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Should We Tell the Employers Now or Wait?

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1.2—Discrimination Prohibited

1.3.1.1—Left Job for Service and Gave Prior Notice

4.0—SCRA Generally

Q: I am the Staff Judge Advocate for a major command in the Marine Corps Reserve and a member of ROA. I have read and have used your "Law Review" articles at www.servicemembers-lawcenter.org.

Our command has been tasked to come up with 90 unit members to be called to active duty in October or November for deployment to Afghanistan, but it is possible that the mobilization will be scaled back to just 20. We have identified the 90, and the commander wants to notify their employers now. I advised that we should wait until we have a better idea exactly who is to be mobilized and when, but the commander wants to send out the notification letters this month. He said that the protections of the Uniformed Services Employment and Reemployment Rights Act (USERRA) are not invoked until the employer is formally notified of the mobilization. The commander wants to notify the civilian employers in order to invoke USERRA protections because he is concerned that some of these 90 reservists will be fired by their civilian employers in the months leading up to their likely mobilization in the fall. What do you think?

A: I think that your commander is confusing USERRA with the Servicemembers Civil Relief Act (SCRA). USERRA has no provision like that which you describe, but the SCRA does have such a provision, as follows:

> **§ 516. Extension of rights and protections to reserves ordered to report for militaryservice and to persons ordered to report for induction *[Sec. 106]***
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> (a) Reserves ordered to report for military service. A member of a reserve component who is ordered to report for military service is entitled to the rights and protections of this title and titles II and III during the period beginning on the date of the member's receipt of the order and ending on the date on which the member reports for military service (or, if the order is revoked before the member so reports, or the date on which the order is revoked).
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> 50 U.S.C. App. 516(a).

Section 4311(a) of USERRA provides:

> 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 a uniformed service

> shall not be denied initial employment, reemployment, *retention in employment,* promotion, or any benefit of employment by an employer *on the basis of* that membership, application for membership, performance of service, application for service, or obligation.
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> 38 U.S.C. 4311(a) (emphasis supplied).

Section 4311(c)(1) provides:

> An employer shall be considered to have engaged in actions prohibited-- … under subsection (a), if the person's membership, application for membership, service, application for service, or obligation for service in the uniformed services is *a motivating factor* in the employer's action, unless the employer can *prove* that the action would have been taken in the absence of such membership, application for membership, service, application for service, or obligation for service.
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> 38 U.S.C. 4311(c)(1) (emphasis supplied).

Let us assume that SGT Joe Smith is one of the 90 reservists included in the possible mobilization. Smith works as a bartender at a small restaurant, owned by Bob Jones. In May, Jones receives the notice from the commander, to the effect that it is likely that Smith will be called to active duty in October or November. In June, Jones finds and hires a new bartender and fires Smith. Smith can complain that Jones fired him *on the basis of* his expected mobilization in October or November. To prevail, Smith will need to prove by a preponderance of the evidence (more likely than not) that Smith's expected mobilization was *a motivating factor* in Jones' decision to fire Smith. If Smith proves that, the *burden of proof* (not just the burden of going forward with the evidence) switches to Jones to prove that he would have fired Smith even if Smith had not been a reservist slated for mobilization.

The *proximity in time* between Jones' receipt of the notice (May) and his firing of Smith (June) will be helpful to Smith in making his case, but remember that the fact that Event B follows Event A chronologically does not prove that there is a causal connection. Beware of the *post hoc ergo propter hoc* logical fallacy. That is Latin for "after which therefore because of which." For example, the crowing of the rooster at 6:20am does not cause the sun to rise at 6:30am, although the rooster may believe that it does.

I think that it would be unwise to put the jobs of 90 reservists on the line, when it is possible that only 20 of them will actually be called. I would advise the commander to hold off on sending the notices until more reliable information is available as to exactly who will be mobilized and when they are to report.

I do think that it is a good idea for the commander to send notices to the civilian employers of those who are to be notified, once we have a better idea as to the identity and timing. Section 4312(a) of USERRA requires prior notice to employers and section 4312(a)(1) provides that "an appropriate officer of the uniformed service in which the service is to be performed" may provide the notice to the employers, either instead of or in addition to the notice that individuals provide to their employers. 38 U.S.C. 4312(a)(1). You should keep a copy of each written notice in the unit files, in a way that individual notices can be retrieved. If SGT Smith fails to give notice to his employer prior to reporting to active duty, being able to prove that the commander gave such notice will be most helpful.