

LAW REVIEW 1234

April 2012

Coast Guard Reservist Needs Drill Credit for Medical Appointment

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

1.2—USERRA Prohibits Discrimination

1.3.1.2—Character and Duration of Service

1.8—Relationship between USERRA and other Laws/Policies

A Coast Guard Reserve officer and ROA member has provided me a copy of ALCOAST 019/12 with a date-time group of R 111644Z Jan 12. The subject line is "FY12 Reserve Management Period (RMP) Policy Update." I am concerned about the application of this policy as it relates to the rights of Coast Guard Reservists under the Uniformed Services Employment and Reemployment Rights Act (USERRA). I respectfully submit that this USERRA issue was likely not considered by those who drafted this policy.

Reserve Management Periods (RMPS) are periods of inactive duty training, to use the USERRA terminology. ALCOAST 019/12 provides for both RMPS with pay and RMPS without pay (retirement points only). Understandably, RMPS with pay are strictly limited, because of fiscal considerations. But the ALCOAST limits even RMPS without pay.

My specific concern is with section (3)(D) of the instruction, which reads as follows:

RMPS [even without pay] are not authorized for the following functions: ... (D) Medical appointments in conjunction with a Notice of Eligibility (NOE) for medical treatment related to an injury, illness, or disease contracted or aggravated while performing duty. Member may request incapacitation pay IAW [in accordance with] Chapter 6 of Ref A.[\[1\]](#)

To explain my concern, let us take a hypothetical but realistic situation. PO3 Joe Smith is an E-4 in the Coast Guard Reserve. He was called to active duty and deployed to Southwest Asia (SWA). While on active duty in SWA, he suffered a wound or injury in the line of duty.

Petty Officer Smith has largely but not entirely recovered from his injury. He has been released from active duty and has returned to his civilian job at XYZ Restaurant, which has 40 employees. Several times per year, Petty Officer Smith travels to a Navy hospital that is 400 miles from the town where he lives and works, for medical appointments related to his recuperation from the wound he suffered in SWA on active duty.

Because of the distance involved, each medical appointment requires that Smith miss a whole day of work at XYZ Restaurant, in order to travel to the Navy hospital, get the treatment, and then return to his home town. Smith has asked the Navy to schedule his appointments for Saturday or evening hours, in order to minimize the burden on his civilian employer, but the hospital has told him that evening and weekend appointments are not available.

Smith has exhausted his meager sick leave and annual leave entitlements at XYZ Restaurant. The Family Medical Leave Act (FMLA) does not apply to the restaurant, because it has only 40 employees.^[2] Smith is scheduled for a medical appointment at the Navy hospital on Monday, April 16, and he has given his civilian employer more than a month of advance notice that he will not be at work that day. He is only asking for an *unpaid* leave day.

Bob Jones, the owner of XYZ Restaurant, told Smith: "I have had it up to here with this Coast Guard crap. No, you cannot have the day off, even without pay, on April 16. If you are not here for work that day you are fired."

Smith has a dilemma. He needs to get to the Navy hospital for his medical treatment, but he also needs his job at the restaurant. Does USERRA give Smith the job-protected right to be absent from his civilian job on April 16 in order to report to the Navy hospital for this medical appointment? Yes, *but only if the Coast Guard is willing to put Smith in a duty status, recognized under USERRA, for this appointment.*

USERRA gives an employee the right to be away from the civilian job for "service in the uniformed services." Section 4303(13) defines that term as follows:

The term 'service in the uniformed services' means the performance of duty on a voluntary or involuntary basis in a uniformed service *under competent authority* and includes active duty, active duty for training, initial active duty for training, *inactive duty training*, full-time National Guard duty, a period for which a person is absent from a position of employment for the purpose of an examination to determine the fitness of the person to perform any such duty, and a period for which a person is absent from employment for the purpose of performing funeral honors duty as authorized by section 12503 of title 10 or section 115 of title 32.

38 U.S.C. 4303(13) (emphasis supplied).

A Coast Guard Reserve RMP clearly qualifies as *inactive duty training* for USERRA purposes. An employee (federal, state, local, or private sector) has the right under USERRA to absent him or herself from the civilian job in order to perform inactive duty training, with or without pay. If the Coast Guard will provide documentation that Petty Officer Smith is performing inactive duty training (RMP) when he travels to and from this medical appointment and undergoes the treatment during the appointment, then Smith has the job-protected right, under USERRA, to miss work on Monday, April 16. Without such Coast Guard documentation, Bob Jones (owner of the restaurant) can lawfully fire Smith for missing work that day. Yes, it really is that important.

The ALCOAST message provides that the individual reservist is permitted to request "incapacitation pay" in this situation. The problem is that "receiving incapacitation pay" is not a status or activity that qualifies as "service in the uniformed services" under USERRA. The issue is not getting Smith paid by the Coast Guard. The issue is giving Smith the opportunity to report to his medical appointments without losing his civilian job for doing so.

Smith does not need incapacitation pay. He has largely recovered from his wound, and he is capable of doing his civilian job. He just needs legal protection for an occasional day when he needs to be away from his civilian job in order to report to the Navy hospital for medical treatment necessitated by the wound he suffered in SWA. Is this too much to ask?

The Coast Guard can solve Smith's problem by the simple expedient of giving him RMP orders (no pay, just one retirement point) for the day when he needs to go to the Navy hospital. My concern is that section (3)(D) of ALCOAST 019/12, as currently written, prevents the Coast Guard from implementing this simple expedient.

I have heard from members of other Reserve Components with this same sort of problem. I want to help solve it in the Coast Guard Reserve first. The Coast Guard Reserve is substantially smaller and less bureaucratic than the other Reserve Components. If we can solve this problem in the Coast Guard Reserve, we can provide a model as to how the other Reserve Components can solve the problem.

[1] Reference A is the Reserve Policy Manual, COMDTINST M1001.28.

[2] For employees to have the right to FMLA leave there must be at least 50 employees at the restaurant. They must be employed within 75 miles.