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Why Can't I Retire From My Civilian Job While I am on Active Duty?

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Q: I am a state police officer. In my state, like many states, police officers can retire when they have 20 years of police service. I began my state police career in May 1992 so I will qualify for retirement in May 2012.

I am also in the Army Reserve, and I was called to active duty in September 2011, for 365 days. I expect to be released from active duty in September 2012.

I don't want to wait until September to start drawing my state police pension. I think that I should be able to start drawing it on May 15, 2012, the 20th anniversary of my state police service. I have applied to retire as of that date. However, the state police personnel office told me that I cannot retire while I am on active duty because I did not have 20 years of state police service as of September 2011, when I was called to active duty.

I was told that under the Uniformed Services Employment and Reemployment Rights Act (USERRA) my military service time counts as state police time for seniority and pension purposes, so I should be able to start drawing my state police pension on May 15, right?

A: Wrong, unfortunately. Section 4318(a)(2)(A) of USERRA provides:

A person reemployed under this chapter shall be treated as not having incurred a break in service with the employer or employers maintaining the plan by reason of such person's period or periods of service in the uniformed services.

38 U.S.C. 4318(a)(2)(A) (emphasis supplied).

The same “reemployed under this chapter” or “upon reemployment under this chapter” language appears in section 4318(a)(2)(B), 4318(b)(1), 4318(b)(2), and 4318(c). It is clear that your current military service time (starting in September 2011) does not count toward state police retirement, under USERRA, *until you are reemployed in your civilian job after leaving the period of service*. It will be necessary for you to leave active duty, apply for reemployment, and return to work. Only then will you be eligible for state police retirement. It may be possible for you to return to work for just one day, to fill out the retirement paperwork, and then retire from the state police.

Q: I am currently serving on active duty in Afghanistan. I am scheduled to come home on leave for a few days in late May, and then report back to Afghanistan until I am released from active duty in September. I could report back to work for one day and fill out the retirement paperwork while I am home on leave. Will that work?

A: No. You cannot apply for reemployment until "the completion of a period of service in the uniformed services." 38 U.S.C. 4312(e)(1). You cannot apply for reemployment while you are on active duty but on leave.

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

1. You 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 September 2011.
2. You must have given the employer prior oral or written notice. I shall assume that you gave such notice.
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. Since your current period of service (September 2011 to September 2012) is involuntary, it does not count toward your five-year limit with the state police. Please see Law Review 201 for a definitive discussion of the five-year limit.[1]
4. You must have been released from the period of service without having received a punitive or other-than-honorable discharge.
5. You must have made a timely application for reemployment after release from the period of service.

You cannot meet these five conditions until September. Until then, this current period of active duty does not count toward your eligibility for state police retirement, so you are not eligible to retire from the state police until you leave active duty.

Q: A lawyer friend of mine suggested that, *under state law*, I may be eligible to get credit for my military service from September 2011 to May 2012 and retire from the state police in May, although I will remain on active duty until September. Will this work?

A: Possibly. Section 4302(a) of USERRA provides:

Nothing in this chapter shall supersede, nullify, or diminish any Federal or *State law* (including any local law or ordinance), contract, agreement, policy, plan, practice, or other matter that establishes a right or benefit that is *more beneficial to, or is in addition to*, a right or benefit provided for such person in this chapter.

38 U.S.C. 4302(a) (emphasis supplied).

If state law permits you to get state police retirement credit for your current military service period without leaving active duty and returning to work, that would be an example of a state law that provides you additional benefits above and beyond USERRA. In that case, you are making a claim under state law and not a claim under USERRA.

[1] I invite the reader's attention to www.servicemembers-lawcenter.org. You will find 738 articles about USERRA and other laws, 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.