service between December 2010 and December 2011.

This is not fair. I clearly would have met both the one-year requirement and the 1,250 work hours requirement, but for my call to the colors. In the six months that I worked for the company before I reported to active duty I had already worked more than 1,000 hours. What do you think?

A: The personnel director is wrong. Under the Uniformed Services Employment and Reemployment Rights Act (USERRA), you are entitled to be treated *as if you had been continuously employed* by the company during the year that you were away from work for service. It is clear from the facts that you would have passed both the one-year threshold and the 1,250 work hour threshold if you had remained continuously employed. Thus, you are entitled to take unpaid leave under the FMLA for these medical appointments.

Section 4331 of USERRA (38 U.S.C. 4331) gives the Secretary of Labor the authority to disseminate regulations about the application of USERRA to state and local governments and private employers. The Secretary promulgated USERRA Regulations in 2005, and they are now codified in title 20 of the Code of Federal Regulations at Part 1002 (20 C.F.R. Part

1002). Those regulations provide as follows concerning the interplay between USERRA and the FMLA:

> The employee is entitled to the seniority and seniority-based rights and benefits that he or she had on the date the uniformed service began, plus any seniority and seniority-based rights and benefits that the employee would have attained if he or she had remained continuously employed. In determining entitlement to seniority and seniority-based rights and benefits, the period of absence from employment due to or necessitated by uniformed service is not considered a break in employment. The rights and benefits protected by USERRA upon reemployment include those provided by the employer and those required by statute. *For example, under USERRA, a reemployed service member would be eligible for leave under the Family and Medical Leave Act of 1993, 29 U.S.C. 2601–2654 (FMLA), if the number of months and the number of hours of work for which the service member was employed by the civilian employer, together with the number of months and the number of hours of work for which the service member would have been employed by the civilian employer during the period of uniformed service, meet FMLA's eligibility requirements.* In the event that a service member is denied FMLA leave for failing to satisfy the FMLA's hours of work requirement due to absence from employment necessitated by uniformed service, the service member may have a cause of action under USERRA but not under the FMLA.
>
> 20 C.F.R. 1002.210 (emphasis supplied).

I also invite the reader's attention to Law Review 54 (October 2002)[1], concerning a Department of Labor (DOL) memorandum dated July 22, 2002, signed by the Solicitor of Labor (Eugene Scalia at the time), the Assistant Secretary for Veterans' Employment and Training (Frederico Juarbe, Jr.), and the Administrator of DOL's Wage & Hour Division (Tammy D. McCutcheon). These three officials took the clear position that the employee who is called to the colors and then returns to work after service, in accordance with USERRA, must be treated as if he or she had been continuously employed by the civilian employer, for the purpose of meeting these two FMLA thresholds. DOL has strongly stuck with that position in the decade since that memorandum.

Q: The personnel director also contends that the FMLA does not give an employee the right to time off without pay for medical treatment for or recuperation from a condition that is connected to military service, as in my case. What do you think?

A: There is absolutely no legal basis for the employer's assertion that the FMLA carves out service-connected conditions. The right to time off under the FMLA applies to medical conditions, without regard to whether those conditions are or are not service-connected.

---

[1] You will find 728 Law Review articles at www.servicemembers-lawcenter.org, along with a detailed Subject Index and a search function, to facilitate finding articles about very specific topics. I initiated this column in 1997, and we add new articles each week.